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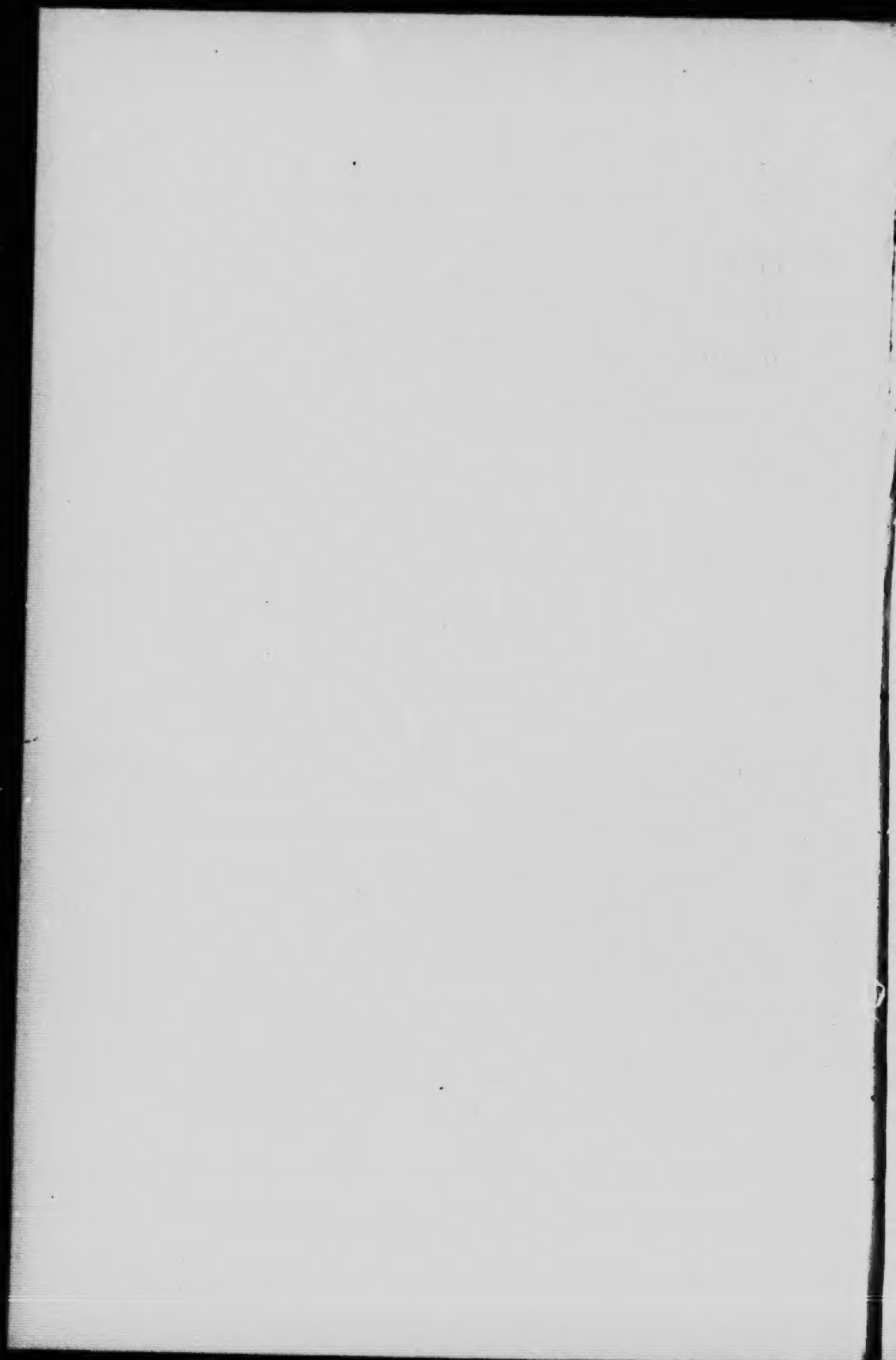
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A TREATISE
ON
THE SYSTEM OF EVIDENCE IN TRIALS
AT COMMON LAW

VOLUME III.



A
TREATISE
ON THE SYSTEM OF
EVIDENCE
IN
TRIALS AT COMMON LAW
INCLUDING
THE STATUTES AND JUDICIAL DECISIONS OF
ALL JURISDICTIONS OF THE
UNITED STATES,
ENGLAND, AND CANADA

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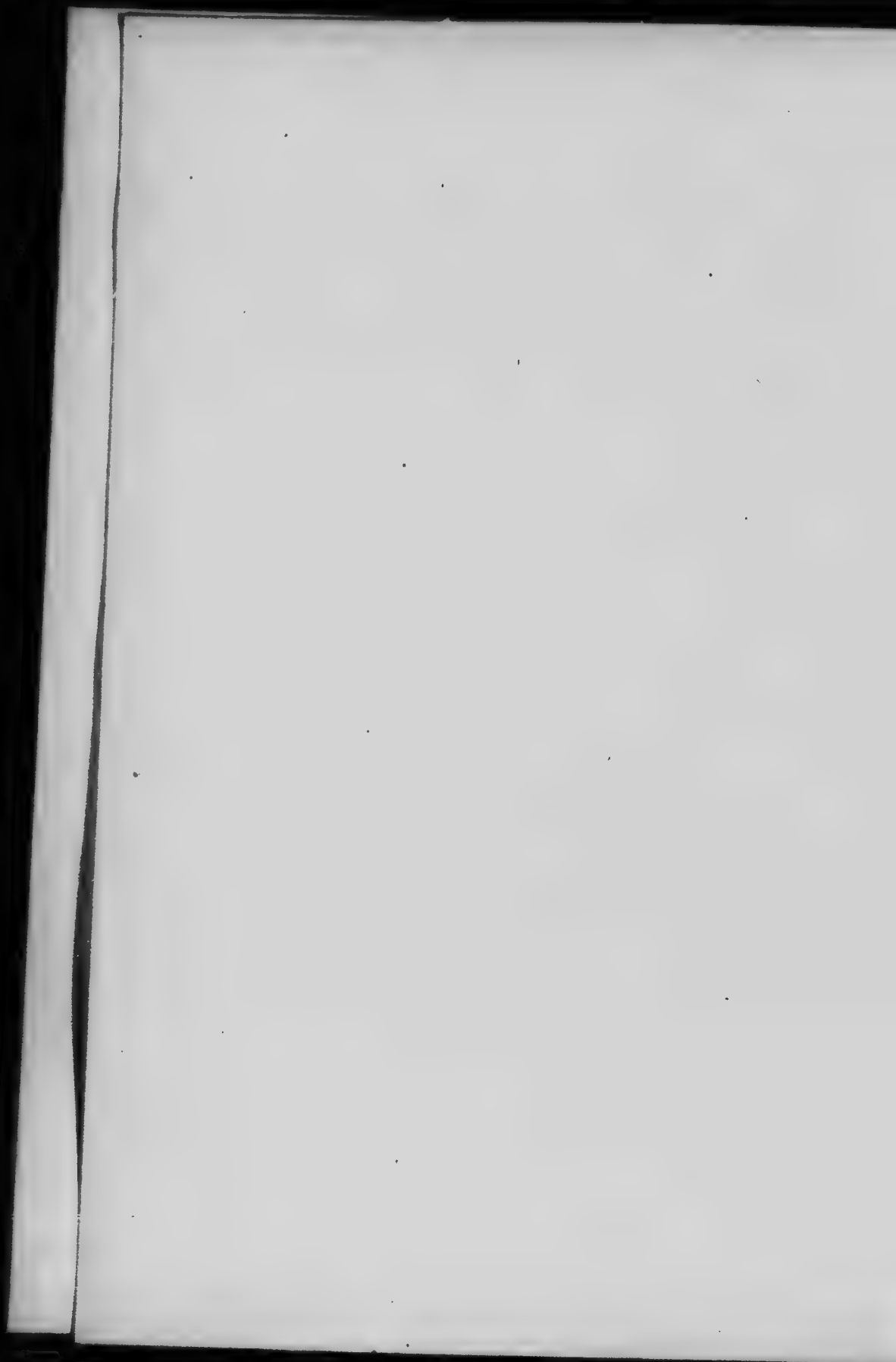
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LIST OF STATUTORY COMPILATIONS AND LATEST REPORTS AND STATUTES CONSULTED.

I. STATUTES.

The titles and dates of the compilations of statutes referred to in this work, and the years of the latest session laws consulted in its preparation, are shown in the table below. In a few jurisdictions new official revised compilations have been made since the material was originally collected for this work, but the usual (and culpable) lack of a table of cross-references in the new revision to the former numbering has made it impracticable in this work to insert the new numbering in every instance; for Massachusetts, however (where a perfect table is published), and for South Carolina, the citations to the revisions of 1902 have been added. The large number of statutory citations (some nine thousand in all) made any further collation of the new numbering impracticable; and the examination of the session laws, to date of printing, made it reasonably certain that the legislative changes would all be represented, under one or another form of citation:

Jurisdiction.	Title and Date of Compilation Used.	Date of Latest Session Laws Examined.
ENGLAND	1908
CANADA:		
Dominion	Revised Statutes 1886	1908
British Columbia	Revised Statutes 1897	1908
Manitoba	Revised Statutes 1902	1908
New Brunswick	Consolidated Statutes 1877	1908
Newfoundland	Consolidated Statutes 1892	1908
Northwest Territories	Consolidated Ordinances 1898	1908
Nova Scotia	Revised Statutes 1900	1908
Ontario	Revised Statutes 1897	1908
Prince Edward Island	1	1908
UNITED STATES: ¹		
Alabama	Code 1887	1901
Alaska	Carter's Laws of Alaska 1900 (U. S. St. 1900, March 8 and June 6)	1908
Arizona	Revised Statutes 1887; Penal Code 1887	1908
Arkansas	Sandels and Hill's Digest of Statutes 1894	1908
California	Codes 1872; Deering's Supplements 1880, Pomeroy's edition of 1901 ²	1908
Colorado	Mills' Annotated Statutes 1891, Supplement 1896, and Code of Civil Procedure 1896	1908
Columbia (District)	Abert and Lovejoy's Compiled Statutes 1894; Code 1901 (U. S. St. 1901, c. 864)	1908
Connecticut	General Statutes 1887	1908
Delaware	Revised Statutes 1893	1908

¹ There being no compilation here, and the Evidence Act of 1889 having codified most of the rules, no complete search was made for statutes prior to 1889, except that those of 1873 and 1887, dealing with evidence, were collated with that of 1889.

² The Legislatures in most States meet biennially, so that the laws of 1902 were in such cases sometimes the latest. In Alabama the laws of 1903 had not come to hand in January, 1904.

³ A note on the validity of the Commission's amendments of 1901 will be found in § 488.

LIST OF COMPILATIONS CONSULTED.

Jurisdiction.	Title and Date of Compilation Used.	Date of Latest Session Laws Examined.
UNITED STATES:		
<i>Florida</i>	Revised Statutes 1898	1900
<i>Georgia</i>	Code 1895; Van Epps' Supplement 1900	1900
<i>Hawaii</i>	Penal Laws 1897; Revised Civil Laws 1897	1901
<i>Idaho</i>	Revised Statutes 1887; Constitution 1890	1900
<i>Illinois</i>	Revised Statutes 1874, Hurd's edition of 1896	1900
<i>Indiana</i>	Thornton's Revised Statutes 1897	1900
<i>Indian Territory.</i> ¹		
<i>Iowa</i>	Eberole's Annotated Code 1897	1900
<i>Kansas</i>	Webb's General Statutes 1897	1900
<i>Kentucky</i>	Carroll's Statutes 1899, and Codes of Civil and Criminal Procedure 1895, edition of 1900	1900
<i>Louisiana</i>	Saunders' Revised Civil Code 1898; Garland's Revised Code of Practice 1894 and Supplement 1900; Wolff's Revised Laws 1897; Constitution 1890	1900
<i>Maine</i>	Public Statutes 1883, Supplement 1895	1900
<i>Maryland</i>	Poe's Public General Laws 1898; Supplement 1900	1902
<i>Massachusetts</i>	Public Statutes 1892; Revised Laws 1902	1900
<i>Michigan</i>	Miller's Compiled Laws 1897	1900
<i>Minnesota</i>	Wenzell, Lane, and Tiffany's General Statutes 1894	1900
<i>Mississippi</i>	Thompson, Dillard, and Campbell's Annotated Code 1892	1900
<i>Missouri</i>	Revised Statutes 1899	1900
<i>Montana</i>	Saunders' Codes and Statutes 1895	1900
<i>Nebraska</i>	Brown and Wheeler's Compiled Statutes 1899	1900
<i>Nevada</i>	Baily and Hammond's General Statutes 1895	1900
<i>New Hampshire</i>	Public Statutes 1891	1900
<i>New Jersey</i>	General Statutes 1896	1900
<i>New Mexico</i>	Compiled Laws 1897	1900
<i>New York</i>	Birdsaye's Revised Statutes 1896	1900
<i>North Carolina</i>	Code 1883; Long and Lawrence's Amendments 1897	1900
<i>North Dakota</i>	Revised Codes 1895	1900
<i>Ohio</i>	Bates' Annotated Revised Statutes 1898	1900
<i>Oklahoma</i>	Statutes 1893	1900
<i>Oregon</i>	Hill's Codes and General Laws 1892	1900
<i>Pennsylvania</i>	Pepper and Lewis' Digest 1896	1900
<i>Philippine Islands.</i> ²		
<i>Porto Rico.</i> ²		
<i>Rhode Island</i>	General Laws 1896	1900
<i>South Carolina</i>	Revised Statutes 1893; Code 1902	1900
<i>South Dakota</i>	Grantham's Statutes 1899	1900
<i>Tennessee</i>	Shannon's Annotated Code 1896	1900
<i>Texas</i>	Revised Civil Statutes 1895; Penal Code 1895; Code of Criminal Procedure 1895	1900
<i>United States</i>	Revised Statutes 1878, Supplements 1891, 1895	1900
<i>Utah</i>	Revised Statutes 1895	1900
<i>Vermont</i>	Statutes 1894	1900
<i>Virginia</i>	Code 1897, Supplement 1898	1900
<i>Washington</i>	Ballinger's Annotated Codes and Statutes 1897	1900
<i>West Virginia</i>	Code 1891, third edition	1900
<i>Wisconsin</i>	Sanborn and Berryman's Statutes 1896	1900
<i>Wyoming</i>	Revised Statutes 1887	1900

¹ Governed by Federal and Arkansas statutes, and by Indian law, not here considered.
² These laws are not here considered, being chiefly of Spanish origin.

LIST OF LATEST REPORTS CONSULTED.

II. REPORTS.

Most of the citations of decisions rendered since 1903 have been taken from the reports published in the National Reporter System, as they appeared in weekly numbers. For all decisions reported since the beginning of that System, the duplicate citation has been added, to include both the Official Report and the National Reporter, — most of these duplicate citations being furnished through the courtesy of the West Publishing Company, the remainder added by the author from the Blue Books. As the printing progressed, the duplicate citations of the Official Reports appearing from time to time were obtained from the Third Labels and inserted in the proof. Thus it happens that in the earlier parts of the book most of the citations of decisions of 1903 are to the National Reporters only.

The printing of these present volumes began in January, 1904, and occupied a full year; it was therefore desirable to set a definite point of time for the ending of citations (instead of inserting current late cases in the latter portions of the book only), in order that those who use the book may know where to begin in bringing the later citations down to the date of their consultation. The point taken was therefore that volume of the different National Reporters which ended nearest to January, 1904; this ranged (dating by the weekly issues) between November, 1903, and March, 1904. Substantially, then, the citations come down to the beginning of 1904. The latest volumes of Reporters consulted were as follows:

Atlantic Reporter, vol. 55.
Federal Reporter, vol. 128.
Northeastern Reporter, vol. 68.
Northwestern Reporter, vol. 94.
Pacific Reporter, vol. 73.

Southern Reporter, vol. 35.
Southeastern Reporter, vol. 45.
Southwestern Reporter, vol. 76.
Supreme Court Reporter, vol. 23.

and of Official Reports not covered by the National Reporter System:

District of Columbia Appeals, vol. 21.

Hawaii, vol. 13.

The latest volumes of English and Canadian Reports consulted were as follows:

England, Law Reports 1903.
Canada (Dominion), vol. 32.
British Columbia, vol. 10, pt. 1.
Manitoba, vol. 12.
New Brunswick, vol. 34.

Newfoundland, vol. 5.
Northwest Territories, vol. 3, pts. 1, 2.
Nova Scotia, vol. 35.
Ontario, Law Reports, vol. 5.
Prince Edward Island, vol. 2.

The reports of the Appellate (intermediate) Courts in Colorado, Illinois, Indiana, Kansas, New York (Supreme Court), and Texas, have not been cited, except on interesting matters for which there is scanty authority; partly because their rulings are not final, and partly because in some jurisdictions they are expressly made not binding as precedents. The trial rulings of Federal District Courts since the creation of the Circuit Court of Appeals have also been left unnoticed to a similar extent.

III. CITATION OF THIS TREATISE.

Citations of other parts of this treatise are made herein by number of section (§) and number of note. The notes are numbered continuously within each section.

Between the chapters, and between main subdivisions of each chapter, there are from one to five (occasionally more) numbers omitted; so that the series of numbers does not read consecutively at those points. This is not an inadvertence, nor a sign of materials omitted; but merely a mechanical expedient which became indispensable in working upon a bulky manuscript. In the course of inserting the cross-references (some ten thousand), a great number of the references obviously had to be made, during the progress of the work, to portions of the text yet unwritten; and it therefore became necessary to give to these topics reference-numbers beforehand. In order to allow for occasional additions of topics in the course of the work, these blanks were left in the series. A reference to the California Codes will show that this expedient is not without precedent.

EVIDENCE

IN

TRIALS AT COMMON LAW.

BOOK I: ADMISSIBILITY.

PART II: AUXILIARY RULES OF PROBATIVE POLICY.

TITLE II: THE HEARSAY RULE.

SUB-TITLE II (continued): EXCEPTIONS TO THE HEARSAY RULE.

TOPIC VIII: OFFICIAL STATEMENTS.

CHAPTER LIV.

A. GENERAL PRINCIPLES OF THE EXCEPTION.

- § 1630. Name of the Exception.
- § 1631. The Necessity Principle; Inconveniences of Requiring the Official's Attendance.
- § 1632. The Circumstantial Guarantee of Trustworthiness; Official Duty; Publicity.
- § 1633. Nature of the Duty; General Principles (No Statute required; Foreign and De Facto Officers; Deputies; Required Statements by Non-Official Persons; Writings; Motive to Misrepresent).
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§ 1645. Same: Certificates of Marriage.

§ 1646. Same: Personal Knowledge as required in such Registers.

§ 1647. Registers of Title; Shipping Registers; Timber-Marks and Stock-Brands.

§ 1648. Registers of Conveyances; General Principle of Admissibility.

§ 1649. Same: Register admissible only to prove Deeds lawfully Recorded.

§ 1650. Same: History of the Law in England.

§ 1651. Same: State of the Law in the United States and Canada.

§ 1652. Same: Registry out of the Jurisdiction.

§ 1653. Same: Modes of Proof Available when Registration is Unauthorized.

§ 1654. Same: Register as Evidence of Other Matters Recorded.

§ 1655. Same: Sundry Questions involving Certified Copies and Sworn Copies of the Register.

§ 1656. Same: Other Principles of Evidence Discriminated.

§ 1657. Record of Assignment of Patent (of Invention).

§ 1658. Record of Wills.

§ 1659. Records of Government Land-Office.

§ 1660. Judicial Records (including Judicial Establishment of Lost Documents).

§ 1661. Records of Corporations.

§ 1662. Records of Legislature (Journals, Statutory Recitals); Executive Proclamations.

2. Returns and Reports.

- § 1664. Returns, in general; Sheriff's Return; Sheriff's Recital in Deed.
 § 1665. Surveyors' Return (Maps, Registers, etc.).
 § 1666. Testimony at a Former Trial; (1) Judge's Notes.
 § 1667. Same: (2) Magistrate's Report.
 § 1668. Same: (3) Bill of Exceptions.
 § 1669. Same: (4) Notes of Stenographer, Attorney, Juryman.
 § 1670. Reports and Inquisitions, in general; (1) Inquisitions of Domain; (2) of Echeat (Pedigree and Title); (3) of Title to Personalty (Sheriff); (4) of Pedigree (Heralds' Books).
 § 1671. Same: Inquisitions (5) of Lunacy; (6) of Death (Coroner); (7) of Population (Census).
 § 1672. Sundry Instances of Returns and Reports, at Common Law and by Statute.

3. Certificates (including Certified Copies).

- § 1674. Certificates, in general; Sundry Instances at Common Law and by Statute; Certificates by Private Persons.

§ 1675. Notary's Certificate of Protest.

§ 1676. Certificates of Execution of Deeds (Recorded and Unrecorded), of Affidavits, and of Depositions.

§ 1677. Certified Copies; General Principle (Scope of the Authority; True Copies; Time and Manner of Certifying; Genuineness of Documents on File in the Office).

§ 1678. Same: Certificate as to Effect or Non-existence of Original.

§ 1679. Same: Authentication of Certified Copies.

§ 1680. Certified Copies of Miscellaneous Administrative Documents.

§ 1681. Certified Copies of Judicial Records (including Probated Wills).

§ 1682. Certified Copies of Registered Deeds; Judicially established Copies of Lost Documents.

§ 1683. Quasi-Official Copies Certified by Private Persons.

§ 1684. Officially Printed Copies (of Decisions, Statutes, and Sundry Documents).

4. GENERAL PRINCIPLES OF THE EXCEPTION.

§ 1630. **Name of the Exception.** The scope of this exception is often designated by the term "public documents." But this term is inadequate and misleading. In the first place, the word "public" is ambiguous. It may signify "open to all," "capable of being known or observed by all"; or it may signify "having an interest for persons in general"; or it may signify "made or done by an officer of the government." These are decidedly different senses. So far as the term may indicate a general principle, it is obvious that the principle may result in different rules according to the sense in which the word "public" is to be interpreted. This ambiguity of phrase has already caused an undesirable uncertainty in the scope of the exception; and it is better to avoid a confusing terminology. The word "official" more accurately signifies the essence of the principle dominating the exception; it indicates the official character of the person stating and of his statements, as the reason for their admissibility. In the second place, the word "document" is here inapplicable. It is true that the exception includes only written statements. Nevertheless, the Hearsay rule applies only to statements or assertions offered testimonially (*ante*, § 1361), and thus the present exception, so far as it is an exception, is concerned with statements or assertions as such, and not with writings or documents as such. The Hearsay rule excludes them only as containing testimonial assertions, and therefore this exception deals with them only as assertions. The word "statement" indicates the source of the objection to them, and the word "document" does not. In the third place, the word "document" is ambiguous in so far as it suggests also other rules quite distinct from the Hearsay rule. To documents or writ-

ings, as such, applies the rule requiring the production of the original (*ante*, § 1177), and the rule requiring certain modes of authentication (*post*, § 2129); and still other rules may also have special application to certain kinds of documents. It is essential that these independent rules be kept distinct from each other and from the Hearsay rule; and the use of the word "document" to designate a Hearsay exception tends to prevent this separation of distinct principles in their application to documents. For all these reasons, the term "Official Statements" seems preferable as a designation of the present exception to the Hearsay rule.

§ 1631. **The Necessity Principle; Inconvenience of Requiring the Official's Attendance.** The principle of necessity, which in one form or another is found in all the Hearsay exceptions (*ante*, § 1421), is satisfied in the foregoing exceptions by the impossibility of obtaining testimony in court from the same person; *i.e.* death, absence, insanity, or other like circumstance, has made it impossible to obtain the person's testimony now on the stand. In the present and ensuing exceptions, this rigorous application of the principle of necessity is found relaxed. Something less than an absolute impossibility is regarded as sufficient. The necessity reduces itself to a high degree of expediency. In none of these exceptions is it required that the witness be shown to be unavailable by reason of death, absence, or the like circumstance.

In the present exception, it is easy to see why it is highly expedient, if not practically necessary, to accept the hearsay statement of an official, in certain classes of cases, instead of summoning him to attend and testify *viva voce* before a court or by deposition before a commissioner. The litigation is unlimited in which testimony by officials is daily needed; the occasions in which the official would be summoned from his ordinary duties are numberless. The public officers are few in whose daily work something is not done which must later be proved in court; and the trials are rare in which testimony is not needed from official sources. Were there no exception for Official Statements, hosts of officials would be found devoting the greater part of their time to attending as witnesses in court or delivering their depositions before an officer. The work of administration of government and the needs of the public having business with officials would alike suffer in consequence. Although, then, there is strictly no necessity for employing hearsay, in the sense that the personal attendance of the officer is corporally impossible to obtain, there is nevertheless a high degree of expediency that the public business be not deranged by insisting on the strict enforcement of the Hearsay rule. The principle, therefore, is in spirit here identical with that of the preceding exceptions.

§ 1632. **The Circumstantial Guarantee of Trustworthiness; Official Duty; Publicity.** The second essential (*ante*, § 1422) for an exception to the Hearsay rule is that some circumstantial guarantee of trustworthiness be found, to take the place of cross-examination so far as may be. Two reasons are judicially sanctioned as justifying the present exception in this respect.

The second, however, is of modern suggestion, and has not as yet received clear recognition in the United States. As its recognition involves a definite modification in the practical application of the rules, the two reasons deserve careful discrimination.

(1) The first reason is related in its thought to the presumption that public officers do their duty. When it is a part of the *duty of a public officer* to make a statement as to a fact coming within his official cognizance, the great probability is that he does his duty and makes a correct statement. The consideration that regularity of habit, a chief basis for the exception for Regular Entries (*ante*, §§ 1422, 1522), will tend to this end is not here an essential one; for casual statements—such as certificates—may be admissible, as well as a regular series of entries in a registry. The fundamental circumstance is that an official duty exists to make an accurate statement, and that this special and weighty duty will usually suffice as a motive to incite the officer to its fulfilment. Possibly the duty may not be one for whose violation a penalty is expressly prescribed. Possibly the officer may not be one from whom in law an express oath of office is required. No stress seems to be laid judicially on either of these considerations; nor need they be emphasized. It is the influence of the official duty, broadly considered, which is taken as the sufficient guarantee of trustworthiness, justifying the acceptance of the hearsay statement. Nor is the adequacy of this traditional principle to be to-day discredited or doubted. Official honor may or may not be what it has been or what it ought to be, and it may differ in different communities and persons. But, in the matters with which the law of evidence is concerned, official duty is on the whole a vital force, more potent than might be supposed, even in a community where official ceremony and dignity are as little regarded as with us. And even if the traditional assumption of the potency of official duty and honor be in some regions or for some classes of incumbents more a fiction than a fact, it is at least a fiction which we can hardly afford in our law openly to repudiate.

That this assumption is the established basis of the present exception is indicated in the following judicial utterances:

1783, *Per Curiam*, in *R. v. Aickles*, 1 Leach Cr. L., 3d ed., 436: "The law reposes such a confidence in public officers that it presumes they will discharge their several trusts with accuracy and fidelity; and therefore whatever acts they do in discharge of their public duty may be given in evidence and shall be taken to be true, under such a degree of caution as the nature and circumstances of each case may appear to require. . . . In the present case Mr. N. has no private interest whatsoever in this book to induce him to make factitious entries in it. He is a public officer recording a public transaction."

1850, *Erle, J.*, in *Doe v. France*, 15 Q. B. 758: "It depends upon the public duty of the person who keeps the register to make such entries in it, after satisfying himself of their truth."

1845, *Parke, B.*, in *Irish Society v. Bishop of Derry*, 12 Cl. & F. 468: "The bishop in making the return discharged a public duty, and faith is given that they would perform their duty correctly; the return is therefore admissible on the same principle on which other public documents are received."

1821, *Gibson, J.*, in *Stewart v. Allison*, 6 S. & R. 329: "What change in the law of
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evidence did the act of assembly [authorizing notaries' certificates] mean to produce? Evidently nothing more than to render that competent, under the sanction of an official oath, which would otherwise have to be attested by an oath taken in the presence of the Court and jury; thus substituting the oath of office, for the violation of which the notary would incur no temporal penalty, for the customary oath in court, which . . . renders the witness obnoxious to the penalties annexed to the crime of perjury."

1851, *Wayne, J.*, in *Guinea v. Relf*, 12 How. 472, 570: "Such writings [those which the law requires to be kept for the public benefit] are admissible in evidence on account of their public nature, though their authenticity be not confirmed by the usual tests of truth, namely, the swearing and the cross-examination of the persons who prepared them. They are entitled to this extraordinary degree of confidence partly because they are required by law to be kept, partly because their contents are of public interest and notoriety, but principally because they are made under the sanction of an oath of office, or at least under that of official duty, by accredited agents appointed for that purpose. Moreover, as the facts stated in them are entries of a public nature, it would often be difficult to prove them by means of sworn witnesses."

1858, *Fowler, J.*, in *Ferguson v. Clifford*, 37 N. H. 85, 95: "Official registers, or books kept by persons in public office, in which they are required to write down particular transactions, or to enrol or record particular contracts or instruments, are generally admissible in evidence, notwithstanding their authenticity is not confirmed by those usual and ordinary tests of truth, — the obligation of an oath and the power of cross-examining the persons on whose authority their truth and authenticity may depend. This has been said to be because they are required by law to be kept, because the entries in them are of public interest and notoriety, and because they are made under the sanction of an oath of office or in the discharge of an official duty."¹

(2) It has also been suggested by some judges that a second circumstance forms an essential part of the sanction for receiving such hearsay statements, namely, the circumstance of *publicity*. The thought here is a composite one, and is closely related to that which is recognized as a reason for the exception for Regular Entries (*ante*, § 1522). Where an official record is one necessarily subject to public inspection, the facility and certainty with which errors would be exposed and corrected furnishes a special and additional guarantee of accuracy. Not only would the periodic inspection by members of the public tend to produce correction of errors actually perpetrated, but, chiefly, the knowledge that the record is to be open to public inspection would subjectively act in advance as a stimulus to careful sincerity on the part of the official. This reason was first definitely expounded as an essential one in the following passages:

1838, *Denman, C. J.*, in *Merrick v. Wakley*, 8 A. & E. 170 (the regulations of a public workhouse, prescribed by the statutory authorities, required the medical officer to make a

¹ So also: 1824, *Starkie, Evidence*, 79.

It is apparently not material whether this sanction for official statements be spoken of as an *authority* or a *duty*. An authority implies a duty, and vice versa. The two words seem merely to represent different aspects of the same relation; for when an official statement actually made is questioned, its propriety is apt to be justified by predicated an authority to make it, and when a refusal to do an official act is questioned, the claimant is apt to lay stress on the duty to do it; and thus the difference between

the two words is (for the present purpose) merely the difference of emphasis which is naturally suggested by the different attitudes of claimant and opponent in the case in hand. The idea of an authority, moreover, makes prominent the objective validity in evidence of the statement authorized to be made; while the idea of duty suggests chiefly the subjective trustworthiness of the statement made in fulfilment of it. It is therefore proper to speak of the justifying circumstance indiscriminately as either an authority or a duty.

weekly return to the board of the attendance, etc., of poor persons; but the book was rejected): "The endeavour was to put this document upon the same footing with the register of the Navy-office, the log-book of a man-of-war, the books of the Master's office, and other public books which are held to be admissible in evidence. But in these cases the entries are made by an officer in discharge of a public duty; they are accredited by those who have to act upon the statements; and they are made for the benefit of third persons. Here, it is true the book is kept by a public officer, but no credit is given him in respect of the entries; they are merely a check upon himself."

1890, Lord Blackburn, in *Sturta v. Freccia*, L. R. 5 App. Cas. 623: "The principle upon which [a previous decision] goes is that it should be a public inquiry, a public document, and made by a public officer. . . . I understand a public document there to mean a document that is made for the purpose of the public making use of it and being able to refer to it. . . . I think the very object of it must be that it should be made for the purpose of being kept public, so that the persons concerned in it may have access to it afterwards. . . . Suppose the English Crown had required of a magistrate that some confidential report should be made, . . . I do not think it would come within the sense and meaning of the rule that a public officer, in making the statement for the public, was likely to speak the truth, and must be presumed *prima facie* to have known and to have spoken the truth."

This reasoning is plausible, and does, no doubt, add to many official documents a special measure of trustworthiness. But it is doubtful whether it can be regarded as justifying a definite limitation of the scope of the exception; for its strict application would exclude many classes of official documents which are in fact admitted and ought in reason to be admitted. Apart from a few jurisdictions in which by statute the right is expressly given to every citizen to demand inspection of official documents, there are everywhere numerous official documents of which inspection cannot be demanded except in casual cases by persons having a specific interest in the subject-matter, — for example, the account-books of public officers. It can hardly be supposed that this bare possibility of inspection can have any appreciable subjective influence on the officer. Moreover, where a certificate of an official act done, or a certified copy of a record, is given out, the certificate is delivered usually to a single party in interest, and the possibility of its inspection and comparison by another person before use in court is small; so that the making of this particular official statement is hardly amenable to the influence above supposed. Finally, so far as the other element is concerned — the actual correction of errors by public inspection —, its efficacy must be of the slightest moment, since it is not pretended that the public, or specific interested members of it, do in fact (whatever their rights may be) ever demand inspection of the vast majority of official records that are made; and there can be hardly any chance of checking or revision from that source. It would seem that this second reason, put forward so definitely by Lord Blackburn, is to be regarded as merely a casual advantage, and not an essential limitation, of the class of documents to be included within the exception. How far the limitation thus suggested is to-day recognized as law may be later noted (*post*, § 1634).

§ 1633. *Nature of the Duty; General Principles (No Statute required; Foreign and De Facto Officers; Deputies; Required Statements by Non-official*

Persons; Writings; Motive to Misrepresent). Whether a given statement was made under an official duty will depend chiefly upon the nature of the office, the subject of the statement, and the form of its making. The application of the general principle to specific official statements is best dealt with under the heads of the various kinds of offices and records (*post*, §§ 1639-1684). But at the outset a few general considerations governing all of them are to be noticed.

(1) It is clear that *no express statute or regulation* is needed for creating the authority or duty to make the statement. The existence of the duty, and not the source of its creation, is the sanctioning circumstance. Not all, nor the greater part, of an officer's conceded duties are expressly laid upon him by written law. They may arise from the oral and casual directions of a superior, or from the functions necessarily inherent in the office. Where the nature of the office fairly requires or renders appropriate the making and recording of a specific statement, that statement is to be regarded as made under official duty:

1856, *Terry, J.*, in *Kyburg v. Perkins*, 6 Cal. 676: "To entitle a book to the character of an official register it is not necessary that it be required by an express statute to be kept, nor that the nature of the office should render the book indispensable; it is sufficient that it be directed by the proper authority to be kept."

1878, *Strong, J.*, in *Evanston v. Gunn*, 99 U. S. 660: "It may be admitted that there is no statute expressly authorizing the admission of such a [meteorological] record as proof of the facts stated in it; but many records are properly admitted without the aid of any statute. . . . The record had been kept by a person whose public duty it was to record truly the facts stated in it. . . . To entitle them to admission it is not necessary that a statute requires them to be kept. It is sufficient that they are kept in the discharge of a public duty."¹

(2) The subjective influence of the official duty being the essential justifying circumstance, it follows that an official statement by a *foreign officer* is equally admissible with one made by a domestic officer. That the duty is not recognized by the domestic law is immaterial; it exists for the foreign officer; and so far as it exists, it affords an equally sufficient sanction.² This application of the principle, though plain, has rarely been drawn in question.

(3) It would seem to follow, that a *supposed duty, though non-existent*, suffices. This consequence, though logically inevitable, has received only a partial recognition in the admission of records of an officer of a *de facto* government constituted rebelliously and therefore without legal right.³ But

¹ *Accord*: 1847, *Perth Peerage Case*, 2 H. L. C. 875 (sundry records); 1903, *Hesser v. Bowley*, 139 Cal. 410, 73 Pac. 156 (sheriff's books); 1940 *Newman v. Doe*, 4 How. Miss. 535 (an Indian agent's list of Choctaw family-names which were to be handed to the maker, though no list was expressly required to be kept); 1902, *State v. Hall*, — S. D. —, 91 N. W. 325 (postmaster's record of money orders cashed); 1892, *Daly v. Webster*, 1 U. S. App. 573, 611; 1896, *White v. U. S.*, 164 U. S. 100, 17 Sup. 38.

² *Accord*: 1868, *Condit v. Blackwell*, 21 N. J. Eq. 193, *semble*; and the instances un-

der marriage-registers and deed-records, *post*, §§ 1644, 1652. *Contra*: 1900, *Fish v. Smith*, 73 Conn. 377, 47 Atl. 711 (Minnesota secretary of State's certificate of organization of incorporation, made receivable there by express statute, not admissible in Connecticut).

³ Because here the *de facto* government, though non-existent as against the parent nation, is internationally existent, and its orders protect its officers and create duties for them. *Accord*: 1899, *Underhill v. Durham*, Freeman 509, 2 Gwill. 542 (surveys taken during the usurpation of Parliament held admissible);

no further recognition would probably be given, nor ought it to be; for it can hardly be doubted that hundreds of official documents, rejected because not made within the scope of official duty, have been made in good faith under a supposed duty; and yet it would be utterly impracticable to inquire in each case into the official's honest belief and to allow that belief to cure an otherwise defective document.

(4) The statement — whether by register, certificate, report, or the like — is admissible only so far as a duty exists to make statements on the *specific subject-matter*. Hence a statement as to matters not covered by the duty is inadmissible; this is conceded. Conversely, the statement is admissible for all matters properly included in the duty, for the duty of statement extends to each and all of the facts as to which the official was bound to inform himself in order to make the statement. This conclusion, too, cannot be doubted; the difficulty lying in its application to specific officers and their duties, as illustrated in the cases of assessors' books (*post*, § 1640) and marriage-records (*post*, § 1646).

(5) The statement must be *in writing*; ⁴ this is not to be doubted. ⁵ The policy of this limitation is unquestionable; for a written statement offers incomparable advantages with respect to accuracy of use and permanency of service; and since official records are commonly preserved after the death or retirement of the officer, there is commonly no practical need (as there is in the statements of private persons dealt with in the foregoing exceptions) of accepting oral statements.

(6) Since the assumption of the fulfilment of duty is the foundation of the exception, it would seem to follow that if a duty exists to record certain matters when they occur, and if no record of such matters is found, then the *absence of any entry* about them is evidence that they did not occur; or, to put it in another way, the record, taken as a whole, is evidence that the matters recorded, and those only, occurred. Such would probably be the judicial result in dealing with the present exception; ⁶ although there is in the other exceptions, where a similar question arises, some difference of opinion (*ante*, §§ 1495, 1531, 1556). Distinguish, however, the question whether this absence of an entry, if admissible, may itself be proved by the certificate of the custodian of the record (*post*, § 1678).

1824, *Jones v. Carrington*, 1 C. & P. 327, 331 (same); 1899, *Oakes v. U. S.*, 174 U. S. 778, 19 Sup. 864 (archives of Confederate Government, being papers drawn up "by its officers in the performance of their supposed duties to that government," admitted to show whether a vessel was acquired by purchase or by capture). *Contra*: 1873, *Donegan v. Wood*, 49 Ala. 242, 248 (notarial certificate of protest by one acting under the Confederate government of Louisiana, not recognized); 1873, *Todd v. Neal*, ib. 266, 272 (same: nor is this to be treated as a case of a *de facto* notary, because the government was illegal and not recognizable, "and before there can be an officer *de facto*, there must be a government known to the Court").

⁴ 1894, *Propst v. Mathis*, 115 N. C. 526, 20 S. E. 710 (recor-clerk's oral reading of will, not admitted); 1810, *Bonnet v. Devebaugh*, 4 Binn. 175 (oral assertions even of a deceased official, inadmissible).

⁵ Except perhaps in England; there the oral report of an officer to his superior, made in the regular performance of duty, has been held admissible (*ante*, § 1528); and since there is in England a tendency to confuse the present exception for Official Statements with that for Regular Entries in the Course of Business (*ante*, § 1524), it is possible that the above-cited ruling might there be regarded as governing the present class of statements.

⁶ 1827, *Jackson v. Miller*, 6 Cow. 753.

(7) In the foregoing exceptions, it is sometimes maintained that a statement otherwise admissible is to be excluded where there existed for the declarant a special interest or motive to misrepresent. No doubt, in a given case, circumstances may justify the exclusion of an official statement where a strong motive to misrepresent appears to have existed; but it seems undesirable to prescribe exclusion, as a general rule; and the usual judicial attitude favors admission.⁷

(8) The person having the duty and the person making the statement must, on principle, be identical. Therefore a statement made by another person acting on behalf of the officer having the duty will be inadmissible; for it is not made under the duty of office.⁸ But it does not follow that only the person taking the oath of office, or only the person expressly vested by statute or otherwise with the duty, is competent to make the statement. Not only does practical necessity require that the details of duty be delegated; but, furthermore, such a delegation re-creates the duty with equal efficacy sufficient to satisfy the requirements of principle. The instances in which the statement may be made by a person other than the one specifically charged with the duty seem to be of two classes:

(a) The first and commonest is that of *deputy*,—as a clerk, registrar, surveyor, or the like. The duty—in the sense of the direct responsibility—of making the record or other statement is upon the general officer or head of department. But the authority to delegate a part of his work to subordinates is in effect a parcelling out of his duty, and the duty exists again for them in fractional form to the extent that the work has been thus assigned. Whether the duty of the subordinates may be thought to run directly to the immediate chief or else to the Government is not material. The fact is that they are not mere intruders or unauthorized substitutes, but possess lawfully the delegated duty; and the determining inquiry must be whether the general nature of the office authorized a delegation of the details of work. A statement, therefore, by a lawful deputy should be admissible.⁹

⁷ 1845, Parke, B., in *Irish Society v. Bishop of Derry*, 12 Cl. & F. 641, 669 ("a marriage or burial register would certainly be admissible to prove a marriage or death, in suits to which the clergyman who made it might happen afterwards to be a party, though he had a pecuniary interest in the particular marriage or death at the time. The observation that it might have been fabricated to advance the interests of the officer affects the value of the evidence and not its admissibility"); 1880, Lord Blackburn, in *Sturla v. Freccia*, L. R. 5 App. Cas. 623, 629; 1851, Marshall, J., in *Ratcliff v. Trimble*, 12 B. Monr. 32 (admitting a certified copy in the certifier's own favor: "The official character of the act, the duty and responsibilities of the clerk, the publicity and notoriety of the proceedings appearing of record and certified by him, the penal consequences of a false certificate, and facility of detection and exposure, are considerations which preclude the application of the rule against [parties' testifying for themselves]");

1832, Briggs v. Murdock, 13 Pick. 316 (town-clerk's record of his own election and qualification, admitted). *Contra*: 1818, R. v. Debenham, 2 B. & Ald. 185.

⁸ 1828, Doe v. Bray, 8 B. & C. 815 (Parke, J., rejecting an entry in a register made by another person, not the incumbent: "One ground why a register is evidence is because it is made by a person who has a public duty to perform. Here the register is made up by a person who, as far as this baptism was concerned, was a perfect stranger to the transaction").

⁹ 1832, Triplett v. Gill, 7 J. J. M. 431, 440 (copy of a will-record, subscribed in the clerk's name by the deputy clerk, sufficient; "the deputy had a right to subscribe the principal clerk's name"); 1895, Com. v. Hayden, 163 Mass. 453, 456, 40 N. E. 846 (certified copy of register of marriage by the assistant-registrar, admitted, by implication of statute); 1854, Whitehouse v. Bickford, 29 N. H. 471, 480 (acting clerk of a corporation may certify a copy

(8) A municipality or other corporation or governing body may have an authority to make statements, and yet the statements themselves may be made by the officers, and not by the corporation itself,—as in the case of counties authorized to make surveys. Here, upon the same principle, the authority to do involves necessarily the delegation of performance to officers lawfully provided; and it must be immaterial whether the statement is made in the name of the corporation or of the proper performing officer.

(9) The duty of all officers runs in theory ultimately to the State. But it is not necessary that the duty to make a statement should be specifically created *directly by the sovereign State*. So far as the State has delegated the power of creating officers, the duties created for them are sufficient to satisfy the present Exception, whether created originally by the State or by the subordinate governing body. Thus, if a city is vested with ordinary municipal powers, it may create an officer whose duty it is to record marriages, and this officer's duty, though it runs directly to the city only, is still an official duty. So far as concerns the origin of such duties, no special discrimination can be made under the present exception. Where an official duty would for purposes in general be deemed to exist, it exists equally for this exception.

(10) Does the duty sufficiently exist only for persons having the general status of officials, or may it exist (by express statute), solely for the purpose of furnishing a record or certificate, in a *person* who otherwise has *no official position*? For example, when a statute makes it the duty of a clergyman to record or certify a marriage ceremony performed by him, is the document to be regarded as made under an official duty in the sense of this exception? In practice, little turns ordinarily on the answer to this question, because such statutes usually declare expressly that the document shall be admissible. But it is important, from the point of view of principle, to determine whether the use of such documents, sanctioned by statute, shall be regarded as forming an additional exception, standing on its own footing, or as merely an instance of the application by statute of the principle of the present exception? Can it be said that a private person, expressly required to make a record or certificate, makes it under an official duty? Or, is it to be said that the term "official" duty is too narrow, and that the principle includes in effect all documents made under a duty created by law? It would at first seem that the latter mode of statement cannot be justified; for although, as already noticed (*ante*, § 1632), the oath of office is hardly to be regarded as the essential sanction, nevertheless the sanction does involve at least the idea of duty as created by official status, and not merely

of its records); 1899, National Accid. Soc'y v. Spiro, 37 C. C. A. 388, 94 Fed. 750 (see the citation *post*, under § 1681, note —); 1903, Laffan v. U. S., 58 C. C. A. 495, 122 Fed. 333 (a copy of an official bond, under U. S. R. S. § 886, as amended by St. 1895, c. 177, § 10, may be certified by the acting Secretary of the Treasury); 1898, Steinke v. Graves, 16 Utah 293, 52 Pac. 386 (clerk's certificate may be signed by a deputy

in the clerk's name). *Contra*: 1818, Sampson v. Overton, 4 Bibb 409 (certificate of copy-gr. t. the name of the register himself, but in fact written by his clerk, excluded, though the clerk had taken an oath of office).

Distinguish the question (treated *post*, § 1635) whether a statement by the chief officer himself of transactions done by subordinates, and not by himself, is admissible.

the idea of duty in the limited and imperfect sense of amenability to a penalty imposed by law. On the whole, however, it seems correct to say that such documents are made under an official duty in the ordinary sense of a duty arising from status. The objection to this view is dissipated when we reflect that an official duty need not involve the devotion of one's entire energies to official work. A justice of the peace, or a registrar of voters, or a coroner, may during the year devote but a small part of his time to official duties, and may occupy himself chiefly as lawyer, physician, or broker; his official duty exists none the less because it concerns only a small fraction of his doings. Conversely (as illustrated throughout this exception), it matters not that an official is completely devoted to official work, unless he has a specific duty to make the record or certificate desired to be admitted under this exception; for example, a city clerk ordinarily gives his entire time to scores of items of official duty, *i. e.* his status as an official is as complete as can be; and yet unless he has also the specific duty to record births, marriages, and deaths, his entries of such matters are inadmissible. In other words, it is not his general official status that renders such statements admissible, but the specific duty to make such statements. Since, then, it is the specific duty to make specific statements which renders them admissible, and since this specific duty is not necessarily dependent on a general official status, it is difficult to see why the specific duty may not exist also for a person not having otherwise an official status. In short, a person may (so far as legal theory is concerned) be an officer for the purpose of doing a single specific class of acts, and may apart from this be merely a private person. It is therefore proper enough, where by statute such a specific and narrow duty has been created, to regard the statements made under it as statements under an official duty within the notion of the present exception. There is, on principle, no obstacle to this view. But in given instances, nevertheless, it remains to determine whether the statutory duty can properly be so construed; in other words, to discriminate between a genuine official duty created and a mere penal responsibility established. For example, a statute requiring every owner of property to make a return of the items of his property, or requiring every employer to make a return of minors and women employed, merely establishes a penal responsibility; while statutes requiring officiating clergymen to record or certify marriage-ceremonies may properly be regarded as creating an official duty. Of the latter class of statutes, a few other instances will be noted from time to time in the ensuing sections. Of the former class, there are many instances in which the statute expressly makes admissible the statements thus required of private persons (for example, certified records of a corporation by its secretary, or of a bank's books by its agent). Although they do not on principle belong under the present exception, but form a statutory class by themselves, it seems more convenient to place them in the present Chapter under the respective class of documents concerned (*post*, §§ 1672, 1683).¹⁰

¹⁰ Compare also § 1710 (affidavits).
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§ 1634. *Publicity of the Document as Essential.* It has already been noted (*ante*, § 1632) that the opportunity of inspection by the public at large has by some judges been advanced as one of the essential reasons on which the Exception is based. If it is an essential reason, and not merely an incidental and usual advantage, then it follows that documents not so open to general inspection are inadmissible, even though made under an official duty. Such seems now to be the law in *England*.¹ But this may perhaps be regarded as in fact a modern innovation in that country. Before the opinion of Lord Blackburn in *Sturla v. Freccia*, it does not seem to have been laid down distinctly as essential.² In the *United States* no definite acceptance of this limitation seems to have been made; although in a few opinions the element of publicity has been referred to *obiter* as essential.³ For the reasons already indicated (*ante*, § 1632) the limitation does not seem to be a desirable one. Should it be accepted, however, the class of official documents excluded by it will after all be a narrow one, namely, those only which are strictly confidential, — for example, reports by inspectors, tax-officers, and the like. These would perhaps usually be privileged from disclosure in any case (*post*, § 2375), so that perhaps the question is not likely often to arise. It can hardly be supposed that the scope of this limitation, as expounded by Lord Blackburn, was intended to include other than confidential documents, *i. e.* to include that vast class of official records (including certified copies) which are customarily not compiled for reference by the general public nor placed where the public has constant opportunity to inspect.

§ 1635. *Personal Knowledge of the Official; Notary's Knowledge.* It has already been seen (*ante*, § 657) that an essential qualification of a witness is that in general his knowledge or belief should be based on personal observation; and that testimony based on anything short of this is receivable only in a few classes of cases in which the source of knowledge is for practical purposes equivalent to personal observation. It has also been noted (*ante*, § 1424) that the same principle is applied to persons whose hearsay statements are receivable under exceptions to the Hearsay rule; and the application of the principle has been noticed from time to time in the foregoing

¹ 1886, *Merrick v. Wakley*, 8 A. & E. 170 (cited *ante*, § 1632); 1880, *Sturla v. Freccia*, L. R. 5 App. Cas. 623 (stated fully, *post*, § 1670).

² For example, in *Doe v. Arkwright*, 2 A. & E. 183 (1834), and in *Daniel v. Wilkin*, 7 Exch. 429, 437 (1852), Parke, B., refers only to the official duty as the reason of the Exception. In some of the quotations *ante*, § 1632, publicity is referred to as one of the reasons, but not as essential. In *Irish Society v. Bishop of Derry*, 12 Cl. & F. 468 (1845), Parke, B., hints at it as essential. In *R. v. Martin*, 2 Camp. 101 (1809), McDonald, C. B., does the same, speaking of a corporation vestry-book; but he is there probably thinking of the incorrect analogy of private corporation books, as to which access is necessary in order to treat the entries as admissions (*ante*, § 1074).

³ 1878, *Evanston v. Gunn*, 99 U. S. 660 (Strong, J.: "[These records of weather] are, as we have seen, of a public character, kept for public purposes and so immediately before the eyes of the community that inaccuracies, if they should exist, could hardly escape exposure"); 1886, *Cushing v. R. Co.*, 143 Mass. 76, 9 N. E. 22 (excluding a report by an official engineer describing preliminary surveys with reference to proposed harbor-works, and printed as a public document by the federal Senate; Field, J.: "Nor are the facts stated in the reports public facts, in the sense that they are facts which the United States have, under the authority of law, undertaken to ascertain and make public for the benefit of all persons who may be interested to know them").

exceptions. How far is the principle to be maintained in the present exception? Must the officer whose statement is admitted have personal knowledge of the thing recorded, certified, or returned? In general, there can be no doubt that the principle applies here as elsewhere; but the principle itself need not be and is not judicially employed to the extent of unpractical strictness; and, as already noted (*ante*, § 664), it has its qualifications and exceptions, based on good sense and practical convenience. For the purpose of the present exception, the cases calling for its application seem to fall into three classes.

(1) Certain kinds of official statements are clearly intended by the law to be based upon actual personal observation. The transaction which the officer is authorized to record or certify is, in its nature, a transaction *done by him or done before him* by another person. He cannot fulfil his duty to do or supervise the transaction except so far as it is done by or before him, and thus the correlative duty to record, certify, or return involves necessarily a personal knowledge of the transaction. For example, a notary is authorized to certify that he himself protested a negotiable instrument, or to certify that some one "personally known" to him "personally appeared" before him and acknowledged a deed;¹ hence the nature of the duty and of the transaction presupposes the notary's ability to base his statement on personal knowledge. That the principle applies to this class of cases has been well expounded in the following passages:

1821, *Gibson, J.*, in *Stewart v. Allison*, 6 S. & R. 327² (excluding a notary's certificate of protest stated by the notary on the stand to have been made on the information of his son, the notary not having served the notice himself): "Now put the case of a witness who has in his direct examination sworn positively to a fact, but from whom, on being cross-examined, it comes out that he personally knows nothing about the matter, having obtained all his information from a person on whose veracity he thinks he can depend. Ought not the Court to direct the jury that the whole of his evidence, taken with the explanation given, is incompetent and goes for nothing? . . . The assertion in a [notary's] protest of a fact founded on hearsay, which would be incompetent to be heard from a witness attending in the ordinary way, is not made competent and legal by the Act of Assembly. . . . The Legislature surely never intended to permit an officer to authenticate by his certificate a fact to which he would not, after being examined touching his means of knowledge, be permitted to swear. . . . I hold the notary competent to certify only what he personally knows to be true, and not what he may conjecture to be so from the relation of others. . . . The confidence supposed to be reposed in the truth and integrity of those officers by the Executive who appointed them is the ground on which the Legislature rested the substitution of their certificate for the ordinary judicial evidence of the facts asserted in it; and it therefore never could have intended to permit them to delegate this high personal trust to a stranger, acting without oath or even official responsibility."

1861, *Dixon, C. J.*, in *Adams v. Wright*, 14 Wis. 413: "The notary's official oath is sub-

¹ This has been true since the very origin of notaries: "*scripsi quia et mihi preceptum est et omnia in presentia mea facta sunt*," in a document of 1163 A. D., quoted, with others, in Bresslau, *Handbuch der Urkundenlehre* (1889), I, 495.

² *Gibson, J.*, here was dissenting in that he

wished to exclude the certificate entirely, while the other judges admitted it, feeling unwilling to decide whether the notary was falsifying on the stand or in his certificate; but all agreed that if the notary's testimony was true his certificate was inadmissible.

stituted for the ordinary judicial oath taken in the presence of the Court and jury, and he cannot lawfully and conscientiously certify or record, as matters of fact, things which he would be incompetent to testify to as a witness if called to the stand in the trial of a cause and which would be excluded as mere hearsay."

1865, *Helmes, J.*, in *Commercial Bank v. Barkdale*, 34 Mo. 503, 572: "The protest is to be evidence of the facts stated in it, of which the notary is supposed to have personal knowledge and credit is given to his official statements by the commercial world on the faith of his public and official character. In court the instrument speaks as a witness. Such statements made merely upon the information of another person would amount to hearsay only, if the notary were himself upon the stand as a witness. The notarial protest must state facts known to the person who makes it, and he cannot delegate his official character or his functions to another."

That the notary at any rate is one of those officers who are required to certify on nothing less than personal knowledge seems clear. For their certificates of protest of commercial paper, this has often been laid down.³ For their certificate of acknowledgment of deeds, the rule is constantly enforced.⁴ In this respect, indeed, it deserves particular emphasis, as involving not merely the requirement of proper testimonial qualifications, but also the strict enforcement of the terms of his certificate. He certifies under his oath of office that A. B., known to him to be the person therein mentioned, personally appeared before him and executed the writing. If this was not so, then he is neither a good witness nor an honest officer. Yet in professional practice in some of our communities, it is not uncommon for a notary to give the certificate without such knowledge and in the absence of the person. Such practices tend to destroy the credit which the law gives to such certificates and to overturn the whole basis of security for the registration system. A specific penalty should be imposed on such violations of the oath

³ The practice of notaries to act in protests upon clerks' information has, however, obtained footing in some regions; and it is in England perhaps an unsettled question whether the practice would be legally recognized, at least for foreign bills; that it would not be was intimated by Buller, J., in *Leffley v. Mills*, 4 T. R. 170, 175 (1793), and was held by Lord Tenterden, C. J., in *Vandewall v. Tyrrell*, M. & M. 37 (1827), as reported by Mr. Chitty, in the seventh and following editions of his work on Bills, p. 458 (9th ed.); in the latter place is given a correspondence between the learned author and the notaries, in which the merits of the question are discussed. That the notary must act personally is decided also in the following cases: 1844, *Sacridor v. Brown*, 3 McLean 431 ("This [the protest] must be done by the officer who acts under oath, and to whose official acts duly certified the law gives verity"); 1842, *Onondaga Co. Bank v. Bates*, 3 Hill N. Y. 53; 1843, *Sheldon v. Benham*, 4 id. 129, 131; 1845, *Chenoweth v. Chamberlin*, 6 B. Monr. 60 (unless local custom sanctions the clerk's action); 1861, *Adams v. Wright*, 14 Wis. 408, 412; 1865, *Commercial Bank v. Barkdale*, 34 Mo. 563, 572 (two in partnership, one making demand, the other drawing up the protest, excluded; see quotation *supra*). Compare *Jocot v. Craig* (1901),

181 Cal. 504, 68 Pac. 84, and cases cited. So many questions of the law of commercial paper and the requisites of protest are usually involved in these rulings that they cannot be further examined here; see *Daniel, Negotiable Instruments*, II, § 959; and a collection of cases in 96 Am. Dec. 606. Distinguish the use of the deceased clerk's entry under the Regular Entries exception (*ante*, § 1622), as in *Halliday v. McDougall*, 20 Wend. 81, 85 (1838).

⁴ The principle has been insisted upon repeatedly, but most of the decisions deal, not with the question of evidence whether the notary's statement of personal knowledge was true, but with the question of substantive law whether the omission of that statement from his certificate makes it useless for entitling the deed to record; the answer being always in the affirmative, and the implication being that the certificate would be equally useless if it were false in fact. There is a collection of cases in a note to *Livingston v. Kettelle*, 41 Am. Dec. 168; the following are a portion only: 1858, *Fogarty v. Finlay*, 10 Cal. 245; 1857, *Shepherd v. Carriel*, 19 Ill. 319; 1860, *Gove v. Cather*, 23 id. 641; 1863, *Lindley v. Smith*, 46 id. 527; 1870, *Becker v. Quigg*, 54 id. 390; 1861, *Brinton v. Seever*, 12 Ia. 390; 1863, *Reynolds v. Kingsbury*, 15 id. 238; 1872, *Callaway v. Fish*, 50 Mo. 423.

of office, and Courts should do what they can to insist on that faithful performance of official duty which alone is the justification for this branch of the Hearsay exceptions.

As for other officers than notaries, it may be difficult, no doubt, in particular instances, to determine whether the official statement belongs within this class. So far as the question has arisen, the cases may be elsewhere examined, under the different kinds of documents.⁶ The proper test, in general, would seem to be whether the subject of the officer's duty is a transaction supposed in legal theory to be done by the officer or to occur or be done before him by another; if it is, then the recording or certifying of it presupposes the same conditions, in order to be admissible.

(2) Assuming still that the transaction is one in its nature required to be done by or before an officer, there are nevertheless many classes of public offices in which the work must be *apportioned among subordinates*. Clerks and treasurers, for example, have in populous districts one or more, perhaps scores, of assistants, to whom various parts of the work are assigned; the chief officer, on whom the general duty directly rests, retaining only a supervising function, and rarely doing in person the acts of recording, returning, or certifying. This is well understood and fully sanctioned as a proper and necessary mode of securing the performance of the official duty. The substantive law recognizes this; and it would be impossible and inconsistent in the law of evidence to refuse equal recognition. When such an officer's record or certificate is made, no one supposes that the chief officer himself has had personal knowledge of the data stated over his name. It cannot be doubted that such official statements are admissible. His duty makes him responsible for errors or defaults therein, no matter whose they are, and his duty should equally suffice to admit such statements. The question, it should be noted, is not whether a statement in the deputy's name is admissible (as in § 1633, par. 8, *ante*), but whether a statement coming in the name of the officer himself is inadmissible if it appears that he made it, not on personal knowledge, but on the faith of a subordinate's information. Since the general nature of the official duty requires that the assistance of proper subordinates must be relied upon for its performance, it follows necessarily that the same assistance may be relied upon for the due recording of the things done. On principle, therefore, there seems to be no objection; and practical necessity certainly demands the same result.

Whether or not a given officer is one who in legal contemplation may properly employ the assistance of subordinates to do, and therefore to record, the transactions of his office is of course sometimes difficult to determine. It is easy to see, for example, that a notary's duty (as in the case above quoted) requires a strictly personal performance, and therefore personal knowledge. On the other hand, it is equally clear that the clerk of a busy court need not make in person the copies of records certified by him, nor know their correctness. In general, Courts are disposed liberally to enlarge the class of official

⁶ See particularly §§ 1640, 1670, *post*.
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statements which may properly be made on the faith of subordinates' acts.⁶ But the principle extends only so far as the assistance relied upon is that of proper subordinates, and not that of outside persons or of other officers having independent duties; for in the latter alternative the statement belongs in the ensuing class.⁷

(3) Where the officer's statement is concerned with a *transaction* done, not by him or before him, but *out of his presence* (and out of the presence of his subordinates), the case is one in which obviously he can have no personal knowledge; the assumption must therefore be that his statement is inadmissible. It is to be noted, however, that the sufficient explanation is usually that the officer's duty does not extend to transactions out of his presence, and thus the recording or certifying of them is not covered by his official duty. For example, under the English ecclesiastical system it was the duty of the priest officiating at a baptism or a marriage to record the performance of the ceremony as an act done officially by him; but his duty was confined to the performance of the ceremony, and hence his record of the age of the persons baptized or married was not made as a part of his duty, since the age depended on the date of occurrence of birth at another time and place (*post*, § 1646). Thus, for matters not occurring in the presence of the officer, his record or certificate is inadmissible, not only because in general a witness must have personal knowledge, but also because an officer's duty is usually concerned only with matters done by or before him. Tested by either principle, there is a shortcoming. Now there may be cases in which the officer's duty clearly does involve his ascertainment of facts occurring out of his presence and requiring his resort to sources of information other than his own senses of observation; for example, an assessor's record of the value of real estate and of its occupancy, or a registrar of voters' record of electors' residences. When such a duty clearly exists, the general doctrine above, that a witness should have personal knowledge, need not stand in the way, for (as already noted) it has its conceded limitations; and where the officer is vested with a duty to ascertain for himself by proper investigation, this duty should be sufficient to override the general principle. It is true that due caution should be observed before reaching the conclusion that the law has in fact in a given case intended to invest the officer with such an unusual duty. But when it clearly appears that a duty has been prescribed to investigate and to record or certify facts ascertained other than by personal

⁶ 1881, *Miller v. Boykin*, 70 Ala. 469, 478 (postmaster's register of mail-arrivals and departures received, though not based on personal knowledge); 1892, *U. S. v. Cross*, 20 D. C. 380 (Marshal's record of measurements of convicted persons, admitted, the measurements being actually taken by some unknown subordinate); 1886, *Worcester v. Northborough*, 140 Mass. 397, 401, 5 N. E. 270 (printed record of Massachusetts volunteers, published by adjutant-general under legislative resolve, admitted to show town of residence of a soldier; "this class of evidence is

not strictly confined to facts within the personal knowledge of the officer making the record").

⁷ The following ruling, perhaps illiberal, illustrates this: 1820, *Governor v. Jeffreys*, 1 Hawks 208 (a certificate of the adjutant-general that the defendant, a colonel, did not make his return to the major-general as required by law, was held inadmissible, because the adjutant-general could not have had personal knowledge of the fact; although his certificate in general was evidence of the delinquency of officers).

observation, then it follows that, in accordance with the general principle of the present exception, the statement thus made becomes admissible. Such, in general, is the judicial attitude towards this class of questions. On the one hand, we find a general exclusion of statements not based on personal knowledge (of the officer or his subordinates); this exclusion being rested usually on the circumstance that the duty does not extend to such matters.⁸ On the other hand, we find a few kinds of statements where it has clearly been made the officer's duty to investigate and record or report irrespective of personal knowledge, in such cases the statements are admitted; but Courts are disinclined to recognize many instances as belonging within this class.⁹ Occasionally a statute makes the result clear by expressly declaring such statements admissible; but, in the absence of statute, Courts are found slow to infer merely from the nature of the office any specific duty to record or certify, on the faith of information derived from other persons, matters occurring without the officer's presence, — or, at least, any duty sufficient to render such statements admissible in evidence. This attitude is, on the whole, and apart from specific vagaries, a safe and practical one, because, so far as the sources of the officer's information are not personal to himself, they will in general be equally and sufficiently available in the ordinary way as testimony for the party desiring to make proof. The various instances in which this general question is illustrated may best be noted under the different kinds of documents.

B. APPLICATION OF PRINCIPLES TO SPECIFIC KINDS OF DOCUMENTS.

§ 1637. **Three Types of Document: Register, Return, and Certificate.** Official statements may of course be classified from various points of view. That classification will here be most serviceable whose distinctions rest on salient circumstances marking general limitations of the implied authority of officers, and therefore suggesting something as to the admissibility of a given document. These circumstances seem to concern mainly the form and the custody of the document. As to form, the statements may be regularly made in a series and collected in a general register or record, or they may be drawn up for each occasion as separate documents. As to custody, they may be preserved by the officer in official custody, or they may be given out to be carried away by the person wishing to use them. There thus arise three classes, in general sufficiently distinct, within which it would seem that all the various sorts of documents may be subsumed, namely, Registers (or Records), Returns (including Reports), and Certificates (including Certified Copies).

A *register* or record differs from a return or report in that it comprises in a single volume a series of homogeneous statements, recorded by entries made more or less regularly; it differs from a certificate in that it is kept in the official custody. A *return* or report differs from a register in that it is a single document, made separately for each transaction as occasion arises, —

⁸ Post, §§ 1630, 1646, 1648, 1664.
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⁹ Post, §§ 1670-1672.

perhaps filed or indexed with others, but having a separate existence of its own; this difference arising usually in practice from the circumstance that the statement deals with something done without the official precincts and therefore not so fitted for entry in a single office volume. The return differs from the certificate in that it is preserved in official custody. A further distinction, within this class, between a return proper and a report is that the former deals with something personally done or observed by the officer, while the latter records the results of his investigations as to something that has occurred out of his presence. A *certificate* differs from a return in that it is not preserved by the official, but is given out by him to an applicant for the latter's use. It differs from a register in that it is not a series of entries in a single volume.

In general, the practical importance of this distinction of terms appears in the following ways: A *register* is usually authorized by implication to be kept by every officer to record his doings, and is therefore generally admissible without express authority to keep it. A *return* is also usually by implication authorized for any officer whose duties involve the doing of things outside of the premises of his office, — for example, a sheriff or a surveyor; yet, so far as it is merely a report — i. e. not based on personal knowledge — few officers, if any, are found vested by implication with such authority, and consequently an express authority must be sought; moreover, the number of officers whose duties necessarily authorize the making of a return proper is small. A *certificate* seems at common law rarely, if ever, to have been regarded as authorized by implication, and therefore an express authority must be sought in each instance. Thus, the distinction between the three classes has important consequences in determining the admissibility of the various sorts of official statements.

The terms above taken are not, it is true, employed in common usage with such precision to mark these specific distinctions; nevertheless, the terms are sufficiently typical, and the ideas ordinarily conveyed by them do roughly correspond to the above definitions; it is enough if here they are understood to be employed in those senses. Furthermore, the lines between these three classes, while broadly enough marked in general, cannot always be strictly marked. Some official documents — for example, a justice's certificate of marriage, recorded with the town clerk — may conceivably be placed under one or another of the classes. In other cases, the officer prepares the document in two forms or prepares it in different forms in different jurisdictions, — for example, a notary, who in some localities gives out separate certificates of protest, in others enters the protest in a general register and gives out copies of the register. Nevertheless, the broad distinctions, and the legal consequences already mentioned, are clear enough, and serve sufficiently to group the various sorts for considering their admissibility in evidence.

§ 1638. *Other Rules applicable to Official Documents, discriminated (Production of Original, Authentication, Privilege, etc.).* The sole inquiry here is the scope of an exception to the Hearsay rule, i. e. the admissibility of an

official document as testimony to the facts asserted in it by the officer. Other rules of evidence will also find application to the same document; but their bearing must be discriminated. (1) The rule requiring the Production of the Original (*ante*, § 1179) finds constant application; but, assuming the original to be produced, the question still remains whether it is receivable as an assertion of fact under the present exception to the Hearsay rule. (2) The rule of Authentication (*post*, § 2129) has always to be satisfied; for an official document may belong to a class clearly admissible under the present exception, and still the document actually offered must be authenticated as genuinely that which it purports to be. (3) The rule of Completeness (*post*, § 2094), requiring the whole of a document to be used, and not merely a portion of it, has constant application to official documents, and may exclude that which would be admissible so far merely as the present exception was concerned. (4) The rules of Preference (*ante*, §§ 1265, 1325, 1335, 1345) apply frequently to official documents, by way of requiring their use in preference to other kinds of testimony. (5) The rules of Privilege (*post*, § 2367) occasionally forbid the use of official documents, or allow the officer to refuse to permit their use. (6) The rule of Integration, or Parol Evidence rule (*post*, § 2400), has a frequent bearing on official documents.

1. Registers and Records.

§ 1639. **General Principle, and Sundry Applications.** Wherever there is a duty to record official doings, the record thus kept is admissible. This much is conceded; the judicial language already quoted (*ante*, §§ 1632, 1633) sufficiently illustrates the principle. The only matter of doubt can be whether there is in a given case a duty to record. It is clear that such a duty need not be expressly prescribed by statute or regulation, but may be implied from the nature of the office (*ante*, § 1633, par. 1).

Further, it may safely be laid down, as a general principle, that wherever there is a duty to do, then there is also a duty to record the things done. It is not conceivable that governmental work could be adequately carried on without the written preservation of the doings. The necessity for supervision and correction and for future reference to past doings makes this conclusion inevitable. Such a general principle seems not to have been expressly adopted by the Courts, but it is distinctly implied in the body of the decisions. It must of course be taken with certain natural qualifications. The theory of official duty does not suppose every officer without exception to be engaged alike in doing and writing; some merely do, and others merely write. The theory applies not so much to individual officers as to each office or administrative group taken as a whole. It is the doings of the office, as such, that are to be recorded by some appropriate officer therein. For example, no one need maintain that the duty of the jail-sentry to watch on the wall implies also a duty to record from time to time the fact that he has watched certain prisoners; and yet the general duty of the prison-warden to keep the persons committed to him does imply a duty to record the

persons committed and the length of time during which they are kept. With this qualification, then, that the principle applies to the doings of an office considered as a whole or as a distinct subdivision, the principle still remains true that wherever an official duty to do is found, there is also a duty on some appropriate person for the office to record the doings. Practically, then, the admissibility of a given register or record depends ultimately on whether the officer has the duty to do the class of things recorded; if they are within his duty, then the record is admissible; otherwise not.

The question of evidence thus depends largely on the question of administrative law. Not all the judicial rulings conform strictly to this principle, but it unquestionably represents the general judicial attitude.¹ *Statute* has

¹ In the following list are contained only cases dealing with registers and records of sundry sorts; instances of documents in the nature of certificates and returns of sundry sorts will be found *post*, §§ 1672, 1674; in the following list are also placed judicial rulings made under statutes: *England*: 1785, *R. v. Aickles*, 1 Leach Cr. L., 3d ed., 436 (prison-register expressly required by law to be kept, admitted); 1802, *Salte v. Thomas*, 3 B. & P. 190 (prison-books, not admitted; partly because "the gaoler is not required by law to keep them"); 1813, *Henry v. Leigh*, 3 Camp. 499 (clerks in the Bankruptcy Court who saw the Lord Chancellor sign the certificates, and then made entries of the fact in a book kept for and consulted by the public, the clerks not being sworn officers; the entries not received); 1815, *R. v. Grimwood*, 1 Price 369, 371 (official excise-books, admitted; Thomson, C. B.: "If all the officers during the period to which they relate were necessarily to be called to substantiate them by proof, there would in most instances be an end of recovering duties in arrear"); 1829, *Arnold v. The Bishop*, 5 Bing. 316 (a bishop's register, admitted to prove "the business transacted at the bishop's visitation"; here the existence of a custom as to a curate's election); 1838, *Merrick v. Wakley*, 8 A. & E. 170 (medical officer's book of returns of attendance, etc., in workhouse, excluded; see quotation *ante*, § 1632); 1845, *Irish Society v. Bishop of Derby*, 12 Cl. & F. 641, 657 (limits of admissibility of records of bishops as ecclesiastical officials, determined); 1863, *The Maria das Doriae*, 32 L. J. Adm. 163 (government lighthouse-journals, admitted); 1866, *The Catherina Maria*, L. R. 1 Ad. & Ec. 63 (returns of coastguard, admitted in a collision suit to show the weather conditions); *United States*: 1881, *Miller v. Boykin*, 70 Ala. 469, 478 (postmaster's required register of arrival and departure of mails, receivable; but said groundlessly to serve only for collateral issues); 1902, *Mears v. R. Co.*, 75 Conn. 171, 52 Atl. 610 (weather in Waltham, allowed to be evidenced by the Federal bureau's records at Boston, 10 miles away, the nearest office of the bureau); 1892, *U. S. v. Cross*, 20 D. C. 380 (record of the measurements of convicted persons, kept by the marshal for the Department of Justice, admitted); 1900, *Snell v. U. S.*, 16

D. C. App. 501, 513 (entries in the books of the Georgia State Sanitarium, concerning insane persons, not admitted to show facts of their history occurring before entering the sanitarium); 1876, *Butler v. Ins. Co.*, 45 Ia. 93, 96 (record of State insane hospital, kept by assistant physician, not under any authority or duty, excluded); 1897, *Huston v. Council Bluffs*, 101 Id. 33, 69 N. W. 1130 (United States Meteorological Office's records, admitted); 1857, *Gurney v. Howe*, 9 Gray 407 (postmaster's record of registered letters, admitted); 1887, *People v. Foster*, 64 Mich. 717, 720, 31 N. W. 596 (record of weather by U. S. Signal Service, not admitted in a criminal case; unsound; compare § 1398, *ante*); 1840, *Newman v. Doe*, 4 How. Miss. 535 (Indian agent's record of names, admitted); 1849, *Browning v. Flanagan*, 22 N. J. L. 567, 572 (clerk's "sealing docket," containing entries of the issue and return of writs, held "an official register"); 1903, *Scott v. R. Co.*, — Or. —, 72 Pac. 594 (U. S. Weather Bureau records of rainfall, admitted; here both the records verified by the incumbent on the stand and the records of his predecessor were admitted; of course the predecessor, under the principle of § 1422, *ante*, did not need to be called; compare § 665, *ante*); 1865, *Howser v. Com.*, 61 Pa. 332, 338 (warden's record of prisoner's presence, etc., treated as admissible); 1878, *Evanston v. Gunn*, 99 U. S. 660 (records of weather kept by U. S. Meteorological Bureau, admitted); 1882, *The Sandringham*, 10 Fed. 556, 568 (reports of a storm, from a U. S. signal-station, admitted); 1892, *Daly v. Webster*, 1 U. S. App. 573, 611, 4 C. C. A. 10, 56 Fed. 483 (copyright clerk's book, received to show deposit of a play); 1896, *White v. U. S.*, 164 U. S. 100, 17 Sup. 38 (book of entries of receipts and discharges of convicts, kept by a jailer, admitted); 1887, *State v. Spaulding*, 60 Vt. 228, 233, 14 Atl. 769 (assess-ment-rolls of collector of internal revenue, admitted to show the issuance of a liquor license to the defendant); 1901, *Hempton v. State*, 111 Wis. 127, 86 N. W. 596 (record of insane person kept by law at State hospital, admitted).

For postmasters' certificates, see *post*, § 1674.

For postmarks as evidence of date, see *post*, § 2152.

For other specific kinds of registers, see the ensuing section-titles.

of course frequently stepped in to make expressly admissible many kinds of registers and records; in most instances the statutory declaration was unnecessary.³

³ In the following list, only registers and records are dealt with; statutes about certificates and returns will be found *post*, §§ 1672, 1674; it is sometimes difficult to say in which class a document properly belongs: CANADA: *Dom. St.* 1893, c. 31, § 17 ("any entry in any book kept in any department of the government of Canada," provable as in *Ont. R. S. c. 73, § 28*, omitting from "apparently" to "believes"); § 19 (ten days' or more notice required for such copies); *B. C. Rev. St.* 1897, c. 71, § 18 (like *Dom. St.* 1893, c. 31, § 17); § 20 (like *ib.* § 19); *Man. Rev. St.* 1902, c. 57, § 16 (like *Dom. St.* 1893, c. 31, § 17, applying also to any province of Canada); § 21 (like *ib.* § 19); *N. S. Rev. St.* 1900, c. 163, § 13 (like *Can. St.* 1893, c. 31, § 17, including also the books of a department of Nova Scotia); *Ont. Rev. St.* 1897, c. 73, § 28 ("any entry in any book of account kept in any department of the government of Canada or of this province" is admissible to prove the facts recorded, "if it is proved by the oath or affidavit of an officer of such department that such book was at the time of the making of the entry one of the ordinary books kept in such department, that the entry was, apparently and as the deponent believes, made in the usual and ordinary course of business of such department"); UNITED STATES: *Cal. Civ. C.* 1872, § 2471 (county clerk's register of partnership names, etc., admissible); *C. C. P.* 1872, §§ 1920, 1926 ("Entries in public or other official books or records, made in the performance of his duty by a public officer of this State or by another person in the performance of a duty specially enjoined by law," receivable; entry "made by an officer or board of officers or under the direction and in the presence of either, in the course of official duty," receivable to show "the facts stated in such entry"); § 1946 (regular entries of a decedent "in the performance of a duty specially enjoined by law" are admissible); *Colo. St.* 1902, March 14, c. 1, § 16 (railroad records and reports of stock killed, kept by virtue of statute, admissible); *Ga. Code*, 1895, § 1033 (books of State railroad—the Western & Atlantic—to be evidence in actions by or against it); *Ind. Rev. St.* 1887, § 5979 (like *Cal. C. C. P.* § 1920); § 5984 (like *ib.* § 1926); § 5996 (like *ib.* § 1946); *Ill. Rev. St.* 1874, c. 15, § 6 (State auditor's books of account with collectors, etc., admissible); c. 79, § 15 (county clerk's record of swearing, resignation, etc., of justices and constables, admissible); *Ind. Rev. St.* 1897, § 1908 (books of State or county auditor or county board, admissible to show a balance against officials charged with embezzlement); *La. Rev. Civ. C.* 1888, § 6 (Secretary of State's register, admissible to prove publication of a law); *Mich. Comp. L.* 1897, § 10201 (weather conditions provable in civil causes by U. S. signal-service record); *Minn. Gen. St.* 1894, § 1844 (county commissioners' book of State and county roads,

admissible); § 3803 (records of board of education, admissible); *Mont. C. C. P.* 1895, §§ 3208, 3214, 3237 (like *Cal. C. C. P.* §§ 1920, 1926, 1946); *Nev. Gen. St.* 1885, § 1487 (State librarian's entries, admissible to prove delivery of books and date thereof, in action for fines, etc.); *N. J. Gen. St.* 1896, Evidence, § 58 (public record in a foreign State, admissible, if there admissible); *N. M. Comp. L.* 1897, § 215 (records of cattle sanitary board, admissible); *N. Y. C. C. P.* 1877, § 944 (U. S. signal-service record of weather, admissible); *Laws* 1896, c. 545, § 73 (on *habeas corpus*, a patient's "medical history" "as it appears in the case-book" of a State hospital is admissible); *Laws* 1897, c. 622 (records of N. Y. State weather bureau, or a certified copy, admissible to prove the conditions of weather and of precipitation); *N. D. Rev. C.* 1895, § 294 (records of State board of dental examiners, admissible to prove the facts stated); §§ 5697, 5698 (like *Cal. C. C. P.* §§ 1920, 1926); § 4415 (register of partnerships by clerk of district court, admissible); *Ok. Rev. St.* 1898, § 7299 (books of State auditor or county auditor or commissioners, admissible to prove a balance due against a public officer charged with embezzlement); § 108 (Governors' records of pardons, extraditions, notaries, etc., admissible); § 89 (penitentiary record of pardon-case, admissible); *Ok. Stats.* 1893, § 1671 (county clerk's road record, admissible); § 4278 ("The books and records required by law to be kept by any probate judge, county clerk, county treasurer, register of deeds, clerk of the district court, justice of the peace, police judge, or any other public officers, may be received in evidence"); *Or. C. C. P.* 1892, § 745 (like *Cal. C. C. P.* § 1920, inserting "or of the U. S."); § 767 (like *ib.* § 1946, inserting after "writings," "of a like character," and after "deceased," "or without the State"); § 2221 (State treasurer's book, admissible); *R. I. Gen. L.* 1896, c. 62, § 11 (school district clerk's record of notice of meeting, admissible); *S. D. Stats.* 1899, §§ 6540, 6541 (like *Cal. C. C. P.* §§ 1920, 1926); § 5258 (register of partnerships by clerk of circuit court, admissible); *Tenn. Code* 1896, § 5583 (records of State Department of this or other domestic State or foreign State, or public documents purporting to have been printed by order of the Legislature or either branch, receivable to prove "acts of the Executive"); *Tex. Rev. Civ. Stats.* 1895, § 2310 (in State suits for official money defaults, records, etc., of comptroller of public accounts are admissible); *U. S. Rev. St.* 1878, § 886 (in a suit for delinquency of a money officer, books of the Treasury Department are admissible); § 887 (on trial for embezzling public moneys, books and proceedings of the Treasury Department are admissible); § 889 (certain account-books in the Post-Office Department, admissible); § 896 ("all official entries in the books or records"

It is to be remembered that a register or record otherwise admissible may fail to be received for one of the general reasons already noted (*ante*, §§ 1633-1635). In particular, a register of things done or occurring *not within the personal knowledge* of the officer may sometimes be excluded on that ground alone.

§ 1640. *Assessors' Books; Electoral Register.* (1) The duty of a *tax-assessor* requires him ordinarily to ascertain, for each piece of property, the person owning or occupying it and the value of the property. It is also clearly his duty to record the facts thus ascertained. The only objection to the admissibility of his record as evidence of these facts must arise from the principle already considered (*ante*, § 1635), that the record of the assessor is not of his own personal deeds or observation, but of facts occurring without his observation. This objection is of no force when the officer's duty clearly requires him — as in the assessor's case — to depend upon investigation. If the assessor does not merely record the sworn statement of the claimant, but also satisfies himself by independent means, and follows his own judgment, his finding deserves some credit. It is true that the record is not made expressly for use as evidence in court; but it is certainly made for a weighty purpose; and few official documents are made expressly for use in evidence. It is also true that in many communities the assessment-book notoriously assesses values far below the actual standards; and that in others the assessor accepts without question the owner's filed statement; where these practices prevail, it is simple enough to reject those particular books as untrustworthy evidence of value, and as inadmissible. But where the books are not thus notoriously untrustworthy, there seems to be no sound objection to receiving them. No one pretends that they are conclusive; but at least they afford some evidence to a rational mind seeking the truth.

There is much judicial difference of opinion as to their admission. It would seem that to prove the *value* of property¹ they should be admissible,

of a U. S. consul, vice-consul, or commercial agent, admissible); *Unk* Rev. St. 1893, § 3389 (like Cal. C. C. P. § 1920); § 3395 (like *ib.* § 1926); § 3406 (like *ib.* § 1946); *Vt.* Stats. 1894, § 1250 (U. S. weather record at the place where taken, receivable by certified copy); *Wash. C. & Stats.* 1897, § 3122 (State weigher's bill of weight of shingles or lumber, to be evidence of the facts stated); § 3111 (State log-scaler's books, to be evidence of the matters stated); *Wis.* Stats. 1898, § 4161 (records of village, as to boundaries, etc., admissible); § 4162 (records in office of county treasurer or clerk, admissible); *St.* 1899, c. 87, § 1 (registration book of State medical examiners, to be evidence of "all matters required to be kept therein"); *Wyo.* Rev. St. 1887, § 3834 (records of clerk of board of county commissioners and county treasurer, admissible to prove sale of realty for taxes, etc.).

¹ In the following list are included those rulings which receive the assessors' records only as containing the admission of the owner as a

party-opponent in the case (as noted *post*): *Admitted*: 1844, *Welland v. Middleton*, 11 Ir. Ej. 603, Sugden, L. C. (assessment-book admissible to show value); 1848, *Swift v. M'Tiernan*, *ib.* 602, Brady, L. C. (*same*); 1890, *Birmingham M. R. Co. v. Smith*, 89 Ala. 305, 7 So. 634 (eminent domain; tax-assessor's valuation said to be inadmissible, but the owner's sworn statement of value filed with the assessor, held admissible against him); 1898, *White v. B. & F. G. Co.*, 65 Ark. 278, 45 S. W. 1060 (admitted to show value of personality); 1875, *Beckwith v. Talbot*, 2 Colo. 639, 651 (cattle-sale; defendant's agent's tax-schedule of the cattle, admitted against him); 1861, *Lynch v. Lively*, 32 Ga. 575, 577 (administration; the intestate's return of taxable property, admitted against an applicant for administration); 1895, *Vernon S. R. Co. v. Savannah*, 95 Ill. 337, 22 S. E. 625 (eminent domain; the owning corporation's return for taxation, admitted); 1899, *Manning v. Lowell*, 173 Mass. 100, 53 N. E. 160 (cited *ante*, § 1060; received as containing the own-

subject to the above limitations, as well as to prove its occupancy,² or the ownership or the lack of property by a particular person;³ the objection, in the last instance, that the title-deeds should be produced, is disposed of by the same reasoning (*ante*, § 1246) that makes it proper for a person to testify on the stand that he is or is not the owner of property. They

er's admission); 1897, *Banking House v. Darr*, 189 Mo. 660, 41 S. W. 227 (cited *ante*, § 1060; similar); 1898, *St. Louis O. H. & C. R. Co. v. Fowler*, 142 id. 670, 44 S. W. 771 (defendants' assessment list, admitted against him); 1877, *Hanover Water Co. v. Iron Co.*, 84 Pa. 285; 1891, *Mifflin Bridge Co. v. Juniata Co.*, 144 id. 365, 375, 22 Atl. 596 (eminent domain; the owning corporation's officers' sworn valuation, admitted against itself); 1897, *West Chester & W. P. R. Co. v. Chester Co.*, 182 id. 40, 51, 37 Atl. 905 (similar); 1903, *Boyer v. St. Louis S. F. & T. R. Co.*, — Tex. —, 76 S. W. 441 (damage by a railroad; the plaintiff's rendition of taxable property, received as an admission); 1880, *Bonkendorf v. Taylor*, 4 Pet. 349, 360 (legality of sale for taxes; the assessor's book "was made out and arranged by an officer in pursuance of a duty expressly enjoined by law; this not only makes the tax-book evidence, but the best evidence which can be given of the facts it contains; in this book are stated the name of the owner of the property, and his residence, if known; the number of the square, the number of the lot, the square feet it contains; the rate of assessment, the valuation, and the amount of the tax"); 1895, *Hubbard v. Moore*, 67 Vt. 559, 32 Atl. 465, *semble* (tax inventory, receivable only so far as it is an admission). *Excluded*: 1884, *Texas & St. L. R. Co. v. Eddy*, 42 Ark. 527 (eminent domain; assessor's valuation of land, excluded, because "being for a different purpose, not a fair criterion of its market value"); 1901, *Scott v. O'Neil*, — Ky. —, 62 S. W. 1042 (assessment excluded as "hearsay"); 1855, *Brown v. R. Co.*, 5 Gray 35, 40 (eminent domain; "it is questionable whether any valuation made for the special purpose of taxation, several years before, is admissible"); 1863, *Flint v. Flint*, 6 All. 34, 37 (not admitted to show "the actual value of the house"); 1869, *Kenerson v. Henry*, 101 Mass. 152, 155 (assessed valuation of an estate, excluded); 1869, *Com. v. Heffron*, 102 id. 148, 151 (excluding an assessor's book as evidence that the defendant's house was within a certain town's boundary different from that alleged in the indictment; Gray, J.: "The assessment can be no better evidence of the situation of land than it is of the value of land or the domicile of the person. The domicile of persons, the situation and value of property, and other facts, are required by the tax acts to be ascertained and recorded by the assessors, according to their best information and belief, for the sole purpose of the assessment and collection of the tax; and there would be great danger of injustice if their estimates of any of these details or incidents were held to be competent evidence against third persons of any fact of which better evidence is

obtainable"); 1894, *Anthony v. R. Co.*, 162 id. 60, 65, 37 N. E. 780 (assessors' valuation, not received to show value of a building burned); 1873, *Virginia & T. R. Co. v. Henry*, 8 Nev. 165, 174 (eminent domain; defendant's sworn valuation to the assessor, said *obiter* to be inadmissible, except to contradict him); 1899, *Ridley v. R. Co.*, 124 N. C. 37, 32 S. E. 379 (tax-list made by assessors, not admissible to show value of land); 1886, *Tuckwood v. Hanthorn*, 67 Wis. 326, 337, 30 N. W. 705 (sale in fraud of creditors; tax-roll held not admissible to show plaintiff's lack of money, being receivable only by statute in a proceeding to enforce the tax; but the plaintiff's statements to the assessor were received as admissions).

² 1824, *Doe v. Cartwright*, Ry. & Mo. 62 (tax-collector's entry of payment, admitted to show occupation by Y.; but put on the ground of a declaration against interest, *ante*, § 1458); 1834, *Doe v. Seaton*, 2 A. & E. 171, 176, 178 (land-tax books admitted as corroborative evidence of occupation); 1883, *Doe v. Arkwright*, ib. 182, note (land-tax books not admitted to show occupation by an individual member of a family, in view of a practice to assess merely in the general family name); 1888, *Blount v. Layard*, cited in 1891, 2 Ch. 681, 691 (assessments for church and poor rates, admitted to show who were tenants); 1891, *Smith v. Andrews*, 2 Ch. 678, 680, 694 (union-workhouse tax-books assessing a tax upon specific occupiers of land, admitted, the officers' "duty being to ascertain who is the occupier of the property and to enter his name as the person rateable in respect of it"); 1886, *Fletcher v. Fuller*, 120 U. S. 534, 552, 7 Sup. 667 (title by presumption of lost grant; the assessment of taxes for many years on the claimants, "such assessment being required to be made, under the laws of the State, to occupants or owners," said to be "circumstances of great significance").

³ 1875, *Winter v. Baudel*, 30 Ark. 362, 371 (assessor's books, received to show that persons listed had no property above the exemption-limit); 1861, *Tollewson v. Posey*, 32 Ga. 372, 375 (assessor's books, admitted to show the defendant's wealth, as being based on his admissions); 1861, *Painter v. Hall*, 75 Ind. 208, 213 (assessment list, admitted as an official document "to show the amount of property owned by the assessed"); 1881, *Hall v. Bishop*, 78 id. 370, 371 (list admitted as embodying the admission of a party); 1892, *Beekman v. Hamlin*, 23 Or. 313, 314, 31 Pac. 707 (assessment-rolls, admitted to show a debtor insolvent, in connection with a presumption of payment). *Contra*: 1881, *Adams v. Hickox*, 55 Ia. 632, 8 N. W. 485; 1895, *Hetch v. Eherke*, 95 id. 757, 64 N. W. 650; 1897, *Allbright v. Hannah*, 103 id. 28, 72 N. W. 421.

should also be admissible, it would seem, to prove any other facts which the duty of the assessor may require him to ascertain for the purpose of taxation, — for example, location,⁴ age,⁵ alienage, coverture, and the like.

It is to be noted that wherever the books are required to be based in part on the sworn statement, return, or list of a claimant or owner, then, as against that person, the statement, or the book containing it, may be used against him as involving in effect his admission;⁶ and it is upon this theory that most of the receiving rulings seem to have been made. In this view, a person's failure to list certain property would be evidence of a failure to claim, amounting (on the principle of § 1072, *ante*) to an admission.⁷ Furthermore, so far as the proceedings of assessment and collection are material in determining the lawfulness of a tax, the amount due from a collector, or the like, the books are admissible without regard to the present principle (on the theory of § 2427, *post*).⁸ Finally, statutes in many jurisdictions expressly make admissible these and other taxation-books; but whether this would authorize their use for any but the purpose last mentioned may be doubtful.⁹

(2) The electoral register, poll-books, tally-books, and the like, are clearly admissible in so far as they embody the doings of the election officials and the doings of others in their presence.¹⁰ But so far as they record persons as residing within a district and as otherwise possessing electors' qualifications,

⁴ *Contra*: 1869, *Com. v. Heffron*, 102 Mass. 148 (quoted *supra*); 1902, *Philadelphia v. Gowan*, 202 Pa. 453, 52 Atl. 3 (assessment-books, held not admissible under statutes to prove for the city that property was assessed as urban).

⁵ *Contra*: 1843, *Clark v. Trinity Church*, 5 W. & S. 286, 269, *semble* (assessor's entries, not admissible to prove the assessee to be of age).

⁶ On the principle of § 1060, *ante*; the cases going on this theory are placed with the others in the notes *supra*. The following ruling therefore seems erroneous: 1795, *Weaver v. Pratt*, 1 Esp. 369 (tax-collector's books, not admitted, *semble*, to prove that A had paid taxes on property as to which he was now charged as owner).

⁷ 1902, *Griffin v. Wise*, 115 Ga. 610, 41 S. E. 1003 (tax-books admitted to show that S. did not make a return for taxation); 1887, *Austin v. King*, 97 N. C. 339, 342; 2 S. E. 678; 1896, *Pasley v. Richardson*, 119 id. 449, 26 S. E. 32. In the following case, substantive law was involved: 1892, *Bowman v. Dewing*, 37 W. Va. 117, 119, 16 S. E. 440 (by law the failure to have land entered in assessor's books is ground of forfeiture; the books are of course receivable to show such failure). Compare § 1072, *ante*.

⁸ 1880, *Dudley v. Chilton* (o., 66 Ala. 593, 598 (moneys due from tax-collector to county; assessor's book, probate judge's book, and treasurer's book, kept by law, receivable)).

⁹ Ala. Code 1897, § 4088 (legally required books and records of tax-collector or probate judge, admissible in issue of sale of realty for taxes); § 3807 (books of auditor or of superin-

tendent of education, admissible to show amount due from county superintendent); Cal. Pol. C. 1872, § 3789 (assessment-book or delinquent list is evidence of assessment, property assessed, delinquency, amount of taxes due and unpaid); Colo. Annot. Stats. 1891, §§ 3771, 3920 (tax-roll, list of lands sold, etc., admissible); *Ida.* Rev. St. 1887, § 1558 (assessment-book or delinquent list, admissible to prove property assessed, and amount of delinquency); Mass. Pub. St. 1882, c. 13, § 54 (tax commissioner's certificate of facts required to be ascertained by him as to corporation-taxes, admissible); Mich. Comp. L. 1897, § 3923 (all tax-records, etc., to be *prima facie* evidence of the facts stated); Mo. Rev. St. 1899, § 5645 (text-books kept by auditor, collector, assessor, etc., admissible "as evidence of all the facts stated therein"); § 2925 (assessment-book, and all taxation-books in office of clerk of county court, admissible in controversies as to tax-sales of land); *Nev. Gen. St.* 1885, § 1110 (delinquent tax-list, admissible to prove "assessment, property assessed," delinquency and its amount); *N. M. Comp. L.* 1897, § 4160 (records, lists, etc., of revenue assessor, clerk, or collector, admissible to prove facts there stated as to assessment, levy, or sale); *R. I. Gen. L.* 1896, c. 48, § 15 (tax-collector's return in sales of realty, to be evidence of facts stated); *Wis. Stats.* 1898, § 4162 ("all assessments and tax-rolls and certificates and warrants thereto attached," as well as notices and proofs of publication, etc., required in relation to taxes, admissible).

¹⁰ On the theory of § 2427, *post*.

they are open to the objection already noted for assessors' books, namely, the registrars' lack of personal knowledge. Nevertheless, this objection, for the reasons noticed, seems to be insufficient; for the registrars of election, in almost every electoral system and usually in practice, are charged with the duty of ascertaining by investigation the qualifications of persons registered and are supposed to enter the names only after satisfying their own judgment upon the facts. This result is generally accepted.¹¹

§ 1641. *Military and Naval Registers; Ship's Log-book.* (1) In the navy and the army are kept certain *muster-books* and other records as a necessary part of administration; these have always been regarded as admissible to prove the facts properly there recorded.¹ Moreover, by statute in many jurisdictions, records of enlistment, muster, discharge, and the like, are required to be kept by officers who would not ordinarily have these duties, such records being made up by compilation from the original records of the officers within the service. The objection to these, namely, that they are not based on personal knowledge (*ante*, § 1635), is overcome by the circumstance that this duty is expressly created by statute.² This objection, moreover, has never availed even against the books, kept by custom and necessity, in the central administrative offices of army and navy.³

(2) A *ship's log-book* is no doubt an entry made in the regular course of business; and, if the entrant is deceased or otherwise unavailable, it would undoubtedly be receivable under the exception for such statements (*ante*, § 1521). But can it be received under the present exception, *i. e.* without showing the entrant unavailable? In *England*, it seems to have been generally considered that the log-book of a government war-vessel was in effect an official record, and therefore admissible; while the log-books of ordinary

¹¹ 1860, *Reed v. Lamb*, 6 Jur. N. S. 828, *semble* (a register of voters, admissible); 1883, *Patton v. Coates*, 41 Ark. 111, 130 (poll-books and certificates of election-officers, receivable, though not expressly admitted by statute); 1891, *Merritt v. Hinton*, 55 id. 12, 15, 17 S. W. 270 (approving *Patton v. Coates*); Cal. Pol. C. 1872, § 1117 (entry in the great register of electors, admissible to prove the person named to be an elector of the county); 1851, *New Milford v. Sherman*, 21 Conn. 101, 112 (register of voters, not admissible to prove evidence for a pauper settlement); 1896, *Enfield v. Ellington*, 67 id. 459, 34 Atl. 818 (list of the registrar of elections, with B.'s name on it checked off, admitted to show that B. was an elector and had voted there; *New Milford v. Sherman* disapproved on this point); 1893, *Langhammer v. Munter*, 80 Md. 518, 31 Atl. 300 (registry of voters, admitted to show residence, etc.; but here treated as a judicial finding of a lower court in an appeal from the finding); Vt. Stats. 1894, § 75 (check-list used at a general election, admissible to show that a person voted).

¹ 1741, *R. v. Fitzgerald*, 1 Leach Cr. L., 3d ed., 24 (muster-book of the navy, admitted); 1742, *R. v. Rhodes*, ib. 29 (muster-book of the

navy, made up of reports sent in by the captains, admitted to show the death of the seaman); 1800, *Barber v. Holmes*, 3 Esp. 190, *semble* (admitting the muster-roll of a frigate, from the Admiralty, to prove J. H. a member of the crew); 1804, *Wallace v. Cook*, 5 Esp. 117 (book of returns made by officers of royal ships to the Admiralty, admitted to show the death of a sailor, as "a book of office kept by a public officer under the Admiralty"); 1879, *Board v. May*, 67 Ind. 561, 565 (to prove enlistment, muster, and discharge, the Adjutant-General's military record-books received); 1874, *Hanson v. South Scituate*, 115 Mass. 340 (army muster-roll, admitted).

² 1870, *Wayland v. Ware*, 104 Mass. 46, 48, 52 (record of names of enlisted townsmen required to be kept by a town-clerk, admitted); 1874, *Hanson v. South Scituate*, 115 id. 340 (town record of enlistments kept under statute, admitted); 1886, *Worcester v. Northborough*, 140 id. 401, 5 N. E. 270 (admitting a volume published by the Adjutant-General's office under a resolve of the Legislature, and stating the towns to which soldiers were credited).

³ See citations in note 1, *supra*.

merchant-ships were at common law excluded.⁴ The latter have, however, there been made admissible by statute.⁵

In the *United States*, the case of a government ship's log does not seem to have been presented. The merchant-ship's log has invariably been held inadmissible as a matter of common law. Two exceptions, apparent only, have been recognized. First, a log-entry may plainly be used as an admission, against the ship whose master made it; secondly, by Federal statute, the entries concerning desertion and other offences of seamen are not only allowed but required to be put in evidence.⁶ But it may be argued that, although a merchant-ship's log is not kept under an official duty, it is at least kept under a duty imposed by law, and therefore ought to be admissible under the principle already considered (*ante*, § 1635, par. 10). Perhaps, however, the practical consequences would be too unsafe; it may be well to trust the sagacity and judicial experience of Mr. Justice Story.

⁴ 1796, *D'Irrell v. Jowett*, 1 Esp. 427 (log-book of a royal convoy-ship, admitted to show the time of sailing of another ship in the convoy); 1809, *The Eleanor*, 1 Edw. Adm. 135, 163 (merchant-ship; Sir W. Scott: "The evidence of the log-book is to be received with jealousy where it makes for the parties, but it is evidence of the most authentic kind against the parties"); 1811, *Le Niemen*, 1 Dods. Adm. 9 (Sir W. Scott; log of naval vessel not admitted in her own interest to show the circumstances of a capture); 1813, *Watson v. King*, 4 Camp. 272, 275 (log-book of naval ship, and official letter of captain, admitted to prove that a merchant-ship was in its convoy); 1816, *L'Etoile*, 2 Dods. Adm. 106, 113 (Sir W. Scott; log of ship-of-war, used as evidence of the circumstances of a capture; possibly here as an admission); 1842, *The Societade Felix*, 1 W. Rob. 303, 311 (Dr. Lushington; log of a naval vessel excluded; "The log-book of a party suing can never be made evidence in his favor under any shape"); 1880, *R. v. Tower*, 20 N. Br. 168, 202 (log-book received, as containing admissions of the defendant captain).

⁵ St. 1854, 17 & 18 Vict. c. 104, §§ 280, 285 ("all entries made in any official log-book," &c. kept on any ship according to the official form naming certain required topics of entry, "shall be received in evidence"; the later St. 1894, 57 & 58 Vict. c. 60, § 239, contains substantially the same provision); Can. Rev. St. 1886, c. 74, § 112 (all entries in a log-book, of facts directed by law to be entered, shall be admissible); 1861, *Biocard v. Shepherd*, 14 Moo. P. C. 471, 475, 489 (log-book of merchant-ship; ruling obscure); 1878, *The Henry Coxon*, L. R. 3 P. D. 156 (Sir R. Phillimore; log of a merchant-ship by the deceased mate, not admitted to prove the circumstances of a collision, partly because the entry was not made till two days after the collision).

⁶ *Haw.*: 1851, *Cobb v. Makee*, 1 Haw. 51 (log-book not receivable except in the statutory cases; unless offered as an admission against the party keeping it); *Mass.*: 1829, *Bixby v. Lus.*

Co., 8 Pick. 86, 89 (log-book of a former voyage, held inadmissible); *U. S.*: St. 1790, July 30, c. 29, § 6, St. 1872, June 7, c. 322, § 58, Rev. St. 1878, §§ 4290-4292, 4547, 4550, 4555, 4565 (vessels required to keep "an official log-book," containing entries on specified topics; production by master, compellable, but nothing said otherwise about using in evidence); § 4597 (entry of seaman's offence required to be made; and "in any subsequent legal proceedings the entries hereinbefore required shall, if practicable, be produced or proved," and in default of production, the Court may refuse to hear evidence of the offence); 1800, *Jones v. The Phoenix*, 1 Pet. Adm. 201 (entry admitted to prove desertion, under the statute; but "it ought not to be admitted to any fact but that in which the act of Congress permits it to be evidence"); 1805, *Malone v. Bell*, ib. 139 (entry of a seaman's tardy return on board, admitted apparently under the statute); 1805, *Thompson v. The Philadelphia*, ib. 210 (similar); 1811, *U. S. v. Mitchell*, 2 Wash. C. C. 478 (debt on embargo bond; defendant not allowed, in proving his excuse for the breach, to use the ship's log-book without authentication); s. c. 3 id. 95, 96 (second trial; log-book now admitted as "better identified than it was"); 1829, *Douglas v. Eyre*, Gilp. 147 (entry of desertion, admitted under the statute); 1834, *U. S. v. Gilbert*, 2 Sumn. 19, 78 (Story, J.: "The log-book is in no just sense proof *per se* of the facts therein stated; except in certain cases provided for by statute. . . . It would be mere hearsay not under oath. . . . I am yet to learn that parties can thus create evidence for themselves by inserting facts in a log-book. . . . In the most common class of cases in which the log-book is used, those of insurance, the log-book has never, to my knowledge, been allowed (if objected to) as proof of the loss for the assured"); 1836, *The Rovena*, Ware 309 (entry of desertion, admitted under the statute); 1848, *The Heracles*, 1 Sprague 534 (similar); 1882, *The Sandringham*, 10 Fed. 556, 558, 555, *semble* (log of merchant-ship, evidence only by way of admissions).

§ 1643. *Registers of Marriage, Birth, and Death: History and General Policy.* The facts of birth, marriage, and death, with their times and places and the persons' names, are facts of pivotal importance in legal controversies, especially as affecting the title to property. The length of time that may elapse before a dispute arises or is litigated, the variety of place and lineage that may be involved, and consequently the difficulty of adducing upon a trial an ample and satisfactory array of evidence to prove even the simplest data, of which there need never have been any doubt whatever, combine to create a special need for the preservation of proof of that class of facts. It is of interest to the State that assistance be furnished to parties in whose cases such facts may be involved. The prime element of security of title is alone a sufficient consideration to justify some provision on the part of the State. Moreover, for few other classes of facts is it so easy for the machinery of State administration to be effectively employed; since registration by a State official will ordinarily for this class of facts (usually notorious and undisputed at the time of occurrence) furnish a simple, trustworthy, and serviceable class of evidence. As a matter of abstract expediency, one can hardly doubt that every community having rational government should by means of a system of official, universal, and compulsory registration authorize the preservation of an adequate source of evidence for this purpose.

Such a system has long been familiar in many parts of the European Continent and in Asiatic countries. But the deep-seated Anglo-Saxon individualism and its repugnance to State interference in family life and private affairs has availed until comparatively recent times to leave its communities lacking such an advantage. In England, indeed, a system of ecclesiastical registration, confined to the ministrants of the established church, provided for the recording of ceremonial occurrences, — baptisms, weddings, and burials. But, even if this system had been thoroughly enforced, as it was not,¹ the ceremony was not the essential fact. Moreover, to sanction registration for members of a privileged church only, and to penalize religious dissent by refusing to dissenters the just facilities for proving the facts of family history, was irrational.²

¹ "An Irish Peer asked me in the House of Lords how the marriage of his grandfather was to be proved. I told him that it must be proved in the usual manner, by production of the register of the parish where the marriage was celebrated. 'But, my dear,' says he, 'in Ireland there are very few parish registers; I don't know in what parish my grandfather was married, but it has no register.' 'How do you know that?' said I, 'if you don't know the parish?' 'Oh, aye,' said he, 'that's true, it did not occur to me. But it is very hard, my lord; won't my testimony, my dear, be sufficient to prove my grandfather's marriage?' 'Certainly, my lord,' said I, 'it will, — if you were present at your grandfather's marriage; otherwise not.'" (Twiss' *Life of Lord El-*

don, II, 606; from the *Chancellor's Anecdote Book*).

² The pharisaism of this exclusive sanction for the parish registers is exposed by a remark made of them by Lord Eldon, in 1812 (*Walker v. Wingfield*, 18 Ves. 444): "There is not one in one hundred that is kept according to the canons." Tales told by genealogists searching records in England show also the carelessness with which these registers were often kept and ease with which they could be falsified. A novel of George MacDonald, "*Wilfrid Cumbermede*," takes as the main incident of its plot the tampering with a parish register.

An interesting litigation, in which copious forgeries of parish registers played an important part, and the dangerous possibilities of such

In the United States, the harshest and most culpable features of this unthrift have disappeared in great part. Almost everywhere local officials are authorized to provide by registration a source of proof.³ But the racial disinclination to State control perpetuates itself. No thorough system has until recent times and in a few places been established. In a large number of jurisdictions, a municipal office is made the repository of returns from clergymen, physicians, undertakers, and midwives. But the important principle of placing upon the head of the family the responsibility of reporting the desired facts is neglected. In many other jurisdictions, a general recognition is given to church registers of all sorts; but this indiscriminate sanction, liberal as it is, can be regarded only as a makeshift, and fails to provide proper safeguards for the permanence and accuracy of records. Compulsoriness, centralization, ease of authentication, — these essential features of a proper system are in general still lacking.⁴ No doubt many circumstances suggest easily an explanation, if not an excuse. But the fact remains; and one of its unfortunate results is seen in the difficulties of harmonizing safe legal principles with practical necessities, and consequently in the uncertain and imperfect condition of the law respecting proof of the great common facts of family history by registers and certificates.

§ 1643. *Same: Theories of Admissibility of Registers.* Five distinct theories appear by which the admissibility may be tested of registers of births (or baptisms), marriages, and deaths (or burials).

(1) *Theory of duty arising from office.* The orthodox theory, as established in England, was the general one governing the present Exception (*ante*, § 1632). The clergyman or priest of the Anglican church (and of the Irish church before disestablishment) were officers under the ecclesiastical branch of the government; by law it was expressly made a part of their duty as ecclesiastical officers to record the ceremonies of baptism, marriage, and burial, as officially performed by them. This register thus became admissible as one kept under an official duty:

Ante 1726, Chief Baron Gilbert, Evidence, 76: "The register is good evidence, or a copy of it. The register began in the 30th of H. VIII [1539] by the instigation of the lord Cromwell, who at that time was vested with all the authority that the Pope's legate formerly had, under the title of Vicar-general to the King, and all wills that were above the value of £200 were to be proved in this court; and therefore it served his purpose¹ to set on foot a registry of all persons that were christened and buried; and this might be very well appointed by the King's authority as supreme head of the Church, since christening and burying are ecclesiastical acts; and when a book was appointed by public authority, it must be a public evidence. This was afterwards confirmed by the injunction of Edward VI, and the particular manner of registering appointed."

registers under the old system were fully revealed, is described in Mr. Earwaker's "A Lancashire Pedigree Case" (the Harrison estates), Warrington, Eng., 1887.

³ John Locke's code of laws for the Carolinas, in 1669, contained perhaps the earliest statute.

⁴ Compare Bentham's remarks: 1827, Rationale of Judicial Evidence, b. IV, c. X (Bowring's ed., vol. VI, p. 570).

¹ This slur on the motives of Cromwell is probably unjust, as is explained in Hubback on Succession, 470 ff.; Mr. Hubback believes the more natural explanation to be that the then recent dissolution of the monasteries by Henry VIII rendered it desirable to provide something to take the place formerly filled by the monastic records.

(2) *Theory of statutory duty.* A theory closely related to this, but not identical, finds the sanction for admission in a duty imposed by statute to keep such a record. This statutory duty is usually imposed upon persons already officers of some sort — for example, town clerks or magistrates; but so far as it is imposed upon private persons — for example, ministers of a church, in this country —, it is obviously not an official duty in the strict sense. That such a statutory duty imposed upon a private person is after all to be assimilated in principle to a strictly official duty has already been seen (*ante*, § 1633, par. 10); yet it is worth noting that the two are not identical. This theory of admissibility by virtue of statutory duty, which leaves admissibility to depend purely on the statutory terms (and may thus, for example, exclude a register of baptisms or of burials), represents the rule prevailing in most jurisdictions of the United States, and is expounded in the following passage:

1663, *Gray, J.*, in *Kennedy v. Doyle*, 10 All. 141, 162: "In England, a church record of baptisms kept by a clergyman of the established church is admissible, even before his death. . . . In the Church of England, from the time of the Reformation, registers of baptisms, weddings, and burials were kept by order of the Crown as head of that church. . . . The ordinances of the English Commonwealth in 1644 and 1653 provided for the registration of births, deaths, and marriages. But these ordinances were annulled upon the restoration of Charles II, and registers kept under ecclesiastical authority continued to be admitted in evidence by the Courts, although not required to be kept, nor declared to be evidence, by any statute. . . . [About 1700] Acts of Parliament began to be passed, which were repealed or altered from time to time, for the registration of births or baptisms, marriages, and burials, generally limited to the established church; and (unless for a few years towards the end of the last century) the law of England does not seem to have provided for registering births or deaths of any person, nor baptisms, marriages, or burials, in any form except that of the established church, from 1706 until 1836,² when the general registration act of 6 & 7 Wm. IV, c. 86, was passed. The English judges, adhering to the principle of admitting in evidence as public documents those registers only which the law require to be kept have considered all others as mere private memoranda, and have refused to admit registers regularly kept by dissenters unless supported by the testimony of the person keeping them or [of] other witnesses. . . . Almost two centuries before the passage of the statute of William IV, the founders of the Massachusetts colony, though not less attached than other Englishmen to their own forms of worship, had the wisdom to perceive that it was more important for the civil government to preserve exact records of the dates of births and deaths than of religious ceremonies from which they might be imperfectly inferred; and that the importance of recording those facts did not depend on the particular creed or church government of the individual, but applied equally to the whole people. They accordingly left the baptism of the living and the burial of the dead to the churches, but, by an ordinance of 1639, enacted "that there be records kept of the days of every marriage, birth, and death of every person within this jurisdiction"; and similar statutes have been ever since in force in Massachusetts. The record of a marriage by the justice of the peace or the minister, or the town clerk's or registrar's record of births, marriages, and deaths, kept as required by these statutes, or a duly certified copy of either, is held competent evidence. . . . It is perfectly true that in this Commonwealth the law makes no distinction between different sects of Christians, and the record of a Roman Catholic priest is of no less weight as evidence than that of a Congregational, or Protestant Episcopal, or any other minister. But, our law not requiring

² This date seems incorrect; compare the statute of 1752, cited *post*, § 1644, note 1.

any record of baptisms, the church record [of baptisms] offered in this case, not having been kept under any requirement of law, was not a public record, and would not, had the priest who made the entries been still alive, have been admissible in evidence, unsupported by his testimony."

(3) Theory of *regular entries in the course of business*. A third theory invokes the ordinary Exception (*ante*, § 1523) for regular entries in the course of a business or occupation:

1863, *Gray, J.*, in *Kennedy v. Doyle*, 10 All. 161, 167: "In the United States the law is well settled that an entry made by a person in the ordinary course of his business or vocation, with no interest to misrepresent, before any controversy or question has arisen, and in a book produced from the proper custody, is competent evidence, after his death, of the facts thus recorded. . . . An entry made in the performance of a religious duty is certainly of no less value than one made by a clerk, messenger or notary, an attorney or solicitor or a physician, in the course of his secular occupation."

There seems to be no difficulty in accepting the principle of that Exception as applicable. The regular entries of a minister or a physician, concerning the services performed as a part of his occupation, fulfil adequately the demands of that Exception. Its peculiar limitation, however, is that the entrant must first be accounted for as deceased, out of the jurisdiction, or otherwise unavailable; and this is in the present class of cases a cumbersome and unnecessary burden. This theory may of course be availed of for admitting registers otherwise not sanctioned by either of the foregoing theories.

(4) Theory of *regular entries*, modified. A fourth theory accepts such registers unreservedly, without requiring either the sanction of an official or statutory duty (as under the first and the second) or the unavailability of the entrant (as under the third theory). This result is strictly not supportable under the Exception for Regular Entries, which is based fundamentally upon the impossibility of securing the entrant's testimony upon the stand. Nevertheless, it is to be regarded as based on that Exception, with a modification resting upon grounds of practical convenience. It is expounded in the following passage:

1887, *Campbell, C. J.*, in *Hunt v. Chasen Friends*, 64 Mich. 671, 674, 31 N. W. 576: "The rule laid down in England, and followed until recent times, which recognized none but registers and similar records of churches of the established religion, has been abrogated there by statute, so as to open the door to many other records which all churches keep, and which are quite as likely to be as accurate as those of an established church. Those registers . . . in this country are fairly to be dealt with as equivalent to corporation records, which are generally evidence of such matters as are recorded in the usual course of affairs. . . . There is no more reason to suppose these entries will be incorrect or falsified than any other. Fraud is possible anywhere; but it cannot be presumed in records of churches any more than in any other documents preserved for similar purposes. The rejection of such proofs would be disastrous. They are relied on by the whole community."

This rule has little acceptance; but it has attractive features, for, in spite of its anomalous principle, it will often serve to relieve from those hardships which our lack of proper administrative provisions must frequently cause. As the basis of a system of legislation, this principle has no merits; but, as

a makeshift to remedy the consequences of defective legislation, it seems a worthy expedient. Perhaps its value as a working rule will depend chiefly on experience. If the principle of the foregoing (third) theory were liberally carried out, by recognizing absence from the jurisdiction as equivalent to death (*ante*, § 1521), there would be little occasion to resort to the present form of rule.

(5) Finally, *express statute* in many jurisdictions declares certain kinds of registers admissible, — usually the registers of municipal officers, but sometimes also church registers of every sort. That this administrative policy is in general not adequately carried out has been already suggested; but at any rate such statutes, so far as they go, remove almost entirely the necessity for judicial construction of the principles involved.

§ 1644. *Same: State of the Law in the Various Jurisdictions.* (1) In *England* and *Canada*, the long line of judicial rulings and statutes covers a period of more than three centuries.¹ Several general features may be noted. (a) In

¹ The statutes and rulings are as follows: STATUTES (for the earlier church ordinances, see the next two notes): *England*: 1695, St. 6 & 7 W. & M. c. 61, § 24 (registers first required by parliamentary statute to be kept); 1753, St. 26 Geo. II, c. 33, §§ 14, 15 (marriage register to be "preserved for public use"; entries to be made "in order to preserve the evidence of marriages, and to make the proof thereof more certain and easy"; the statute applying throughout to registers in a "parish church or public chapel," i. e. apparently to the dissenting chapel as well as to the established church); 1781, St. 21 Geo. III, c. 53, § 3 (registers, in churches or chapels, of certain marriages performed without publication of banns, "shall be received in all courts of law and equity as evidence of such marriages in the same manner" as those of marriages lawfully performed); § 4 (chapel registers to be removed to parish churches in certain cases); 1804, St. 44 Geo. III, c. 77 (similar curative act); 1808, St. 48 Geo. III, c. 127 (similar); 1823, St. 4 Geo. IV, c. 76, §§ 5, 6 (duty of keeping marriage-registers extended to licensed chapels of dissenting churches); 1836, St. 6 & 7 Wm. IV, c. 86, § 37 (general system provided for the official registration, in a special office, of births, marriages, and deaths; "all certified copies of entries purporting to be sealed or stamped with the seal of the said register office shall be received as evidence of the birth, death, or marriage to which the same relates"); 1840, St. 3 & 4 Vict. c. 92, §§ 6-17 (certain non-official registers of births, marriages, deaths, etc., having been examined and authenticated by a commission, those deposited in official custody are made admissible, with certain limitations); 1858, St. 21 Vict. c. 25 (St. 3 & 4 Vict. c. 92, admitting non-parochial registers, enlarged in scope); in addition, there are a number of minor statutes dealing with colonial and sundry registers; *Canada*: B. C. Rev. St. 1897, c. 33, § 25 (register-general's certified copies of entries of birth, marriage, and death, to be evidence of the facts stated); c. 129, § 21 (marriage certificates, etc.,

made under this act, to be evidence of the facts stated); Man. Rev. St. 1902, c. 173, § 31 (entry in the official records of births, marriages, and deaths, to be evidence of the "facts therein stated"); § 34 (certain religious bodies' records, deposited in the department, are "declared to be authentic and to be the official registers"); N. Br. Consol. St. 1877, c. 71, § 11 (clerk of the peace's certified copy of the recorded certificate of marriage is "evidence of the marriage"); St. 1887, c. 5, § 18 (register's certified copy of a register-entry of birth, death, or marriage, to be evidence "of the facts therein stated"); St. 1897, c. 10 (foregoing act repealed); St. 1901, c. 6 (repeal suspended until proclamation by the Lieutenant-Governor); Newf. Consol. St. 1892, c. 133, § 9 (register of marriages, to be evidence of "the celebration of any marriage in this colony or dependencies"); N. W. Terr. Consol. Ord. 1898, c. 14, § 20 (certified extracts of registry of births, marriages, and deaths, to be evidence of the facts stated); P. E. I. St. 1889, § 22 (a certificate of marriage, baptism, or burial, out of the province, under the hand of the officiating clergyman or officer, or an extract from a register certified by the clergyman or officer "being the legal custodian," is evidence "of the contents thereof"). JUDICIAL RULINGS: *England*: 1695, *Vicary v. Farthing*, Cro. Eliz. 411, Moore 451 ("to prove the nonage of the plaintiff, . . . a church-book was given in evidence"); 1698 (1), *Tyrwhite v. Kynaston*, Noy 146 ("Note by Cooke, C. J., that the keeping of a church-book for the age of those which should be born and christened in the parish began in the 30th year of H. VIII, by the instigation of the Lord Cromwell"); 1658, *Dudley's Case*, 2 Sid. 71 (perjury for falsifying a parish register: Glyn, C. J.: "A register-book for the entry of marriages, births, etc., is an evidence by our law, and the falsifying of it, whether it be by conspiracy or not, ought not to be unpunished"); 1695, *Stayner v. Droitwich*, 12 Mod. 86, Skin. 623 ("There have been admitted

the first place, no statute, until 1836, expressly declared any registers admissible. In that year a general system of secular registration was first established. In the Marriage Act of 1753 words had been used which clearly implied admissibility, but the Courts seem not to have acted under them. (b) The admissibility thus depended on the existence of a duty to keep the register. But, as to the source of this duty, the important inquiry cannot be definitely answered whether the duty was implied from the nature of the office or was solely the creature of the statute. The registers were originally kept under ecclesiastical ordinances² having the effect of law, and the early decisions are all subsequent to these ordinances. From the time of the Restoration (1660) to the first parliamentary statute, in 1695, these ordinances ceased apparently to be in force;³ but during that interval there are no decisions; and the statutory duty of 1695, reinforced by later statutes, underlay all subsequent decisions. (c) It might therefore be argued that the

register-books of parishes in christenings and marriages, though no law for it; for the nature of the thing requires it"); 1737, *May v. May*, 2 Stra. 1073 ("the general register of the parish," admitted to prove legitimacy; "this register, the clerk said, was a book into which the entries were made once in three months, out of the day-book, wherein the entries are made immediately after the christening, or next morning"; but the day-book, by two judges to one, was excluded, since "there could not be two registers in one parish"); 1779, *Birt v. Barlow*, 1 Doug. 174 (Mansfield, L. C. J.: "The registers [under the marriage act, St. 26 Geo. II] were directed to be kept as public books and accompanied with every means of authenticity. . . . A copy is proof of a marriage in fact"); 1786, *Hust v. Le Meaurier*, 1 Cox 375 (Gernsey register of baptisms, excluded); 1798, *Leader v. Barry*, 1 Esp. 353 (register in a foreign chapel, excluded); 1811, *Newham v. Raithby*, 1 Phillim. Eccl. 315 (register of dissenting chapel, admitted); 1820, *Ex parte Taylor*, 1 Jac. & W. 483 (register of dissenting chapel, excluded); 1824, *Bain v. Mason*, 1 C. & P. 202 (parish register, admissible); 1830, *Whittuck v. Waters*, 4 C. & P. 375 (register of a Wesleyan chapel, excluded); 1834, *Doe v. Wollaston*, 1 Moo. & R. 389 (Dunman, L. C. J.: "It is the clergyman's duty to enter the marriage correctly"; parish register admissible); 1839, *Malone v. l'Estrange*, 2 Ir. Eq. 16 (marriage record of a Catholic priest, excluded); 1839, *O'Connor v. Malone*, 6 Cl. & F. 572, 576, 583 (register of marriage in a Catholic chapel, admitted, and justified by counsel on the principle (*ante*, § 1523) of regular entries by a deceased person; but the Court did not notice the point); 1841, *Athlone Peerage*, 8 id. 262 (entry of marriage in a register kept at the house of the British Ambassador in Paris by his chaplain, excluded, as "not like a parish register"); 1844, *D'Agile v. Fryer*, 13 L. J. Ch. 398 (register of a Catholic chapel, excluded); 1844, *Davis v. Lloyd*, 1 C. & K. 275 (register kept by the chief rabbi at a synagogue, containing an entry of the circumcision of the plaintiff, excluded); 1846, *Parkinson v. Francis*, 15

Sim. 160 (register of the General Register Office, admitted, under statute, to prove death); 1848, *Dufferin and Claneboye Peerage*, 2 H. L. C. 47 (entry in a register of baptism in a parish church in Ireland, from a certificate of a chaplain to the British minister at Florence, "not deemed sufficient, under the circumstances"); 1848, *Perth Peerage Case*, ib. 865, 873 (French registers of marriages, births, and deaths, kept at the town hall, according to French law, admitted; register of deaths kept in a nunnery at Antwerp, admitted); 1853, *Stockbridge v. Quicke*, 3 C. & K. 305 (register kept apparently privately by a clergyman of the established church in Ireland, excluded); 1857, *Shrewsbury Peerage Case*, 7 H. L. C. 1, 14 (register of a Catholic chapel at Bristol, deposited with the general registrar under statute, admitted); 1859, *Ratcliff v. Ratcliff*, 5 Jur. n. s. 714 (register kept by the authority of the East India Company having governmental powers in India, admitted as an official register); 1860, *Abbott v. Abbott*, 4 Sw. & Tr. 254 (register of marriage, kept in Chile according to requirement of local law, admitted); 1879, *Queen's Proctor v. Fry*, L. R. 4 P. D. 230 (register of baptisms in India, kept by Government order, admitted); 1889, *Burnaby v. Baillie*, L. R. 42 Ch. D. 283, 291, 296 (French register of marriage, kept at the mayor's office, admitted); 1900, *Whitton v. Whitton*, Prob. 178 (certified copy of a marriage-register in the Mariners' Church, Kingston, Ire., admitted, under certain statutes); 1902, *Wigley v. Solicitor*, Prob. 233 (Scottish marriage registry, admitted); *Canada*: 1839, *Montgomery v. McLeod*, Ber. N. Br. 375 (certificate of marriage, duly filed, admitted, under a local St. 52 Geo. III, c. 21); 1884, *Sutherland v. Young*, 1 Man. 28 (baptismal certificate under the hand of the custodian of the parish register, admitted under statute).

² Beginning with 1539; see the quotation from Gilbert. *ante*, § 1642.

³ They are to be found in Scobell's Ordinances; in Hubback on Succession, pp. 470, 503, 516, is given a full account of them and also of the history of the different kinds of registers.

judicial admissibility of such registers rested on the statutory duty to keep them. Against this, however, are two circumstances. First, their admission was not placed upon that ground until 1779, in *Birt v. Barlow*, by Lord Mansfield, and even thereafter it is rarely mentioned. Secondly, as early as the Marriage Act of 1753 (26 Geo. II), the statutory duty was imposed equally upon the ministers of "public chapels" (i.e. dissenting churches) as on the rectors and curates of parish churches; and, if the statutory duty was the ground of admission, it would thereafter have sufficed equally to admit the registers of dissenting chapels. Yet in the subsequent rulings such registers were almost uniformly excluded. From these circumstances, and from the general tenor of the decisions, the English judicial attitude appears to have had this anomalous feature, that it received the registers by virtue of an official duty which had a purely statutory origin, and yet ignored the statute so far as it applied to any but officers of the ecclesiastical establishment. The result was practically to place the admission on the ground of an official duty, not an express statutory duty; and this is seen in the recognition accorded to foreign registers kept according to official duty. (d) In 1836, admissibility was expressly granted to registers to be kept by secular officials according to the system then established; and in 1840 a large collection of dissenting registers, approved by a commission and gathered into official custody, was made admissible. Alongside of these statutory provisions, the principle already established by judicial practice remains apparently still in force. (e) In one respect a distinct exception (now of purely historical interest) was made to the general principle. In the populous precincts of the Fleet prison there lived a number of persons, convicted of crime or abandoned in character, who still were (or pretended to be) ordained clergymen; and some of these were accustomed to keep registers of marriages. These Fleet registers, if kept by clergymen of the established church still in orders, would presumably have been admissible, and originally they seem to have been received like others.⁴ But they came to be known as notoriously fraudulent and untrustworthy, and by the beginning of the 1800s they were refused recognition.⁵

(2) In the *United States*, the laws of the various jurisdictions are in a state of variegated inconsistency.⁶ Not only does each one of the five theo-

⁴ 1706, *Felding's Trial*, 12 How. St. Tr. 1352, 1367.

⁵ 1795, *Read v. Pamer*, 1 Esp. 215; 1803, *Cooke v. Lloyd*, Peake's Evidence, App. 74; 1815, *Lloyd v. Passingham*, Cooper 155, 16 Ves. 68; 1824, *Nokes v. Milward*, 2 Add. 391; 1838, *Doe v. Getacre*, 8 C. & P. 578. The reporters of the last case give the following explanation, from *Burn on Fleet Registers*: "There were in the neighborhood of the Fleet prison about sixty marriage-houses; some of which were also public-houses, others not. They were known by having a sign-board with joined hands, in addition to the public-house sign. At the doors of these houses persons called Pliers solicited the passers-by to come in and be married, and at

these houses persons who were or pretended to be clergymen performed the marriage ceremony, and made entries in registers that were kept at the respective houses. There is little doubt that many entries had false dates, that persons who were married personated others, and that women who wish to plead a plea of coverture or to hide their shame by a Fleet marriage certificate were here married." In Walter Besant's novel, "The Chaplain of the Fleet," is an interesting picture of one of these Fleet persons.

⁶ Where a ruling is apparently based on a statute, it is so noted; statutes which deal with certified copies, as a substitute for the original, are also noted *post*, § 1680, with other statutes of the sort: *Id.*: Code 1897, § 1811 (registers

ries above mentioned find support in one or another jurisdiction, but it is often difficult to determine in any one jurisdiction the precise effect of deci-

of marriages, births, and deaths, "kept in pursuance of law or any rule of a church or religious society," are to be presumptive evidence of "the facts therein stated," when certified by the custodian); § 2846 (probate judge's record of marriage licenses issued by him is "presumptive evidence of the facts"); § 2847 ("all persons or religious societies solemnizing marriage in virtue of a license or according to their peculiar forms must within one month thereafter certify the fact in writing to the judge of probate, setting forth the names of the parties and the time and place of celebration thereof"; the certificate to be recorded and a certified copy to be "presumptive evidence of the fact"); 1876, *Beggs v. State*, 55 Ala. 108, 109 (marriage evidenced by the probate judge's record of a justice of the peace's certificate); 1889, *Hawes v. State*, 88 id. 37, 69, 7 So. 302 (the statute applies to registers kept out of the State); 1900, *Elbridge v. State*, 126 id. 63, 28 So. 580 (certified copy of license, with certificate of celebrant, admitted under Code §§ 2846, 2847); *Ariz.*: St. 1889, March 21, No. 52 (duly filed marriage certificate by the solemnizing person shall be evidence of every fact required to be stated therein, & a. the ceremony and the names); *Cal.*: 1886, *People v. Stokes*, 71 Cal. 263, 12 Pac. 71 (recorded certificate of marriage, made according to law, admitted); *Colo.*: Annot. Stata. 1891, § 3003 (recorder's book of marriages, admissible); 1874, *Kansas P. R. Co. v. Miller*, 2 Colo. 442, 453, 462 (extracts from a German parish register of baptisms, found in the deceased's effects, admitted as statements of family history, under the rule of § 1480, *ante*, apparently without regard to the present question); *Conn.*: Gen. St. 1897, § 2788 (town registrar's or officiating person's certificate of marriage, to be evidence of the facts stated); 1794, *Huntly v. Compstock*, 2 Root 99 (minister's record of baptisms, admitted); 1892, *Erwin v. English*, 61 Conn. 502, 23 Atl. 753 (marriage certificate of a minister in Ohio, admitted; abstract of a marriage register of a Roman Catholic chapel in Ireland, excluded because imperfect); 1902, *Murray v. Supreme Lodge*, 74 id. 715, 52 Atl. 722 (city registrar's record of marriage license, marriage certificate, and birth certificate, admitted, the record being a part of the statutory duty of the officer); *Del.*: Rev. St. 1893, c. 39, § 7 (religious society's register of marriage, birth, death, or burial, admissible); *D. C.*: Comp. St. 1894, c. 30, § 13 (copy of a recorded license and minister's certificate, admissible); *Fla.*: Rev. St. 1892, § 2058 (the original license and certificate "shall be filed as evidence of the marriage" with the county judge); *Haw.*: St. 1896, No. 50, § 19 (record of birth, marriage, and death, kept by the board of health, admissible to prove "the fact therein contained"); 1852, *Whittit v. Miller*, 1 Haw. 82 (certificate of marriage, not required by law to be given, held not admissible, in crim. con., to evidence a domestic marriage; otherwise of the marriage registry or a

copy of it); 1896, *Republic v. Waipa*, 10 Haw. 442 (marriage record of a Roman Catholic church in Maui, admitted, being required by law to be kept; marriage certificate of the same priest, not decided); *Ida.*: St. 1899, Feb. 14, § 9 (county recorder's "books of marriages" to be "evidence in all courts"); *Ill.*: Rev. St. 1874, c. 89, § 12 (county clerk's registry of a certificate of marriage by the celebrant, or "such certificate or a copy of the same," admissible "as evidence of the marriage of the parties as therein stated"); 1840, *Jackson v. People*, 3 Ill. 231 (marriage license and certificate of domestic justice of the peace, proved by certified copy, admitted); 1886, *Tucker v. People*, 117 id. 91, 7 N. E. 61 (marriage register, admissible only when kept under statutory duty); 1887, *Tucker v. People*, 122 id. 583, 592, 13 N. E. 809 (like *Jackson v. People*, under statute); 1901, *Howard v. Illinois T. & S. Bank*, 189 id. 568, 59 N. E. 1108 (physician's return of birth, made under statute, receivable; here excluded because it was impeached by both parties as knowingly falsified by the maker); *Ind.*: Rev. St. 1897, § 7649 (certificate of marriage by one authorized, admissible to prove facts recited); *Ida.*: Code 1897, § 3146 (court clerk's register of marriages, not expressly declared admissible; this provision supersedes Code 1873, § 2197, under which some ensuing cases were decided); 1862, *Niles v. Sprague*, 13 Ia. 198 (certified copy, by an Ohio clerk, of his record-memorandum, and not of the recorded certificate of marriage itself, excluded); 1866, *Verholf v. Van Houtenlengen*, 21 id. 429, 430 (marriage register, received under statute); 1886, *State v. Matlock*, 70 id. 229, 30 N. W. 495 (county marriage record, admitted under statute); 1903, *Casley v. Mitchell*, — id. —, 96 N. W. 725 (parish register of St. Just, Cornwall, kept by the vicar, as required by law, admitted); *Kan.*: Gen. St. 1897, c. 97, § 23 ("When by ordinance or custom of any religious society or congregation in this State a record is required to be kept of marriages, births, baptisms, deaths, or interments, such register is admissible"); *Ky.*: Stata. 1899, §§ 2581, 2582, 2588 (duty imposed to keep a register, of marriages, by officiating persons, and of births and deaths, by physicians, surgeons, and midwives; entry made admissible); *La.*: 1881, *Hebert's Succession*, 33 La. An. 1099, 1105 (marriage register kept by law, admitted); 1896, *Justus Succession*, 48 id. 1096, 20 So. 680 (German official parish register, admitted); *Me.*: St. 1887, c. 47 (town clerk's record of birth, marriage, or death, admissible to show the facts recorded); 1824, *Sumner v. Sebec*, 3 Greenl. 225 (town clerk's record of births, etc., admitted); 1829, *Damon's Case*, 6 id. 148, 149 (certified copy of justice's recorded certificate of marriage, admitted); 1830, *Wedgwood's Case*, 8 id. 75 (same as *Sumner v. Sebec*); *Md.*: 1879, *Weaver v. Leiman*, 52 Md. 709, 720 (entries of baptism and marriage in a Lutheran church in Baltimore, admitted as regular entries receivable

sions and local statutes in combination, for the rulings have seldom been frequent enough to develop a general principle. Moreover, the statutory

after the entrant's death; here the clergyman was alive, but by agreement his calling was dispensed with); *Mass.*: Pub. St. 1882, c. 145, § 29, Rev. L. 1902, c. 151, § 37 (record of marriage kept by law by the person solemnizing, or by a town clerk, or a certified copy thereof, admissible); *ib.* § 30, Rev. L. § 38 (record or certificate of U. S. consul or diplomatic agent, admissible to prove a marriage solemnized by him); *St.* 1897, c. 444, § 21, Rev. L. 1902, c. 29, § 20 (city or town clerk's record relative to a birth, marriage, or death, shall be evidence of the facts recorded); 1810, *Milford v. Worcester*, 7 *Mass.* 48, 56, *semble* (recorded certificate of marriage as required by statute, admissible); 1813, *Com. v. Norcross*, 9 *id.* 493 (town record of marriages, admitted under statute); 1865, *Kennedy v. Doyle*, 10 *All.* 161 (record of baptism, kept by a deceased priest, in a Catholic church in the State, held inadmissible as an official document, but admissible as a regular entry; quoted *supra*); 1874, *Whitcher v. McLaughlin*, 115 *Mass.* 169 (priest's record of baptism, admitted); 1882, *Shutebury v. Hadley*, 133 *id.* 247 (town records, admissible); 1895, *Com. v. Hayden*, 163 *id.* 453, 40 *N. E.* 846 (town clerk's record of marriage, admitted under statute; also his assistants', under *St.* 1892, c. 314, § 2); *Mich.*: *Comp. L.* 1897, § 4617 (register or certificate of death, authorized by law, admissible); § 8601 (county clerk's record of marriage or minister's or justice's lawful certificate of marriage, admissible); 1875, *Hutchins v. Kim*, 1 *Mich.* 126, 129 (entry in a Lutheran church register of marriages in Germany, admitted); 1882, *People v. Broughton*, 49 *id.* 339, 13 *N. W.* 621 ("a recorded marriage certificate," admitted to prove marriage); 1886, *Durfee v. Abbott*, 61 *id.* 471, 475, 28 *N. W.* 531 (records of baptism of a German Lutheran church in Detroit, admitted; objection being not properly taken); 1887, *Hunt v. Chosen Friends*, 64 *id.* 671, 31 *N. W.* 576 (sworn copy of entry in a parish record of a Catholic church in Ontario, admitted to prove baptism; quoted *supra*); 1894, *Teesman v. United Friends*, 103 *id.* 185, 188, 61 *N. W.* 261 (certificate of baptism and certificate of marriage, from Prussia, signed by the parish priest, and certifying the facts "upon the basis of the registry"; the register or "the actual contents," if proved by copy, said to be admissible, but the certificate of contents excluded, on the principle of § 1678, *post*); 1897, *Mead v. Randall*, 111 *id.* 268, 69 *N. W.* 506 (marriage register, admitted under statute); *Minn.*: *Gen. St.* 1894, § 5760 (certificates and records of marriage, made as prescribed by law, admissible to prove marriage); *Miss.*: *Annot. Code* 1892, § 1789 (certificate of marriage, "signed and transmitted to the circuit clerk of the proper county by the person, officer, or clerk of the religious society celebrating the same," admissible); *Mo.*: *Rev. St.* 1899, § 3101 ("When by the ordinance or custom of any religious

society or congregation in this State a register is required to be kept of marriages, births, baptisms, deaths, or interments, such register shall be admitted as evidence"); § 3140 (records' books of marriages kept according to law, admissible); § 4320 (certificate of marriage by the person solemnizing, stating names, residence, and date, admissible to prove "the facts therein stated"); § 9066 (celebrant's recorded certificate of marriage, made to take the place of a destroyed marriage record, admissible); 1852, *Childress v. Cutter*, 16 *Mo.* 24, 31, 46 (ordinary church-register of marriages in Louisiana, not kept by law, excluded); 1871, *Morrissey v. Wiggins Ferry Co.*, 47 *id.* 521 (register of baptism kept by church rule in a Catholic church in New York, excluded, because in this country "all church registers are unauthentic and are not regarded as public documents"; the Missouri statute held not to apply to foreign registers); *Nebr.*: *Comp. St.* 1899, § 3656 ("certificate and record of marriage made by the minister, officer, or person, as prescribed in this chapter," admissible; probate judge's record of marriages, admissible); *Nev.*: *Gen. St.* 1885, § 483, *St.* 1899, c. 35, § 1, *St.* 1901, c. 6 (certificate and record of marriage, made as prescribed in statute, admissible to prove marriage); *N. H.*: *Pub. St.* 1891, c. 173, § 10, c. 174, § 14 (town-clerk's record of birth, marriage, or death, admissible); c. 174, § 14 (duly officiating person's certificate of marriage, admissible); 1898, *State v. Wallace*, 9 *N. H.* 515 (town-clerk's record of marriage, admitted; "the Legislature, in requiring marriages to be recorded by the town-clerk, intended the record should be evidence of the fact"); *N. J.*: *Gen. St.* 1896, *Evidence*, § 60, and *1900*, c. 150, § 28 (return of death, marriage, or birth, by a "physician, clergyman, or other person," according to law, admissible); *Gen. St.* 1896, *Marriage, B. & D.*, § 23 (same); *St.* 1901, c. 13 (records of marriages, births, and deaths, kept heretofore and prior to *St.* 1888, Feb. 15, by the Secretary of State, made admissible "to prove the facts therein contained"; as also a copy certified by the medical superintendent of the State bureau of vital statistics); 1896, *Royal Society of Good Fellows v. McDonald*, 59 *N. J. L.* 248, 35 *Atl.* 1061, *semble* (Irish parish-register excluded, because not shown to be kept by law; opinion not clear as to the principle adopted); 1902, *Hancock v. Supreme Council*, 67 *id.* 614, 52 *Atl.* 301 (entry of baptism in a Catholic parish-register of Ireland, admitted); *N. M.*: *Comp. L.* 1897, § 1422 (certificate of recorded marriage, as required by law, admissible to prove marriage); § 3030 ("all church records," proved genuine as ancient documents under the rule of § 2137, *post*, receivable to show date of birth, baptism, marriage, or death); *N. Y.*: *C. C. P.* 1877, § 928 (minister's certificate of marriage within the State, or magistrate's certificate or municipal clerk's entry of marriage, admissible);

provisions of the various jurisdictions differ widely in their scope. A uniform system of legislation for marriage and divorce is a need not more pressing

Laws 1893, c. 661, § 23 (recorded certificate of birth or marriage, by parent or custodian, physician or midwife, groom or clergyman, admissible); 1818, *Jackson v. Boueham*, 15 John. 226 (town records of births, etc., admitted); 1825, *Jackson v. King*, 5 Cow. 238, 241 (church register of baptisms, etc., admitted); *N. C.*: 1819, *Jacocq v. Gilliams*, 3 Murph. 52 (register of births, etc., kept by law, admitted); 1897, *State v. Melton*, 120 N. C. 591, 28 S. E. 933 (county record-book of marriages, with filed justice's certificate, admitted); *N. D.*: *Rev. C.* 1895, § 2730 (record-books of marriage licenses and certificates, kept by county judge, admissible); *Oh.*: *Rev. St.* 1898, § 6599 (record in the Probate Court of entries of births and deaths by physicians, clergymen, sextons, etc., admissible); 1827, *Richmond v. Patterson*, 3 Oh. 370 (town record of marriages, etc., kept by law, admissible); 1867, *Stanglein v. State*, 17 Oh. St. 453, 463 (record of foreign marriages, not shown to be kept by law, excluded); *Okl.*: *Stats.* 1893, § 3214 ("A certificate or declaration of marriage, or the entry thereof made as above directed" with a county clerk or register of deeds, is evidence of the marriage); § 4270 (record of "marriages, births, baptisms, deaths, or interments," required "by ordinance or custom of any religious society or congregation in this Territory" to be kept, admissible); 1897, c. 23, § 14 (certified copy by probate judge, under official signature and seal, of marriage record kept by him "shall be received as evidence"); *Pa.*: *St.* 1700, P. & L. Dig., Evidence, 48 (registry kept by any religious society, of marriage, birth, or death within the province, receivable); *St.* 1837, ib. 45 (registry of burials of any religious society or corporate town in places out of the United States, *prima facie* evidence of the death and the time of interment of the person); *St.* 1838, ib. 47 (registry of baptism or marriage by a domestic bishop, receivable as if made by the clergyman of the church); *St.* 1860, ib. 49 (register by the health officer, of marriage, birth, or death, receivable as *prima facie* evidence); *St.* 1899, May 2, Pub. L. 164, § 12 (books of the bureau of health in cities, or a certified copy, to be *prima facie* evidence of marriage, birth, or death); 1759, *Hyam v. Edwards*, 1 Dall. 2 (birth-and-death register of Quakers in England, received to show pedigree); 1814, *Stoever v. Whitman*, 6 Binn. 416 (registry of German Reformed Congregation at Easton, Pa., admitted to prove death, under *St.* 1700; the Court saying, "This act is in conformity to the principles of the common law"); 1823, *Kington v. Lealey*, 10 S. & R. 383, 387 (parish-register of marriages, etc., kept by the rector, from the Barbadoes, admitted); 1843, *Clark v. Trinity Church*, 5 W. & S. 600 (minister's record of baptisms, admissible under statute); 1875, *American Life Ins. Co. v. Rosenagle*, 77 Pa. 507, 515 (register of births, etc., kept according to law by a parson in Germany, received); 1884, *Bitler v. Gehr*, 105 id. 577, 600 (register of do-

ministic Evangelical Lutheran church, admitted to show death and burial); 1901, *Yung's Estate*, 199 id. 35, 48 Atl. 692 ("a certificate of inheritance," by the judge of a court in the Grand Duchy of Oppenheim, admitted; approving *Hyam v. Edwards*); *R. I.*: *Gen. L.* 1898, c. 100, § 16 (municipal clerk's record of marriage, birth, or death, admissible); 1902, *Rhode Island H. T. Co. v. Thorndike*, — R. I. —, 52 Atl. 873 (English marriage certificate and birth register, admitted); *S. D.*: *State.* 1899, § 3453 (marriage register of clerk of circuit court, to be evidence of marriage and the date thereof); § 3455 (certified copy, by a court clerk, of the celebrant's return on a marriage license, admissible to prove marriage); § 3463 (certificate or declaration of marriage, or the entry thereof in a marriage register of a city or town clerk or county register of deeds, admissible); *Tenn.*: 1846, *Rice v. State*, 7 Humph. 14 (county court marriage license and return, admitted under statute); *Tex.*: 1846, *Smith v. Smith*, 1 Tex. 621, 625 (record-certificate from Missouri, not admitted without a showing as to its legal sanction in that State); *U. S.*: 1831, *Lewis v. Marshall*, 5 Pet. 469, 476 (register of burials in Christ's Church, Philadelphia, admitted "in a case like the present"); 1851, *Gainey v. Self*, 12 How. 472, 513, 522, 569 (an ecclesiastical record of proceedings for bigamy in the Catholic church court was admitted on the footing of a judgment; but *Wayne, J.*, dissenting, treating it as a register, held that American church registers, not being official, are in general inadmissible); 1865, *Blackburn v. Crawford*, 3 Wall. 175, 182, 183, 189, 191 (baptismal register of a Catholic church in Washington, required by church usage to be kept, held admissible as "entries made by the writer in the ordinary course of his business"; the private memorandum or register of another priest of the same church at a prior time when no official register was kept, held admissible, the entrant being in France); *Vt.* *Stats.* 1894, § 2640 (certificate of marriage by a person required by law to keep a record, admissible); 1878, *State v. Colby*, 51 Vt. 291, 295 (town clerk's record, not made in accordance with the statute's terms, excluded); 1879, *State v. Potter*, 52 id. 33, 38 (similar record, admitted as properly made); *Va.* *Code* 1887, § 2241 (books of clerk of county and corporation court, registering marriages, births, and deaths, admissible to prove "the facts therein set forth"); 1838, *Moore v. Com.*, 9 Leigh 639, 642 (county court's records of marriage returns, admitted under statute); *W. Va.* *Code* 1891, c. 63, § 27 (county court clerk's books of registry of marriages, births, and deaths, to be "*prima facie* evidence of the facts therein set forth in all cases"); 1887, *Blair v. Sayre*, 29 W. Va. 608, 2 S. E. 97 (ejectment; county clerk's certified copies of a record of marriage and a record of births in West Virginia, admitted under the statute); *Wis.* *Stats.* 1898, § 4160 (record of marriage, birth, or death, kept in the office of the

than a uniform system of providing and receiving evidence of marriage, birth, and death. The different theories (*ante*, § 1643), considered together with the rulings and statutes in each jurisdiction, will perhaps suffice to unravel the law in a given jurisdiction of the United States.

§ 1645. *Same: Certificates of Marriage.* For admitting certificates in general (*post*, § 1674) no implied authority of office seems to have been recognized at common law; certificates differing remarkably in this respect from registers. It might therefore be assumed that, in the absence of an express statutory duty to give a certificate of marriage, the certificate of the celebrant of a marriage, even though he were an ecclesiastical officer, would be inadmissible. Such seems to have been the common law. But in order to interpret the rulings aright, the distinction between a certificate proper and certain other things must be kept in mind. (1) A *bishop's certificate* of marriage or divorce is sometimes mentioned in the older books. This, however, was not regarded as a form of evidence, but as judgment under another mode of trial. The ecclesiastical officers in former times had jurisdiction to try matters matrimonial and testamentary (*post*, § 2250); and it was not infrequent, when an issue involving marriage arose in a common-law court, to accept the bishop's lawful finding, as to the fact of marriage, in the form of a "certificate." This was not evidence to the jury, but was a finding under a mode of trial independent of jury trial; and trial by certificate is enumerated in the books, down to the end of the 1700s, as one of the several modes of trial.¹ This early use, then, of the bishop's certificate of marriage does not afford any precedent for the use of an ordinary clergyman's certificate. (2) The word "certificate" was probably sometimes used to signify merely a *certified copy*, by the ecclesiastical custodian, of an entry in the marriage register. This, however, merely presents in effect the marriage register as the evidence, the original being exempted from production on general principles (*ante*, § 1218). No new question as to certificates proper is raised. (3) Where a secular register of marriages is kept, it is usually based in part upon returns made to the *municipal officer* by the actual celebrant; his return (sometimes, but less properly, called "certificate") is filed

register of deeds or of the Secretary of State, pursuant to statute, admissible; "any church, parish, or baptismal record, and any record of a physician or a person authorized to solemnize marriages, in which record are preserved the facts relating to any birth, marriage, or death, including the names of the persons, dates, places, and other material facts," are admissible to prove such facts; "but such record must be produced from its proper custody," with the lawful custodian's oath of genuineness; § 4173 ("official certificates of births, marriages, or deaths, issued in foreign countries in which such births, marriages, or deaths have occurred, purporting to be founded on books of record, and authenticated by the signature of any United States minister, secretary of legation, or other diplomatic officer, or by a consul of the United States accredited to or appointed for the foreign coun-

try," are admissible to prove the facts stated); St. 1903, c. 189, amending St. 1898, § 439a (compulsory education; provision for the use of baptismal or birth certificate and school enrolment, as evidence of a child's age in certain cases); 1902, *Sandberg v. State*, 113 Wis. 578, 89 N. W. 505 (Stats. § 4160, applied); *Wyo. Rev. St. 1887*, § 1556 ("original certificate and record of marriage," made as prescribed, "and the record thereof," or a certified copy, admissible to prove "the fact of such marriage").

For the use of *certificates of marriage* at common law, see the next section.

For the question whether a certificate or a register is *essential* in certain criminal cases, see *post*, § 2085.

For the statutory use of recorded *affidavits* by witnesses to a marriage, see *post*, § 1710.

¹ See a further explanation *ante*, § 1386.

or recorded with the registrar, and a copy of the record is furnished to the parties. Here, again, the use of the recorded original, or of a certified copy of the record, involves merely the use of a register authorized by law, and raises no new question. In some of the decisions and statutes the word "certifiable" is clearly applied to this registered document or entry; and its possible use in others renders their significance uncertain.³

The new question is raised only when the document offered in evidence is an *original separate paper*, given by the celebrant into the custody of the parties themselves, and certifying the performance of the ceremony by him. This, as already suggested, would on general principles at common law not be admissible, since no duty to give it can be implied from the office and no early statute in England ever created such a duty. In *England*, the later decisions seem to admit such certificates,⁴ but it is likely that the term was used in one or the other of the last two meanings above noted. In the *United States*, there is little common-law authority and that not harmonious.⁴

³ Such rulings are placed *ante*, § 1644.

⁴ 1620, *Alsop v. Bowtrell*, Cro. Jac. 541 (legitimacy; "in this case the marriage betwixt them being at Utrecht beyond seas, and certified under the seal of the minister there, and of the said town, and that they cohabited for two years together as man and wife, was a sufficient proof that they were married"); 1744, *Willis, C. J.*, in *Omichund v. Barker*, *Willis* 538, 549 (disapproves in part of *Alsop v. Bowtrell*; "to admit the certificate of the minister of the fact of the marriage at a place where there is no bishop" might be allowable, but not to admit "the certificate of their cohabiting together"; i. e. to admit the certificate only as to the act of official duty as done by the celebrant); 1773, *Anon.*, *Loft* 328 ("Certificate of marriage not evidence, unless it is shown as a copy from the parish register"); 1849, *Piers v. Piers*, 2 H. L. C. 331, 335, 363 (certificate of marriage by a clergyman of the established church, admitted without question); 1853, *Stockbridge v. Quicke*, 3 C. & K. 305 (certificate by a clergyman of the established church in Ireland, admitted); 1864, *Sichel v. Lambert*, 15 C. B. N. S. 781 (certificate of marriage in a Catholic chapel in London, admitted, but apparently not as evidence of the ceremony); 1885, *Glenister v. Harding*, L. R. 20 Ch. D. 285, 288 (marriage certificate, and baptismal certificate, apparently by the parish rector, held admissible); 1899, *Westmacott v. Westmacott*, Prob. 183 (certificate of marriage from the India Office, received); 1900, *Cooper-King v. Cooper-King*, id. 65 (certificate of marriage from the Registrar-General at Hong-Kong, admitted).

⁵ In the following list are placed only those cases which seem to deal with certificates in the strict sense; other cases, dealing with *registered certificates*, or certified copies of them, are placed in the note to the preceding section; all *statutes* are for convenience sake collected under the preceding section; *Conn.*: 1810, *Swift*, Evidence, 5 ("Courts have permitted marriages to be evidenced by the certificate of the magistrate or

minister who performed the ceremony. On principle, it should be under oath and not by certificate; but we [in Connecticut] have experienced no inconvenience from the practice, and it has continued so long that it seems to have become common law"); 1885, *Northrop v. Knowles*, 52 Conn. 522, 525 (certificate of marriage by a magistrate, received, following "in this jurisdiction from the earliest times the practice" to do so, on proof of genuineness); 1889, *Erwin v. English*, 57 id. 562, 564, 19 Atl. 233 (certificate must be by the officiating person); 1892, *Erwin v. English*, 61 id. 502, 23 Atl. 753 (*cit. ante*, § 1645); *Me.*: 1841, *Jones v. Jones*, 18 Me. 308 (justice's certificate of marriage, admitted); *Mass.*: 1814, *Ellis v. Ellis*, 11 Mass. 92 (certificate of marriage not sufficient on charge of adultery; on the principle of § 2085, *post*); 1818, *Com. v. Littlejohn*, 15 id. 163 (obscure; similar to the preceding case); 1848, *Com. v. Morris*, 1 Cush. 391 (adultery; a "certificate, purporting to be a marriage certificate made by a clergyman of another State," excluded because not authenticated); *Mich.*: 1858, *People v. Lambert*, 5 Mich. 364 (excluding a marriage certificate made by a clergyman in New Jersey); 1896, *People v. Isham*, 109 id. 72, 67 N. W. 819 (Baptist minister's certificate, admitted; explaining away *People v. Lambert*); 1896, *People v. Innes*, 110 id. 250, 68 N. W. 157 (domestic certificate admissible, but not a foreign one); 1897, *Mead v. Randall*, 111 id. 268, 66 N. W. 806 (marriage certificate, admitted under statute); *N. C.*: 1891, *State v. Davis*, 109 N. C. 780, 783, 14 S. E. 55 (marriage license and certificate by a justice of the peace, admitted); *Or.*: 1898, *State v. Isenhardt*, 32 Or. 170, 52 Pac. 569 (certificate required by law, but not expressly made evidence, admissible); *U. S.*: 1851, *Gaines v. Relf*, 12 How. 472, 475, 534, 571 (certificate by a deceased Catholic priest in New York, made in 1806, of a marriage celebrated in 1790, excluded, partly because of lack of identity of parties, partly because it was made so long after the purported fact, and partly because "if it

No doubt such certificates, or their equivalent, ought to be provided, for convenient use in evidence by the parties to a marriage, especially in this our country of numerous jurisdictions and migratory population. But a certificate given directly by the celebrant is in the lapse of time difficult for honest persons to authenticate and easy for dishonest ones to fabricate; a certified copy from the permanent municipal register is for both these reasons the only satisfactory form of evidence suitable to be taken into possession by the parties; and it therefore seems safer, at the cost of occasional hardship, to adhere to principle and to refuse to recognize the admissibility of certificates in the strict sense of the term. Statutes, however, in a few jurisdictions have sanctioned their use, either by creating a duty to give them or by expressly making them admissible.⁶

A certificate of marriage, however (in the strict sense), may nevertheless sometimes be available, not under the present Hearsay exception, but by virtue of other rules of evidence. (1) If it has been signed or used by the adverse party, it may be receivable against him as an admission.⁶ (2) On a principle of circumstantial evidence (*ante*, § 268), the conduct of persons comporting themselves as husband and wife is always admissible as evidence of their marriage by consent. Among other acts available in this way, the possession of a marriage certificate, purporting to declare them married, may amount to holding themselves out as married, and may therefore, with the other conduct-evidence, be used in that aspect. This seems to be what is meant in a few decisions which declare marriage certificates, especially when coming from the possession of one of the parties to the alleged marriage, receivable as "corroborative" evidence.⁷ This phrase is in itself meaningless, as affording a ground for admission; but the principle just noted serves apparently to support these rulings, and is unquestionably a legitimate ground for admission.

were allowable in this country to give such certificate in evidence, where every clergyman of all denominations can perform the ceremony of marriage, and where it is performed by justices of the peace in many of the States, it would open a door to frauds that could not be guarded against"; *Vt.*: 1878, *State v. Colby*, 51 Vt. 291, 295 (original marriage "certificate," returned by the minister to the town clerk, *admissible*, if duly authenticated).

⁶ These statutes are for convenience' sake noted with the other statutes in the preceding section.

⁷ 1859, *Hill v. Hill*, 32 Pa. 511 (domestic marriage certificate, held not admissible "by itself," but received here because the husband, opponent's intestate, had once read it as his certificate); and cases cited *ante*, § 1073.

⁸ *E.g.*: 1824 (1), *Dallas, C. J.*, in *Beer v. Ward*, unreported, but quoted in *Hubback on Succession*, 258 ("A certificate of a marriage, if proved to have been kept in the custody of a person whom it affects and produced from proper custody, may be read as collateral

proof"); *Cal.*: 1845, *Doe v. McWilliams*, 3 U. C. Q. B. 77, 80 (justice's certificate, admitted "as corroborative," being an official's declaration which he was "specially authorized" to make); *U. S.*: 1886, *Camden v. Belgrade*, 78 Mo. 204, 211, 3 Atl. 652 (certificate in the possession of a party to the marriage, admissible); 1880, *Gaines v. Green* P. I. M. Co., 32 N. J. Eq. 88, 95 (certificate, produced by the woman, mother of the plaintiff, and proved by the celebrant's oath, admitted as "corroborative of her testimony"); 1894, *State v. Behrman*, 114 N. C. 797, 807, 19 S. E. 220 (marriage certificate of a Russian rabbi, held admissible as "corroborative, not as substantive evidence"; the opinion confuses half a dozen principles); 1896, *State v. Leenhart*, 32 Or. 170, 52 Pac. 569 (*res gestæ* phrase, applied to a marriage certificate as evidence of marriage); 1903, *Dalley v. Frey*, 206 Pa. 227, 55 Atl. 963 (certificate of marriage "procured from the custody of the plaintiff's father and claimed by him as the certificate of his own marriage," admitted, "though not in itself evidence").

Certain other principles affecting the use of marriage certificates need to be discriminated. Whether proof of the *official character* of the celebrant and of the genuineness of the *signature* is necessary, is a question of Authentication, dealt with elsewhere (*post*, § 2161). Whether the *identity of names* is sufficient evidence of the identity of the persons or needs to be reinforced by other evidence, is a question of the presumption elsewhere considered (*post*, § 2529). Whether a certificate is *indispensable* in certain criminal cases is a question of the required quantity of evidence (*post*, § 2082). Whether a certificate may be used in a *criminal case*, in violation of the rule entitling the accused to be confronted with witnesses, has already been considered (*ante*, § 1398).

§ 1646. *Same*: *Personal Knowledge is required in such Registers.* The question whether personal knowledge (*ante*, § 1635) is essential on the part of the officer making the record is a difficult one, as to principle, precedent, and policy alike. It arises usually with reference to the uses of entries of baptism as evidence of the date of birth, but it may be raised also for other kinds of facts. The argument for excluding the use of entries except for facts necessarily within the entrant's personal knowledge has been stated as follows:

1834, *Denman, L. C. J.*, in *Dee v. Wollaston*, 1 Moo. & R. 389: "The clergyman must be present . . . and this fact of the time [of the marriage] is within his own knowledge. In the case of the registry of baptism, the time of the birth must generally be taken by the clergyman from other people. . . . The registry of the marriage being made evidence, I think it is so for the purpose of proving all the facts there stated necessarily within the knowledge of the party making the entry."

The argument for receiving such entries as evidence of all facts required to be recorded has been thus stated:

1850, *Patteson, J.*, in *Dee v. France*, 15 Q. B. 756 (admitting entries of death, in a church-register, appearing to have been copied from a workhouse-register by a clerk at 3d. a thousand): "Must we not take it to be the act of the incumbent, who, however he got his information, had satisfied himself of the fact before he sanctioned the entry?"; *Wightman, J.*: "Surely the Court must give credit to a public officer for having taken proper precautions to secure accuracy in the registration."

(1) As to precedent, it can only be said that no final settlement was ever reached at common law in England; and, even under the statute expressly making the registers admissible to prove the date of birth (*ante*, § 1644), there have been conflicting rulings.¹ In the United States, the same lack of

¹ 1787, *May v. May*, 2 Stra. 1073 (on the production of the parish register, in an issue of legitimacy, "the defendants asked him [the clerk] if any notice was taken of bastards; and he said their method was to add 'B. B.' which stood for 'base born'; and then they offered the day-book, from whence the other entry was posted, in which 'B. B.' was inserted"; but the Court, by two judges to one, thought the day-book was not admissible like the register); 1821, *Wihen v. Law*, 3 Stark. 63 (register

of christening, not admitted to show the date of birth, since the entrant "had no authority to make inquiry concerning the time of birth, or to make any entry concerning it in the register"; though if it had been made by the mother's direction, it might have been read to corroborate her); 1826, *R. v. Petherton*, 5 B. & C. 508, 510 (register of baptism, not evidence of the place of birth, unless with evidence of the extreme infancy of child, or other evidence); 1828, *Morris v. Davies*, cited in 1 Moo. & Rob. 271,

harmony is found in the decisions; it can hardly be said even that the weight of authority definitely accepts either view.³

(2) As to principle, it would seem that where the registrant has authority to record only the performance of a ceremony, his record would be admissible to prove only what he has done; thus, an entry of baptism would not be receivable to prove the date of birth. On the other hand, where the reg-

istrar, J. (the following entry admitted: "Evan Williams, a base child, was baptized 11th of January, 1793," with a note as to the supposed father); 1823, *Doe v. Bray*, 8 B. & C. 815 (Bayley, J., rejecting an entry, by a later incumbent, of a baptism by his predecessor: "He was recording a fact, therefore, not within his own knowledge, but one of which he received information from the clerk"); 1829, *R. v. Clapham*, 4 C. & P. 29 (entry of baptism is not evidence of age); 1833, *Cope v. Cope*, 1 Moo. & Rob. 269, Alderson, J. (the following baptismal entry admitted: "1794, Dec. 7, Willis, illegitimate son of Elizabeth Cope"); 1834, *Doe v. Wolleston*, 1 Mon. & Rob. 269 (quoted *supra*); 1834, *Burghart v. Angenstein*, 6 C. & P. 690, 696 (register of baptism, not admitted to show the date of birth); 1850, *Doe v. France*, 15 Q. B. 758 (quoted *supra*); 1870, *In re Wintle*, L. R. 9 Eq. 273 (though the registrar was required to make entry of the date of birth, the entry was held admissible only to show the fact that the child was alive at the date of registration); 1873, *R. v. Weaver*, L. R. 2 Q. C. R. 85 (official register of births, received to show the exact age); 1885, *Glenister v. Harding*, L. R. 20 Ch. D. 985, 988 (baptismal certificate, admitted to show the date of birth as entered, partly because the issue was of pedigree; following *Morris v. Davies*, (Cope v. Cope); 1886, *Londonderry Case*, 4 O'M. & H. 96 (certificate of birth of an illegitimate child, admitted to show the date of birth).

³ 1902, *Murray v. Supreme Lodge*, 74 Conn. 715, 52 Atl. 722 (city registrar's record of marriage and of birth, admitted to show the age of the wife and the age of the mother respectively, these facts being a required part of the registrar's duty to ascertain and record); 1901, *Howard v. Illinois T. & S. Bank*, 189 Ill. 568, 59 N. E. 1106 (physician's return of birth, not receivable to prove the child to be the second of that mother; "the return is not evidence of matters of mere hearsay gathered up by the physician, of which he knows nothing"); 1896, *Justus' Succession*, 45 La. An. 1096, 20 So. 680 (entries in an official parish register of Germany, containing an entire family tree, admitted, because recorded "in conformity with the rules of the registering church"); 1894, *Metropolitan L. I. Co. v. Anderson*, 79 Md. 375, 378, 29 Atl. 606 (city register of deaths, not admissible to show the cause of death); 1895, *Com. v. Phillips*, 170 Mass. 433, 49 N. E. 632 (certificate of birth, admitted under statute to show age); 1886, *Durfee v. Abbott*, 61 Mich. 471, 475, 28 N. W. 521 (baptismal record is not evidence of age, though receivable for such weight as it de-

serves); 1892, *Houlton v. Mantouff*, 51 Minn. 185, 53 N. W. 541 (certificate of baptism, not received to prove infancy); 1898, *Royal Society of Good Fellows v. McDonald*, 59 N. J. L. 248, 35 Atl. 1061 (parish register of baptisms, not admitted to show the date of birth; ignoring the equal availability of the baptism-date, in this case, to determine age); 1899, *State v. Snover*, 68 id. 352, 43 Atl. 1059 (rape under age of consent; to show the woman's age, a clergyman's baptismal certificate stating the date of birth was not admitted); 1901, *Hickey v. Morrissey*, — N. J. Eq. —, 50 Atl. 182 (register not receivable to show the precise date of birth, unless perhaps the date of birth mentioned in the record is proved to have been inserted on the statement of the father and mother); 1843, *Clark v. Trinity Church*, 5 W. & S. 266, 269 (church register, not admitted to prove the date of birth); 1884, *Sitler v. Gehr*, 105 Pa. 577, 600 (ordinary church-register held "competent to show the death and burial of these ladies, but what the pastor put down in the book as to their parentage and the time and place of their birth, was incompetent, for the plain reason that it was no part of his duty to make such entries"); 1865, *Blackburn v. Crawford*, 3 Wall. 175, 182, 189 (baptismal entry as follows: "1837, July 30. G. T., son of T. B. C. and E. T., his wife, born 7th of September, 1836," not admitted as evidence of the child being lawful, "without further evidence"); 17. St. 1902, No. 44 (no public record of births, etc., shall be competent evidence to prove any fact stated therein, except the fact of birth, marriage, or death"); 1902, *McKinstry v. Collins*, 74 Va. 147, 52 Atl. 438 (town-clerk's record of physician's death certificate, admitted to show the cause of death, this fact being required by law to be entered); 1887, *Blair v. Sayre*, 29 W. Va. 608, 2 S. E. 97 (county clerk's record of births, admitted to prove the date of birth of a minor; his record of marriage licenses, admitted to show the age of the wife, since the statute made it "the duty of every clerk . . . to ascertain . . . their respective ages"); 1875, *Herman v. Mason*, 37 Wis. 273 (church register, not admitted to show the date of birth); 1889, *Lavin v. Mutual Aid Soc'y*, 74 id. 349, 43 N. W. 145 (action for a death benefit; a Prussian certificate of baptism, not received to show the date of birth, under a statute making certificates of birth admissible; but the ruling singularly ignores the availability of the baptism date, for in this case it was only necessary to show the person to have been alive at the time named).

istrant—as is usually the case for secular official registers—is authorized to record the fact itself of family life, and not merely a ceremony, the entry would on principle be evidence of the fact recorded. Nevertheless, to settle the question upon the lines of this distinction is to leave the law in an arbitrary and inconsistent condition; because the secular registrar having such authority rarely investigates the facts any more carefully than the officiating minister, and the one entry is practically as trustworthy as the other.

(3) So far as policy and practical safety are concerned, it is at first sight unsatisfactory to accept an entry as evidence of a fact not occurring within the personal knowledge of the entrant. At the same time, there are reconciling considerations. In the first place, there is in the vast majority of instances no controversy at the time and no motive to deceive the official; his record is, on the whole, of sufficient trustworthiness to be at least worth receiving in evidence. In the next place, the secular registers must in any case be founded on the testimony of some one else; and a discrimination between entries founded on the reports of physicians, midwives, undertakers, and ministers, and entries founded on the reports of parents or other family members, would be out of the question. Finally, in strictness, the registrars do not have personal knowledge of even the most fundamental facts, of which their entries are now accepted without cavil; for example, how can a minister always say with personal knowledge that the persons married by him were M and N, or how can a registrar usually have personal knowledge that the child registered was actually born to S, or was a boy or a girl? If we are to insist with pedantic strictness upon the entrant's personal knowledge, it will be found that the registers will cease to be of much practical service for any purpose. On the whole, then, it seems desirable to receive all such registers as evidence (a) first, of the facts required by law to be recorded, and (b) next, if no law specifically provides for the contents of the register in question, of the fundamental facts customarily entered in such registers directly on the faith of other persons having personal knowledge,—namely, in birth or baptism registers, of name, sex, parentage, and date of birth; in marriage registers, of name, age, residence, and date of ceremony; and in death or burial registers, of name, sex, age, residence, and date of death.

§ 1647. **Registers of Title; Shipping Registers; Timber-Marks and Stock-Brands.** (1) The law might conceivably authorize an administrative officer to investigate a *title to property* and to record the results of his investigation, and the authority thus given might suffice to admit his record as evidence of the title. This, however, the law has not done. There are judicial investigations and findings, in specific litigations, by judicial officers appointed for the purpose; but their findings stand on the footing of the report of a master in chancery, and are merely stages in a judgment upon the litigation in hand. They are not evidence, but are preliminary forms of a judgment. In a few jurisdictions, moreover, a rational system of *registration of land-title* has been introduced from Australia; but these registers, again, are not evidence; they

are either judgments, or are the very documents of title, operate by a rule of prescription. The title (in a sale, for example) is constituted by the combined act of the transferor, the transferee, and the official; and the register cannot be disputed. To refer to the register is not to use evidence, but to offer some constitutive act of title. The theory of these registers is elsewhere briefly considered (*ante*, § 1227, *post*, § 2456). They have no significance under the present exception.

There, are, however, two sorts of registers in vogue in many jurisdictions, which purport to be in some respects registers of title, without being in any sense the constitutive and indisputable acts of title. These are registers of ships and registers of stock-brands and timber-marks.

(2) A *register of ships* is usually a register purporting to record for each ship the kind of vessel, the nationality, the tonnage, the master, the names and the shares of the owners, and sundry other items, and based upon a sworn statement as to these facts by a person declaring himself to be one of the owners. This register is needed and is of chief use for administrative and police purposes; but the attempt has often been made to employ it for evidential purposes also. The question thus usually presented is whether the official register, stating the ownership of the vessel, is admissible as evidence of the ownership. The judicial reasoning on this question is illustrated in the following passages; and in considering them, it should be borne in mind that the registrar makes no investigation as to the title, and merely records the sworn statement of a person claiming to be an owner:

1800, *Manfield, C. J.*, in *Fraser v. Hopkins*, 2 Taunt. 5: "To suppose the effect of the Act to be such as is contended, would be to impute madness to the Legislature. It supposes that, without proof of any bill of sale to the defendants, or any act done by them, or any connection shown between them and the officer, a letter written by a custom-house officer, and an entry made in London in consequence of that letter, will make the defendants liable to all the world as owners of the vessel. The entry is evidence of the registration; it is not evidence of the transaction of sale. I never yet knew an instance where the act of any one man could charge another unconnected with him."

1854, *Black, C. J.*, in *Lincoln v. Wright*, 23 Pa. 76, 81: "A vessel may be sold . . . and the register be left unchanged; for these reasons a certificate of the register is no evidence in favor of the person therein named as owner, nor in actions between other parties. It will not establish an insurable interest in the registered owner as against an underwriter, nor will it disprove such interest in the assured where the policy has been taken for the benefit of other persons. Neither would it be any defence whatever, in an action for supplies against one for whose profit the ship is navigated, to show that she is registered in another name. But all this does not prevent us from saying that a man's declaration on oath is some evidence against him of the fact therein asserted."

It would seem, on principle, that the solution of the four chief situations presented is as follows: (α) Where the register is offered by a person *claiming to be owner*, either the one whose sworn statement was recorded or one therein stated to be another owner, it is obvious that the register is of little more weight than the claimant's own testimony, because it is merely either his own statement out of court or that of his agent. The registered publicity of the claim, to be sure, counts for something; but this seems hardly sufficient.

In this case, it is generally agreed, the register is inadmissible. (b) Where the register is offered *against* a person *not making the sworn statement*, to prove that he is not the owner — as in the case of an alleged assignment by the opponent —, the result will be the same; for the register is merely evidence that somebody else claims to have bought from the opponent. This and the preceding situation will usually in effect arise on the same state of facts. (c) Where the register is offered *against* a person *named in the sworn statement* as one of the owners, to charge him with liability as owner — for example, for goods supplied —, the result should be no different; because the register is evidence of no more than that somebody else stated the opponent to be an owner. This conclusion also is generally agreed upon by the Courts. (d) Where the register is offered *against* the *very person* purporting to have *made the sworn statement* as an owner, the register evidences in effect his admission that he was owner, provided only the genuineness of the sworn statement be assumed. Yet, since the registrar appears not to be charged with the duty of ascertaining (by notary's certificate or otherwise) the identity of the person presenting the statement, it seems necessary that other evidence of the opponent's identity (or, what is the same thing, of the genuineness of the affidavit) should be furnished. This conclusion also is accepted by most Courts.¹

¹ The decisions are as follows; they are not harmonious: *England*: 1802, *Bucher v. Jarratt*, 3 B. & P. 143 (the shipping register admitted to prove the existence of the certificate of registry); 1809, *Stokes v. Carne*, 3 Camp. 339 (N. P.; action for goods supplied to the ship; register admitted to prove defendant's ownership, where defendant had not given notice in pleading that he denied it); 1809, *Fraser v. Hopkins*, 2 Taunt. 5 (C. P.; action for goods furnished the ship; register not admitted to show a transfer to the defendants); 1811, *Tinkler v. Walpole*, 14 East 226 (K. B.; action for goods sold; same ruling, "notwithstanding the practice may have prevailed for a long time to receive ship's registers as evidence, without more, of the property being in the persons therein named"); 1812, *Pirie v. Anderson*, 4 Taunt. 652 (C. P.; action on a policy; plaintiff not allowed to prove ownership by the register; Gibbs, J., said that it had been "a thousand times received," but merely to save time); 1812, *M'Iver v. Humble*, 16 East 169 (K. B.; action for goods sold; register admitted, but not as evidence of ownership); 1812, *Flower v. Young*, 3 Camp. 240 (register not evidence to show owners); 1813, *Smith v. Fuge*, ib. 456, *semble* (same); 1814, *Teed v. Martin*, 4 id. 90 (same); these rulings are now apparently superseded by the Merchant Shipping Act: St. 1854, 17 & 18 Vict. c. 104, § 107 (shipping register, and certificate of registry, stating the owners, master, etc., is to be "*prima facie* proof of all the matters" contained in it); *Canada*: N. Br. Consol. St. 1877, c. 46, § 15 (British ship register or certificate is admissible to prove the facts recited); *Newf.* Consol. St. 1892, c. 57, § 8 (like N. Br. Consol. St. 1877,

c. 46, § 15); N. Sc. Rev. St. 1900, c. 163, § 15 (like N. Br. Consol. St. 1877, c. 46, § 15); P. E. I. St. 1889, § 26 (like N. Br. Consol. St. 1877, c. 46, § 15); *United States*: 1833, *Jones v. Pitcher*, 3 Stew. & P. 135, 145, 152 (action for negligent carriage; register not admitted to prove ownership, even against the person in whose name the registered affidavit of ownership ran); 1899, *Moynihan v. Drobas*, 124 Cal. 212, 56 Pac. 1026 (registry not admitted to show ownership); *Hawaii*, Civil Laws 1897, § 1400 (ship's register of Hawaiian vessels, and certificate of registry, admissible as "*prima facie* proof of all matters contained or recited in such register . . . and of all the matters contained or recited in or endorsed on such certificate"); 1855, *Post v. Schooner Lady Jane*, 1 Haw. 162 (admissible, but of little weight); 1887, *Merchants' Nav. Co. v. Amaden*, 25 Ill. App. 307 (action for personal injury; defendant's ownership evidenced by shipping-register entry in the customs department); 1859, *Sampson v. Noble*, 14 La. An. 347 (certified copy, by a deputy collector, of the vessel's enrolment and bill of sale, admitted); 1829, *Bixby v. Ina Co.*, 3 Pick. 86, 88 (it "might be evidence" of ownership in an action contested by the apparent seller's creditors); Mo. Rev. St. 1899, § 3143 (certified copy of enrolment of a steamboat in the custom-house or office of the customs surveyor and inspector, admissible to prove ownership "as against the persons described as owners of such steamboat in such enrolment"); 1833, *Hacker v. Young*, 6 N. H. 95 (copy of record of enrolment of a vessel, evidence of the defendant's admission on oath of ownership); 1817, *Sharp v. Ina Co.*, 14 John. 201 (action to recover premium;

No doubt it is unfortunate that a document so much relied upon as the shipping register should not be available as a convenient mode of proving ownership. But the proper remedy for this is an improved statutory system of registration. No doubt, also, that the publicity given by registration, even under the present system, is in practice a great safeguard, so that the registered ownership is in most instances a fact not open to real dispute; and this may be the reason why the modern British statute, returning to the common understanding and practice before the 1800s, expressly makes it admissible in evidence. But while the rule may be unnecessarily strict and technical, it is not improbable that a more liberal rule — so long as the looseness of the registration system continues — would be taken advantage of for fraudulent purposes.

Some other uses of the register, as affecting ownership, must be distinguished, since they involve no question of evidence. The effect by way of *estoppel* of a registration as sole owner² concerns a question of substantive law. The *conclusiveness* of the registry for purposes of administrative law is a matter of that law. The use of the registry to prove *nationality*³ is apparently not a question of evidence, or at any rate not a different one; because nationality signifies either the fact of American registration, which is to be gathered merely from the existence and tenor of the entry, or the ownership by American citizens, which involves merely the same evidential question as that above examined. The liability of the registered owner for the acts of the ship's employees raises sometimes, but in appearance only, a question of evidence.⁴

(3) In a number of jurisdictions where the wealth consists largely of cattle and of timber, a system of *registration of stock-brands and timber-marks* is provided for by statute; the method being usually to record in a public office the marks and brands appropriated by the different owners and to vest the registrar with authority to receive only patterns of a certain description, to refuse duplicates, and to sanction the use of the registered mark. It is clear that under such statutes (as often expressly provided) the register sufficiently evidences the *right* of a certain person to *use a given mark*.⁵ But the ques-

register not admitted for plaintiff to show him not to be owner); 1817, *Coolidge v. Ins. Co.*, 1b. 308, 314 (register is "good evidence of the facts it sets forth"); 1818, *Leonard v. Huntington*, 15 id. 298, 302 (action for work done on the ship; register said not to "determine the ownership"); 1854, *Lincoln v. Wright*, 23 Pa. 76 (action for goods sold, etc.; register admitted, where defendant's taking the oath of ownership was proved; quoted *supra*).

² 1817, *Wheaton v. Penniman*, 1 Mason 306 (action for money had and received; defendant claimed a credit for money spent on behalf of a ship jointly owned; effect of defendant's registration as sole owner, considered).

³ 1893, *St. Clair v. U. S.*, 154 U. S. 134, 151, 14 Sup. 1002 (certificate of registry, admissible to show nationality of vessel).

⁴ That is, there is a question of substantive

law whether ownership is equivalent to or is *prima facie* evidence of liability as employer for the acts of the ship's employees; if it is, then in effect the registration is equally evidential, wherever by statute it is evidence of ownership. In many shipping cases, however, in which this question of owner's liability as employer is involved, the opinions occasionally speak of the register as evidence of that liability; this is merely an elliptical form of speech. A leading case illustrating this usage is *Hibbs v. Rose*, L. R. 1 Q. B. 534.

⁵ The statutes are collected *ante*, § 150. Some statutes merely declare the register admissible, without declaring for what purpose, e. g.: Ill. Rev. St. 1874, c. 88, § 3 (county clerk's record of stock brands and marks, admissible); Minn. Gen. St. 1894, §§ 2416, 2418 (surveyor-general's record-book of log-marks, admissible).

tion often arises judicially, and the statutes sometimes deal also with it, whether the presence of such a registered mark on a log or an animal is admissible to show that the registered appropriator of that mark has *title* to the log or the animal found bearing it. This, however, is not a question of the admissibility of the register; for the register-entries take no cognizance of specific animals or logs. The type of mark, as the subject of a right to use it, is shown by the register to be M's; but whether M or any one else actually placed such a mark on the log or the animal cannot possibly be evidenced by the register. The question is really one of circumstantial evidence, *i. e.* whether the presence of that mark is evidence of the fact that M placed it on the log or the animal, and, next, whether the placing of it by M indicates that M was the owner; the only real difficulty being with this last step of the inference. This question has already been examined (*ante*, § 150).⁶

§ 1648. *Registers of Conveyances; General Principle of Admissibility.* No officer at common law had an implied authority of office to record deeds of conveyance; so that the question of the extent of an implied authority (the chief difficulty in many of the foregoing instances) does not here arise. But statutes have in every jurisdiction given express authority to certain officers to record deeds of conveyance (and sometimes other classes of deeds) presented to them by private persons for the purpose; and the question presented is whether, assuming that the non-production of the original is sufficiently accounted for (*ante*, § 1224), this *official record* (or a copy) is admissible as evidence of the deed, *i. e.* of its contents and its execution.

If the question had been merely of the deed's contents, no difficulty would probably have been felt; for the authority to record *verbatim* the terms of the deed might easily have been construed as sufficient, under the general principle (*ante*, § 1639) to render the record admissible, being a record kept under an express official duty. The real obstacle came from the consideration already discussed (*ante*, § 1635) that, as regards the execution of the deed, the registrar would ordinarily have no personal knowledge whatever. He would sufficiently enter, as of his own knowledge, the terms of the writing presented to him; not even his testimony on the stand could be any stronger evidence than his contemporary transcription of the document lying before his eyes. But how could he know that it was in fact executed, as it purported to be, by J. S., and, therefore, how could his entry to that effect be admissible? Could the statutory authority to record, even when expressly given, suffice to admit his entry, not merely of the document's terms as seen by him, but of a fact which he did not see and apparently had no means of knowing? So far as any general principle affected the situation, it would prescribe merely this (as already noted in § 1635), that the statutory authority to record would not suffice to admit the record

⁶ Occasionally also the same question arises for other property used by recorded license: 1814, *Strother v. Willan*, 4 Camp. 24 (an official book of licenses of stage-coaches, kept under a statute, not admitted to show ownership of a

coach); Wis. St. 1901, c. 360, § 1 (certified copy, by register of deeds or Secretary of State, of registered trademark, to be evidence of ownership of the mark). Compare the statutes collected post, § 1680.

to prove a matter occurring without the officer's personal knowledge, unless the statute also directed or implied that the officer *should be furnished with the means of knowing, or should make some investigation of the facts, and should record only after taking such means of adequately informing himself.*

It is in harmony with this general principle that the Courts dealt with the admissibility of the record of a deed. Where the statute had provided the registrar with the means of informing himself, before registration, of the authenticity of the deed, this was regarded as a sufficient authority to admit the record, though not made on personal knowledge, to prove the execution; and where the statute had failed to provide such a means and to impose such a duty, this was regarded as a fatal objection. The express authority to record was universally regarded as intended by the Legislature to furnish, not merely a notice of claim of title, but also a means of evidencing the deed, and the inclination was therefore to receive the record; the only obstacle felt was as to the propriety of receiving the registrar's entry of a fact not personally known to him, and this obstacle disappeared where the statute authorized and required a means of sufficiently informing the official on this point. In the legislation of the newer jurisdictions, and in the newer legislation of some of the older ones, the statutes expressly declare the record admissible, and thus the question is there no longer a judicial one. But the theory upon which the Courts treated the earlier statutes has usually served as the foundation of the newer legislation. In the following passages various phrasings of it are found:

*Circa 1658, Sir Matthew Hale, L. C. J., in his "Treatise showing how useful, safe, reasonable, and beneficial the Inrolling and Registering all Conveyances of Lands may be to the Inhabitants of this Kingdom," printed in "Two Tracts,"*¹ p. 29: "If every man that brings a deed should have it inrolled without acknowledging it by him that made it, any forged deed may be inrolled, and men in a little while may lose their estates by the countenance that a forged deed shall receive by the being enrolled among the public records of the office."

1864, *Sawyer, J., in Landers v. Bolton*, 26 Cal. 393, 405 (repudiating the argument that a deed without acknowledgment is a nullity even between the parties): "The acknowledgment is only the mode provided by law for authenticating the act of the parties, so as to entitle the instrument to record and make it notice to subsequent purchasers, and to entitle it to be read in evidence without other proofs. If purchasers neglect to have their deeds properly authenticated and recorded, they will be liable to have their title divested by subsequent conveyances to innocent parties, and to the further inconvenience of being compelled to prove their execution when called upon to put them in evidence. By sections 10, 11, 14, and other sections of the Act, the execution of the conveyance may be proved [to the officer] by the subscribing witnesses; and when the subscribing witnesses are dead or cannot be had, the end may be accomplished by proving the handwriting of the party and of the subscribing witnesses by other witnesses; and upon such proof the officer may make his certificate thereof, and the instrument thereafter becomes entitled to record and to be read in evidence without further proof; and this may be done years after the actual making of the deed, and even after the parties and witnesses to it are dead. . . . The question is in our opinion one of preliminary proof. If acknowledged or proved [to the officer] in pursuance of the statute, the instrument is admissible

¹ Cited *post*, § 1650.

without further proof; if not, it must be proved [to the Court] according to the ordinary rules of law applicable to the subject."

1870, *McCay, J.*, in *Eady v. Shirey*, 40 Ga. 684, 686: "Why should not the existence of a proper record be evidence of the existence and contents of a lost original? To go to record, a deed must be probated, either executed or acknowledged before a magistrate, or proven by the affidavit of one of the witnesses. The very object of the record is to preserve a copy of the deed to be used if the original is lost or destroyed; and it would largely lessen the uses of a record if it were necessary before it could be used to prove the existence of the original by other evidence. . . . Unless there be forgery or false swearing, nothing but a genuine existing deed can go upon the record properly, and the copy will show upon its face if the requirements of the statute have been complied with. We recognize fully the rule that the genuineness and existence of an original must be shown before the contents of it can be shown by secondary evidence. But in our judgment this is done by evidence that there is a duly executed record of what purported to be an original duly probated according to law."

1872, *Gray, J.*, in *Gragg v. Learned*, 100 Mass. 107: "[The reason for admission is that] our statutes allow no deed to be recorded until it has been acknowledged by the grantor or proved by subscribing witnesses before a magistrate."

The mode of informing the registrar (commonly termed "proving" or "probate"), as provided by the earlier statutes, was twofold, — either the *acknowledgment* of the grantor or the testimony of an *attesting witness*, each to be given *before the registrar* personally. It will be seen that by the former method — acknowledgment — the registrar does obtain a personal knowledge; for the acknowledgment is in truth, not merely an admission, but an adoption of the deed as his act; as an admission, it might be regarded as available only against himself and his privies,² but in its true aspect as an adoption, it is virtually a reexecution of the deed;³ and the registrar could testify to the execution from personal knowledge as well as if he had seen the signature written. By the other method — the attesting witness' oath —, the registrar acts upon virtually the same kind of evidence that would have sufficed in court; so that the registrar's entry is after all based upon no mean quality of evidence. In most statutes, other sources of evidence, analogous to such as would have sufficed even in court (*ante*, § 1511) — for example, testimony to the signature of a deceased grantor or witness — are authorized for the registrar.

By another type of statute, common in the newer jurisdictions, and based in part upon the inconvenience of travelling long distances to make acknowledgment or proof to the registrar in person, the proof or acknowledgment is authorized to be made before other kinds of officers — usually a *notary* or a *magistrate*; and this is the general rule for deeds executed out of the jurisdiction. But the principle is here no different; the registrar's functions are merely (as it were) subdivided. The registrar does not himself take the proof or acknowledgment; but he cannot record until it has been taken by some

² This was the attitude taken in some of the English rulings.

³ 1882, *Woods, J.*, in *Nye v. Lowry*, 82 Ind. 316, 320: "The signature of a grantor in a deed, written by another at his request, or though written without his knowledge, if adopted by

him as his own, has the same validity as if written by his own hand; indeed, within the meaning of the law, it becomes his proper handwriting, and the deed so signed is of the same validity as if written by his own hand."

one; and as long as a means is provided for satisfying the registrar that such proof or acknowledgment has been made to a proper officer, it is immaterial that it is not made to the registrar. Hence the statutory machinery which provides for the authentication by seal, or the like, of the certificate of proof or acknowledgment by the notary or magistrate. The two officers speak together in the record; the registrar's function has been delegated, but this delegation is merely a convenient modern expedient for providing in the register-book an official testimony, based on personal knowledge or on lawful evidence, to the execution of the deed.

So the sum and object of these provisions, which occupy so much space in the statutes, is the building up, in the register-book, of a trustworthy official statement, based upon personal knowledge or its equivalent, that the deed purporting to be executed by J. S. was in fact executed by him. It will be seen, in the rulings to be cited in the ensuing sections, that the steady inclination of the Courts (when not controlled by express statute) is to admit the register, as evidence of execution, whenever some statutory means is provided for informing the recording officer, and to reject it, when no such means is provided. It is this general principle which serves alike as the key to the admissibility of registers of deeds and to the inadmissibility of shipping registers (*ante*, § 1647) and of registers of patent assignments (*post*, § 1657). In some form or other, it must be invoked in any efficient system of evidencing the execution of documents by official records.

It is impossible, in this place, to examine the voluminous details of the statutes providing for acknowledgment and probate before registrars, as provided in the different jurisdictions for different classes of documents. The subject is after all one of substantive law; for the primary object of the registration system is to provide notice of claims, and to validate titles with reference to the recording of the muniments of title; and the provisions concerning acknowledgment and proof raise primarily the question whether a deed has been lawfully recorded. The inquiry here concerns the subject of evidence offered in court, and not the matter of "proof" before a registrar or a notary. It is enough to have noted here that the general principle upon which Courts have proceeded is that the registrar's entry, to be admissible, must have been founded on adequate sources of knowledge, specified by the administrative law and authorized to be employed by him.

§ 1649. *Same: Register admissible only to prove Deeds lawfully Recorded.* The registrar's entry is admissible only because he had authority to enter certain things (*ante*, § 1632), and this authority (as already noted) he here derives entirely from statute. The statute specifies the kind of document that may be recorded, the time for recording it, and (if acknowledged or proved before another officer) the various certificates, seals, and the like, which it must bear when presented to him for record. So far as the registrar records a document not fulfilling the statutory description, he acts without authority. Accordingly, the register of a document not authorized by statute is not receivable as evidence of its execution:

1813, *Owsley, J.*, in *Eastland v. Jordan*, 3 Bibb 186, 187: "It is clear the clerk had no authority to admit the deed to record unless it had been acknowledged by the party or proven by two witnesses at least. He having therefore certified its admission to record upon the oath of one witness, it is evident he exceeded his authority, and no advantage can be derived from its being recorded. The deed could not therefore have been used as evidence unless [other] proof had been made of its due execution."

1821, *Mills, J.*, in *Wemack v. Hughes*, Litt. Sel. C. 291, 294: "The Acts directing the mode of recording deeds do not direct that they shall thereafter be given in evidence in any court on the trial of an issue without any other proof than the *ex parte* authentication which entitles it to a place on its own record; nor is there any statutory provision which directs, within the recollection of the Court. But the common-law principle relative to enrolled deeds has been uniformly applied by this Court to deeds recorded according to our statutes. It is not, however, every placing a deed upon record which makes it a recorded deed. The statutes usually point out the officer or Court before whom the deed is to be acknowledged, what the acknowledgment shall consist of, and how and to whom it shall be certified, and they are equally positive as to the time in which the different acts shall be done. Within these periods the recording officers have authority to record the instrument; afterwards, such authority ceases."

1860, *Handy, J.*, in *Lock v. Mayne*, 39 Miss. 157, 164: "The object of statutes authorizing a deed to be acknowledged or proved is, not to establish the instrument as the deed of that party for all purposes, but to entitle it to be recorded. If that object is carried out by having it recorded, the deed is thereby so solemnized as to make the record original evidence without further proof of its execution upon an issue of *non est factum*. But if not recorded, it is not clothed with that solemnity, the purpose of the acknowledgment not having been consummated; and it stands as matter in *pais*, and must be proved according to the general rules of evidence."

Whether the deed has been in every respect lawfully recorded depends upon the provisions of the administrative law prescribing the recorder's duties,—a subject beyond the present purview. The principle, as expounded in the above passages, is everywhere unquestioned, and is constantly illustrated in its application to various details.¹

With this survey of the general principle, there come now to be considered, first, the state of the law in the various jurisdictions, and, next, sundry minor questions involving the use of deed-registers.

§ 1650. *Same: History of the Law in England.* No general system of registration of deeds was ever adopted in England down to the end of the 1800s.²

¹ See the cases cited *post*, § 1651.

² Under the Commonwealth, it is true, this reform, with many others, had been proposed and nearly effected; indeed, these proposed reforms, long afterwards effected, would have gained nearly two hundred years for England in many parts of the law. But the Restoration of Charles II repudiated their achievements or blocked their beginnings. The following bill was based on the deliberations of Whitlocke, Lisle, and Lane: 1658 (1), Draught of an Act for a County Register; printed in "Two Tracts on the Benefit of Registering Deeds," 1756 (all deeds of certain sorts are to be registered, after being acknowledged before a justice of the peace, who "shall either know the party so acknowledging or be informed by credible witnesses that such party is the same mentioned in the deed"; and "every deed or bond indorsed, registered, and

attested by the stamp of the registry, shall and may be given in evidence upon all occasions, as any deed enrolled in a court of record, without further proof"; and if the original is "lost or mislaid, so as the same cannot be produced," then "a copy of the same deed or bond so registered" may be used "as if the said deed or bond were produced under the hand and seal of the party that acknowledged the same"). The debates on this proposal are mentioned in Oldmixon's *History of England*, II, 409; see also Sir Matthew Hale's *Treatise*, quoted *ante*, § 1648; and Mr. Robinson's "Anticipations under the Commonwealth of Changes in the Law" (*Juridical Society Papers*, III, 567).

One of the reasons for the long opposition to a registration system in England is noticed elsewhere (*post*, § 2219).

On the Continent, the relatively early exist-

But statutes of a narrow scope had existed for several centuries. These statutes, seven in substance, covered, first, all deeds in the ancient form of bargain and sale, and, next, all deeds whatever in the counties of York and Middlesex and certain Crown lands. In some of them a means of probate by witnesses before the registrar was provided for, and in some of these the grantor's acknowledgment was also sanctioned; in two alone (the North Riding of York and Crown lands) was it expressly declared that the registry copy should be admissible to prove (apparently) the deed's execution, and this only where the original was accidentally destroyed.³ There was therefore ample opportunity for the judicial development of a principle to test the admissibility of such registers as evidence of the recorded deed's execution. But the rulings unfortunately present only a perplexing conflict. Up to the middle of the 1700s, it may be gathered that the enrolment or registry of a deed belonging to the class authorized or required to be enrolled was regarded as admissible. But it was otherwise for deeds enrolled (as was not uncommon, for example, for safe custody in a court)

ence of a system of municipal registration of deeds was due to special historical influences; compare Schroeder, *Deutsche Rechtsgeschichte*, 1902, 4th ed., p. 703; Brunsian, *Handbuch der Urkundenlehre*, 1889, I, pp. 551-555; Stobbe, *Handbuch des deutschen Privatrechts*, 3d ed., § 67; Aubert, *Grundboergernes Histori i Norge, Danmark, og tildels Tyskland*, in *Zeitschr. f. Savignystiftung*, XIV, 1.

³ 1535-36, St. 27 H. VIII, c. 16 (no estate, etc., to take effect by bargain and sale, unless in writing and enrolled; "to thentent that every partie that hath to do therewith may resort and see theffectes and tenour of every suche writing so enrolled"); 1703, St. 2 & 3 Anne, c. 4 (West Riding of York; a "memorial" of deeds and wills of land to be registered; the memorial to be "put into writing" under the hand and seal of a grantor or a grantee, and an attesting witness to prove the "signing and seal of the said memorial and the execution of the deed or conveyance mentioned in said memorial" before the registrar; the deed, conveyance, or will to be produced to the registrar and indorsed by his certificate, which is to be "evidence of such respective registries"); 1706, St. 5 & 6 Anne, c. 18 (same district; statute extended to bargains and sales acknowledged by the bargainor before the registrar and indorsed and enrolled by him; all such deeds so indorsed, and all copies of the enrolment, to be "as good and sufficient evidence" as any enrolled at Westminster); 1707, St. 6 Anne, c. 35 (East Riding of York; foregoing statutes extended to this district); 1709, St. 7 Anne, c. 20, § 1 (Middlesex; any deed or will may be put into a "memorial" and registered, if an attesting witness prove on oath before the registrar or a Master the execution of the deed and of the memorial, or, if a will, of the memorial; the memorial for a deed to contain the principal items of it, and to be executed by a party or representative, and attested, etc., and for a will, by an heir, etc.; the deed or will

itself to be produced to the registrar at the time of recording, who is to indorse upon it a certificate of recording, "which certificates shall be taken and allowed as evidence of such respective registries in all courts of record"); 1711, St. 10 Anne, c. 18 ("for supplying a failure in pleading or deriving a title" under bargain and sale according to St. 27 H. VIII, *supra*, "where the original indentures of bargain and sale, to be shewed forth and produced, are wanting, which often happens," especially where part of the land has gone to different persons, it is enacted that whenever such deed is pleaded with profert, it shall be sufficient to produce "a copy of the inrollment of such bargain and sale; and such copy, examined with the inrollment, and signed by a proper officer having the custody of such inrollment, and proved upon oath to be a true copy, so examined and signed, shall be of the same force and effect" as the profert of the deed itself); 1734-35, St. 3 Geo. II, c. 6 (provisions of the above York statutes extended to the North Riding thereof; with the addition that the person signing the memorial may make proof by acknowledgment of the deed before the registrar; by §§ 22, 23, any deed, etc., after a specified date may be enrolled in full and proved by a witness and indorsed as in case of a memorial, and then copies signed by the registrar and attested by two witnesses shall be "good and sufficient evidence" of such deed, etc. "destroyed by fire or other accident"); 1821, St. 2 Geo. IV, c. 52, § 8 (Crown lands; leases, etc., are to be enrolled, with the same effect as if in a court of record at Westminster); 1832, St. 2 W. IV, c. 1, § 26 (enrolment of Crown possessions; the memorandum of the Keeper of the Records shall be "sufficient proof of the deed, etc., having been duly executed, etc.," by the purporting parties). No attempt is here made to present the provisions of the modern English acts for registration of title (culminating in St. 1897, 60 & 61 Vict. c. 65).

without statutory authority; although, even for these last, the enrolment was receivable as against the party enrolling, because it virtually contained his admission. This much is fairly to be inferred from the somewhat obscure rulings;³ and it is clearly laid down in accordance with strict and straightforward principle, by Chief Baron Gilbert, writing in the early 1700s:

Ante 1726, *Gilbert*, C. B., *Evidence*, 24, 97: "Where the deed needs enrolment, there the enrolment is the sign of the lawful execution of such deed, and the officer appointed to authenticate such deeds by enrolment is also empowered to take care of the fairness and legality of such deeds. . . . But where a deed needs no enrolment, there, though it be enrolled, the *insuperimus* of such enrolment is no evidence; because since the officer hath no authority to enrol them, such enrolment cannot make them public acts."

It will be noticed that, in the foregoing passage, the author, intent on stating his general principle, omitted to note that the enrolment even of a deed not required to be enrolled might still be admissible against the enrolling party as embodying his own admission of execution. Forty years later, Mr. Buller (afterwards Justice), having apparently in mind this passage of Chief Baron Gilbert's, wrote in his *Trials at Nisi Prius* (which is indeed based largely on the other writer's text⁴) as follows:

1763, *Buller*, J., *Trials at Nisi Prius*, 265: "It has been said that a deed of bargain and sale enrolled may be given in evidence without proving the execution of it, because the deed by law does need enrolment, and therefore the enrolment shall be evidence of the lawful execution; but that where a deed needs no enrolment, there, though such deed be enrolled, the execution of it must be proved, because since the officer is not intrusted by the law to enroll such deed, the enrolment will be no evidence of the execution. . . . However, the law may well be doubted. . . . [It seems] absurd to say that a release, which has been enrolled upon the acknowledgment of the releasor, should not be admitted in evidence against him, without being proved to be executed, because [*i. e.* for the alleged

³ 1441, *Anon.*, Y. B. 19 H. VI, pl. 11 (Newton: "For the enrolment of a deed is for no other purpose than that the party whose deed it is cannot deny the deed after enrolment; for if I enrol my deeds of record, and I lose them, I shall not have advantage of the record"; which was conceded by the whole Court); 1613, *Read v. Hide*, 3 Co. Inst. 173 (discharge of tithes offered to be proved by an exemplification, under the great seal, of a copy of the Pope's bull of discharge in a volume of monastery records; "by the opinion of the whole Court, . . . neither deed, charter, or other writing, either sealed or without seal, ought to be exemplified under the great seal or any other seal in court of record," and "therefore where this statute [of forgery, 5 Eliz. c. 14, not extending to exemplifications] or any other statute or book speaks of an exemplification . . . of a deed, etc., it must be intended of a deed enrolled, . . . which is of record"); 1661, *Edeu v. Chalkill*, 1 Keb. 117 (enrolled deed, other than one of bargain and sale, not provable by enrolment-copy, "because it was needless," *i. e.* not required by law); 1667, *Kirby v. Gibs*, 2 id. 294 (an *insuperimus* of a lease, excluded, "being a private deed and may be forged"; otherwise of a record); 1684, *Lady*

Ivy's Trial, 10 How. St. Tr. 553, 595 (deed enrolled, proved by examined copy); 1694, *Smart v. Williams*, Comb. 247 (a deed of bargain and sale acknowledged by the bargainer and enrolled was given in evidence without any proof of the bargainer's sealing and delivery; admitted, "for the acknowledgment of the party in a court of record, or before a master extraordinary in the country (as this was), is good evidence of it being sealed and delivered; . . . it is the acknowledgment which gives it credit"); 1697, *Taylor v. Jones*, 1 Sal. Raym. 746 (a deed declaring the uses of a fine; enrolled copy sufficient, "because enrolment was at common law, and that for some purpose"); 1702, *Holcroft v. Smith*, 2 Freeman 259 ("a difference was taken where the estate passeth by the inrollment," in which case the enrolled deed "is an evidence"; but otherwise where it is only enrolled "for safe custody," in which case it is receivable only against the party and his privies); 1707, *Combs v. Dowell*, 2 Vern. 591 (a deed declaring the uses of a fine, and enrolled "for safe custody," allowed).

⁴ For an account of the composition of that book, see Thayer, *Preliminary Treatise on Evidence*, 471.

reason that] such release does not need enrolment; and in fact such deeds have often been admitted."

Now the truth seems to be that "the law" which Mr. Justice Buller here thought "may well be doubted" was not Chief Baron Gilbert's general statement as to the admissibility of enrolments required by law, but his failure to make the qualification that even an enrolment *not* required by law was admissible to prove the deed as against the particular person acknowledging it. The context, when properly read, fairly indicates this to be Mr. Justice Buller's meaning; and it thus stands in harmony, not only with the tenor of previous rulings, but also with Chief Baron Gilbert's rule, for which it merely points out the correction of an obvious omission. Nevertheless, the language of Mr. Justice Buller's exposition was capable of a misunderstanding; and he seems to have been misread in later times as asserting that "the law" of Chief Baron Gilbert's main proposition "may well be doubted," i. e. as doubting whether the enrolment of a deed legally required to be enrolled may be given in evidence "without proving the execution of it." Buller's book was much in vogue in the next fifty years; and it is probably something more than a mere coincidence that doubts arose in that period as to the correctness of the sound principle so clearly laid down by his predecessor. At any rate, by the beginning of the 1800s the rulings bear increasingly against that proposition.⁵ By the end of the first half of the 1800s the opinion seems clearly to prevail in England that it is not the law; as the following passages indicate:

1824, *Mr. Thomas Starkie*, Evidence, 412: "It would be manifestly inconsistent with the plainest principles of justice to admit such enrolments to be evidence against those who have not acknowledged them, without proof of the execution of the deeds; . . . and although it appears that an opinion once prevailed to this effect, yet it seems to be so destitute of principle that it is not probable it would now be acted upon."

1847, *Doe v. Clifford*, 2 C. & K. 448, 452; a copy of the registry-memorial of a Middlesex deed was offered, the original deed being unavailable; Mr. *Knowles* (opposing): "The Stat. 7 Anne, c. 20, does not, by any express enactment, make these memorials evidence"; *Alderson*, B.: "Then the memorial is only evidence against the persons who

⁵ 1803, *Hobhouse v. Hamilton*, 1 Sch. & Lefr. 207 (attested copy of recorded memorial of lost deed of assignment of judgment, not admitted to prove contents, the original memorial being required; but admitted to prove the fact of assignment, because the record was conclusive under St. 9 Geo. II, c. 5; *Redeudale*, L. C., "compared it to the case of enrolment of a deed, the office copy of which is evidence against the party, because the statute makes it evidence; and in that case if a person not the attorney of the party acknowledges a deed in his name, and it is enrolled on that acknowledgment, the enrolment binds"); 1809, *Manfield*, C. J., in *Frazer v. Hopkins*, 2 Taunt. 5, 6 (rejecting a ship's register to prove ownership: "In all cases of enrolments, the deed itself, and not the enrolment, is evidence"); 1811, *Baile v. Chandless*, 3 Camp. 17 (enrolled annuity; copy examined with the enrolment, admitted; *Ellenborough*, L. C. J.: "The act of Parliament requires the memorial carried in to be enrolled correctly, and I must

presume that those concerned do their duty under the act. The enrolment is a sort of statuteable record"); 1811, *Tinkler v. Walpole*, 14 East 226, 231 (ship's register not admitted to show ownership; *Ellenborough*, L. C. J., remarking that "the case of enrolments stands upon a particular statute," viz. 10 Anne); 1812, *Gibbs*, J., in *Pirie v. Anderson*, 4 Taunt. 652, 656 (referring to a ship's register: "It resembles the case of enrolling a deed; a person cannot by enrolling it prove that he has a good title"); 1825, *Jenkins v. Biddulph*, Ry. & Mo. 339 (an enrolment under a statute 2 Geo. IV, c. 52, § 8, making such enrolments "as good and available" as if enrolled in a court of record, etc., held not to dispense with proof); 1838, *Collins v. Maule*, 8 C. & P. 502 (examined copy of a Middlesex registry of deed, objected to because "not evidence of the deed as against third persons," in the absence of statutory sanction; admitted by *Tindal*, C. J., with some hesitation).

register the deed and persons claiming under them. . . . If there is no clause in the act of Parliament making the memorial evidence, . . . then the memorial amounts to this: 'A. B. states the contents of a deed which he has executed,' and is evidential against himself only.

Mr. Starkie's statement as to the understanding of the profession in his time seems to represent accurately the final attitude of the English courts on this subject. But his concession that "an opinion once prevailed" to the contrary seems equally correct, in the light of the evidence just considered. An interesting corroboration of this appears in the circumstance that the earliest American rulings (representing the understanding and practice brought over from England) harmonize with this view, and reproduce, in dealing with our early registration systems, the very principle so lucidly laid down by Chief Baron Gilbert.⁶ The language of these earliest rulings, moreover, indicates that the result is reached in a natural manner, through custom and professional tradition, and not as a matter of original reasoning. The principle of Chief Baron Gilbert was to our early judges an inherited common-law principle, and is constantly thus referred to in their opinions.⁷ The orthodox principle, then, of the common law on this subject is to be found carried out in the earlier English practice and the subsequent American practice; it is in the English doctrine of the 1800s that a break occurs in its continuity.

§ 1651. *Same: State of the Law in the United States and Canada.* The history of the registry-system in the colonies and the original States is an interesting subject, which has yet to be investigated.¹ In every jurisdiction where the inquiry came before the Courts,² the conclusion was reached that the register was admissible on common-law principles as evidence of the execution and contents of the recorded deed.³ In only a few of the earlier States was this result expressly provided for by statute. But as time went on, and other States were formed, express statutory declarations became common; and now in almost every jurisdiction⁴ such provisions exist. For judicial rulings, then, the field is now restricted chiefly to two classes of questions,—the kind of document thus provable, and the regularity of the recording under the statutory requirements. The general principles (*ante*, §§ 1648 and 1649) serve still as the foundation of decision for cases not ex-

⁶ Compare the passage of Gilbert, *supra*, with the quotations *ante*, §§ 1648, 1649.

⁷ See, for example, *Womack v. Hughes*, quoted *ante*, § 1649, *Knox v. Silloway*, *Barbour v. Watta*, in § 1651, *post*, under Maine and Kentucky, and the quotations given under § 1224, *ante*, where the rule about producing the original is dealt with; see also the early cases in South Carolina and Virginia, cited in § 1225, *ante*.

¹ The earliest act judicially cited seems to be that of South Carolina in 1696 (1 Bay 37). John Locke's charter of 1669, for the Carolinas, had contained such a provision. But it is known that a registration system was also a feature of the law of the colonies of Plymouth, Virginia, and Maryland, before the end of the 1600s. These probably all had their origin in the public

discussion of the subject under the Cromwellian Commonwealth. But it is noticeable that Royalist and Puritan colonies alike adopted the expedient. The colonial histories would doubtless yield interesting material; e. g., *Shepherd's History of Proprietary Government in Pennsylvania* (1896), c. 3.

² Except California, Louisiana, Michigan, and Missouri.

³ Though in many courts only when the original deed was shown unavailable; the history of that other rule is briefly examined *ante*, §§ 1224, 1225.

⁴ There remain only Connecticut, Maryland (domestic deeds), Massachusetts, and apparently Virginia.

pressly covered by statute; but the mass of decisions are concerned with the details of registration-requirements, and are therefore without the present purview, both as dealing with substantive law and as concerning the verbal interpretation of local statutes. It is enough here to note the terms of the statutes that declare a rule of evidence and the decisions illustrating the general principle.⁵

⁵ In the following list are placed, first, the statutes, and, next, the decisions; but a detailed examination of the statutory history is here impossible, so that it must be understood that many of the decisions antedate the statutes or at least the statutes in their present form, and only in special instances can the relation of statute and ruling be noted.

In this list the *rulings* given without detailed notes of their terms chiefly rulings declaring the register (or a certified copy; see § 1655, *post*) *admissible provided the instrument is lawfully recorded or inadmissible because the instrument is not lawfully recorded*; and no attempt is made to note the particular irregularity (defective acknowledgment, wrong county, period for record expired, etc.) causing exclusion, for here the countless details of local statute and substantive law are involved; except that a ruling affecting a *class of documents* (e. g. chattel mortgages) is so noted, when it involves the general principle (*ante*, § 1648) requiring the record to be based on a system of acknowledgment or proof. In almost all the instances the evidence admitted is a *certified copy* of the register, but this involves the same principle (as explained *post*, § 1655).

The *statutory provisions* are here summarized without noting their terms as to accounting for non-production of the original; on this point they are summarized *ante*, § 1225. Moreover, general statutes declaring the record admissible are alone noted, omitting minor statutes declaring documents of certain kinds or of certain districts entitled to record or curing defects of record under earlier laws. Statutes sanctioning the use of records reestablished in place of lost records are noted *post*, § 1682, and statutes authorizing the recording of *abstracts of title* ("burnt record" acts) are dealt with *post*, § 1705. Statutes allowing the execution of the original deed to be proved by the *certificate of acknowledgment* appended are dealt with *post*, § 1676.

CANADA: Dominion: St. 1893, c. 31, § 18 (similar to Ont. R. S. 1897, c. 73, § 32); § 19 (reasonable notice, not less than ten days, required before using such copies); *British Columbia*: Rev. St. 1897, c. 71, § 19 (like Dom. St. 1893, c. 31, § 18); § 20 (like *ib.* § 19); § 40 (for certified copies of registered instruments, ten days' notice at least must be given to the opponent, and the certified copy shall then suffice unless the opponent within four days after receipt gives notice of intention to dispute the original's validity); c. 111, § 48 (registrar's certified copy of any recorded instrument, except a will, admissible "without further proof"); St. 1899, c. 62, § 158 (similar to Man. Rev. St. 1902, c. 148, § 161); St. 1902, c. 22, § 2, repealing R. S. 1897,

c. 71, § 39 (certified or exemplified copy, under seal of the registrar, of any instrument deposited or registered in a land-office or registry of a county or the Supreme Court is admissible as evidence "of the original," without proof of the registrar's signature or seal); 1899, *Pavler v. Snow*, 7 Br. C. 81 (certain certificates, etc., admitted under R. S. 1897, c. 125, § 98, without notice); *Maine*: Rev. St. 1902, c. 148, § 161, Real Property Act (a certified copy, by the district registrar under official seal, of a certificate of land title or any instrument deposited or registered in such office, is admissible to prove "due execution of the original," and "without proof of the signature or seal" of office of the district registrar); Rev. St. 1902, Registry Act, c. 150, § 50 (registrar's certificate of registration of an instrument shall be evidence of the registration "and due execution of the instrument," without proof of the signature of the registrar); § 51 (registrar's certified copy of a registered instrument, with the exception of crown grants and other specified instruments, shall be evidence "of the contents of and of the execution of the original instrument"); § 75 (registrar's certified copy under seal of an instrument duly registered shall be evidence "of the facts and matters therein stated, without proof of the registrar's signature or seal"); § 76 (registrar's certified copy under seal of an instrument duly registered shall be receivable "without proof of the due execution of the original, as *prima facie* evidence of the original instrument and the due registration," without proof of the registrar's signature or office); c. 11, § 19 (clerk's certified copy under court seal of bill of sale or mortgage of chattels is to be evidence of the registration only); c. 57, § 17 (Quebec notarial instruments; like Dom. St. 1893, c. 31, § 18); § 21 (like *ib.* § 19); *New Brunswick*: Consul. St. 1877, c. 46, § 10 (crown grants made before the erection of the Province, provable "as heretofore provided"; compare § 1680, *post*); St. 1878, c. 41, §§ 1, 2 (registrar's certified copy of a filed bill of sale is to be evidence of the filing and the time thereof); St. 1882, c. 27 (amending c. 74, § 4, by providing that a certified copy may be received on terms; quoted *ante*, § 1225); St. 1888, c. 8 (a deed or will registered in the sheriff-court books of Scotland is provable by certified copy of the custodian under the sheriff's seal, if accompanied by affidavit of comparison with the original and of the genuineness of the seal); St. 1894, c. 20, § 34 (notice of sale under mortgage, provable by certified copy; cited *ante*, § 1225); § 52 (all certified copies by the registrar of instruments duly registered "shall be allowed"); § 59 (registered instruments, other than wills, are provable by certified copy; cited

ante, § 1225); St. 1897, c. 11 (instruments filed under the bills of sale act of 1896 are provable by certified copy; quoted ante, § 1225); 1844, *Smith v. Millidge*, 2 Kerr 408, 419; 1857, *Doe v. Hildrew*, 3 All. 502; 1892, *Doe v. McLean*, 31 N. Br. 474 (requirement of notice construed); *Newfoundland*: Consol. St. 1892, c. 57, § 25 (a duly registered "deed or document" may be proved by the registry or a "certified copy thereof by the registrar, without further proof"); *Northwest Territories*: Consol. Ord. 1898, c. 43, § 30, c. 44, § 9 (execution and contents of mortgages and sales of chattels are provable by the registration-clerk's certified copy); *Novi Scotia*: Rev. St. 1900, c. 163, § 20 (crown grants); duplicate original provable by certified copy of the commissioner of crown lands; books of registry provable by certified copy of the registrar of deeds; special provisions for plans not annexed); § 21 ("any deed, or any document from the books of registry," is provable by the registrar's certified copy); § 23 (for copies under § 21, ten days' notice and a schedule of documents must be given, unless the Court dispenses); § 24 ("every bill of sale or other document, filed in any registry of deeds, may be proved" by certified copy of the registrar of deeds); § 25 (the registration is provable by the registrar's indorsement on the deed or copy); § 27 (Quebec notarial instruments; substantially like Dom. St. 1898, c. 31, § 18, omitting the proviso); *Ontario*: Rev. St. 1897, c. 73, § 32 (a "notarial act or instrument" in Quebec, filed, enrolled, or unregistered, is provable by certified copy of the notary possessing the original; but it may be "rebutted or set aside" by proof that the document is one not lawfully to be taken or filed by a notary, etc.); § 46 ("any registered instrument or memorial" is provable by exemplification or certified copy "under the hand and seal of office of the registrar in whose office the same is registered"); § 47 (certain notices required for such copies; cited ante, § 1225); § 50 ("any instrument affecting land which may be deposited, filed, kept, or registered in the office of the master or local master of titles," is provable by certified copy under the master's seal of office); c. 134, § 2 (contracts for sale of land; quoted ante, § 1225); c. 138, § 160 (registered titles; "a land certificate or certificate of charge shall be *prima facie* evidence of the several matters therein contained, and the office copy of a registered lease shall be evidence of the contents of the registered lease"); c. 148, § 24 (chattel mortgage or bill of sale filed; a certified copy by the clerk under seal of Court shall be evidence only of the fact that the instrument was received and filed); *Prince Edward Island*: St. 1889, § 42 (duly registered deed or mortgage is provable by the registrar's certified copy, as "evidence of the contents of the original"); § 44 (public lands commissioners' duplicate deed, deposited in his office, is provable by a certified copy under seal by him or the assistant, as evidence "of the due execution and of the contents of the original"); § 45 (registered plan, provable like a deed); § 46 (Surrogate's registered license to sell real estate, provable by the Surrogate's certified copy under seal); § 49 (filed

bill of sale or mortgage of chattels is provable by certified copy of the notarian under seal of the Supreme Court, as "evidence of the contents" and the filing).

UNITED STATES: *Alabama*: (Code 1897, § 902 (certified copy of a duly recorded "conveyance of property," admissible); § 1544 (recorded declaration of notice of adverse possession, provable by certified copy); 1833, *Mitchell v. Mitchell*, 3 How. & P. 61, 63; 1834, *Tatum v. Young*, 1 Port. 208, 210; 1839, *Swift v. Fitzhugh*, 9 Id. 30, 57; 1839, *Swout v. Fitzhugh*, ib. 72, 75; 1874, *Keller v. Moore*, 51 Ala. 340; 1878, *Sharpe v. Orme*, 61 Id. 253; 1879, *Hart v. Rom*, 64 Id. 94, 97; 1880, *Baucum v. George*, 65 Id. 256, 267; 1880, *Haykin v. Smith*, ib. 294, 300; 1881, *Dugger v. Collins*, 66 Id. 324, 328; 1881, *Coker v. Ferguson*, 70 Id. 284, 287; 1884, *Roney v. Moss*, 76 Id. 491; 1885, *England v. Hatch*, 80 Id. 247, 249; 1886, *Tramm v. Wilkinson*, 81 Id. 408, 1 So. 201, *anobile*; 1899, *Patterson v. Jones*, 89 Id. 388, 8 So. 77 (statute held to apply to conveyances of personal property also); 1899, *Calliwell v. Pollak*, 91 Id. 353, 359, 8 So. 546; 1899, *Robinson v. Cahalan*, ib. 479, 481, 8 So. 415 (mortgage; certified copy admitted as "self-proving"); 1894, *Jinwright v. Nelson*, 105 Id. 399, 401, 17 So. 91 (statute held to apply to conveyances by corporations); 1895, *Postal Tel. Cable Co. v. Brantley*, 107 Id. 633, 18 So. 320; 1897, *Jones v. State*, 113 Id. 95, 21 So. 329; 1898, *Foxworth v. Brown*, 120 Id. 59, 24 So. 1, *anobile* (record of mortgage, admissible); 1899, *Stamphill v. Bullen*, 121 Id. 250, 25 So. 923; *Atlanta*: Civil Code 1900, §§ 99, 104, 108 (substantially like Or. Annot. C. 1892, §§ 3028, 3035, 3037); § 116 (like ib. § 3045); *Arizona*: Rev. St. 1887, § 1873 ("any instrument of writing" lawfully recorded after proof or acknowledgment is provable by a certified copy of the record, which shall be admissible "in like manner as the original could be"); *Arkansas*: Stats. 1894, § 722, 726 (record or record-certified transcript of a duly recorded deed "may be read in evidence without further proof of execution"); 1838, *Brown v. Hicks*, 1 Ark. 233, 243 (bill of sale); 1843, *Brock v. Saxton*, 5 Id. 708 (same); 1852, *Dixon v. Thatcher*, 14 Id. 141, 146; 1856, *McNeill v. Arnold*, 17 Id. 154, 169; 1856, *Trammell v. Thurmond*, ib. 206, 215; 1886, *Apel v. Kelsey*, 47 Id. 413, 420, 2 S. W. 102; *California*: Here the rulings had originally refused to recognize the registrar as evidence: (C. C. P. 1872, § 1919 ("A public record of a private writing may be proved by the original record, or by a copy thereof, certified by the legal keeper of the record"); § 1951 as amended by St. 1889, no. 45 ("every instrument conveying or affecting real property, acknowledged or proved and certified as provided in the Civil Code" may be read "without further proof"; "also, the original record of such conveyance or instrument thus acknowledged or proved, may be read in evidence, with the like effect as the original instrument, without further proof"); for the amendment of 1901, not touching this point, see ante, § 1226; Civ. C. 1872, § 1207 (certified copy of an instrument affecting real property

defectively recorded before Jan. 30, 1873, admissible, if the original is first proved genuine; St. 1867, c. 74, amending Civ. C. § 1307 (when an instrument affecting realty was recorded before Jan. 1, 1867, but defectively executed or acknowledged, "duly certified copies of the record of any such instrument may be read in evidence with like effect as copies of an instrument duly acknowledged and recorded; provided it be first shown that the original instrument was genuine"); Commissioners' Amendment of 1901, to § 1307 (limits the last proviso to instruments recorded "within 15 years prior to the trial"; as to the validity of this amendment, see § 489, ante); 1853, *Powell v. Hendrick*, 3 Cal. 427, 430 (recorded agreement, copy and original offered, not evidence of execution); 1862 *Touchar d v. Keyes*, 21 Id. 202, 210 (county recorder's certified copy of Alcalde's deed records legally put in his charge, receivable; *Sutton v. Dallas*, because the Alcalde's records were not made upon any requirement of previous proof of execution); 1862, *Clark v. Troy*, 21 Id. 223 (deed duly proved and recorded, but without further proof; the recorder is held to apply to deeds theretofore made, *Idem*, *Tumlin v. Faught*, 23 Id. 237, 239, *same* (deed duly proved before a notary, etc., received); 1864, *Landers v. Bolton*, 25 Id. 393, 405 (general principle laid down, that a deed duly proved and recorded may be offered without further proof, see quotation *supra*); 1865, *McMinn v. O'Connor*, 27 Id. 238, 244 (certified copy of a deed duly recorded, receivable without otherwise proving execution); 1869, *Anderson v. Fisk*, 35 Id. 625, 635 (certified copy of a recorded deed made prior to statute, receivable, though not acknowledged or proved, the statute treating such deeds as entitled to record and to the evidential benefits thereof); 1869, *Garwood v. Hastings*, 35 Id. 216, 219 (like *Touchar d v. Keyes*; *Sprague, J., diss.*); 1869, *Mayo v. Manaux*, *Id.* 442, 449 (general principle declared, as in *McMinn v. O'Connor*); 1872, *Moss v. Atkinson*, 44 Id. 3, 17 (same); 1874, *Jones v. Marks*, 47 Id. 242, 248 (same); 1884, *Anthony v. Chapman*, 65 Id. 73, 76, 3 Pac. 639 (same); 1897, *Davis v. Impr. Co.*, 118 Id. 45, 50 Pac. 7 (same); *Colorado*: Annot. Stats. 1891, § 444 (for a recorded instrument not duly acknowledged or proved, a certified copy may be "proved or acknowledged" with like effect as the original); § 447 (a duly recorded instrument may be proved by the record thereof, "whether an original record of any mining district, or a copy thereof deposited in the recorder's office of any county" under the law, "or a record of such recorder's office," "or a transcript from any such record certified by the recorder of the proper county"); § 633 (recorder's certified copy of "all papers filed" and of records, admissible); St. 1894, p. 53, § 6 (certificate of sale by trustee under trust deed, provable by certified copy); 1874, *Sullivan v. Hense*, 2 Colo. 424, 431; *Columbia (District)*: Code 1901, § 1071 (a certified copy, by the keeper of the record, under official seal, of "the record of any deed or other instrument in writing, not of a testamentary character," duly

recorded by law, admissible to prove "the existence and contents" and "that it was executed as it purports to have been"); *Connecticut*: Gen. St. 1857, § 2895 (certified copy of a recorded tax-collector's deed, admissible); 1808, *Wright v. Tryon*, 3 Day 490 (copy of record, receivable; here the document was defectively copied); 1868, *Talcott v. Goodwin*, *Id.* 264, 267; 1814, *Cunningham v. Tracy*, 1 Conn. 252; 1847, *Kelsey v. Hammer*, 18 Id. 311, 318 ("in all cases where a party is authorized to read in evidence a copy of a deed from the public records"); 1902, *Col. Sav. Bank v. Brown*, 75 Id. 66, 62 Ad. 216 (admissible for a deed to a third person; compare the citations *ante*, §§ 1224, 1225); *Delaware*: Civ. C. § 1893, c. 35, § 10 (county deed records a record or certified copy, of any instrument authorized by law to be recorded, admissible; c. 38, § 14 (record or office copy of a duly recorded deed, or a duly recorded deed; c. 1897, c. 3 (certain conveyances before January 1, 1897, prior to 1897, provable by certified copy of record); 1835, *Roach v. Martin*, "because the parties in old deeds thus provable, even though in substance not properly recorded"; 1847, *Forster v. Buckingham*, 3 Id. 197; *Florida*: Rev. St. 1892, § 1111 (a "deed, conveyance, paper, or instrument of writing," lawfully filed or recorded in the public office of this State or a county, provable by the custodian's certified copy under official seal, or if none, under private seal); 1896, *Parker v. Cleaveland*, 37 Fla. 39, 19 So. 344; *Georgia*: Code 1895, §§ 5211, 5219 (record in a public office is provable by certified copy); § 2628 (a "registered deed shall be admitted in evidence . . . without further proof," unless the maker or heir or opponent makes affidavit that it is a forgery, whereon an issue of genuineness shall be tried); 1851, *Beverly v. Burke*, 9 Ga. 440, 443, 445; 1853, *Jones v. Morgan*, 13 Id. 515, 522; 1858, *Watson v. Tindal*, 24 Id. 494, 502; 1858, *Poulet v. Johnson*, 25 Id. 403, 409; 1860, *Oliver v. Persons*, 30 Id. 391, 398 (the mere fact of record, insufficient; proper probate must appear); 1860, *Payne v. McKinney*, *Id.* 83, 85; 1861, *Gill v. Strozier*, 32 Id. 688, 694; 1870, *Early v. Shivey*, 40 Id. 684, 686; 1874, *Highfield v. Phelps*, 53 Id. 59; 1876, *Graham v. Campbell*, 56 Id. 258, 260; 1876, *Gardner v. Granniss*, 57 Id. 539, 554; 1877, *Eaton v. Freeman*, 58 Id. 129; 1877, *Hearn v. Smith*, 59 Id. 703; 1879, *Eaton v. Freeman*, 63 Id. 535, 538; 1882, *Chapman v. Floyd*, 68 Id. 455, 458; 1893, *First Nat'l Bank v. Cody*, 93 Id. 127, 143, 19 S. E. 831; 1894, *Bagley v. Kennedy*, 94 Id. 651, 20 S. E. 105; 1898, *Hayden v. Mitchell*, 103 Id. 431, 30 S. E. 237; 1900, *Garbutt L. Co. v. Gross L. Co.*, 111 Id. 821, 35 S. E. 686; 1902, *Crummey v. Bentley*, 114 Id. 746, 40 S. E. 765; 1902, *Griffin v. Wise*, 115 Id. 610, 41 S. E. 1003; 1902, *Anderson v. Leverette*, 116 Id. 732, 42 S. E. 1026 (recorded bills of conditional sale of personalty, admitted on the same conditions as mortgages); in the following rulings it is held that, under the statutory proviso, there must be other evidence of execution, if the statutory affidavit alleging forgery is made: 1867, *Doe v. Stevens*, 36 Ga. 463, 479; 1869, *Hanks v. Phillips*, 39 Id.

550, 552 (the proponent must then prove it "as on other papers not required by law to be registered"); 1870, *Eady v. Shivey*, 40 id. 684, 687; 1877, *Hill v. Nisbet*, 58 id. 586, 589; 1887, *Holland v. Carter*, 79 id. 139; 3 S. E. 690; 1898, *Anderson v. Cuthbert*, 103 id. 767, 80 S. E. 244 (but the statute does not exclude evidence denying a deed's genuineness even though no affidavit is made); 1902, *Crummey v. Bentley*, 114 id. 746, 40 S. E. 765; *Hawaii*: Civil Laws, 1897, § 1849 ("The record of an instrument duly recorded, or a transcript thereof duly certified," may be admitted); *Idaho*: Rev. St. 1887, § 5978 (like Cal. C. C. P. § 1919); § 5998 (like Cal. C. C. P. § 1951); *Illinois*: Rev. St. 1874, c. 30, § 90, as amended by St. 1903, May 28, p. 118 (for deeds, etc., without the State and within the United States or any Territory or Dependency or the District of Columbia, an acknowledgment or proof may be made "in conformity with the laws of the State, Territory, Dependency, or District where it is made"; and "if any clerk of a court of record within such State, Territory, Dependency, or District shall under his hand and the seal of such court certify" to the conformity of the acknowledgment, or the conformity shall appear by the laws thereof, "such instrument, or a duly proved and certified copy of the record of such deed, mortgage, or other instrument relating to real estate, heretofore or hereafter made and recorded in the proper county, may be read in evidence as in other cases of such certified copies. Fourth: All deeds or other instruments or copies of the record thereof duly certified or proven which have been heretofore acknowledged or proven before either of the courts or officers . . . may be read in evidence without further proof of their execution, with the same effect as if this act had been in force at the date of such acknowledgment or proof"); § 21 (instruments affecting land, executed and acknowledged or proved before a justice out of the county of the land, but recorded in the county of the land, shall be treated as legally recorded, notwithstanding the lack of a proper certificate of the justice's office; provided that the record "shall not be read in evidence unless the certificate of the proper county clerk under his official seal is produced, or other competent evidence introduced," of the justice's office at the date of acknowledgment); § 31 (recorded deeds, etc., not duly acknowledged or proven "shall not be read as evidence, unless their execution be proved in a manner required by the rules of evidence applicable to such writings, so as to supply the defects of such acknowledgment or proof"); § 35 (record or a certified copy by the recorder of an instrument concerning land, lawfully recorded, to be admissible, "without further proof thereof"); § 36 (same, where proof of loss, etc., is made by the party's affidavit); c. 95, § 5 (same for duly recorded chattel mortgages); c. 109, §§ 2, 11 (same for duly recorded plats of subdivisions); St. 1897, May 1, § 39 (registrars of title's certified copy under seal of an original certificate of a registered title, and the owner's duplicate certificate, to be admissible); § 58 (certified copy admissible in place of a lost duplicate original certificate of title); 1840, *McConnel v. Johnson*, 3 Ill. 522; 1844, *Graves v. Bruen*, 6 id. 167, 172 (certified copy not sufficient for an auditor's patent to public land; the registry acts not applying); 1864, *McCormick v. Evans*, 33 id. 327; 1864, *Holbrook v. Nichol*, 36 id. 161, 167; 1886, *Lake v. Brown*, 116 id. 63, 89, 4 N. E. 778; *Indiana*: Rev. St. 1897, § 471 (copies of record of "deeds and other instruments," provable by keeper's attestation under official seal, and, if no seal exists, certified by clerk of court of county under official seal); § 3424 (record not evidence unless a certificate of acknowledgment or proof is recorded); § 7660 (recorded apprentice's indenture, provable by certified copy); § 2439 (same for recorded power of attorney to convey land); §§ 5750, 5756, 5763 (same for deeds re-recorded on change of county boundaries or creation of new county); § 8396 (same for certain re-recorded deeds); 1838, *Bowser v. Warren*, 4 Blackf. 522, 527 (record copy sufficient, whenever the original need not be produced); 1839, *Dixon v. Doe*, 8 id. 107 (record of a deed to other than the offeror (*see ante*, § 1225) admissible without otherwise proving execution); 1839, *Rucker v. McNeely*, ib. 123 (record admitted after proof of loss); 1842, *Rawley v. Doe*, 6 id. 141, 144 (proof of execution of recorded land-patent not necessary); 1842, *Foreman v. Marsh*, ib. 285 (general principle of *Bowser v. Warren* repeated); 1843, *McNeely v. Rucker*, ib. 391 (like *Rucker v. McNeely*); 1847, *Stephenson v. Doe*, 8 id. 508, 512 (like *Rawley v. Doe*); 1858, *Tenant v. Rumsfeld*, 11 Ind. 130 (chattel mortgage; general principle affirmed); 1860, *Lyon v. Perry*, 14 id. 515; 1865, *Allen v. Vincennes*, 25 id. 531; 1877, *Westerman v. Foster*, 57 id. 408, 410; 1878, *Steeple v. Downing*, 60 id. 478, 496 (justice's office); 1878, *Gossett v. Tolen*, 61 id. 388, 391 (betterment assessment); 1885, *Benefiel v. Aughe*, 93 id. 401, 405; 1891, *Adams v. Buhler*, 131 id. 68, 30 N. E. 883 (mechanic's lien notice); 1895, *Kron v. Vermilion*, 143 id. 75, 41 N. E. 539 (mortgage); *Iowa*: Code 1897, § 4630 ("any instrument" recorded in a public office by authority of law is provable by record "or a duly authenticated copy thereof"); § 4636 (so also for copies of entries in a book of "copies of original entries"); § 4641 (land-office receiver's duplicate receipt is proof of title except against holder of actual patent); 1887, *Carter v. Davidson*, 73 Ia. 45, 49, 34 N. W. 603; *Kansas*: Gen. St. 1897, c. 97, §§ 2, 3 (any paper lawfully filed in "any public office" is provable by the legal custodian's certified copy under official seal, or by record); St. 1901, c. 124 (record of a deed, etc., defectively executed or acknowledged or recorded at the time of this act is to be admissible, when the original is lost, etc.); *Kentucky*: Stats. 1899, § 1638 (an instrument duly registered out of the U. S. is provable by the keeper's attested copy certified under official seal by a U. S. consul, chargé, or minister); § 519 ("certified copies of all instruments legally recorded" are admissible); 1813, *Eastland v. Jordan*, 3 Bibb 186, 187 (here excluded for defect of probate); 1814, *Wells v. Wilson*, ib. 264, 265 (admitted where recorded

upon the acknowledgment of the opponent; other cases undetermined); 1815, *Tebbs v. White*, 4 id. 42 (admissible in "all cases where the original would be relevant"); 1818, *Morgan v. Bealle*, 1 A. K. Marsh. 310 (here excluded for defective probate); 1820, *Barbour v. Watta*, 2 id. 290 ("the well-known common-law rule with regard to enrolled deeds attaches to them"); 1820, *Hood v. Mathers*, ib. 553, 558; 1821, *Womack v. Hughes*, Litt. Sel. C. 292, 294 (see quotation *supra*, § 1649); 1821, *McIntire v. Funk*, ib. 435, 437; 1823, *Sharp v. Wickliffe*, 3 Litt. 10, 12; 1823, *Ross v. Lawless*, 4 id. 218; 1824, *Young v. Ringo*, 1 T. B. Monr. 30; 1827, *Hunt v. Owings*, 4 id. 20 (the probate must be set out); 1830, *Edwards v. Hauna*, 5 J. M. 18, 20; 1835, *Ross v. Clare*, 3 Dana 139, 195; 1838, *King v. Mima*, 7 id. 267, 269; 1853, *Dickerson v. Talbot*, 14 B. Monr. 60, 62, 69; 1854, *Hedger v. Ward*, 15 id. 108, 114; 1868, *Patterson v. Hansel*, 4 Bush 654, 656; 1899, *Middlesborough W. Co. v. Neal*, 105 Ky. 594, 49 S. W. 428; *Louisiana*: The civil-law doctrine of "authentic acts" makes it difficult to consider the Louisiana cases from the point of view of common-law principles; the statutes, moreover, seem to lack systematic arrangement: Rev. Civ. C. 1893, § 2234 ("The 'authentic act,' as relates to contracts, is that which has been executed before a notary public," etc.); § 2235 ("An act which is not authentic . . . avails as a private writing, if it be signed by the parties"); § 2236 ("The authentic act is full proof of the agreement contained in it," as against the parties, unless proved a forgery); §§ 2251, 2253 (notaries, outside of New Orleans, are to deposit with the parish recorder "the original of all acts passed before them," after recording them in their own record-books; acts under private signature, for sale or exchange of realty, are to be acknowledged or proved before record by parish recorder); §§ 2255, 2257, 2260, 2261 (notaries in New Orleans are to register every deed affecting realty with the parish register; the register's certificate under seal is to be "received in courts of justice in evidence in the same manner as all other public acts"; private act, if recorded, may be acknowledged or proved if the parties wish); § 2267 (recorder's copies under official seal of "original acts deposited with them" are to be "legal evidences of their contents," if the act is an authentic one; duly certified copies of official bonds "shall always be admissible in evidence"); § 2268 (notaries' certified copies of original acts of which they are depositaries, "make proof of what is contained in the originals"); § 2269 ("When the original title or record is no longer in being, a copy is good proof . . . when it is certified as being conformable to the original by the notary who has received it or by one of his successors, or by any other public officer, with whom the record was deposited, and who had authority to give certified copies of it, provided the loss of the original be previously proved"); § 2270 ("When an original title, by authentic act, or by private signature duly acknowledged, has been recorded in any public office, by an officer duly authorized, either by the laws of this State or of the

United States, to make such record, the copy of such record, duly authenticated, shall be received in evidence, on proving the loss of the original, or showing circumstances, supported by the oath of the party, to render such loss probable"); Rev. L. 1897, § 1455 (sheriff's deed, provable by certified copy by the clerk or deputy clerk of the court where recorded; and if the original has been "lost or mislaid" without being recorded, then "a copy of the same, certified as aforesaid, being recorded in said office," shall have the same effect as if original had been recorded; the affidavit of any person interested being sufficient to establish loss or mislaying and to entitle to record); § 3080 (recorder's copies under official seal of notaries' acts deposited with him are to be "legal evidence of the contents of the original acts"); C. Pr. 1894, § 142 (notaries are not bound to produce "the record of acts passed before them, of which authentic copies may be obtained, except when it is necessary to prove the genuineness of the signatures affixed to them"); § 698 (recording officer's certified copy of a recorded sheriff's deed, admissible; so also for a copy of a certified copy recorded in place of a lost or mislaid original); 1826, *Norwood v. Green*, 5 Mart. N. S. 175 (excluded); 1830, *Walden v. Grant*, 8 id. 565, 569 (excluded, in the absence of express statutory authority); 1851, *Dupleasis v. Miller*, 6 La. An. 683, *Slidell and Preston, JJ.*, diss. (conveyances recorded in U. S. land-office are not documents that can be proved by the register's certified copy); 1859, *Reynolds v. Stille*, 14 id. 699 (same as *Walden v. Grant*); *Grant's Succession*, ib. 795 (same); compare also the cases cited *ante*, § 1225, and *post*, § 1676; *Maine*: Pub. St. 1883, c. 82, § 110 (in actions affecting realty, attested copies of recorded deeds are admissible without proof of execution, when the offeror is not grantee nor heir nor "justifies as servant" thereof); this statute in effect merely enacts the rule of the earlier decisions; compare also the citations *ante*, § 1225; 1833, *Knox v. Silloway*, 1 Fairf. 201, 216 (admitted under a rule of Court; "this rule is in unison with immemorial usage in Massachusetts; the Courts of this State have uniformly observed it; and it is believed that a similar practice has long prevailed in most if not all the New England States; . . . it dispenses with proof of execution in all cases but one, namely, the case of a deed to the party himself"); 1834, *Kent v. Weld*, 2 id. 459 (same; but this is allowable under Court Rule 34, only "in actions touching the realty," "when the party offering such office copy in evidence is not a party to the deed, nor claims as heir, nor justifies as servant of the grantee or his heirs"; not applicable, therefore, to a recorded power of attorney in an action for services rendered to an alleged agent of the defendant); 1851, *White v. Dwinel*, 33 Me. 320 (not applicable to an office copy of a deed to the ancestor under whom the plaintiff claims as heir); 1898, *Flynn v. Sullivan*, 91 id. 355, 40 Atl. 136 (rule applied); 1901, *Egan v. Horrigan*, 96 id. 46, 51 Atl. 246 (same); *Maryland*: Pub. Gen. L. 1886, Art. 35, § 38 (any instrument required, by the law of the State or country where

executed, to be registered, and lawfully registered, is provable by the keeper's certified copy under seal of court or office); 1800, *Gittings v. Hall*, 1 H. & J. 14, 18, *semble*; 1801, *Carroll v. Norwood*, ib. 167, 178, 184, *semble*; 1804, *Cheney v. Watkins*, ib. 527, 532; 1823, *Counelly v. Bowie*, 6 H. & J. 141; 1824, *Crauford v. State*, ib. 231, 234 ("where an instrument of writing is required by law to be recorded, the enrolment of it is evidence of all circumstances necessary to give it validity"; here, of the delivery of a bond in the Orphan's Court); 1843, *Mitchell v. Mitchell*, 1 Gill 66, 81 (the due acknowledgment of an heir's record release, presumed); 1854, *Barry v. Hoffman*, 6 Md. 78, 87; 1854, *Warner v. Hanly*, ib. 525, 537; *Massachusetts*: Pub. St. 1882, c. 82, § 7, Rev. L. 1902, c. 78, § 4 (clerk's certified copy of cemetery conveyances recorded by the corporation, admitted); 1828, *Eaton v. Campbell*, 7 Pick. 10, 12; 1829, *Hathaway v. Spooner*, 9 id. 23, 25 ("the very registry proves the execution, for the deed cannot be effectually registered without an acknowledgment before a magistrate"); 1834, *Ward v. Fuller*, 15 id. 185, 187; 1848, *Stetson v. Gulliver*, 2 Cush. 494, 498 (bond not required, nor perhaps competent to be recorded; office copy by the registrar allowed where the opponent had refused to produce the original, but *semble* not where the offeror relies simply on the deed being presumed out of his control; the reason is not clearly explained, but seems to rest on a theory that in the latter case the registrar's copies are "original evidence," and hence applicable only to lawfully recorded documents); 1863, *Thacher v. Phinney*, 7 All. 146, 149, *semble*; 1870, *Samuel v. Borrowdale*, 104 Mass. 207, 209; 1872, *Gragg v. Learned*, 109 id. 167 (sufficient, if "not made to either party to the action, or presumed to be in the custody of either"); Rev. L. 1902, c. 128, § 46 (recorder's certified copy, under seal of court, of the original certificate of registered title, and the owner's duplicate certificate, admissible); § 104 (new duplicate certificate, issued in place of a lost one, shall be "regarded as the original duplicate for all the purposes of this chapter"); *Michigan*: Comp. L. 1897, §§ 8964, 8965, 8990, 8995, 8996, 9006, 9040, 9043, 9046, 9047, 9050, 9052, 1271 ("conveyances and other instruments" lawfully registered are provable by register's certified copy); § 9528 (filed chattel mortgage, with affidavits, etc., is provable as to the fact of filing by the municipal clerk's certified copy, but as to no other fact, *i. e.* execution); § 9635 (duly recorded assignment in insolvency is provable by the register of deeds' certified copy); § 10776 (municipal clerk's certified copy of filed notice of horse-shoeing lien, admissible only to prove the fact of filing); 1849, *Ives v. Kimball*, 1 Mich. 308, 310; 1862, *Hall v. Redson*, 10 id. 21, 24 (record is evidence of execution by such persons only as execute properly); 1863, *Brown v. Cady*, 10 id. 535, 538 (record not receivable apart from statutory authorization); 1866, *Farmers' & M. Bank v. Bronson*, 14 id. 361, 369 (same); 1870, *Raynor v. Lee*, 20 id. 384, 386; 1871, *Shotwell v. Harrison*, 22 id. 410, 423; 1871, *Morse v. Hewett*, 28 id. 481, 487, 488; 1877, *Grand Rapids v. Hastings*, 36 id. 123; 1877, *Bills v. Keeler*, ib. 69; 1878, *Wilt v. Cutler*, 38 id. 189, 192 (a record-copy may be used in any court of the State); 1882, *Taylor v. Youngs*, 48 id. 268, 12 N. W. 208 (defects of record may be cured before trial, so far as use in evidence is concerned); 1885, *Toledo & A. A. R. Co. v. Johnson*, 55 id. 456, 458, 21 N. W. 888 (certified copy of a deed assigning a contract, not admissible to prove the fact of assignment, under the circumstances); 1888, *Shelden v. Merrill*, 69 id. 156, 37 N. W. 66 (certified copy of a mortgage filed with a town clerk, not evidence of execution); 1891, *Butler v. R. Co.*, 85 id. 246, 258, 49 N. W. 659 (lost land-patent; "Scranton Abstract" received to prove it); *Minnesota*: Gen. St. 1894, § 5759 (record or a transcript, certified by the register, of instruments authorized to be recorded, and duly acknowledged or proved, admissible); §§ 4135, 4151 (certified copy of a filed chattel mortgage or conditional sale, by the clerk or other proper officer, admissible like the original or copy on file); §§ 4193, 7528-7584 (certain curative acts, making admissible certified copies of instruments otherwise not entitled to record or defectively recorded); 1864, *Land v. Rice*, 9 Minn. 230 (excluding the record of a copy from a defectively recorded deed in another State); 1866, *Wilder v. St. Paul*, ib. 192, 211 (applying the statute admitting deeds defectively acknowledged); 1867, *Lowry v. Harris*, ib. 255, 267, 269; 1871, *Mankato v. Meagher*, 17 id. 265, 271; 1884, *Morrison v. Porter*, 35 id. 425, 29 N. W. 54; 1886, *Ellingboe v. Brakken*, 36 id. 156, 30 N. W. 659 (chattel mortgage); 1901, *Van Dervort v. Northwestern F. Co.*, 85 id. 25, 88 N. W. 2 (same); *Mississippi*: Annot. Code 1892, § 1777 ("copies of the record of all instruments in writing which by the laws of any foreign country may be admitted to record upon acknowledgment or proof thereof" are admissible if certified under official seal by the "officer having custody of the record," and "authenticated by the certificate of any public minister, secretary of legation, or consul of the United States"); § 1778 (same, for instruments "required or permitted to be recorded" in the U. S., a State or Territory, or the District of Columbia, first certificate sufficing); § 1779 (same, for instruments "required or permitted to be recorded" in this State); St. 1896, c. 102 (amending § 1779, and making the original record also admissible); 1848, *Thomas v. Bank*, 9 Sm. & M. 201; 1858, *Harper v. Tapley*, 35 Miss. 506, 510; 1858, *Cogan v. Frisby*, 36 id. 178, 183 (gift of chattels); 1860, *Davis v. Herndon*, 39 id. 484, 505; 1873, *Lockhart v. Camfield*, 48 id. 471, 488; *Missouri*: Here the decisions originally refused to use the register as evidence: Rev. St. 1899, § 932 ("every instrument in writing, conveying or affecting real estate," duly acknowledged or proved and recorded, provable by recorder's certified copy under official seal, when original is lost, etc.); § 935 (such a record not to be read "until established by other competent proof," if the opponent makes it appear that the proof was taken "upon the oath of an incompetent witness"); § 941 (certified copy of a duly recorded instrument

executed out of the State but within the U. S., conveying military bounty land in this State, provable by certified copy, when the original is lost, etc.); § 3107 (records of the French or Spanish government, and deeds before their officers, etc., provable by certified copy by the recorder of land-titles); § 3108 (conveyance, etc., among the archives of the French or Spanish government, filed and recorded with the county recorder, and the records of such government there deposited, provable by recorder's certified copy); § 3109 (certified copy of the record of such instruments, admissible where the original is shown lost, etc.); § 3116 (deed recorded more than 20 years, though not duly acknowledged, etc., and afterwards proved on trial, a copy being preserved in bill of exceptions and transcript filed in certain courts, is provable, if lost or destroyed, by a certified copy by the clerk of the proper court); § 3119 (certified copy of a record, made one year before this law's taking effect, of a deed, will, etc., not duly acknowledged or proved, to be admissible only when the execution of the original is duly proved, "except where such record shall have been made 30 years or more prior to the time of offering it in evidence"); § 3141 (certified copy, under the recorder's official seal, of a marriage contract duly acknowledged or proved and recorded, admissible when the original is lost, etc.); § 5074 (certified copy, by a notary or justice, of a recorded contract of boatman's hire, admissible); § 8957 (county recorder's certified copy of a recorded plat, admissible); 1823, *Chouteau v. Chevalier*, 1 Mo. 343 (copy of marriage-contract in Spanish archives, excluded for insufficient certification); 1829, *Philipson v. Bates*, 2 id. 116 (apart from statute, the record is inadmissible); 1829, *Strother v. Christy*, ib. 148 (same, for a statute not expressly making certified copies admissible); 1837, *Miller v. Wells*, 5 id. 6, 10 (apart from statute, the acknowledgment and record are not sufficient); 1838, *Newman v. Studley*, 5 id. 291, 295 (certified copy of a recorded sheriff's deed; undecided, under the law of 1835); 1842, *Moss v. Anderson*, 7 id. 337, 340 (certified copy admitted, though evidence of identity may be required under the act of 1835); 1844, *Roussin v. Parks*, 8 id. 529, 537, 546 (recorder's certificate of authenticity of a deed found among Spanish archives, admitted under the statute); 1855, *Charlotte v. Chouteau*, 21 Mo. 590 (statute as to Spanish archives, applied); 1855, *Aubuchon v. Murphy*, 23 id. 115, 123 (Act of 1845; a deed not recorded within one year; evidence of identity required, under § 18); 1859, *Garnier v. Berry*, 26 id. 438, 449 (Act of 1845; § 55 applied; § 16 applied); 1862, *Gwynn v. Frazier*, 33 id. 59, 91 (deed recorded within one year); 1872, *Briggs v. Henderson*, 49 id. 531, 534; 1872, *Crispen v. Hannavan*, 50 id. 415, 417 (military bounty land); 1872, *Ryder v. Fash*, ib. 476 (same); 1872, *Callaway v. Fash*, ib. 420, 422; 1873, *Yankoe v. Thompson*, 51 id. 241, 244; 1883, *Hackinson v. Adkins*, 77 id. 537, 539; 1893, *Hunt v. Sellick*, 118 id. 598, 599; *Montana v. C. C. P.* 1895, § 3207 (like Cal. C. C. P. § 1919); § 3241 (like Cal. C. C. P. § 1951, as amended by St. 1899, adding, after "Civil

Codes," "and every instrument authorized by law to be filed or recorded in the county clerk's office"); Civ. C. § 1637 (duly certified copies of certain defectively recorded "instruments affecting real property," admissible "provided it be first shown that the original instrument was genuine"); St. 1899, p. 145, March 2 (county clerk's certified copy of record of certain defective deeds, made admissible); *Nebraska v. Comp.* St. 1899, § 4106 (duly recorded deed, provable by record or certified copy); 1896, *Thams v. Sharp*, 49 Nebr. 237, 68 N. W. 474; *Nevada v. Gen. St.* 1886, § 2598 (a "conveyance, or other instrument conveying or affecting real estate," duly recorded, is provable by the record or the recorder's certified transcript under official seal "without further proof"); § 2649 (duly certified copies of instruments already recorded before 1862, Dec. 17, but not lawfully, admissible when proof is made that the originals "were genuine instruments, and were in truth executed by the grantor or grantors therein named"); § 2665 (certified copies of instruments relating to mining claims now recorded 1873, Feb. 20, admissible under the same rules as provided for instruments affecting mining claims or real estate duly recorded); *New Hampshire v. Pub. St.* 1891, c. 224, § 23 (certified copy, by the proper officer, of any document required to be recorded in a public office, admissible); compare the rulings cited *ante*, § 1225; 1831, *Southerin v. Mendum*, 5 N. H. 420, 428, *semble*; 1833, *Montgomery v. Dorion*, 6 id. 250, 252; 1835, *Montgomery v. Dorion*, 7 id. 475, 483; 1840, *Pollard v. Melvin*, 10 id. 554, 557 (sufficient "only in a chain of title, where due proof has first been made of the execution of the last conveyance"; not applicable to third person's title); 1840, *Loomis v. Bedel*, 11 id. 74, 86 (same); 1842, *Homer v. Cilley*, 14 id. 85, 98 (same); 1844, *Lyford v. Thurston*, 16 id. 399, 404 (same); 1845, *Andrews v. Davison*, 17 id. 413, 415 (same); 1848, *Cram v. Ingalls*, 18 id. 613, 617, *semble* (same); 1850, *Foranith v. Clark*, 21 id. 409, 421 ("Ordinarily the admission of an office-copy admits all that appears upon it, — execution, acknowledgment, and record"; here, it was taken to cover the authority of the magistrate taking the acknowledgment in another State, the document being old; yet "the deed directly to [the officer] himself must be proved"); 1859, *Ferris v. Freesenden*, 39 id. 288, 276; general principle affirmed); 1861, *Wendell v. Abbott*, 43 id. 68, 73 (same); 1879, *Smith v. Cushman*, 59 id. 27 (same); it does not appear what the effect is of the statute upon these decisions; *New Jersey v. Gen. St.* 1896, *Conveyances*, § 29 (record or certified copy of a duly recorded conveyance, admissible, to be as "available in law as if the original . . . were then and there produced and proved"); § 38 (same admissible to prove stamps affixed); §§ 15, 20 (record or certified copy of a deed not recorded till ten years after date, not to be admissible unless original is destroyed, lost, or taken away); § 18 (railroad or canal lease, provable by the Secretary of State's record or certified copy; see also §§ 50-57, 75, 80, validating certain acknowledgments); § 180

(recorded conditional sales of personalty, provable like deeds); Mortgages, §§ 18, 32, 56 (same for mortgages of lands or chattels); Fences, § 17 (same for fence-agreement); Judgments, § 19 (same for assignment of judgment); Leasehold Estate, § 8 (same for leasehold deeds); Evidence, § 58 (a document recorded in a foreign State is provable by copy exemplified according to the U. S. law, if the record is admissible in that State); St. 1898, c. 232, §§ 55-56 (prior provisions as to certified copies, loss of original, and ten days' notice, re-acted, and applied to the revised provisions for recording); compare also the amendment of St. 1903, c. 98 (proof of foreign deeds); 1828, Fox v. Lambson, 8 N. J. L. 276, 279 (copy of a duly recorded certificate of manumission, not received to show execution of the certificate, because the record-law provided for no means of evidencing genuineness before the recording; "an entry by a clerk in a book in his office of an instrument not previously acknowledged or proved or otherwise authenticated, and which therefore does not bear with it the slightest proof of genuineness," cannot be received); 1839, New Jersey E. & T. Co. v. Suydam, 17 id. 25, 29 (clerk's certified copy of a recorded deed, admissible, but not of recorded mortgage, because only an abstract is recorded and no copy of the acknowledgment, etc., is required); New Mexico: Comp. L. 1897, § 3394 (abstract of title, as described in the quotation *post*, § 1705, to be received "in the same manner and to a like extent that the public records are now admitted"); § 3985 (record, or recorder's certified transcript, of a duly recorded "writing conveying or affecting real estate," admissible "without further proof"); § 2361 (record, or recorder's certified transcript under official seal, of a duly recorded chattel mortgage, admissible "without further proof"); § 2364 (recorder's certified copy of an affidavit, etc., of a mortgagee's interest, admissible to prove the fact of filing); New York: C. C. P. 1877, § 935 (a duly recorded conveyance is provable by the record or by a certified copy, "without further proof"; unless proof was taken on the oath of "an interested or incompetent witness"); § 936 (same for any instrument, except a bill, note, or will); § 945 (sale, etc., of a vessel, recorded in the U. S. customs' office after due proof, provable by certified copy); §§ 946, 947 (conveyance of realty out of the State, admissible if authenticated so as to be evidence in the country where offered; conveyance of realty in another U. S. State or Territory, admissible if authenticated according to the law of such State, etc.; the latter kind also provable by exemplification of record under seal of the custodian, if the "original cannot be produced"); Laws 1837, c. 150, § 27 (recorded mortgage with State loan-commissioners, provable by attested copy under seal); Laws 1844, c. 326, § 2 (similar, for re-recorded copy); Laws 1864, c. 112, § 6 (certified copy of a canal-boat recorded mortgage, admissible only to prove the fact of filing); Laws 1833, c. 279, § 4 (same for recorded chattel mortgages in general); 1837, Morris v. Wadsworth, 17 Wend. 103, 112

(sufficient; here offered against the grantor acknowledging it); 1857, Van Cortlandt v. Toser, id. 338, 340 (a deed duly recorded according to the process prescribed by the Legislature may be proved genuine by certified copy; here the legality of the proceeding of record, with reference to the place, the officer, and the mode of proof to the officer, was in issue); 1859, Hunt v. Jackson, 19 N. Y. 279, 294 (construing the terms of the early statutes authorizing a recorded deed to be assumed genuine); 1888, Sudlow v. Warshing, 108 id. 520, 522, 15 N. E. 532 (certified copy sufficient); North Carolina: Code 1883, §§ 1251, 1252, 1263 (registry or certified copy of instrument "required or allowed" to be recorded, admissible, to be "full and sufficient evidence of such deed"; providing that the original may on certain conditions be required); § 1344 (a deed by an inhabitant of another State or Territory, of domestic property, is provable, if the original cannot be obtained, by copy certified either under Federal law or "by the proper officer of the said State or Territory"); 1878, Rollins v. Henry, 78 N. C. 342, 345, 349; 1882, Love v. Harbin, 87 id. 249, 253 (register's certified copy, held sufficient on the facts with reference to the probate of execution; a certified copy is admissible to prove execution of a lost deed, even where the execution is expressly put in issue by denial); 1900, Cochran v. Linville I. Co., 127 id. 386, 37 S. E. 496 (certified copy, dated 1859, and proved genuine, of a deed dated 1796, admitted); North Dakota: Rev. C. 1895, § 5696 (the record, or a "duly authenticated copy," of "every instrument conveying or affecting real property," when duly acknowledged or proved and certified, admissible; compare id. § 3597); St. 1901, c. 145 (amending § 3597 so that the record or a certified copy is to be "read in evidence without further proof"); Ohio: Rev. St. 1898, § 4115 (auditor's certified copy under official seal of the record of a lost or destroyed State deed, admissible to prove "the existence of such deed"); § 4182 (2) (recorder's certified copy under official seal of a recorded power of attorney, admissible); § 4143 (recorder's certified copy under official seal of a recorded instrument, admissible); § 4156 (same for chattel mortgage); § 3322 (recorder's certified copy of a grant of way or easement to railroad, admissible); 1824, Johnston v. Haines, 2 Oh. 279 (55); 1847, Webster v. Harris, 16 id. 490, 499; 1877, Warner v. R. Co., 31 Oh. St. 265, 270; Oklahoma: Stats. 1893, § 4262 ("all papers" lawfully recorded in "any public office, provable by legal custodian's certified copy under official seal"); § 4278 (record of "paper, document, or other instrument authorized to be recorded," admissible with "same effect as the original"); § 6130 (proof, recording, and deposit at registry "do not entitle the instrument, or the record thereof, or the transcript of the record, to be read in evidence"); § 1621 ("all deeds, agreements, writings, and powers of attorney, duly recorded according to Territorial law, provable by the record or by a transcript certified by clerk or recorder of county, when original is not in party's possession, etc.); these statutes in part

repealed by St. 1897, c. 2, § 25 (all instruments affecting real estate and duly recorded are provable by copies "certified from the records by the register of deeds"); *Oregon*: Code 1892, § 3023 (record, or county clerk's certified transcript, of duly recorded conveyance, admissible); § 3035 (powers of attorney and contracts for the sale of land); § 3037 (instruments heretofore acknowledged or proved in accordance with the laws of the State at the time "shall have the same force as evidence" as those conforming to the present law); § 3045 (deeds of sales defectively made by executors, etc.; the record, "duly certified by the county clerk, shall be evidence in all courts, and have the same effect as the original"); C. C. P. § 744 (like Cal. C. C. P. § 1919); St. 1893, p. 162 (amends Code § 3058 so as to make the certified copy of the record to be evidence "with the like force and effect as the original instrument, but the effect of such evidence may be rebutted by other competent testimony"); St. 1903, p. 17 (deeds of land, duly executed in a foreign country, and recorded in this State in the proper county, are provable by certified copies of the county clerk); *Pennsylvania*: St. 1715, P. & L. Dig. Deeds, 88 (certified copies, under seal, of deeds duly recorded, receivable); St. 1870, ib. 68 (same for land in more than one county); St. 1841, ib. 92 (certain old deeds, unrecorded, provable similarly, *semble*, if recorded before a certain date); St. 1853, ib. 162-3 (mortgage of coal-mining rights; certified copy of a recorded instrument is evidence of contents and filing, but of nothing else); St. 1854, 1864, id. Deeds, 79, Evidence, 48 (letters of attorney relating to personality, duly made abroad before a U. S. officer or a notary, and here recorded, receivable, as also a certified copy, when the original is lost; also, affidavits before a proper officer, duly certified, in another domestic State); St. 1885, id. Evidence, 25 (letters of attorney relating to personality, duly recorded, authenticable by exemplification); St. 1887, id. "Deeds," 178 (certified copies of recorded mortgages, etc., of iron ore and other specified personality, receivable); St. 1893, ib. 77 (same for sheriffs' deeds recorded with the Court of Common Pleas); St. 1834, id. Evidence, 10 (record or exemplifications of papers lawfully recorded, receivable); St. 1840, ib. 11 (certified copy, by the recorder of deeds, of a justice's bond, recorded, receivable); St. 1846, ib. 12 (same, for commission of justice or alderman); St. 1844, ib. 15 (certain entries in the probate register's office, authenticated by his copy under seal); St. 1846, id. Evidence, 16, Deeds, 76 (records or duly certified copies of duly recorded Commonwealth patents, sheriffs', coroners', marshals', and treasurers' deeds, and deeds under decree of Court, receivable); St. 1849, id. Evidence, 17 (same, for deeds of county commissioners); St. 1849, id. Evidence, 18, Deeds, 117 (same, for assignments of mortgages and attorney-powers authorizing satisfaction of mortgages); St. 1828, 1850, 1866, id. Evidence, 19, Deeds, 80-82 (copies under the recorder's seal of duly recorded written discharges of "any legacy or recognizance charged upon lands" in

the State, receivable; also other specified releases to executors, etc.); 1759, Hyam v. Edwards, 1 Dall. 2 (copy of a deed proved and enrolled in England, received); 1810, Carkhuff v. Anderson, 3 Binn. 4, 7, 10 (under St. 1781, April 9, authorizing copies from the land-office); 1811, Vickroy v. McKnight, 4 id. 204, 206; 1821, Leasure v. Hillegan, 7 S. & R. 313, 318; 1828, Duffield v. Brindley, 1 Rawle 91, 95 (but here the deed was ancient); 1834, Hellman v. Hellman, 4 id. 440, 444 (release of a legacy, excluded); 1842, Brotherton v. Livingston, 3 W. & S. 334, 337 (certified copy is "enough to dispense with the common-law evidence of execution"); 1844, Fittler v. Shotwell, 7 id. 14, 16 (same); *South Carolina*: St. 1731, Quit Rents, § 30 (grants in auditor-general's office, and grants and deeds duly proved before a justice and recorded; attested copies are "as good evidence" as the original); St. 1803, Rev. St. 1893, § 2360, Code 1902, § 2895 (certified copy, by the Secretary of State, of a grant and plat of land from this State, or a certified copy of a grant of land from the State of North Carolina, receivable conditionally); St. 1843, id. § 2361, Code 1902, § 2896 (certified copy of a recorded deed, receivable on the same conditions, and on ten days' notice); St. 1731, id. §§ 2362-3, Code 1902, § 2899, 2899 *bis* (exemplifications of records attested under seal of a mayor, Governor, or notary of domestic or foreign State, receivable, but only conditionally for claims against residents of this State); 1795, Purvis v. Robinson, 1 Bay 493 (record copy, sufficient, provided the original is accounted for; compare the rulings cited *ante*, § 1225); 1853, Lamar v. Raynor, 7 Rich. 509, 514 (office copy of a recorded deed, sufficient, although the proof required for recording did not appear on its face; the deed here being old, and the purpose a collateral one); 1892, Stone v. Fitts, 38 S. C. 393, 397; 1895, Hobbs v. Beard, 43 id. 370, 21 S. E. 305 (the fact of registration is evidence of execution, where the records have been burnt); 1897, State v. Crocker, 49 id. 242, 27 S. E. 49 (official record itself of a deed, admissible, if the deed is lost, as a common-law method, independent of the statutory provisions as to certified copies, in R. S. 1893, § 2361, Jones, J., diss.); *South Dakota*: St. 1899, § 6539 (the record, or a "duly authenticated copy," of "every instrument in writing, which is acknowledged or proved, and duly recorded," admissible; compare id. § 4485); § 6369 (certified copy, by the register of deeds, of a recorded certificate of tax-sale, admissible); *Tennessee*: Code 1896, § 5573 ("duly certified copies" of all records, receivable); § 3748 ("any of said instruments [i. e. deeds, etc.] so proved or acknowledged and certified and registered shall be received as evidence"; extended to old or mutilated records re-copied, by §§ 3778, 3786, 3793, 5575); § 3704 (register's certified copy of an acknowledgment of release of lien, receivable); § 3711 (copy of a registered copy of a deed of lands in different counties, receivable); 1805, Miller v. Holt, 1 Overt. 111 (proper proof before the register must appear to have been made, in order that a copy may suffice); 1805, Craig

v. Vance, 1b. 192; 1807, Miller v. Holt, 1b. 243; 1808, Frazier v. Bassett, 1b. 207, *semble*; 1809, Reed v. Dodson, 1b. 396, 398, *semble*; 1823, Norflet v. Nelson, Peck 188 (North Carolina grant); 1825, Wilson v. Smith, 5 Yerg. 379, 407 (due probate of original presumed); 1832, Melver v. Robertson, 3 id. 84 (a certified copy must show that the deed had been properly probated before registry); 1833, Batts v. Stone, 4 id. 168; 1836, Melver v. Clay, 9 id. 257, 259 (like Melver v. Robertson); 1840, Guines v. Catron, 1 Humph. 514, 521 (same); 1844, Saunders v. Harris, 5 id. 345, *semble* (like Melver v. Clay; here the recording was in a State not requiring probate for recording); 1858, Brogan v. Savage, 5 Sneed 689, 692; 1899, Bond v. Montague, — Tenn. Ch. App. —, 84 S. W. 65; *Texas*: Rev. Civ. Stats. 1895, § 2311 ("all conveyances and other instruments of writing between private individuals, which were filed in the office of any alcalde or judge in Texas previous to the first Monday in February, 1837," are provable by certified copy under official seal of "the officer with whom the originals are now deposited"); § 2312 ("every instrument of writing" lawfully recorded with the clerk of a county court, after proof or acknowledgment according to the law at the time, is provable by a certified copy of the record, when filed with the papers of the suit three days before trial begun, and notice given to the opponent, unless the opponent within three days before trial files an affidavit of forgery); § 4667 (all instruments permitted by law to be registered, and recorded before Feb. 9, 1860, are provable by certified copy when the acknowledgment or proof was made before certain officers); 1847, Craddock v. Merrill, 2 Tex. 494; 1857, Butler v. Dunagan, 19 id. 539, 565; 1878, Wiggins v. Fleischel, 50 id. 57, 63 (an original deed properly certified cannot be read without statutory notice, etc.); 1879, Texas Land Co. v. Williams, 51 id. 51, 58; 1891, McFaddin v. Preston, 54 id. 403, 407; 1895, Hancock v. Tram Lumber Co., 65 id. 225, 232; 1897, Shifflet v. Morelle, 68 id. 392, 398; 1898, Boydston v. Morris, 71 id. 697, 699, 4 S. W. 843 (certified copy not admissible to prove execution of chattel mortgage); 1898, Falls Land & C. Co. v. Chisholm, 71 id. 523, 527, 9 S. W. 479; 1890, Kimmarle v. R. Co., 76 id. 696, 693, 12 S. W. 698; 1895, Davidson v. Wallingford, 88 id. 619, 32 S. W. 1030; 1899, Heintz v. Thayer, 92 id. 656, 50 S. W. 929, 51 S. W. 640; in this State, as in Georgia, the filing of the statutory affidavit of denial under Stats. § 2312 prevents the use of the registry copy; 1878, Gainer v. Cotton, 49 Tex. 101, 116 (statute applied); in this State there is special learning about the authentication of government land-office documents; the statutes are given *ante*, § 1230, and the following decisions deal with the subject: 1848, Glasscock v. Com'r, 3 Tex. 51 (statutory certificate, by commissioners, of land-office certificates, etc.; mode of authentication determined); 1848, Bracken v. Wells, 1b. 88 (similar); 1851, Herndon v. Casiano, 7 id. 322, 333, 337 (Spanish deed-copy, not properly in the land-office; copy probably inadmissible); 1852, York v. Gregg, 9 id. 85

(county court clerk's copy of Spanish land-documents, excluded); 1853, Holmes v. Anderson, 59 id. 481, 482 (certified copy of land-certificates on file in land-office, admissible; Short v. Wade, 35 id. 510, being of no force since the statutory changes); 1853, Burkett v. Scarborough, 1b. 495, 498 (similar); 1853, Thomson v. Himes, 1b. 525 (similar); in this State, moreover, the proof of the early Spanish land-titles (*testamentos*, etc.) has peculiar rules, partly depending on Civ. Stats. § 2311, quoted *supra*; the following decisions, dealing with them, should be compared with those cited *ante*, § 1225: 1851, Paschal v. Perez, 7 Tex. 348 (leading case); 1851, Edwards v. James, 1b. 372; 1864, Lambert v. Weir, 27 id. 359, 364; 1867, Hatchett v. Connor, 30 id. 104, 110; 1875, Wood v. Welder, 42 id. 396, 408; 1877, State v. Cardinas, 47 id. 250, 287; 1878, Gainer v. Cotton, 49 id. 101, 114; 1882, Storey v. Flanagan, 57 id. 649, 655; *United States*: 1802, Edmondson v. Lovell, 1 Cr. C. C. 103; 1809, M'Keen v. Delancy, 5 Cr. 22; 1816, Sharpless v. Knowles, 2 Cr. C. C. 128; 1826, Peitz v. Clarke, 1b. 703; 1830, Beall v. Dick, 4 id. 18; 1830, Carver v. Jackson, 4 Pet. 1, 81 (for New York law); 1835, Winn v. Patterson, 9 id. 663, 677; 1850, New York Dry Dock v. Hicks, 8 McLean 111, 112; 1858, Thomas v. Lawson, 21 How. 331, 338 (for Arkansas); 1866, Sechrist v. Green, 3 Wall. 744 (for Illinois and New York); 1869, Carpenter v. Dexter, 8 id. 513, 530 (same); 1897, Union P. R. Co. v. Reed, 25 C. C. A. 389, 80 Fed. 234 (power of attorney to convey Nebraska land; record-copy does not dispense with other proof apart from statute; this seems to ignore the preceding rulings; see especially Winn v. Patterson); *Utah*: Rev. St. 1898, § 3388 (like Cal. C. C. P. § 1919); § 3409 (substantially like id. § 1951); § 3410, par. 4 (like id. § 1855); § 158 (recorder's certified copy of duly filed chattel mortgage, admissible "without further proof of the execution of the original"); *Vermont*: St. 1797, Stats. 1894, § 2216 (attested copy of a deed recorded with county clerk, receivable); § 2222 (certified copy of a recorded power of attorney for a deed, receivable); 1814, Pearl v. Howard, D. Chip. 173; 1827, Williams v. Wetherbee, 2 Aik. 329, 336; 1834, Hart v. Gage, 6 Vt. 170, 172 (copy by town-proprietors' clerk, excluded, in the absence of an authorizing statute); 1840, Bush v. Van Ness, 12 id. 83, 91 (certified copy of a power of attorney to convey, received, but not of a revocation not authorized to be recorded); 1842, Royaltan v. B. & W. T. Co., 14 id. 311, 324 (town-clerk's record of a town-contract, not receivable to authenticate it); 1850, Williams v. Bass, 22 id. 353, 356 (the record of a deed is evidence of due execution, but "by this is to be understood a perfect record"; here, the seal being missing, the record afforded no such proof; for this point, compare the citations *post*, § 2108); 1851, Brown v. Edson, 23 id. 435, 446, 448 (legality of record "will depend upon the inquiry whether at the date of the registry there was any law justifying such registry"; here also applied to exclude a copy of a deed registered in the wrong county); 1852, Preston

§ 1652. **Same: Registry out of the Jurisdiction.** That an official statement authorized to be made is the statement of a *foreign officer* does not make it any the less admissible (*ante*, § 1633, par. 2). The essential thing is the authority of the officer, and a foreign authority equally satisfies the principle. There is, in the United States, the additional consideration that under the Federal Constitution (Art. 4, § 1) and the Federal Revised Statutes (§ 906) the Courts of each State are required to give full faith and credit to the records of other States, and this may well be held to imply that recognition should be given (not merely as a matter of comity, but as a matter of legal right) to an official authority created by the laws of another State for its domestic recording officers.

It is generally conceded, then, that the registry of a deed in another State

v. Robinson, 24 id. 533, 539 (the clerk's duty as register is to certify a copy of the record, not of the original deed; but a "copy of the deed" will be intended to mean a copy of the recorded deed); 1854, 1859, *Townsend v. Downer*, 27 id. 119, 125, 32 id. 183, 193; 1856, *Colchester v. Culver*, 29 id. 111, 113 (*Williams v. Bass* approved; but here in a similar case the fact of a preceding contract to convey sufficed to admit, the deed being old); 1861, *Pratt v. Battle*, 34 id. 391, 397; *Virginia*: Code 1887, § 3376 (no certified copy of any deed, will, account, or other original paper required to be recorded in a court, is to be used as evidence in place of a destroyed original or record, until such copy has been admitted to record in substitution); § 3333 (copies of deeds imperfectly recorded under certain early statutes, receivable; these early statutes do not appear in the current revision); 1794, *Turner v. Strip*, 1 Wash. 319, 322, *semble*; 1796, *Lee v. Tapscott*, 2 id. 276 (attested copy of land patent recorded in the county court, admitted; here being old and accompanied by possession; *Lyons, J., diss.*); 1797, *Maxwell v. Light*, 1 Call 117, 121, *semble*; 1804, *Hord v. Dindman*, 5 id. 279, 284; 1815, *Rowlett v. Daniel*, 4 Munf. 478, 482 (certified copy of a recorded deed dated 1765, received; no reasons given); 1821, *Baker v. Preston*, *Gilmer* 235, 284 (registry copy admissible; definite decision after ample argument); 1824, *Hen v. Poete*, 2 Rand. 539, 543 (certified copies of recorded deeds are "every day admitted without other evidence"; even if deeds are not lawfully recorded, copies are admissible against the maker by virtue of his acknowledgment, or against those claiming under him subsequently to the acknowledgment); 1835, *Peternans v. Law*, 6 Leigh 527, 528 (certified copy of North Carolina deed, defectively authenticated as to seal, etc., admitted under statute); 1845, *Pollard v. Lively*, 2 Gratt. 216, 218, 4 id. 73, 80 (like *Baker v. Preston*); 1852, *Hassler v. King*, 9 id. 115, 124; 1855, *Fiott v. Com.*, 12 id. 564, 570, 577 (office copy of a deed not duly authenticated before record, admissible, where the inquisition under which both claimed referred to the deed as recorded); 1860, *Carter v. Robinett*, 31 id. 429, 433, 440 (power of attorney); 1867, *Barley*

v. Byrd, 95 Va. 316, 36 S. E. 329; *Washington*: Codes and Stats. 1897, § 6046 ("any deed, conveyance, bond, mortgage, or other writing, lawfully recorded or filed, is provable by copy duly certified by the official custodian under seal of office if any, and if none, then with his official certificate"); § 4532 (county auditor's certified copy of an instrument duly acknowledged abroad and recorded here, admissible "to the same extent and with like effect"); *West Virginia*: Code 1891, c. 73, §§ 7-11 a (certified copy of a duly recorded deed, admissible, to prove execution, etc., *semble*; but of a recorded deed not properly acknowledged or proved, admissible to prove contents only, in case of loss); c. 130, § 4 (certain recorded deeds of Virginia, provable by copy); 1884, *Peterson v. Ankrom*, 25 W. Va. 56, 60; 1896, *Clark v. Perdue*, 40 id. 300, 21 S. E. 735; *Wisconsin*: Stats. 1898, § 4154 ("every conveyance" executed and acknowledged or proved so as to be entitled to record, and every land-patent from the U. S. or this State, and the record of either in the registry of deeds, and every document "affecting land, or the title thereto," kept lawfully with a register of deeds, is admissible "without further proof thereof"; "whenever any presumptive effect as evidence is given by law to any such patent, conveyance, or instrument, such record, as well as duly certified copies thereof, shall have the like effect"); § 4173 a (certified copy of a conveyance, admissible to prove title in a criminal case); § 2318 (certified copy of a chattel mortgage, admissible only to prove its filing); 1850, *Davis v. Ruggles*, 2 Pinney 477; 1864, *Hincheliff v. Hinman*, 18 Wis. 130, 135; 1871, *Smith v. Garden*, 28 id. 685, 688; 1872, *Evans v. Sprague*, 30 id. 306, 305, *semble*; 1885, *Herrin v. Strong*, 62 id. 223, 227, 22 N. W. 408; *Wyoming*: Rev. St. 1887, § 20 (the record of any instrument concerning any interest in land in this Territory, duly acknowledged or proved, or the register's certified transcript, is admissible "with like effect as the original"); § 1348 ("copies of all papers filed" in the office of the register of deeds, and transcripts from his records, certified by him under seal of office, admissible).

is admissible to prove its execution.¹ But several different attitudes may be taken. (1) It may be held that the existence of a *registry-law* in the other State authorizing the record of deeds is sufficient, without more. That is, the Court merely transfers its point of view to the other forum and asks whether the law there has vested the registrar with powers of record, precisely as it would ask the same question for local registrars. This is the simple and orthodox view. (2) It may be maintained that the foreign law, additionally, must not merely authorize registration, but must *expressly declare* the registry *admissible* in its own courts. This additional requirement is perhaps plausible; but it is inconsistent with the orthodox principle already expounded (*ante*, § 1648), and long recognized in almost every jurisdiction; for it is immaterial whether the foreign statute expressly makes it there admissible, or whether it is there received by judicial ruling, or even whether the rules of evidence there receive it at all; the sufficient thing is that the officer there has an express authority which if created by the domestic law would have been sufficient. It follows, however, under either of these first two views, that the statutory authority given by the foreign law must be duly observed, and a registration not thus lawfully made will of course be rejected, under the general principle (*ante*, § 1649). (3) It may, again, be maintained (as a modification of both the preceding views) that if the foreign registration system, in a fundamental respect, *requires less than the domestic law*, the foreign register will not be recognized. For example, if under the foreign system no provision is made for informing the registrar, by acknowledgment or proof, as to the deed's execution, the willingness of the foreign State to accept such a register in evidence of execution should not be allowed to override a fundamental requirement of the domestic law in that respect. This limitation is one likely to find favor;² and yet it is difficult to reconcile it with the view that the recognition of foreign registers depends upon the Federal Constitution; for the constitutional command is absolute. (4) Finally, it may be also held (here as an enlargement of the first two rules above) that the foreign register is receivable if its formalities in the case in hand *satisfy the domestic law*, even though they do not satisfy the law of the place of registration.³ This is in practice not harmful, though it seems unsound on principle.

All these views are represented in the precedents, which are comparatively few;⁴ but in several jurisdictions the matter has been expressly dealt with

¹ The contrary has been held in Georgia: 1884, *Baskin v. Vernon*, 74 Ga. 371 (mortgage recorded in Alabama, without other evidence of execution, excluded); 1884, *Papet v. R. Co.*, ib. 296, 310 (same for deed).

² E. g. in *Saunders v. Harris*, Tenn., cited *ante*, § 1651.

³ 1857, *Clardy v. Richardson*, 24 Mo. 205, 207, *semble*.

⁴ Besides the foregoing and ensuing cases, compare also the cases cited for notaries' certificates (*post*, § 1676): 1853, *Palmer v. Stevens*, 11 Cush. 147, 151 (deed recorded in New York in

1802 before a mayor; a record copy allowed as proof of execution, though not shown to have been lawfully acknowledged and therefore lawfully recorded); 1848, *State v. Engle*, 21 N. J. L. 347, 364 (certified copy of power of attorney not duly recorded in New York, excluded); 1896, *Chase v. Caryl*, 57 Id. 545, 31 Atl. 1024 (exemplified copy of a mortgage duly recorded in New York under a statute making such copy admissible, held receivable in New Jersey under U. S. Rev. St. § 906, quoted *post*, § 1680, for giving faith to the records of other States; good opinion by Lippincott, J.); 1897, *Union P. R.*

by statute.² It should be added that the foreign statutory authority must of course be expressly evidenced, according to the various principles elsewhere discussed (*ante*, §§ 564, 690, 1271; *post*, § 1684).

§ 1653. *Same: Modes of Proof Available when Registration is Unauthorised.* Certain minor problems, depending upon the foregoing principles, have now to be considered.

(1) Suppose the statute authorizes the recording, but does not provide for probate of execution before the registrar, so that the register is inadmissible to prove execution (according to the principle of § 1648, *ante*); nevertheless, may not the register be used to show the contents of the deed, supposing that its execution is otherwise evidenced and that its non-production is accounted for? It would seem that it could; for the authority to record is an authority to make a copy in the register, and ought to suffice for that purpose at least. This seems to have been the result in England;¹ and it has also been reached in many rulings (and sometimes by express statute) for record copies of ancient documents whose execution was sufficiently evidenced by their antiquity.³

(2) Suppose that the statute authorizes the recording, but that owing to non-fulfilment of its requirements the register is not admissible to prove execution; nevertheless, may the register not be received to evidence the contents of the deed, assuming that its execution can be otherwise proved and its non-production accounted for? This inquiry differs slightly from the preceding one; because in that case there was a clear authority to record a copy of the contents, while here the doubt may be raised whether the authority to record a copy is separable from the authority to record as to execution; i. e. does not the whole authority fall to the ground if the requirements as to execution are not complied with? It is an arguable question, and in the realm of the substantive law has been the subject of much difference of judicial opinion in its bearing on the problem whether an improper record of a deed will serve as sufficient legal notice to subsequent purchasers. The more practical view seems to be that the authority to record a copy is separable, and that the record is therefore receivable at least to prove contents.⁴ By judicial ruling and express statute this result has been reached for record copies of ancient deeds;⁵ but it is not likely to be accepted for ordinary deeds.⁶

(3) Suppose that the offeror of a duly recorded deed produces the original,

Co. v. Reed, 25 C. C. A. 389, 80 Fed. 234 (power of attorney purporting to be acknowledged before a Missouri mayor, and recorded in Nebraska, but lacking a clerk's certificate, excluded). See additionally the following cases cited under § 1651, *ante*: Alabama: *Mitchell v. Mitchell*, *Tatum v. Young*, *Swift v. Fitzhugh*, *Smoot v. Fitzhugh*, *Keller v. Moore*; Minnesota: *Lund v. Rice*; Pennsylvania: *Hyam v. Edwards*.
² In Kentucky, Maryland, Mississippi, New Jersey, New York, North Carolina, Pennsylvania, South Carolina; see these statutes cited *ante*, § 1651.

¹ See the citations in § 1650, *ante*, and also some of the American cases cited in § 1651, *c. g.* *Powell v. Hendricks*, Cal'.

³ The subject is treated under that head, *post*, § 2143.

⁴ See *Fiott v. Com.*, Va., cited *ante*, § 1651.

⁵ The cases are collected under that head, *post*, § 2143.

⁶ The cases are collected *ante*, §§ 1225, 1226, where they are equally involved under that principle.

as required by the general rule (*ante*, § 1178); may he not then use the register (or, what is the same thing, the registrar's certificate on the deed) as evidence of the deed's execution? If he could not, the law would place him in the absurd position of being required to bring witnesses for a deed in court but not to bring them for a deed not in court. If the registrar's official statement suffices in the one instance, it ought equally to suffice in the other. The argument to the contrary has proceeded mainly upon the faulty wording of the earlier group of statutes, which usually declared merely that the record (or a certified copy) could be used when the original deed was shown to be lost or otherwise unavailable, and the suggestion was that this statutory authority was confined to the specified case of a deed lost or the like. But the statutory proviso was in reality intended to sanction the rule requiring production of the original, and had no other limitations in view; so that, when that rule was satisfied, and the execution remained to be proved, the registrar's statutory authority to take probate of execution was still in full effect and could be availed of for that purpose, even though it was not needed for proving the deed's contents. This result was generally reached by judicial construction, and the modern statutes have often taken care to make express provision for it.⁶

(4) Suppose the register not admissible because of requirements not fulfilled; nevertheless, proof of execution may be made in the ordinary way, — by calling the attesting witness, if that is the law under another rule (*ante*, § 1287), or by evidencing the genuineness of the signature, or by showing the document an ancient one, under another rule (*post*, § 2137), or by any other appropriate mode (as enumerated *post*, § 2131). The imperfection of the record may under the substantive law affect its validity, and may thus render it immaterial in the case and therefore forbid its proof by any mode; but this is the result of the substantive law. No rule of evidence forbids the offeror to fall back upon other sources of evidence simply because he is unable to avail himself of the mode additionally provided by the registration statutes.⁷

(5) Where the register thus fails to assist because not made according to statutory requirements, and the offeror must fall back on other evidence, may not the official certificate of acknowledgment, by a notary or magistrate, be treated as an attestation, so that, upon calling the officer as attesting witness or proving his signature if he is deceased or out of the jurisdiction, the execution is sufficiently evidenced, upon another principle (*ante*, §§ 1292, 1505, 1508)? That this mode can be used seems clear.⁸ That any doubt was ever

⁶ The authorities are collected *post*, § 1676, because it is on principle a question of the use of Certificates (on the deed) and not of Registers. The use of certificates of notaries, etc., to prove an unrecorded deed is treated *post*, § 1675.

⁷ 1849, *Hutchinson v. Kelly*, 10 Ark. 178, 181; see also the cases cited under § 1236, *ante*, where a similar question is involved.

⁸ 1878, *Sharpe v. Orme*, 61 Ala. 263, 268 (Brickell, C. J.: "The acknowledgment and

certificate in this case is merely a substitute for an attestation by a witness, the parties to the deed being able to write and having signed it. . . . The certificate of acknowledgment, operating as a substitute for the attestation of a witness, when it is shown that it is legally impossible for the party proposing to introduce the conveyance in evidence to produce the officer making it, by reason of his residence without the jurisdiction of the Court, may be proved by

raised was probably due only to the failure to perceive that the imperfection of an acknowledgment with reference to the substantive law of registration has nothing to do with its sufficiency as an attestation under the rules of evidence.

(6) It was conceded in England that, even though the register was in general inadmissible to prove execution, nevertheless a registration based upon an *acknowledgment* made by the very opponent in the case would be receivable as embodying his admission of the execution.⁹ This concession no longer has any practical bearing for the law in the United States, since the register is now everywhere admissible; except that a mode is thus suggested by which a deed may be proved when the registration was not made according to the statutory rules. If the register contains an entry of acknowledgment made, and (probably) if some further evidence of identity is offered (*post*, § 2529), then it would seem that the register-entry could be used as embodying an admission by the party-opponent making the acknowledgment.¹⁰ Furthermore, whenever by any other rules of evidence (*ante*, §§ 1294-1298, *post*, § 2132) the opponent's admission suffices to evidence execution, then the irregularity of the registration is of course immaterial (for the reasons just suggested in par. 4). Finally, such an admission, when made expressly with reference to the registry-entry in question, will suffice to admit it without regard to the irregularity of the record and without other evidence of execution.¹¹

(7) In a few other ways, the register of a deed not placed there according to law could be availed of for other purposes than to evidence execution. For example, the notorious presence on the record, or the manual possession of a certified copy, of a document purporting to vest a certain person with title may amount in effect, under another principle (*post*, § 1777), to a "verbal act," constituting a *claim of title* or color of title.¹² Again, where certain consequences in substantive law ensue from the failure to have a deed recorded, the condition of the register will be in issue for this purpose.¹³ Such uses of the register have no bearing on its admissibility under the present Exception.

§ 1654. *Same: Register as Evidence of Other Matters Recorded.* The statutes authorizing registration give expressly to the registrar the authority to make the entry in certain terms. This entry is therefore (on the general

evidence of his handwriting, and when the evidence is given the conveyance may be read"); 1851, *Borst v. Empey*, 5 N. Y. 33, 37 (acknowledgment is not essential, except for purposes of record, etc.; and a deed imperfectly acknowledged may be proved in the common-law mode; here by treating the notarial officer as a subscribing witness).

⁹ *Ante*, § 1650.

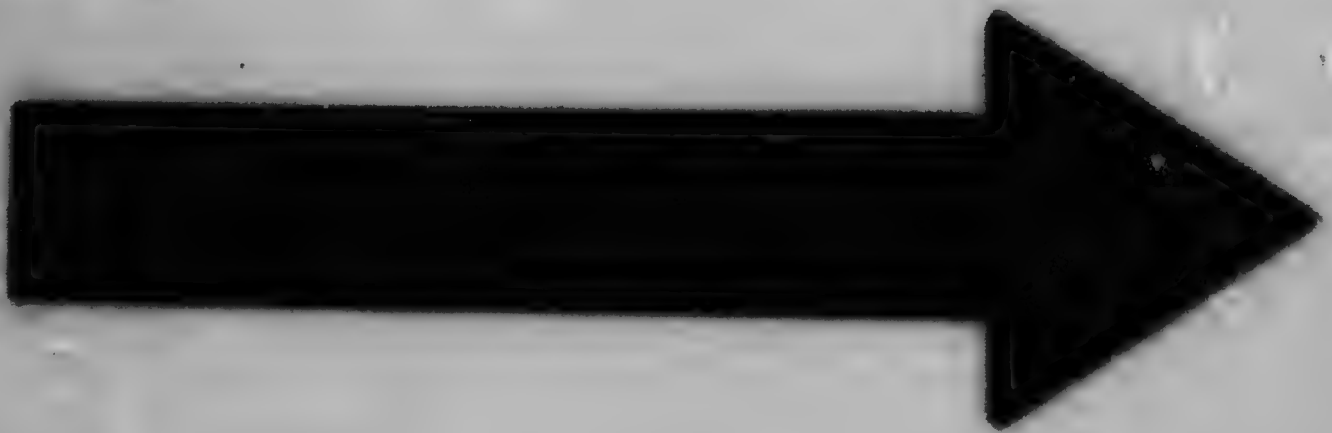
¹⁰ It might perhaps be objected that the registrar has no authority to make hearsay statements as to acknowledgments, except for the purpose provided in the statute; but this objection seems fatal.

¹¹ *Flett v. Com., Va.*, cited *ante*, § 1651;

1892, *Chicago M. & S. P. R. Co. v. McArthur*, 10 U. S. App. 546, 569, 3 C. C. A. 594, 53 Fed. 464 (defectively recorded plat, used as having been recognized in defendant's dealings as correct).

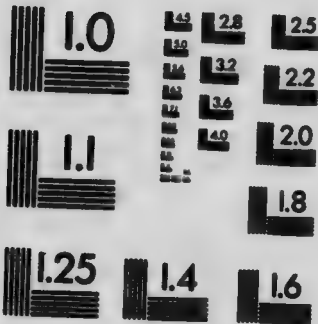
¹² 1823, *Doe v. Roberts*, 13 M. & W. 520, 531 (irregularly enrolled lease; examined copy of enrolment admissible to show an "act of ownership"); 1894, *Knight v. Lawrence*, 19 Colo. 425, 38 Pac. 242; see analogous instances *post*, §§ 1777, 2132.

¹³ 1885, *Steiner v. Snow*, 80 Ala. 45 (penalty for not recording satisfaction of mortgage; record produced).



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principle of § 1639) admissible to prove whatever facts are thus authorized to be entered,—that is, usually, the *time*¹ and the *fact*² of record; on these points the statute commonly makes the entry expressly admissible. The entry, conversely, is not admissible to prove facts which the registrar is not authorized to record or to ascertain.³ In practice, the only controversy that has here arisen is as to the *conclusiveness* of the record,—a different principle (*ante*, §§ 1346, 1352). Whether the record is evidence of the deed's *delivery* is chiefly a question of the presumption as to delivery (*post*, § 2550).

§ 1655. *Same: Sundry Questions Involving Certified Copies and Sworn Copies of the Register.* In the foregoing inquiries, it has been assumed that the *register itself* is offered in evidence, and not (as is usual) a copy of the register. Does this assumption affect the correctness of the results reached under the foregoing principles? By no means. If the register is not produced, as of course ordinarily it cannot be, this inability to produce it serves as an excuse, under another rule (*ante*, § 1218), for using a copy of it (sworn or certified) to prove its contents. But this use of a copy of the register only removes by one stage the general inquiry as to the admissibility of the register. The copy is of itself of no efficacy except to prove the contents of the register; and, having thus proved its contents, the party is merely in the same position (*ante*, § 1226) as if he were offering the register itself in court; and thus he must after all face the main question, whether the register itself is admissible for any purpose,—the question dealt with in the seven preceding sections. The fundamental inquiry, then, so far as concerns the evidence of execution and contents of the recorded deed, involves the admissibility of the register itself; and this must be first determined upon the principles just examined, before any other question as to the use of copies of the register can be of any consequence.

But suppose that the admissibility of the register has been settled in the affirmative, and that none of the problems discussed in the foregoing sections are concerned, and suppose that a copy of the record is desired to be used, then certain other questions arise. It may be premised that, in the traditional usage of the profession, a "certified" or an "office" or an "attested" copy (being one and the same thing) is a copy given out by the official custodian of the record and certified or attested by him as correct; while an "examined" or a "sworn" copy is a copy made by some other person and sworn to by him testifying on the stand.¹

(1) May a *certified copy by the registrar* be used? This is a question

¹ It is also evidence of the time of the deed's receipt for registration: 1822, *Sherman v. Goble*, 4 Conn. 247, 256. Compare the cases as to *certificates of record*, *post*, § 1676.

² 1895, *Thompson v. Anderson*, 94 Ia. 554, 63 N. W. 385 (certificate of a recorder, indorsed on a mortgage, admissible if the law requires or authorizes the certificate to be made); 1831, *Jakway v. Jenison*, 46 Mich. 521, 522,

9 N. W. 836; 1894, *Garneau v. Mill Co.*, 8 Wash. 467, 473, 36 Pac. 463 (lien-notice; the original, bearing a certificate, received).

³ 1855, *Charlotte v. Chouteau*, 21 Mo. 590, 597 (a conveyance of a slave, authenticated by a Spanish official, in a region where slavery was lawful, is no determination of the transferred person's slavery).

⁴ See a further explanation *ante*, § 1264.

whether the registrar's hearsay official statement as to the contents of the record is receivable under the present Exception. A certified copy, however, of any document, is of the nature of a Certificate, not a Register (*ante*, § 1637), and this inquiry properly concerns the admissibility of certified copies in general (*post*, § 1677). It is enough here to note that, at common law in this country, the principle was recognized that every custodian of records had an implied authority to certify copies of them, and in particular, as to registrars of deeds, that by statute almost everywhere the registrar's certified copies are expressly made admissible and the mode of authentication prescribed.²

(2) A few of these statutes that expressly make certified copies of the register admissible *fail* expressly to make *the register itself admissible*. It is obvious, however, that this omission should not render the register inadmissible, supposing it can be produced. The certified copy merely proves the register's contents; and it would be absurd that a document which merely evidences the register should be admissible to prove the deed (from which it is twice removed), and yet the register itself should be for the same purpose inadmissible. The whole virtue of the certified copy, for proving the deed, comes from the register; and, if the register were inadmissible, the singular trick would be performed of making an inadmissible thing admissible by merely copying it. The clear implication of such statutes is that the register also should be admissible, provided it is in court; and this is the usual judicial construction.³ It should be noted, however, that we are here dealing merely with the admissibility of the register so far as the Hearsay rule and the present Exception are concerned. There may be other reasons why the register itself should not be admitted,—the reason, for example, that the law has forbidden its removal and that its production is therefore a violation of the law; or the reason that a due regard for its safety and for public convenience requires its continuous preservation in the registrar's office; these reasons have sometimes availed with Courts (*post*, §§ 2182, 2183, 2373).

(3) Suppose the statute to make the register, or a certified copy of the register, admissible; will not a *sworn copy of the register* be equally admissible? On principle, there is no doubt that it would be. The reason appears in what has already been said. The register is the fundamental document; the registrar's entry, based on the probate made to him, is the official statement to which faith is given; and the primary object is to offer that statement in court. The register itself cannot be removed; so that its contents must be proved by copy. A sworn or examined copy is the most straightforward and unquestionable mode of doing this; but the statute has also expressly authorized, by way of exception to the Hearsay rule, the use of a certified copy. This, however, is merely an additional means provided; there is no reason why it should displace the other preëxisting legitimate

² *Post*, §§ 1677, 1682, where the authorities are examined.

³ The cases are collected *ante*, § 1136.

means. The circumstance that the statute expressly mentions a certified copy only is no reason for excluding the other sort; for that mention was intended only to remove the doubt which otherwise might have been raised (*post*, § 1677) whether the certified copy could be used at all. A sworn or examined copy is therefore equally admissible, as it would be for any other public record.⁴

(4) A superficially related, but entirely distinct question, is whether a certified copy is preferred to a sworn one; i. e. whether the former kind must be shown unattainable before the latter can be used. The orthodox and sound opinion is that no such rule of preference obtains; the principle has already been discussed (*ante*, § 1273).

(5) Since the register is the fundamental document whose entries evidence execution, it is to the register alone that the certified copies must relate; a *certified copy of the deed itself* is unauthorized, and can evidence nothing. In form, then, the certified copy must be of the register, not of the deed; although a certificate in the latter form could hardly be made except by inadvertence, and would therefore be liberally construed by the Courts.⁵ But a *certificate of execution* appended to the deed may be admissible (*post*, § 1676).

§ 1656. **Same: Other Principles of Evidence Discriminated.** We are concerned here only with the use of the register under an Exception to the Hearsay rule; and the following discriminations are worth noting. (1) There is in practice always to be considered at the same time the rule requiring the *production of the original* of a document, with its exception for recorded deeds (*ante*, §§ 1224-1227). (2) There is also to be considered the principle as to a preference between various modes of evidencing the contents of documents not produced, — that is, as between copy and recollection or as between *different kinds of copies* (*ante*, §§ 1265-1275). (3) Again, there are principles determining the qualifications of a *witness to a copy* (*ante*, §§ 1277-1280). (4) There are also rules about proving the *whole*, and not merely a part, of a document (*post*, § 2107). (5) Finally, there are rules as to the *authentication* (or proof of genuineness) of a document produced (*post*, § 2129).

§ 1657. **Record of Assignment of Patent (of Invention).** It seems for a long time to have been the understanding of the profession that the Federal record of assignment of a patent (of invention) was admissible to prove its execution. That this opinion was unsound seems clear, in the light of the foregoing principle (*ante*, § 1648), so firmly enforced by the Courts of the various jurisdictions; for the Federal law regulating the record of such assignments provides for the registrar no means of informing himself as to the genuineness of the document. Nevertheless, the Federal judiciary for many

⁴ 1859, *Farrar v. Fessenden*, 39 N. H. 268, 276 ("an examined copy of any instrument thus recorded" is admissible "without proof of the original"); and cases cited *ante*, §§ 1225-1227.

⁵ 1858, *Vickery v. Benson*, 26 Ga. 582, 588; 1882, *Preston v. Robinson*, Vt., cited *ante*, § 1651.

years recognized the register (or a certified copy) as admissible to prove the assignment's execution and contents.¹ In more recent times, however, the propriety of this view has been generally questioned, on the grounds noted (*ante*, § 1648). Discordant rulings have been made in the different circuits;² and it is desirable that the register's inadmissibility under the present system be finally determined.

§ 1658. *Record of Wills.* Upon the principle already examined (*ante*, § 1648), the record of a will cannot be received as evidence of its execution and contents, unless the recording officer has authority to record such documents, and, in particular, has authority to inform himself as to the will's execution. Such was in fact the recognized rule of the common law. Until the middle of the 1800s, the jurisdiction in England over matters matrimonial and testamentary was in the ecclesiastical Courts, and had been for many centuries. But this jurisdiction over wills was understood not to concede to those Courts any jurisdiction to determine the title to lands; their jurisdiction was confined to wills of personalty. Their records, therefore, finding the due execution of a will, were not receivable to evidence its execution so far as it disposed of lands, because the ecclesiastical officers had no authority to deal with wills in that respect:

1726, Chief Baron *Gilbert*, Evidence, 71: "If a man devise lands by force of the statute of wills or by custom, the probate of the Spiritual Court cannot be given in evidence; for all their proceedings, so far as they relate to lands, are plainly *coram non judice*, for they have no power to authenticate any such devise. . . . [But] in a suit relating to a personal estate, the probate of the will under the seal of Court, is sufficient evidence, and no evidence contrary to it can be given that such will was not the last will and testament of the party deceased; for the Spiritual Court are the proper judges of what is and what is not the will of the testator, and since the authority of judging is committed to them, the Temporal Courts are bound by their judgments."

This had been apparently an arguable question in the preceding century;¹

¹ 1860, *Lee v. Blandy*, 1 Bond 361, 363; 1886, *Derrick v. Whitman A. Co.*, 26 Fed. 763. Other cases, sometimes cited for this point, seem to deal only with the rule as to production of the original; they are given *ante*, § 1225.

² 1893, *Paine v. Trask*, 5 U. S. App. 283, 286, 5 C. C. A. 497, 56 Fed. 233 (admissibility doubted; partly because "no provision is made for authentication of the genuineness of the instrument to be recorded, as frequent in laws providing for registry, but a forged assignment may be recorded equally with a genuine one"); 1894, *Mayor of New York v. American Cable R. Co.*, 26 U. S. App. 7, 9 C. C. A. 336, 60 Fed. 1016 (certified copy excluded; in part because "any stranger can put an assignment upon record"); 1896, *Standard Elevator Co. v. Crane El. Co.*, 46 U. S. App. 411, 22 C. C. A. 540, 76 Fed. 767, 789 (certified copy admitted; the above arguments answered by the suggestion that the commissioner's record "is in law tantamount to a finding by the certificate that the original is genuine"; the opinion does not seem to apprehend correctly the principle of admis-

sibility of deed-records); St. 1897, c. 391, § 5, Mar. 3, 29 Stat. L. 692 (Rev. St. 1878, § 4898, which declared an assignment of patent void against a purchaser for value without notice, unless recorded in the Patent Office within three months, is amended by adding that if such assignment is acknowledged before a notary or U. S. commissioner, or a secretary of legation or consular officer duly authorized, "the certificate of such acknowledgment under the hand and seal of such notary or other officer shall be *prima facie* evidence of the execution of such assignment, grant, or conveyance"); 1900, *National Cash-Reg. Co. v. Navy C. R. Co.*, 99 Fed. 89 (the original's execution and loss must be shown).

³ 1635, *Netter v. Brett*, Cro. Car. 326 (will of land; excluded); 1688, *Anon.*, Comb. 46 (same); 1696, *Puleston v. Warburton*, ib. 394 (same); 1697, *King v. Raines*, 12 Mod. 136 (admitting the probate of a will of personalty in the Ecclesiastical Court; "because they having jurisdiction of the cause, it was an undeniable evidence, which should conclude all others from

but by the time of Chief Baron Gilbert the principle was fully settled. It will be noticed that, where the ecclesiastical Court had jurisdiction, its record of probate was not only admissible, but conclusive; because it was not merely an official register, but a judicial determination.

In the United States the same principle was accepted. But at an early date the unendurable division of judicial functions in testamentary matters was almost everywhere ended by statute, and the jurisdiction over wills of both kinds was placed in a single Court; so that the determination of that Court was admissible for all wills, and where it was not conclusive, it was no more so for one kind of will than for another:

1858, *Lumpkin, J.*, in *Churchill v. Corker*, 25 Ga. 479, 490: "We maintain broadly that it is not necessary in this State that any will, whether of realty or personalty, should be proven when offered in evidence as a muniment of title; but that a certified copy, from the Ordinary, under the seal of that Court makes it evidence. This results necessarily from the fact that by law Courts of Ordinary in Georgia are clothed with original, general, and exclusive jurisdiction, except by appeal, over testate and intestate's estates, and are also courts of record. It is here that the validity of the will must be tried and established."

Thus the statutory reform granted a uniform authority, and the older distinction ceased to be of practical consequence.² The record of a probate of a will, when offered in evidence, is of course still receivable only where the Court granting probate had authority to do so; but this now depends entirely on the terms of the statute. These statutes are without the present purview, because they concern primarily the subject of jurisdiction of courts.

Certain other principles affect the use of will-records. (1) Supposing the

saying the contrary"); 1699, *St. Legar v. Adams*, 1 Ld. Raym. 731 (register of the Spiritual Court, to prove the contents of a lost will, admitted; but in *Anon.*, ib. 732, *semble, contra*); 1701, *Dike v. Polhill*, ib. 744 (register of the Spiritual Court, not admissible to authenticate a will of land; *Tracy, B.*, *contra*, where the purpose is not to establish title through the will).

² The following cases illustrate the early American common-law doctrine; some of them are rendered under the statutes above-mentioned, but will serve to show the distinction: *Ga.*: 1858, *Churchill v. Corker*, 25 Ga. 479, 490 (certified copy of a probated will under Court seal, admissible); 1876, *Thunby v. Myers*, 57 id. 155, 157 (copy of record of will from ordinary's office, admitted); *Ill.*: 1868, *Gardner v. Ladue*, 47 Ill. 211 (certified copy of a foreign will probated, admitted); *Minn.*: 1873, *First National Bank v. Kidd*, 20 Minn. 234, 238 (certified copy of a probated will, admitted); *Mo.*: 1838, *Haile v. Palmer*, 5 Mo. 403, 417 (sworn copy of a will registered in Louisiana, excluded because it was not shown how the law of Louisiana required wills to be executed and proved); *N. J.*: 1898, *Nelson v. Potter*, 50 N. J. L. 325, 15 Atl. 375 (statute as to proof of wills construed); *Pa.*:

1759, *Lewis v. Stammern*, 1 DaF. 2 (exemplification of a will probated in England, admitted, under St. 1705); 1782, *Morris v. Vandern*, 1 Dall. 64, 66 (same); 1791, *Walmsley v. Read*, 1 Yeates 87, 89; 1807, *Sharr v. Pettit*, 4 id. 413; 1819, *Logan v. Watt*, 5 S. & R. 212 (probated will of lands, received); 1835, *Smith v. Bonnell*, 5 Rawle 80, 83, 86; 1848, *Thompson v. Thompson*, 9 Pa. St. 234 (probated will provable by certified copy); *S. C.*: 1824, *Franklin v. Crevon*, Harp. Eq. 243, 249; *Tenn.*: 1848, *Weatherhead v. Sewell*, 9 Humph. 272, 282 (the production of an attested copy of a probated will of realty, under St. 1784, c. 10, § 6, is *prima facie* evidence of execution, and throws on the contestant the burden of going forward); *Va.*: 1831, *Ex parte Povall*, 2 Leigh 316, 318 (duly authenticated copy of a foreign probated will, sufficient, without re-proving it by witnesses); *Ex parte Todd*, ib. 319 (same); 1844, *Taylor v. Burnside*, 1 Gratt. 165, 168, 210 (office copy of probated will and proceedings, received).

If the record was not admissible, the will's execution might of course be evidenced in the ordinary way: 1820, *Hood v. Mathers*, 2 A. K. Marsh. 553, 555; 1823, *Elmendorff v. Carmichael*, 3 Litt. 437, 479.

record itself to be admissible, under the above principle, to prove the will's execution, it still remains to prove the contents of the record, the production of the record itself being unnecessary, under another rule (*ante*, § 1215). For this purpose, a *certified copy* is desirable; here, however, is involved the general principle concerning the proof of *judicial records* by certified copy (since a probated will becomes a part of the court-records); the statutes affecting the use of certified copies of probated wills are therefore examined under that head (*post*, § 1681).

(2) A question may arise, under the doctrine of Completeness (*post*, § 2094), as to the *sufficiency of the contents of the record* as evidenced by the certified copy; how far, for example, the copy or the record must set out the kind or the tenor of the testimony upon which the probate was granted, has been a matter of some controversy. This, however, besides being largely regulated by statute, is in substance a question of what constitutes a proper record and of the presumption of the regularity of judicial proceedings,—matters beyond the present purview.²

(3) The recorded copy of an *ancient will* may sometimes be admitted without other evidence of execution, on the principle of Authentication (*post*, § 2143).

(4) The application of the rule requiring *production of the original*, especially as affecting *letters of administration*, has already been considered (*ante*, § 1238).

§ 1659. **Records of Government Land-Office.** The records of a government land-office, dealing with grants, patents, warrants, certificates, scrip, and the other variously named indicia of title, are available in evidence on principles no different from those applicable to other official deed-registers and public documents. The peculiarities, however, that are to be found in the mode of proving them are due, not to the rules of evidence, but to the principles of substantive law. The chief question having practical effects upon the mode of proof is as to the nature of the title-document,—known variously as patent, certificate, or grant. If this document is of the nature of an ordinary deed of grant, then the record remaining in the government office is a mere register or copy of the substantive title-deed delivered into the grantee's hands, and consequently it must be accounted for (under the principle of § 1179, *ante*) before the register (or a certified copy of it) may be used. But if the constitutive document of title is the entry in the official record, then the document given to the purchaser is a mere copy of this, and therefore since the original is in official custody, a copy of the official original may be used without accounting for the copy given to the grantee (under the principle of § 1218, *ante*). Thus the question depends in truth upon the theory of the substantive law as to the nature of the title-document. Moreover the matter is in most jurisdictions affected by express statutory provisions. On account of this complicating element of substantive law, and the frequent difficulty of determining the precise principle involved in a decision, the statutes and

² The subject is further noticed *post*, § 2110.

decisions can best be considered under one head, in dealing with the rule for production of the original (*ante*, § 1239).

In addition to this general question, however, decisions and statutes upon a few other special rules concerning land-office documents are elsewhere to be considered; these concern (1) the *register* (or a copy) as evidence of the execution of a grant (*ante*, § 1651); (2) land-office *certificates* (*post*, § 1674); (3) certificates *summarizing the entries* of a register, instead of copying them in full (*post*, § 1678); (4) land-office *reports* as evidence of title (*post*, § 1672); and (5) returns of government *surveys* (*post*, § 1665).

§ 1660. **Judicial Records** (including **Judicial Establishment of Lost Documents**). (1) A judicial record is not evidence of something else; it is a constitutive act. It is the judgment itself, not evidence of the judgment. Whether the record of another court shall be considered when offered is not a question whether something is admissible in evidence, but whether the Court of the forum is willing or is obliged to lend its assistance to enforce the judgment of the other Court. This principle is considered elsewhere (*ante*, § 1347, *post*, § 2450), and need not be further noticed; for no question of an exception to the Hearsay rule is involved. But the admissibility of *certified copies*, as evidence of the contents of a judicial record, is genuinely a question of evidence, and involves the general principle of certified copies in a particular application (*post*, § 1681).

(2) Statute has in many jurisdictions provided a proceeding for *judicially reestablishing the contents of documents lost or destroyed*, — deeds, wills, official registers, and many other specific classes of documents. The documents thus reestablished are usually under the statute preserved as official records; so that such a repository of private documents becomes a record or register of a peculiar sort, by which the documents can be proved in a manner analogous to the use of deed-registers. Nevertheless, these records are after all not ordinary official registers, given in evidence by way of exception to the Hearsay rule, but are in the nature of judgments; for the statutory proceeding is almost everywhere a judicial one; and the typical question arising in their use is whether the record is to be taken as a judgment *in rem*, binding on all the world, or as a judgment affecting only the parties to the proceeding. The conditions of their use involve the principles concerning the effect of judgments, and are thus without the present purview.¹ The use of re-

¹ Besides the following statutes, compare the rulings cited *ante*, § 1215 (whether the loss of the original must be expressly proved), *ante*, § 1347 (whether the record reestablishing the document is *conclusive*), and *ante*, § 1275 (whether the prohibition of a copy of a copy applies to such copies); the following list of statutes is probably not complete: Ala. Code, 1897, §§ 2647 ff.; Ariz. Rev. St. 1887, §§ 931, 2561; Colo. Annot. Stats. 1891, § 3753; D. C. Comp. St. 1894, c. 20, §§ 23, 24; 1903, *Hoodless v. Jernigan*, — Fla. —, 35 So. 666 (certified copy of a clerk's minute-book in which a reestablished lost judgment and execution

were entered, held admissible); Ga. Code 1895, §§ 3611, 5223; 1902, *Leggett v. Patterson*, 114 Ga. 714, 40 S. E. 736 (judicially established copy suffices to prove execution); 1903, *M. v. Lanahan v. Blackwell*, — id. —, 45 S. E. 785 (certified copy of a judicially established copy of a lost document, admitted); Ill. Rev. St. 1874, c. 116, §§ 1-5 (judicial records); § 9 (plat or map); § 13 (deeds, etc.); Miss. Annot. Code 1892, §§ 2793-2804; Mo. Rev. St. 1899, §§ 4560-4565; N. C. Code 1883, §§ 55-71; Oh. Rev. St. 1898, §§ 528 a, 907 c, 2621, 5339 a-5339 c; Okl. St. 1895, c. 42; Pa. St. 1796, 1793, 1866, P. & L. Dig. Deeds, 106, 110, 112; S. D. Stats. 1899,

corded abstracts of title to prove lost or destroyed deed-records is elsewhere considered (*post*, § 1705).

§ 1661. *Records of Corporations.* (1) The records of the proceedings and acts of an ordinary private corporation are, according to one theory, the constitutive acts of the corporation; they are not evidence of what is done, but they are what is done; since the proceedings must be in writing. According to the other theory, they are merely entries of the oral doings, and are thus analogous to any ordinary person's contemporary entries of his doings. The chief practical difference between the two theories is as to their effect on the conclusiveness of the entries; and in this aspect the subject is considered under the Parol Evidence rule (*post*, § 2451).

But the books of account, the stock-books, and other books recording the acts of the officers and employees of the corporation stand on a different footing; they are merely some person's assertion; and, so far as they are admissible, they naturally come in under the Exception for Regular Entries (*ante*, §§ 1523, 1547), if the maker is accounted for as unavailable, or as Memoranda to aid Recollection (*ante*, § 735). Here, however, statutes have in some jurisdictions intervened to modify the Exception's ordinary rules and to admit the books without producing the maker of the entries. Furthermore, against persons having knowledge of their contents, the corporation records may be received as embodying an admission, *i. e.* by a presumed assent to the known statements. In these aspects they have already been elsewhere dealt with (*ante*, § 1074).

(2) There is, apparently, no sound reason for regarding the records of a public corporation as governed, for the purposes of evidence, by principles any different from those just enumerated. Nevertheless, a loose and intangible doctrine has received some currency, by which the books of a public corporation are said to be admissible to prove the facts entered,¹ — apparently with some suggestion that, as official books, they have a force under the present Exception which is denied to other corporate records. The authority on the subject is scanty; but that this doctrine, in its application to the present Exception, has probably misunderstood and exaggerated the significance of the precedents. The true extent of the doctrine is a narrow one, and seems to be as follows:

(a) Books of entries of corporate proceedings are (as above noted) ordinarily not receivable under the Regular Entries Exception without calling the clerk or other entrant. But the records of a public officer are admissible under the present Exception without calling the entrant, because he is a public officer; and therefore the books of a public corporation (that is, with us, usually a municipal governing body) are receivable *without calling the official entrant*; their contents, as irremovable from official custody (*ante*, § 1218),

§ 6570 *n*; Tex. Rev. Civ. Stats. 1895, §§ 4594-4601; U. S. Rev. St. 1878, §§ 899-904; Wash. C. & Stats. 1897, §§ 6063-6070; Wis. Stats. 1898, §§ 661 *d*-661 *e*.

¹ 1801, Peake, Evidence, 64 ("Corporation

books, concerning the public government of a city or town, when publicly kept, and the entries made by a proper officer, are received as evidence of the facts contained in them").

being provable by certified copy (*post*, § 1680); the original may require to be authenticated (*post*, §§ 2159, 2169).

(b) The fact which such entries are admissible to prove are merely those which may be conceived as contained in the entries themselves, namely, the *doings of the corporation*. This is their sole scope as testimony; the officers are authorized to record the corporate acts or proceedings; their authority to record extends no further, and their record is therefore (*ante*, § 1639) no further admissible. So far, then, as the entries record (for example) the corporation's vote to lay out a street through certain property or the corporation's appointment of a wharf toll-master or the corporation's act of receiving a deed of land, they are admissible. But so far as they record the fact that Doe lived in a house on the street, or that the river-bank was public property, or that Roe had title to the land deeded, they are not admissible, because these entries record, not the corporate acts, but extrinsic facts. It is true that a statute may expressly authorize the corporation to ascertain and record such extrinsic facts, and then the record would presumably be admissible (*ante*, § 1639). But, apart from express authority, the books are receivable only to prove corporate acts. This, it will be seen, is in fact the narrow scope of their use, so far as the precedents carry it; the entries of customary rights, admitted in the older cases,² being in fact merely entries of corporate acts which served to found a prescriptive exercise of the right. The important thing is, then, that the ordinary phrase about using corporate books to prove "public but not private facts"³ is misleading, so far as it suggests that the entries can be used to prove matters other than mere corporate acts; for, whether the matter is "public" or not, the entries are not receivable to prove it if it is not a corporate act.

(c) Supposing the entries to be offered to prove merely some corporate act, nevertheless the doctrine of the disqualification of parties as witnesses (which prevailed down to the middle of the 1800s), would prevent the corporation from using its books *on its own behalf*; and it was apparently upon this principle that the adverse rulings were based. The Exception for Parties' Books was not recognized in England after the end of the 1600s (*ante*, § 1518).

(d) But since, under the English borough and parish system, the inhabitants were members of the corporation (so clearly that it was long maintained that an inhabitant in a suit by or against the corporation was disqualified by interest), and since as a member he had the right of access to the corporate books,⁴ it would follow, on the principle of Admissions (*ante*, § 1074), that this constructive knowledge of the contents of the entries made them receivable *against members as admissions*, i. e. on the ordinary principle upon which corporate books are admitted as against stockholders (*ante*, § 1074). Thus, the entries must be of genuinely public matters, i. e. matters in which the inhabitants at large had an interest, and for which alone they

² See the cases collected in note 5, *infra*.

³ E. g. in *Marriage v. Lawrence*, *infra*, often cited.

⁴ 1708, *Love v. Bentley*, 11 Mod. 134 ("Every parishioner has a right to the parish books").

could in theory be expected to consult the book. For such entries, thus placed on the footing of admissions, the book became available against all the inhabitants; and the objection as to testifying on one's own behalf disappeared, since the book was not offered as the corporation's own testimony, but as embodying an admission of the opponent.

Such seems to be the explanation of this obscure and confusing line of precedents.⁵ The rulings in the United States are not complicated by the interest-disqualification; but their scope does not seem to be different from that indicated above (par. 5).⁶ It may be added that the use of public corporation books as admissions against the public at large would to-day be wholly inappropriate. On the other hand, the disqualification by interest has disappeared.

⁵ 1712, *Thetford's Case*, 12 Vin. Abr. 90, Evidence, A, b, 15 ("The books of a corporation, containing their public acts, are very proper evidence"; here a book not appearing to be kept by the proper person was rejected, "yet their common books are evidence in regard they contain a register of their public transactions"); 1718, *R. v. Motherwell*, 1 Stra. 93 (suppose corporate minutes, all written by one not an officer, rejected; "Corporation books are generally allowed to be given in evidence when they have been publicly kept as such and the entries made by the proper officer; not but that entries made by other persons may be good, if the town clerk be sick or refuses to attend; but then that must be made to appear"); 1720, *Warriner v. Giles*, 2 id. 954 (London city books, said to be evidence to prove the boundaries of the markets set out by the city); 1789, *London v. Lynn*, 1 H. Bl. 206, 214 (on an issue as to a custom of exemption from toll, the defendant town was not allowed to use its books on its own behalf); 1809, *R. v. Martin*, 2 Camp. 100 (parish vestry book, admitted to show due notice of a meeting of the vestry; "what is thus recorded before the inhabitants of the parish, I must consider as having their assent"; here, the defendant, a resident, was indicted for libel on the parish treasurer, whose appointment at the above meeting was in issue); 1812, *Price v. Littlewood*, 3 id. 288 (action for disturbing the plaintiff's right to a church pew; the vestry-book entry stating a user by license, etc., of the pew, admitted; in *Sturle v. Freccia*, 1 L. R. 5 App. Cas. 646, Lord Blackburn places this case on the ground that "the entry in the vestry was intended for the information of all the parishioners who liked to come and use it"); 1818, *R. v. Debenham*, 2 B. & Ald. 185 (pauper-settlement; an entry in old corporate books was offered as "a public document, for it is kept in the parish chest and by a public body," but was excluded because it dealt with a fact tending to exempt the entrant parish from supporting the pauper); 1819, *Marriage v. Lawrence*, 3 id. 142 (trespass, the defendant justifying as bailiff of Malden; an entry in old corporate books as to an early instance of a custom as to the levy of toll, etc., was excluded; Abbott, C. J.: "This was no more than a minute made by a party in his own

memorandum-book, and it was in fact making evidence for himself. It is said these were public books in which this entry was found; but they were not public books for all purposes"; Bayley, J.: "If a corporation enter their own private business in the public court-book, that circumstance will not alter the nature of the entry"); 1827, *Attorney-General v. Warwick*, 4 Russ. 222 (whether a nomination to office belonged to the vicar or to the corporation; the latter's books not admitted on its own behalf, following *London v. Lynn*).

⁶ 1876, *Wilson v. Waltersville S. Dist.*, 44 Conn. 137 (clerk's record of a vote at a school-district meeting, on a subject not lawfully before the meeting, excluded); 1900, *Harris v. Ansonia*, 78 id. 359, 47 Atl. 672 (city council records, though admissible under charter, receivable only as to matters upon which the council could lawfully act); 1855, *State v. Van Winkle*, 1 Dutch. 73, 74 (book of trustees of school district, admitted to show notice put up by them; the corporation being "established by law for a public purpose," though not required to keep a record of proceedings); 1831, *Denning v. Roome*, 6 Wend. 651, 656 (trespass, defendant justifying as superintendent of city repairs under a city ordinance ordering a street widened; city records admitted to show the proceedings of the council as to the property, on the principle that "the books of a public body are . . . the best evidence of their acts"); 1845, *Gearhart v. Dixon*, 1 Pa. St. 224, 228 (trespass, defendant justifying as levying a tax under orders of a board of school directors: the board's records admitted to prove their proceedings); 1876, *Fraser v. Charleston*, 8 S. C. 312, 337 (books of a municipal corporation, receivable to show "the exercise of the power of legislation granted to the corporation," but not, as here, to show the transfer of stock issued by it); 1820, *Jwings v. Speed*, 5 Wheat. 420, 424 (public-land trustees; "the books of such a body are the best evidence of their acts"; here admitted to prove their allotment of land, etc.).

The innumerable statutes making the records of various governmental bodies admissible to prove their proceedings need not be here noted, because they merely apply the common-law principle.

§ 1662. *Records of Legislature (Journals, Statutory Recitals); Executive Proclamations.* (1) The *legislative journals*, for reasons analogous to those just noted with regard to corporations, are admissible to prove the proceedings of the Legislature; because the entrant is an officer charged with the duty of making such a record. This general principle is undisputed. So far, then, as the proceedings of the Legislature are relevant to be proved, the journal is admissible. If the proceeding, for example, consists in the receipt or acceptance of a report or a petition, the statements in the report or petition may be inadmissible;¹ but the fact of its receipt or the mode of its treatment may be relevant, and therefore may be evidenced by the journal.²

The *conclusiveness* of the enrolment of an act, as against the journals, has already been considered (*ante*, § 1350). The use of *printed volumes* to evidence the contents of the journals is governed by the principle of certified copies (*post*, § 1684).

(2) With the *conclusiveness* of a *statutory recital*, in a public or a private act, upon the parties interested in the subject matter, we are not here concerned; the question there raised is one of the scope of legislative powers and the effect of a judgment (*ante*, § 1352). The inquiry here is whether, as against persons who are in no sense parties to a prior proceeding, the recitals of a statute may be used as evidence of the facts recited, on the ground that they are official statements by persons authorized to investigate and record. It is clear, in the first place, that the statements concern matters not within the personal knowledge of the declarants; the recital deals, not with the legislative proceedings, but with extrinsic facts. It follows, then, under the general principle (*ante*, §§ 1635, 1639), that, unless there is an official duty to investigate and obtain adequate information, the statement should not be received. The publicity and solemnity of the declaration — an argument sometimes advanced³ — cannot otherwise suffice to give it any weight as evidence in a controversy. But, next, it is clear enough that the Legislature has within itself the authority to inform itself properly; for, if it can give such authority to others, it can assume the authority for itself. Accordingly, when the recital is not a mere allegation, but is a statement of the result of due investigation, it should be receivable; and this was in fact the distinction applied to the use of recitals of pedigree in English peerage acts and the like.⁴ But statutory recitals have not ordinarily such a basis.

¹ For the use of reports of officers or committees, *see post*, §§ 1670, 1672.

² 1895, *Woodruff v. State*, 61 Ark. 157, 32 S. W. 102 (Senate journal, admitted to prove a report presented to it); 1832, *Thomson v. Gaillard*, 3 Rich. 418, 419, 425 (entry about a petition in Senate journal, receivable to show its contents); 1830, *Carver v. Jackson*, 4 Pet. 1, 13, 101 (journals of Legislature showing a petition relative to a forfeited estate, and a report thereon, admitted).

³ 1816, *Bayley, J.*, in *R. v. Sutton*, 4 M. & S. 532, 549 ("When we consider in what manner an act of Parliament is passed, and that it is a

public proceeding in all its stages, and challenges public enquiry, and when passed is in contemplation of law the act of the whole body, it seems to me that its recital must be taken as admissible evidence").

⁴ 1844, *Wharton Peerage Case*, 12 Cl. & F. 295, 302 (recitals of family relationship, admitted; L. C. Lyndhurst: "It is the well-known practice of this House not to allow the insertion of a statement in the recitals of a private act of Parliament, unless the truth of that statement has been previously proved to the satisfaction of the judges, to whom the bill has been referred"); 1857, *Shrewsbury Peerage*

They may represent merely the partisan pre-judgments of the majority; they may represent only general conclusions in which the recited particulars have not been verified with special attention; they may have been inserted without any investigation at all; and they are in general only a statement of motives — "an apology for the passage of the act" (in the apt phrase of the Court of Kentucky), rather than a deliberate finding of fact:

1816, *Messrs. Denman and Phillips*, arguing, in *R. v. Sutton*, 4 M. & S. 532, 530: "As to their [these preambles] proving that the facts [here a riot in certain districts] were notorious, — if by that is meant [merely] a notoriety such as exists in general rumor, then the jury ought not to have taken that into consideration; if it be meant that all the world knew them, *a fortiori* they might and ought to have been proved. For to assume that the recital in every act of Parliament is even *prima facie* evidence of the facts recited in it, would lead to very extensive consequences, and might sometimes perhaps bring the truth into hazard. . . . And it is singular that one of the preambles now in question should have recited that these disorders pervaded the county of Nottingham and the adjoining counties, so that, if this were evidence, it might be adduced as proof that they existed in Lincolnshire, when it is perfectly well known that that county has been entirely free from them. . . . [The preamble] is but matter of inducement, and cannot be founded upon oath, for neither branch of the Legislature can for this purpose administer an oath; whereas all evidence ought to be upon oath."

1823, *Per Curiam*, in *Elmendorff v. Carmichael*, 3 Litt. 472, 480 (excluding a recital of naturalization, etc.): "We well know that such applications [for private beneficial acts] are made frequently *ex parte*. And if they are not entirely so, but the party affected appears and resists the statute, it is very questionable whether the facts recited ought to be evidence in a future contest. The Legislature, in all its inquiring forms, by committees, makes no issue, and in their discretion may or may not coerce the attendance of witnesses or the production of records, and are frequently not bound by those rules of evidence applicable to an issue properly formed, the trial of which is an exercise of judicial power. Once adopt the principle that such facts are conclusive or even *prima facie* evidence against private rights, and many individual controversies may be prejudged and drawn from the functions of the Judiciary into the vortex of Legislative usurpation. The appropriate functions of the Legislature are to make laws to operate on future incidents, and not the decision of or forestalling rights accrued or vested under previous laws. Hence, such a preamble as the present ought in such a controversy to be taken to answer the purpose for which it was intended, that is, an apology for the passage of the act and the reason why the Legislature so acted. Such a preamble is evidence that the facts were so represented to the Legislature, and not that they are really so."

These considerations indicate it as the wiser course to reject, as a general rule, such recitals as evidence. Should it be made to appear that the recitals offered in a given case are not merely allegations resting on an unknown basis, but are in fact the findings of the Legislature after proper means of information have been deliberately sought, there seems no ground to object to their admission as official statements made with due authority and upon adequate sources of knowledge. So far as the precedents speak, there is no

Case, 7 H. L. C. 1, 13 (recital of a death without issue, and other recitals, admitted; Lord St. Leonards, referring to the preceding quotation: "That used to be the practice, but it is not so now, . . . and future recitals will not therefore be evidence"); 1879, *Polini v. Gray*, L. R. 12

Ch. D. 411, 432, 436 (Brett and Cotton, LL.J., doubt whether such recitals are admissible at all, outside of the Committee on Privileges, but seemed unaware that the committee professed to follow the ordinary law)

general agreement;⁵ but in England, and perhaps elsewhere, the distinction would probably be taken that the recitals of a public act, but not those of a private act, would be admissible; this distinction, however, being apparently not only without principle to support it but also ill adapted to indicate the true grounds of trustworthiness.

(3) *Executive proclamations* are difficult to classify; they are precisely neither Registers nor Returns nor Certificates. So far as recitals of fact therein are offered to prove facts other than the very doing of the executive act itself, they would seem inadmissible, unless made by virtue of express authority. The precedents indicate no accepted rule.⁶

2. Returns and Reports.

§ 1664. *Returns, in general; Sheriff's Return; Sheriff's Recital in Deed.* A return or report differs from a register, according to the use of terms

⁵ *England*: 1571, *Leicester v. Haydon*, 1 Plowd. 394, 396, 398 (whether one erroneously attainted on indictment was bound by a recital of the attain in an act of Parliament confirming it; assumed on all hands that the recital was at least admissible); 1628, *Coke upon Littleton*, 19b ("The rehearsal or preamble of a statute is to be taken for truth; for it cannot be thought that a statute that is made by authority of the whole realm, as well of the King as of the lords spiritual and temporal and of all the commons, will recite a thing against the truth"); 1816, *R. v. Sutton*, 4 M. & S. 549 (preamble of a public act, reciting the fact of rioting in certain districts, admitted; quoted *supra*); 1825, *Gardner Peckage Case*, *Le Marchant's Rep.* 276 (recital as to legitimacy, in a private act, excluded, as against one not a party to the act); 1829, *Brett v. Beales*, M. & M. 416, 421 (a private act's recitals — here as to the right of a town to levy tolls — not admitted as evidence, even where the final clause declared it to be taken as a public act); *United States*: Cal. C. O. P. 1872, § 1903 (recitals in public and private statutes, conclusive, for certain purposes; quoted *ante*, § 1352); 1849, *Birdsong v. Brooks*, 7 Ga. 88, 92 (recital of a bank's assignment, etc.; "the plaintiff can take nothing by the recital of that fact in the act, when an issue is made on it"); 1850, *Beall v. Bealla*, 8 Ga. 310, 222 (constitutionality of an act of legitimation; "as to the facts in this case," the records of the Legislature "are to be treated as true until the contrary appear"; apparently meaning to treat them on the analogy of a judicial record appealed from); 1852, *Thornton v. Lane*, 11 id. 459, 520 (preceding case followed); 1854, *Lane v. Harris*, 16 id. 217, 222 (recitals in public acts; admissible); 1861, *Duncombe v. Prindle*, 12 Ia. 1, 11 (preamble reciting a clerical error in a former statute, not received as conclusive); 1823, *Elmendorff v. Carmichael*, 8 Litt. 472, 480 (alienage; recital of R. B. being a naturalized citizen and of a power and a conveyance from J. B., in a statute confirming the title of a transferee from J. B., excluded; quoted *supra*); 1845, *Farmer v. Thompson*, 7 Hill N. Y.

77, 80 (statute of indemnification of G., held not to prove him a tavern-keeper; "the Legislature has no jurisdiction to determine facts touching the rights of individuals"); 1860, *McKinnon v. Bliss*, 21 N. Y. 206, 213 (ejectment; recitals as to forfeitures and the true ownership of the forfeited land, excluded, approving *Elmendorff v. Carmichael*); 1833, *Drake v. Drake*, 4 Dev. L. 110 (act of legitimation; *Ruffin, C. J.*, holding the recitals as to legislative proceedings conclusive; "As to other recitals, it would seem but a decent respect, though they be not conclusive, to treat them as true until the contrary appear"). Compare *Endlich, Interpretation of Statutes*, § 375 (1888).

⁶ *Canada*: Ont. Rev. St. 1897, c. 124, § 2 (quoted *ante*, § 1573); 1881, *Stone v. Nash*, 2 P. E. I. 415 (the Governor-General's proclamation is evidence that the necessary preliminary proceedings to the coming into force of a law were duly had); *United States*: 1898, *Masons' F. A. A. v. Riley*, 65 Ark. 261, 45 S. W. 684 (policy on accidental death; Governor's pardon of S. for killing the deceased, excluded); 1839, *Lurton v. Gilliam*, 2 Ill. 577, 579 (Governor's proclamation, admitted to show S.'s election to Congress); 1871, *Whiton v. Ins. Co.*, 109 Mass. 25, 30 (certain proclamations and official letters of the Secretaries of State and Treasury, admitted to show that the United States "had acquired and had asserted against foreign governments a title in the island of Navama" and that it was a guano island); 1874, *Hanson v. S. Scituate*, 115 id. 336, 340 (governor's general order calling for troops and assigning quotas, admitted as evidence of the call and the assignment; here, of course, the order was the call and the assignment); N. Y. Laws 1893, c. 661, § 6 (Governor's order to abate a nuisance, admissible to show the existence of the nuisance); 1902, *Chicago v. Pennsylvania Co.*, 57 C. C. A. 509, 119 Fed. 497 (action for goods destroyed by a mob during a riot; the mayor's proclamation calling for troops to suppress the riot, admitted as "a public act which had become a part of the history" of the period). Compare the cases as to the King's certificate (*post*, § 1674).

already explained (*ante*, § 1637) in that a return is only a single document, made separately for each transaction as occasion arises, and not necessarily collated regularly with others in a book; this difference arising usually in practice from the circumstance that the statement deals with something done or occurring without the official precincts. A further distinction, between *returns* proper and *reports*, is that the former term applies typically to something done or observed personally by the officer, while the latter embodies the results of his investigation of a matter not originally occurring within his personal knowledge.

Considering first the nature of a return in the narrow sense, it would seem, under the general principle (*ante*, § 1632), that *wherever the duties of an officer require him to act without the premises of the office, he has by implication an authority to return*, — that is, to write down, upon his return to his office, a statement of his doings. The necessity of preserving a record of his doings is particularly apparent where his duty is performed without the premises of the office; and therefore the general implication of an authority to make a return is no less strong than that of an authority to keep a register for doings within the office (*ante*, § 1639). The question, then, ultimately is whether the officer's duties require or authorize him to do or observe the matter in question. There are, it would seem, only two clear instances at common law of officers authorized to make returns, — the sheriff and the surveyor. Since the distinction between returns proper and reports is not always carefully observed in common usage, and is perhaps often difficult to draw clearly, sundry common-law rulings as to both classes may be later considered (*post*, § 1672). In this place may be examined first the use of a *sheriff's return*.

(a) It is clear enough, and well accepted, that the *sheriff's office* authorizes him by implication to *make a return* of his doings under the customary authority of his office, and this return is admissible, without calling the sheriff, as an official statement under the present Exception:

1626, *Dalton, Office of Sheriffs*, c. 36, p. 87: "These returnes are nothing else but the sherifes' answers, certifying the Court touching that which they are commanded to doe by the King's writ, and are to ascertaine the Court of the truth of the matter."

1809, *Ellenborough, L. C. J.*, in *Gyfford v. Woodgate*, 11 East 297, "was of opinion that this [return] was *prima facie* evidence of the facts stated in the return, upon the ground that faith was to be given to the official act of a public officer like the sheriff, even where third persons were concerned."

1845, *Nelson, C. J.*, in *Browning v. Hanford*, 7 Hill N. Y. 120: "The return of a sheriff is nothing more nor less than his answer under oath respecting the duty enjoined upon him by the writ, and is intended to inform the Court of what has been done in the premises. . . . If it embraces matters not pertaining to the duties which the writ commands, that is, not touching the things which the officer is required to do in executing the process, it is thus far made without the sanction of the sheriff's official oath, and must be treated like the unsworn declaration of a private individual."¹

¹ 1849, *Browning v. Flanagan*, 22 N. J. L. 567, 574 (admissible, because it is "his answer under oath respecting the duty enjoined upon him by the writ").

It follows, therefore, that it is admissible even against persons not parties to the suit, as any official statement is; *i. e.* the limitations applicable to its other aspect (to be noted later) as a part of a judgment record, do not affect its admissibility as an official statement.³ It follows, also, that it is admissible only for such matters as are within the authority of his office; here the question becomes ultimately one of administrative law, *i. e.* the extent of the sheriff's duties.³

(b) The sheriff's return is, however, also a part of the record of proceedings leading up to a judgment in litigation; in this aspect, therefore, the principles of the law of judgments may come into play, and the question may arise as to the *conclusiveness of the return*. There are thus some situations in which the return is binding upon the parties only, and there are others in which it may not be disputable by any one in a collateral proceeding. The solution of such questions has occasionally been put upon grounds of policy as to the desirability of preventing repeated controversies;⁴ but this is after all the same policy that governs the conclusiveness of judgments, and no other principles than those of that branch of the law seem to be involved. This aspect of sheriff's returns has therefore no concern for us here.

(c) A return acted upon by another party may create for the sheriff an *estoppel*, so that he may not dispute it in an action against himself. It is, at the least, necessarily an admission (*ante*, § 1056) usable as evidence in an action against him. The controversy here, then, is whether it amounts in a given case to an estoppel or is a mere disputable admission. This, being a question of substantive law, is beyond the present purview.

(d) A question of much interest, and in great controversy, has been whether the *recitals in a sheriff's deed* are admissible to prove his authority to sell, without producing the judgment and the execution. On principle, the solution is as follows: (1) The deed is not valid unless the sheriff had authority to sell; that authority to sell could come only from a judgment against the owner and a writ of execution, based upon the judgment, ordering the sheriff to sell; this judgment roll, therefore (or a certified copy) must be produced, in order to prove the sheriff's authority; (2) Even if it could be assumed that the sheriff's office gives him a general authority to recite that he has in this instance a specific order to sell, nevertheless, since this order is contained in a written document, the contents of the document must be

³ 1809, *Gyford v. Woodgate*, 2 Camp. 117; 1821, *Waldo v. Spencer*, 4 Conn. 79, 94; 1832, *Lowry v. Cady*, 4 Vt. 504, 505.

⁴ A few illustrations only must here suffice: 1901, *Schloss v. Inman*, 139 Ala. 424, 30 So. 667 (sheriff's inventory of goods levied, not admissible to prove their value); 1869, *Obermier v. Core*, 25 Ark. 562, 564 (sheriff's certificate of seizure, not under process, excluded); 1900, *People v. Lee*, 128 Cal. 330, 60 Pac. 854 (sheriff's return of "not found" for J. P. C. as witness, not admissible to prove that no J. P. C. had existence at the time in the county; on the ground

that this was not a matter "which the sheriff was required to officially ascertain or declare"; this seems erroneous, because the natural way to prove a person not within the jurisdiction is to prove that he cannot be found there; compare § 1313, *ante*); 1848, *McCully v. Malcom*, 9 Humph. 187, 192 (a sheriff's return on a warrant is evidence that he had it when arresting).

⁵ *E. g.*, in the following opinions: 1675, *Atkyns, J.*, in *Whitrong v. Blaney*, 2 Mod. 10, 11; 1824, *Sergeant v. George*, 5 Litt. 199; 1829, *Taylor v. Lewis*, 2 J. J. Marsh. 400.

proved by production or by copy (under the rules of § 1215, *ante*, and § 1678, *post*), unless we are further to assume that the sheriff has an implied authority both to state the contents of the judgment and to state them in summarized form (as an exception to the rule of § 1678, *post*). These steps of assumption have usually proved too radical for the Courts to take on common-law principles; the general attitude is represented in the following passage:

1866, *Shafter, J.*, in *Hihn v. Peck*, 30 Cal. 280, 288: "The judgment and execution go to the sheriff's power to sell and to his power to recite a sale, and therefore the recitals are not admissible to prove the sheriff's authority to sell or his authority to recite a sale. To hold otherwise would be to reason in a circle. The power to sell, to recite, and to deed, having its origin in the judgment and execution, must be proved by a production of both under the rule of best evidence. But when the power has been proved, the sheriff becomes, so to speak, the accredited historian of his acts under it. He may narrate his proceedings on the back of the execution and return it into court, and, with or without that, he may issue a certificate to the purchaser; and both the certificate and the return, if made, would, within the limits of the authority delegated to him, be evidence against all persons of the facts stated or recited therein. As already remarked, it is also the official duty of the sheriff to make a like statement or recite his deed; and it follows that a recital so made must be entitled to the same effect, as an instrument of evidence," as the return on the execution.

This conclusion seems unavoidable on strict principle. The contrary conclusion reached by a few Courts, seems to have rested in part upon the presumption of the regularity of official doings (*post*, § 2534). But practical convenience seems in experience to have demanded the latter, and not the former result; so that statute has in many,⁵ perhaps most jurisdictions, interfered to exempt from production of the judgment roll or a copy of it, and to permit the sheriff's recital to suffice.⁶ It should be added that, even

⁵ *E. g.*: Ill. Rev. St. 1874, c. 30, § 12 (in deeds by masters in chancery, sheriffs, executors, etc., a recital of the judgment or decree in full is not necessary).

⁶ Since the statutes have so widely abrogated the judicial rule, and these statutes are too lengthy and too complicated with matters of local execution-procedure to be dealt with here, it seems undesirable to attempt to set forth the state of the law in the various jurisdictions. The following list contains only some typical series of cases illustrating the common-law treatment: Ark.: 1849, *Hutchinson v. Kelly*, 10 Ark. 178, 181, Scott, J., diss. (production required); 1853, *Newton v. Bank*, 14 id. 9, 10 (not required); 1856, *Jordan v. Bradshaw*, 17 id. 106, 108 (same); Cal.: St. 1850, April 22, § 207 (a sheriff's deed must recite the "date of the judgments, and other particulars as recited in the execution, and these recitals shall be "evidence of the facts recited"); 1866, *Hihn v. Peck*, 30 Cal. 280, 288 (judgment and execution being produced, the deed-recitals by the sheriff are evidence of the sale; explaining *Donohue v. McNulty*, 24 id. 411; the statute was not referred to, but the judgment and execution were themselves offered, and the recitals were relied on only to prove the sale; quoted *supra*); 1874, *Clark v. Sawyer*, 48 id. 133, 140

(declares that "the judgment and execution must be introduced," but the statute, "when the recitals are full, dispenses with the necessity of introducing the judgment and execution"; *Hihn v. Peck* not cited); 1878, *Harper v. R.*, 53 id. 233, 234 ("the method of proving the judgment to be valid is by the production of the roll"; no statute or cases cited); Fla.: 1893, *McGehee v. Wilkins*, 31 Fla. 83, 85, 12 So. 228 (judgment and execution must be produced); Ga.: 1861, *Boatright v. Porter*, 32 Ga. 130, 140 (recital sufficient, upon loss of judgment, etc., being shown); 1880, *Shackleford v. Hooper*, 65 id. 366 (production required); N. C.: 1878, *Rollins v. Henry*, 78 N. C. 342, 348 ("The return to an execution is ordinarily the best evidence of a levy and sale"; but if it is not returned and is lost, and a judgment and execution are proved to exist, the recital in the sheriff's deed is admissible as an official statement to show the fact of levy and sale; and, *semble*, also of the judgment and the execution, provided the sale is an ancient one; explaining *Edwards v. Tipton*, 77 N. C. 222, *Hardin v. Cheek*, 3 Jones L. 135, and *Owen v. Barksdale*, 8 Ired. 81); Pa.: 1784, *Burke v. Ryan*, 1 Dall. 94 (recitals admitted, without producing the record; but here there had been ancient possession); 1796, *Wilson v. M'Veagh*, 2 Yeates

at common law, the main difficulty being the requirement of producing the judgment roll, the recitals of the deed were admissible if the loss of the roll was shown; moreover, if the roll (or a copy) was produced, and the rule thus satisfied, the recitals were of course admissible to prove the fact of the sale as being an official act of the sheriff.

In the same connection, the question constantly arises whether the *whole of the record* of judgment and execution must be proved, and, conversely, whether, though the judgment be produced in entirety, this suffices even where the land is not adequately identified; here the principle of Completeness (*post*, § 2094) comes into play.⁷

(c) Somewhat different considerations are involved in the subject of *recitals in old deeds other than sheriffs' (ante*, § 1573), and the admissibility of a *sheriff's inquisition of title (post*, § 1670).

86 (judgment and execution required to be shown by exemplification or abstract; "the consequences of asserting the doctrine that a sheriff by his recital could deduce a power to sell lands would be highly mischievous"): 1819, *Weyand v. Tipton*, 5 S. & R. 332 (recitals are no evidence of authority to sell; judgment and execution must be produced); 1823, *Hampton v. Speckanagle*, 9 id. 212, 221 (same); 1841, *Bradde v. Brownfield*, 2 S. & R. 271, 289 (preceding cases approved); *S. C.*: 1802, *Hopkins v. De Graffenreid*, 2 Bay 441, 445 (recitals in a sheriff's deed, admissible for all parts of his proceedings; production of the execution or *s. fa.* not required; *Waties and Burke, JJ., diss.*); 1805, *D'Urphy v. Nelson*, 1 Crav. 470 (recital of the execution, here lost, received); 1811, *Tobin v. Seay*, 2 id. 470 (production not required); 1819, *Barkley v. Screven*, 1 N. & McC. 408 (production of the execution required, but only the last, not the intermediate ones; for lands, the judgment also); 1820, *Vance v. Reardon*, 2 id. 299 302 (same, but applied equally to personalty; extracts of executions, in proving a sheriff's sale, held insufficient; *Colcock and Bay, JJ., diss.*); 1839, *Smith v. Smith*, Rice 232, 238, *semble* (judgment must be produced, to show authority); 1852, *Floyd v. Mintzey*, 5 Rich. 361, 365, 372 (recitals not sufficient, without producing the judgment at least); *Tenn.*: 1833, *Nichols v. Billee*, 5 Yerg. 63, 65 (recitals to show the fact of sale, admitted); 1874, *Sampson v. Marr*, 7 Baxt. 486, 488 (sheriff's deed-recitals, evidence of advertisement, etc.); *Vt.*: 1874, *Maxham v. Place*, 46 Vt. 434, 442 (execution reciting judgment; proof of loss of judgment, held sufficient); *Va.*: 1847, *Robinett v. Preston*, 4 Gratt. 141, 147, *semble* (sheriff's recitals of judgment and execution, sufficient without production, as against strangers setting up a title adverse to that conveyed by the officer); 1848, *Jesse v. Preston*, 5 id. 120, 130 (tax-collector's recitals of due proceedings authorizing sale, not sufficient without production; preceding case distinguished because adverse possession there accompanied the deed).

The same principles are illustrated in the use of recitals in a collector's tax-deed, or in a deed

by any other officer empowered to sell on a certain warrant; *Bolan v. Bolan and Burke v. Burke* are useful cases: 1899, *Lawless v. Stamp*, 108 Ia. 601, 79 N. W. 365 (receiver's recital of his appointment, not admissible); 1868, *Bolan v. Bolan*, 4 Nev. 150 (tax-deed; production of judgment required); 1898, *Burke v. Burke*, 170 Mass. 499, 49 N. E. 753 (tax-collector's deed-recitals, not evidence of facts recited); 1801, *Simon v. Brown*, 3 Yeates 186 (recitals of payment of taxes in a county commissioner's deed, excluded); 1848, *Henderson v. Galloway*, 8 Humph. 692, 696 (recital of notice in a trustee's deed, not receivable like a sheriff's); 1883, *Coal C. M. & M. Co. v. Ross*, 12 Lea 1, 8 (clerk's deed; production of decree required); 1832, *Hall v. Collins*, 4 Vt. 316, 326, *semble* (tax-collector's deed-recitals not evidence against one not a party, because he is "not by any law made a certifying officer for the purpose"); 1859, *Townsend v. Downer*, 32 id. 183, 190 (collector's deed-recitals of having done all things required, not evidence); 1815, *Christy v. Minor*, 4 Munf. 431 (U. S. marshal's tax-deed recitals, not sufficient without "other proof of authority"); 1829, *Allen v. Smith*, 1 Leigh 231 (U. S. marshal's tax-deed recitals, not sufficient without proving the prerequisites of advertisement, etc., although here there had been 20 years' possession); 1820, *Chapman v. Bennett*, 2 id. 329, 330 (sheriff's testimony of sale of land for taxes, not sufficient without showing preliminary proceedings); 1848, *Wynn v. Harman*, 5 Gratt. 157, 166 (decree of partition and report of commissioners, sufficient without producing the whole record, if the land is adequately described); 1848, *Masters v. Varner*, ib. 168, 171 (marshal's conveyance under Court decree ordering sale of land "in the bill mentioned"; production of a record sufficient to identify the land, required); 1852, *Walton v. Hale*, 9 Gratt. 194, 198 (deed of commissioner for delinquent taxes; recitals insufficient, without proving authority, where there is no "long acquiescence and possession").

⁷ The cases cited in the foregoing note illustrate this principle also; compare further § 2110, *post*.

§ 1665. *Surveyors' Returns* (Maps, Registers, etc.). The very office of a surveyor is to run lines and establish boundaries for the purpose of applying the terms of grants and patents and thus of perpetuating the settlement of boundaries; it is therefore a natural implication that he has the duty and the authority to make a written return of his doings.¹ At common law in England there were doubtless few instances of persons whose sole or constant official duty was that of a surveyor; so that most surveys became official only by virtue of a special warrant to make them. Nevertheless, the principle was sufficiently recognized at common law;² and it may therefore be said that wherever the office of government surveyor³ has been created, the officer has an implied authority of office to make return of his official surveys, and his returns are therefore admissible. The admissibility depends upon the authority (*ante*, § 1633); hence, on the one hand, the returns of the government surveyor are admissible to evidence only those matters which he is authorized to do; and, on the other hand, a private person's survey, if made under special warrant or if otherwise sanctioned by proper authority (*ante*, § 1633, par. 10), may become admissible:

1836, *Story*, in *Ellicott v. Pearl*, 10 Pet. 412, 441: "The survey, made by a surveyor, being under oath [of office] is evidence as to all things which are properly within the line of his duty. But his duty is confined to describing and marking on the plat the lines, corners, trees, and other objects on the ground, and to subjoin such remarks as may explain them. But in all other respects, and as to all other facts, he stands, like any other witness, to be examined on oath in the presence of the parties and subject to cross-examination. . . . It has never been supposed that if in such a survey the surveyor should go on to state collateral facts, or declarations of the parties, or other matters not within the scope of his proper official functions, he could thereby make them evidence as between third persons."

These principles generally receive consistent application.⁴ In many juria-

¹ His record is usually indexed and filed, and is perhaps sometimes kept as a Register; but in its nature it is a Return (as defined in § 1664). Whether the surveyor's Return is not, after all, a Report (*ante*, § 1664) is a nice question; but it seems more correct to regard it as a statement of the surveyor's own doings.

² 1844, *Doe v. Roberts*, 13 M. & W. 520, 531 (an ancient extent, or official survey, of Crown lands, admitted; Parke, B.: "It is a finding by a public officer on a public matter"); 1852, *Daniel v. Wilkin*, 7 Exch. 429, 434, 437 (a private surveyor's survey, excluded; Parke, B.: "If the survey had been made by officers of the Crown, no doubt it would have been admissible").

³ That a distinction could be taken in this respect between surveyors of the State, a county, or a town, seems untenable; yet it seems sometimes to be made; see the citations *infra*, note 4.

⁴ *Eng.*: 1899, *Evans v. Merthyr Tydfil*, 1 Ch. 241, 250 (survey of Crown land, made under the provisions of a statute and filed in the Law Revenue Office, admitted); *Can.*: 1834, *Badgley v. Bender*, 3 U. C. Jr. o. a. 225 (official survey or map, admissible); 1877,

O'Connor v. Dunn, 2 Ont. App. 247, 254 (surveyor's official survey, *semble*, admissible); 1885, *Vankoughnet v. Denison*, 11 id. 679 (city surveyor's map, excluded); 1857, *Maynes v. Dolan*, 3 All. N. Br. 573 (Crown survey, not admitted to show that the line had actually been run); *U. S.*: *Ala.*: 1854, *Stein v. Ashby*, 24 Ala. 530 (government map, admissible); *Conn.*: 1839, *Wooster v. Butler*, 13 Conn. 309, 315 (survey must be one made by authority); *Fla.*: 1884, *Simmons v. Spratt*, 20 Fla. 495, 499 ("the simple filing of a private survey in a public office does not make it evidence"); *Ga.*: 1889, *Polhill v. Brown*, 84 Ga. 342, 10 S. E. 921 (State map of county, admissible); 1903, *Berry v. Clark*, 117 Ga. 964, 44 S. E. 824 (Secretary of State's certified copy of a county map on file in his office, admitted, without showing its authorship); *Ia.*: 1870, *Pfotzer v. Mullaney*, 30 Ia. 197 (map in MS. used in city office as official, not admitted); *La.*: 1841, *Carrollton E. Co. v. Municipality*, 10 La. 44 (city map, admissible); *Mass.*: 1903, *Clark v. Hull*, 184 Mass. 164, 68 N. E. 60 (official chart of coast, made by authority of St. 1807, Feb. 10, § 1, admitted); *Mich.*: 1864, *Smith v.*

dictions, statutes have expressly made admissible the returns and records of the surveyor-general and of the county-surveyors, as well as of various special commissioners and other officers having a surveyor's duties.⁶ In a

Lawrence, 13 Mich. 431 (book of township plats of title, not required by law to be kept, excluded); *Miss.*: 1866, *Wilder v. St. Paul*, 13 Minn. 192, 209 (map made by statutory authority, admitted); *N. H.*: 1852, *Adams v. Stanyan*, 24 N. H. 412 (town map made under State authority, admissible); *N. Y.*: 1807, *Jackson v. Witler*, 2 John. 150 (official map bearing an indorsement of partition by persons chosen thereto; excluded, because the surveyor had no authority to report as to title); 1893, *Blackman v. Riley*, 138 N. Y. 318, 329, 34 N. E. 214 (ancient map by a city surveyor for a private party, received); *N. C.*: 1888, *Dobson v. Whisenant*, 101 N. C. 647, 8 S. E. 126 (unofficial map, inadmissible); 1889, *Barwell v. Sneed*, 104 id. 119, 10 S. E. 152 (map made by a surveyor appointed by the county, excluded); *Pa.*: 1773, *Biddle v. Shippen*, 1 Dall. 19 (official map or survey, admissible); 1795, *Denn v. Pond*, Cox 381 (same); 1797, *Shields v. Buchanan*, 2 Yeates 219 (survey made by a private surveyor, under land-office order, and returned into the surveyor-general's office, admitted); 1817, *Salmon v. Rauce*, 3 S. & R. 311, 515 (deputy-surveyor's return to an order of survey, receivable, because he is a sworn officer; but not when he states matters not within his duty; a return that a former survey was mistaken, excluded); 1836, *Com. v. Alburger*, 1 Whart. 469, 473 (ancient plan of Philadelphia as officially laid out in 1683, received); 1840, *Wolf v. Goddard*, 9 Watts 544 (official warrant and survey return, receivable to show the lands taken); 1869, *Baird v. Rice*, 63 Pa. 489, 497 (like *Com. v. Alburger*); *Wis.*: 1901, *Schlei v. Struck*, 109 Wis. 598, 85 N. W. 430.

⁶ *Ala.* Code 1897, § 3895 (county surveyor's survey or plat, admissible, "if the opposite party has notice that such survey is to be made"); *Ariz.* Rev. St. 1887, § 3145 (report under oath of a surveyor appointed by Court on motion after notice, admissible); *Colo.* Annot. State. 1891, § 914 ("The certificate of the county surveyor or any of his deputies shall be admitted as legal evidence"; compare also *ib.* § 3687); *Ga.* Code 1895, § 484 (county surveyor's survey or plat, made by order of Court on notice to parties, admissible); *Ida.* St. 1903, p. 223, § 37 (State engineer's map of stream, ditches, etc., admissible in irrigation suits); *Ill.* Rev. St. 1874, c. 133, § 7 (county surveyor's record of surveys, admissible); § 10 (so also for U. S. surveyor-general's field-notes in State auditor's office, admissible); *Ia.* Code, 1897, § 538 (county surveyor's field-notes and plat, admissible against persons requesting survey or having reasonable notice of it beforehand); *La.* Rev. L. 1897, § 1437 (State surveyor's plan of town lots, after filing in parish recorder's office and public notice given, to be evidence "of the description and dimensions of said property"); *Mass.* St. 1885, c. 244, § 6 (harbor and land

commissioners' registered map of Connecticut river in certain counties to be evidence); *St.* 1888, c. 324, § 3 (topographical survey commissioners' triangulation points, to be evidence of town boundary lines); *Mich.* Comp. L. 1897, § 2511 (county supervisors' record of boundaries perpetuated, admissible); § 2619 (surveyor's or deputy's certificate of survey, admissible where the surveyor or deputy is not interested); § 3372 (municipal survey-plat, admissible); §§ 3366, 3367 (same for county-supervisors' survey of municipal plat); 1903, *Sherrard v. Cudney*, — Mich. —, 96 N. W. 15 (statute applied); *Minn.* Gen. St. 1894, § 5758 (certificate of a county surveyor or deputy, admissible); §§ 2319-2320 (certain plats, etc., made admissible); §§ 697, 699 (county commissioners' establishment of certain boundaries, etc., admissible); § 1876 (certain roads provable by certain recorded field-notes, plats, etc.); *St.* 1899, c. 294 (records of surveys by municipal engineering department, admissible); *Miss.* Annot. Code 1892, § 1786 (certificate of a county surveyor or deputy, of a survey made of lands in the county or under Court order, to be presumptive evidence of "the facts connected with and pertinent to the survey," if the maker is not interested therein); *Mo.* Rev. St. 1899, § 6949 (certain returns of county surveyors, to be evidence); § 10186 (no survey to be "legal evidence," except those made by a county surveyor or deputy or by the U. S. authority or by mutual consent); *Nev.* Gen. St. 1885, § 2213 (certificate of a county surveyor or deputy, admissible); *N. M.* Comp. L. 1897, § 792 (survey, plat, or field-notes of a county surveyor or deputy, admissible "only when the surveyor may be dead, or when it shall be impossible to obtain his evidence either by his personal attendance or by means of a deposition"); *N. Y.* C. C. P. 1877, § 955 (maps, surveys, and official records on file in certain public offices in New York city for twenty years, admissible); *Laws* 1869, c. 898, § 7 (filed map by drainage commissioners, admissible); *Laws* 1895, c. 589, § 5 (State land-survey superintendent's recorded maps and field-notes, certified under seal, admissible); *Laws* 1894, c. 388, § 4 (State engineer's map and field-notes of canal lands, admissible); *N. D.* Rev. C. 1895, § 9029 (county surveyor's records of field-notes and plats, admissible); *Oh.* Rev. St. 1898, §§ 1172, 1191, 1195, 2624 (certain surveys of a county surveyor, and of a private survey under official order, to be evidence); 1902, *State v. Cincinnati T. & J. Co.*, 66 Oh. 182, 64 N. E. 68 (under §§ 218-223, *Bates* Annot. St., the findings, maps, etc., of the canal commissioners are admissible only for the kinds of land there specified); *Okl.* Stat. 1893, §§ 1716, 1717 (county surveyor's survey to be held "presumptively correct"; his record of field-notes and plats to be admissible); *Tex.* Rev. Civ. Stat. 1895,

few of these jurisdictions, chiefly in the South, the statutory procedure (based apparently upon an early local common-law practice⁶), necessary to make the official survey receivable when it deals with private boundaries, requires the parties interested to be first notified of the intended survey so that they may attend and cooperate.⁷

Statutes also have made admissible various kinds of surveyors' certificates (*post*, § 1674); for a certificate of the contents of a surveyor's record another principle (*post*, § 1678) is also involved.⁸ Other principles concern the use of private surveys as embodying reputation to boundaries (*ante*, §§ 1582-1595), the statements of deceased surveyors under the peculiar exception for private boundaries (*ante*, §§ 1563-1571); the testimony of a surveyor on the stand, with his map (*ante*, § 791); the authentication of ancient surveys (*post*, §§ 2137, 2158) by age or official custody. Distinguish the use, under substantive law, of a survey which has been referred to by a deed or a land-patent and thus incorporated into it;⁹ here the survey is received, not as evidence, but as a part of the description in the deed (*post*, § 1777) or as a source of interpretation (*post*, § 2465); and this use includes most of the instances in which in practice a survey is resorted to. The conclusiveness of a government survey in establishing a boundary involves still other principles (*ante*, § 1352, *post*, § 2427). The proof of the contents of the surveyor's records by certified copy depends upon the general principle applicable to proof of official records by certified copy (*post*, § 1680).

§ 1666. **Testimony at a Former Trial; (1) Judge's Notes.** Under the orthodox common-law trial system it was the practice of judges at a trial to take full notes of the testimony of the witnesses, in order to aid themselves in commenting upon the testimony in the charge to the jury. This practice has naturally died out in the United States, under the misguided rule, now almost universal (a veritable mutilation of the common-law trial by jury), forbidding the trial judge to charge the jury upon the effect of the testimony. But while it prevailed, the question was often presented whether these notes of the judge were admissible, without calling him, to prove at another trial the terms of testimony delivered on the former occasion. It was generally agreed that they were not, because the notes, however full they might be,

§ 2307 (county surveyor's records of surveys and plats, "whether private or official," admissible); § 5264 (in trespass to try title, a report under oath of a surveyor appointed by court is admissible, "if said report be not rejected for good cause shown"); Vt. St. 1902, no. 62 ("all books, papers, and records of the surveyor-general in possession of the State are provable by certified copy of the Secretary of State"); Wash. C. & Stat. 1897, § 492 (certificate of a county surveyor or his deputy, to be presumptive evidence of the facts contained, "unless such surveyor or deputy shall be interested therein"); Wis. Stat. 1898, § 771 (certificate of a county surveyor or deputy, admissible); St. 1899, c. 286, § 4 (survey of lands by canal company,

to be evidence of the facts therein stated); Wyo. Rev. St. 1887, § 1891 (county surveyor's certificate of survey to be "admitted as legal evidence").

⁶ 1813, *Ewing v. Savary*, 3 Bibb 235 (surveyor's report made without notice to absent resident, excluded).

⁷ 1902, *Boyett v. State*, 132 Ala. 23, 31 So. 551 (statute applied). That there is no inherent necessity for this notice, see *ante*, § 1385.

⁸ For land-office registers, see *ante*, § 1659.

⁹ *E. g.*: 1849, *May v. Haskin*, 12 Sm. & M. 429 ("the original survey fixed the rights of the parties; the government sold the land according to that survey"); 1848, *Eberle v. Board*, 11 Mo. 258.

were not taken under any official duty, — a strict application of the general principle (*ante*, § 1633):

1830, *Abinger*, L. C. B., in *Leach v. Simpson*, 5 M. & W. 311, 7 Dowl. Pr. 514: "A judge only takes notes for his own private convenience; and there is no law which requires him to do so."

1811, *Tilghman*, C. J., in *Miles v. O'Hara*, 4 Binn. 110: "It is refining too much to say that he taken his notes under the obligation of his oath of office. . . . In general, where the law directs a judge to do an official act, it receives his certificate as sufficient evidence of the act being done. But the taking notes of the evidence was not an act required by law; therefore his certificate is no evidence that these notes contain the truth."¹

§ 1667. *Same*: (2) *Magistrate's Report*. For one sort of judges' reports of testimony, however, there has long been a basis of statutory authority, — *committing magistrates'* reports of testimony at the *preliminary hearing* for committal. By statutes first enacted in the 1500s, and extended in scope from time to time,¹ the magistrates were directed to take the testimony, or the material parts thereof, in writing, and to return it to the proper office for preservation. The statutes, however, did not expressly make this magistrate's return admissible (*i. e.* as an official statement, without calling the magistrate or the clerk acting under his direction). Accordingly, for a long time it seems to have been thought necessary to call the magistrate or the clerk, who verified the notes and thus used them as an aid to memory (on the principle of § 737, *ante*). Such at any rate was the English practice down to the 1700s.² It persisted as a tradition into the 1800s; but by this time the

¹ *Accord*: 1883, *Schafer v. Schafer*, 93 Ind. 588; 1867, *Webster v. Calden*, 55 Me. 171 (report signed by the judge); 1890, *State v. Wheelon*, 102 Mo. 17, 22, 14 S. W. 730; 1898, *People v. Corey*, 157 N. Y. 332, 51 N. E. 1024 (statement made from the bench); 1821, *Foster v. Shaw*, 7 S. & R. 162; 1844, *Livingston v. Cox*, 8 id. 62; 1875, *Zitake v. Goldberg*, 38 Wis. 216, 229 (justice of peace's minutes, excluded); 1891, *Elberfeldt v. Waite*, 79 id. 284, 48 N. W. 525 (preceding case followed); 1903, *Ex. t. v. Allen*, — id. —, 96 N. W. 803 (justice's minutes excluded).

Yet modern practice in *England* does not seem to observe a definite rule upon this point: 1851, *R. v. Child*, 5 Cox Cr. 197, 203 (excluded); 1858, *R. v. Harvey*, 8 id. 99, 103, *omitted* (excluded); 1860, *Watson v. Little*, 5 H. & N. 472 (legitimacy; to prove inconsistent statements of the mother in a proceeding for filiation of a bastard, the order of filiation, by deceased magistrates, reciting her oath, were admitted); 1874, *Ex parte Gillebrand*, *Re Sidebotham*, L. R. 10 Ch. App. 52 (judge's notes of evidence received, when "verified"; whether this means "sworn to," does not appear); 1892, *R. v. Britton*, 17 Cox Cr. 627 (judge's notes of proceedings, excluded in a prosecution for perjury); 1896, *Griffin's Divorce*, App. Cas. 133 (judge's notes of testimony, offered by certified copy, received upon verification by a witness to the testimony); 1898, *Re Batt & Co.'s Reg. Trademarks*, 2 Ch. 442, 701.

In *Canada* there is authority for admission:

1848, *Doe v. Murray*, 1 All. N. Br. 216 ("he takes them under the sanction of an oath"); 1862, *Bennett v. Jones*, 5 id. 342; N. Br. Consol. St. 1877, c. 46, § 80 (judge's notes admissible, when by him produced and read by him or transmitted "to the presiding judge to be read by him"); 1890, *R. v. Mills*, 2 N. W. T. r. 297 (admitted; the judge being required by law to take notes).

The notes may of course be used by the judge to aid his memory on being called to the stand (*ante*, § 737). Whether he is *compellable* to take the stand involves a question of privilege (*post*, § 2372).

² They are collected in full, *ante*, § 1826.

³ 1666, *Lord Morley's Trial*, 6 How. St. Tr. 770 (coroner's examination; oath of coroner required); 1679, *Langhorn's Trial*, 7 id. 417, 467 (Lord's Journal of an examination before them, not admitted without some witness' oath); 1679, *Wakeman's Trial*, ib. 591, 664 (same); L. C. J. North: "When there is an examination in a court of record, these not passing the examination of that Court but being taken by the clerks, we always in evidence expect there should be somebody to prove that such an examination was sworn and subscribed to"; 1680, *Earl of Stafford's Trial*, ib. 1293, 1440 (like *Langhorn's Case*), 1680, *Hale, Pleas of the Crown*, II, 52 ("Oath is to be made in Court by the justice or his clerk, that these examinations and informations were truly taken"; ib. 284 ("that they are the true substance of what," etc.).

sounder view was occasionally advanced that the magistrate's express statutory authority to make the return sufficed to admit it (when duly authenticated) as an official statement, without calling him or his clerk.³ The matter remained, however, in the dubitable realm of conflicting *visi prius* rulings, until in 1847 a statute expressly adopted the correct and practical view.⁴

In the *United States*, the same result is reached by a majority of the Courts, although the original English view is also here represented;⁵ one reason for adopting it (in some jurisdictions at least) being the supposed incompleteness of the report (*post*, §§ 2098, 2099), — either because the local statute requires only the "substance" to be taken down,⁶ or because in practice the notes are carelessly taken and are untrustworthy (though even these would seem safer than mere recollection-testimony, which is universally received).

It will be remembered that there are two other ways in which the report

³ 1808, *R. v. Howe*, 1 Camp. 462, 6 Esp. 125 (magistrate's record of conviction, containing the witness' testimony, as required by law, excluded); 1831, *R. v. Watkins*, 4 C. & P. 550, note (Bosanquet, J.); the clerk taking the examination must be called, using his paper to refresh his memory; 1834, *R. v. Chappel*, 1 Moo. & Rob. 395 (Lord Denman, C. J.; neither magistrate nor clerk must be called); 1835, *R. v. Richards*, 1b. note (Patterson, J.; same); 1835, *R. v. Foster*, 7 C. & P. 143 (Bosanquet and Alderson, JJ., "intimated an opinion that the [accused's] statement might be read on proof of the magistrate's handwriting, on the ground that the law required the magistrate to certify that it had been duly taken"; remarking, in reference to Lord Hale's doctrine, "it could not be intended that the magistrate or his clerk must be called, on account of their office"); 1839, *R. v. Pikesley*, 9 id. 124 (held, on the facts, desirable, but not legally necessary, to call the magistrate).
⁴ 1847, St. 11 & 12 Vict. c. 42, § 17 ("it shall be lawful to read such deposition in evidence," signed by the witness and the justice or justices); § 18 (the examination of the accused "may if necessary be given in evidence against him").
⁵ 1874, *Bass v. State*, 29 Ark. 142, 145 (escape; coroner's minutes of inquest-proceedings, excluded); 1899, *Payne v. State*, 66 id. 545, 52 S. W. 276 (magistrate's report excluded, except as an aid to memory, because it is legally required to contain the substance only; *Atkins v. State*, 16 id. 538, explained as decided *contra* under a statute requiring reduction of the whole to writing and the signature by witness); 1872, *People v. Devine*, 44 Cal. 452 (coroner's report of testimony, admitted, the coroner being required by law to return it in writing); 1901, *Green v. State*, 43 Fla. 552, 30 So. 798 (justice of the peace's certificate of a dying declaration, excluded, the justice not being called); 1900, *Haines v. State*, 109 Ga. 526, 35 S. E. 141 (magistrate's report, reduced to writing "some time after the trial"; admitted); 1792, *Benedict v. Nichols*, 1 Root 434, *semble* (examination before a probate judge, admitted); 1862, *Schoonover*

v. Myers, 28 Ill. 308 (magistrate's notes of testimony, not read to or signed by the witness, excluded); 1876, *State v. Hayden*, 45 Ia. 11, 13 (even to impeach by inconsistencies, the clerk's minutes of grand-jury testimony or the magistrate's of testimony on preliminary examination, are inadmissible, because of their customary brevity and uncertainty; the clerk or magistrate or other hearer must be called; even a report signed by the witness himself is not sufficient, unless its contents were made known to him at the time); 1883, *Com. v. Ryan*, 134 Mass. 223, 225 (justice of the peace's report of a case, under Pub. St. 1882, c. 26, § 15, is not usable as an official record of testimony); 1868, *Lightfoot v. People*, 16 Mich. 507, 512, *semble* (clerk's minutes of testimony before a magistrate, admissible); 1901, *Cunning v. State*, 79 Miss. 284, 30 So. 658 (magistrate's report, uncertified and unverified, excluded on the facts); 1832, *Bellinger v. People*, 8 Wend. 598, *semble* (committing magistrate's report, admissible); 1840, *People v. White*, 24 id. 520, 533, 556 (coroner's report of testimony, excluded because in pencil; *Furman, Sen., diss.*); 1847, *State v. Valentine*, 7 Ired. 225, 226 (magistrate need not be called); 1902, *Edwards v. Gimbel*, 202 Pa. 30, 51 Atl. 357 (coroner's written report of testimony, excluded, because no duty required him to record it); 1888, *State v. Jones*, 29 S. C. 227, 7 S. E. 296, *semble* (coroner's report, admitted; though other questions are confused with it).

The magistrate's report is sometimes excluded because it is not in the form precisely prescribed for it: 1850, *R. v. Miller*, 4 Cox Cr. 166 (deposition signed by "H. J.," not purporting to be a magistrate; not admitted, nor his actual magistracy allowed to be shown, because the statute requires it to "purport" to be so signed); 1896, *State v. Hatcher*, 29 Or. 309, 44 Pac. 584 ("The statute, having provided the manner in which the statement must be authenticated, would seem to exclude oral evidence in aid of a faulty execution, or to supply the necessary certificate").

⁶ See the statutes, *ante*, § 1326.

may be used, even though it is inadmissible as an official statement. (a) The magistrate or the clerk, being called, may use it to aid his memory.⁷ (b) If the report is signed by the witness or the accused (as is usually required by statute), then it has become by adoption his own statement, and it is no longer merely the magistrate's report of what was testified; consequently, it may be put in as the witness' or accused's own statement, if his signature to it as read to him is proved; and an oral acknowledgment of its correctness will suffice for the same purpose.⁷ It follows, when the document is used in this way, that the objection as to not calling the magistrate or his clerk disappears, since it is not put in as the officer's report.⁸ Conversely, it is receivable as an official statement, even though the signature of witness or accused is not appended.⁹

§ 1668. *Same*: (3) *Bill of Exceptions*. A bill of exceptions usually embodies so much of the testimony as is needed to be laid before the superior Court in order to enable it to understand and rule upon the questions of law raised by the exceptions; it is signed by the trial judge, partly (at least) in token of his approval of it as a fair representation of the issues raised. May it not therefore be regarded as an official statement, by the judge, of the tenor of the testimony, whenever in another trial (even between other parties) it may be desired to prove the parts of the testimony stated in the bill? The arguments for so receiving it have been forcibly put in the following passages:

1824, *Owsley, J.*, in *Baylor v. Smithers*, 1 T. B. Monr. 6: "The statements contained in a bill of exceptions must be supposed to have undergone not only the inspection of each party or their counsel, but moreover the scrutiny and supervision of the Court, by whom the exceptions are signed. When enrolled, those statements in fact compose part of the record, and are entitled to as much verity and are deserving as much credit as would be the testimony of any witness who might prove what the witness whose statements are contained in the record proved on a previous trial."

1850, *Benning, J.*, in *Smith v. State*, 28 Ga. 19, 23: "The test ought surely to be no more than this: Is it probable that the [party's] admission admits only what is true, that the [Court's] judgment sanctions only what is true? For the truth is all that justice requires; and taking this as the test, the paper in question would, it is certain, be admissible. Is it likely that the parties agreed to anything as proved that was not proved, even though the only purpose of this agreement was to comply with the requisitions of the law as to new trials and the law as to writs of error? Is it likely that the Court would have approved as true anything that was not true, even though the purpose of the approval was

⁷ The cases to this effect are collected *ante*, § 1328.

⁸ 1834, *R. v. Chappel*, 1 Moo. & Rob. 395 (Denman, L. C. J.); 1835, *R. v. Richards*, ib. 396, note (Patteson, J.); *R. v. Hopes*, 7 C. & P. 136 (Vaughan and Patterson, JJ.); *R. v. Reading*, ib. 649 (Parke, B.); *R. v. Rees*, ib. 568 (Denman, L. C. J.).

⁹ 1897, *Miller v. Busick*, 56 Oh. 437, 47 N. E. 249.

From the use of the magistrate's report under the present Exception, the application to it of certain other principles of evidence must be distinguished; namely, its required use as a pro-

ferred sort of testimony (*ante*, §§ 1326-1329), its force as conclusive testimony (*ante*, § 1349), and the necessity of showing it to a witness under cross-examination before it can be used to prove his prior contradictory testimony (*ante*, § 1262). Moreover, the magistrate's report of oral testimony is distinguished from the deposition proper, in which the witness testifies originally in writing; the distinction has been examined, *ante*, §§ 802, 1331, 1376, 1401.

Whether the whole of the testimony and the precise words must be proved involves the principle of Completeness (*post*, §§ 2098, 2099).

merely to comply with the regulations of these same laws? Certainly it is not. Surely all will agree that a paper thus agreed to by the parties and approved by the Court will be more trustworthy on the question what was the evidence delivered on the trial than the daily fading recollection of persons who happened to hear the evidence when it was so delivered."

Nevertheless, the objections to this persuasive exposition are serious, and they are mainly three,—first, it is not the judge's duty to make a report of the testimony, but only to approve the form of the exceptions, so that upon strict principle the bill does not contain an authorized official statement by him; secondly, the bill contains only such fragments of the testimony as bear upon the exceptions, and is therefore not necessarily a fair representation of its tenor; thirdly, the bill is customarily prepared under conditions not likely to ensure a sufficiently correct statement of the testimony. These objections are forcefully detailed in the following passage:

1868, *Beck, J.*, in *Boyd v. Bank*, 25 Ia. 237: "The rule which admits in evidence against the accused his voluntary confession and statement upon a preliminary examination is supported by reasons which do not exist in the case of a bill of exceptions. The magistrate is charged by law with the duty of reducing correctly to writing such confessions and statements. They are read over to him under the provisions of our statute, and he has the opportunity to correct them. In all cases where the authorities hold such statements to be admissible, it is the duty of the officer reducing them to writing to do so correctly; and it is presumed that the writing contains fully and perfectly the statements and admissions made by the accused. Bills of exceptions are prepared with no view to such accuracy in the statements of witnesses. They are not required to contain all of the evidence of the witnesses, nor the language used by them, but only so much of the evidence as may be necessary to explain the ruling of the Court. They are never read to the witnesses, who in fact have nothing to do with their preparation. They are often written out days, weeks, and even months after the trial. . . . The bills of exceptions are then presented to the judge, who, unless they contain some glaring mis-statements, will usually sign them. We are warranted in saying that some judges seldom refuse to sign, and often do not look over and read with care bills of exceptions presented to them by respectable opposing counsel with an indorsement of their approval and agreement. In the preparation of bills of exceptions in open court, the counsel of the respective parties often disagree upon the evidence intended to be stated, and their differences are reconciled, with the approbation of the Court, by mutual concessions which finally present the evidence as claimed by neither and which in fact does not fully satisfy either. . . . As the statute does not require it to be prepared with a view that it shall contain an accurate report of the evidence, and as in practice this is not always so, it ought not to be admitted in evidence in any proceeding to impeach or contradict a witness whose evidence it purports to contain, unless verified and supported as other proof."¹

From the point of view of practical safety, the question is a difficult one to settle by a general rule, and must depend much on the local professional methods. But it seems clear, so far as principle is concerned, that where the parties to the later trial are (as in the usual case) the same in interest, the signing of the bill in the first trial is an admission of the correctness of its statements, and the objection that the admission was intended for that trial only (*ante*, § 1066, *post*, § 2592) may affect its weight but not its admissi-

¹ See also a good opinion by Lawrence, C. J., in *Roth v. Smith*, 54 Ill. 431, 433.
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bility; while, as against one not a party to the former trial, the bill involves no admission of his, and is furthermore not available as an official statement of the judge. The majority of Courts, on one ground or another, receive the bill to prove the tenor of the former testimony.³

§ 1669. *Same*: (4) *Notes of Stenographer, Attorney, Jurymen*. (a) The appointment of an *official stenographer* has chiefly an administrative purpose, — that of providing conveniently, constantly, and (sometimes) without expense to litigants, a trustworthy means of dealing with the testimony during and after the trial. Does the stenographer, under the general principle (*ante*, § 1633), become an official authorized to report the testimony, in the sense that his report is admissible in other trials (without calling him to the stand) as a statement made under an official duty? It would seem that such a result could be reached without doing violence to principle; and practical convenience would certainly be advantaged, while in trustworthiness such reports would greatly surpass the ordinary recollection-testimony. Nevertheless, the Courts have generally declined to recognize the reports of an

³ *Ark.*: 1895, *St. Louis I. M. & S. R. Co. v. Sweet*, 60 Ark. 550, 51 S. W. 571 (bill of exceptions, excluded); *D. C.*: 1897, *Anderson v. Reid*, 10 D. C. App. 426, 430 (bill not purporting to be "an agreed statement of all of the evidence of the witnesses," excluded); *Ca.*: 1852, *Riggins v. Brown*, 13 Ca. 271, 275 (bill of exceptions, not decided); 1859, *Smith v. State*, 28 id. 13, 23 ("brief" of evidence, agreed to by parties and approved by the Court, admitted to prove former inconsistent testimony; partly as an admission, partly as a judicial order; quoted *supra*); 1869, *Adair v. Adair*, 29 id. 75 (testimony on a former trial as agreed upon by counsel and approved by Court, admitted); 1883, *Mitchell v. State*, 71 id. 124, 155, *semble* ("brief" agreed upon for a motion for new trial, admissible); 1891, *Lathrop v. Atkinson*, 87 id. 339, 243, 13 S. E. 517 ("brief" of evidence, approved by Court, admitted, though not complete); 1897, *Columbus v. Ogletree*, 102 id. 293, 29 S. E. 749 (brief of evidence, filed with a motion for new trial and approved by the judge, receivable); 1900, *Owen v. Palmour*, 111 id. 385, 36 S. E. 969 (testimony in a brief of evidence at a former trial, admitted); *Ill.*: 1870, *Roth v. Smith*, 54 Ill. 431, 433 (bill of exceptions, excluded); 1882, *Stern v. People*, 102 id. 540, 555 (same); 1898, *Illinois C. R. Co. v. Ashline*, 171 id. 313, 49 N. E. 527 (same); *Ja.*: 1868, *Boyd v. Bank*, 25 Ja. 257 (excluded; quoted *supra*); *Ky.*: 1824, *Baylor v. Smithers*, 1 T. B. Monr. 6 (bill of exceptions admitted to prove former inconsistent statements; quoted *supra*); 1873, *Kean v. Com.*, 10 Bush 190 (witness deceased; admissible in a civil case, but not in a criminal case, because in the latter the accused has the right to cross-examine a reporting witness to the terms of the former testimony; an erroneous distinction, because the present exception to the Hearsay rule exists equally for criminal cases; *ante*, § 1398); 1895, *Reynolds v. Powers*, 96 Ky. 481, 29 S. W. 299 (former testimony provable by bill of exceptions); 1896, *Louisville Water Co. v.*

Upton, — id. —, 36 S. W. 520 (same); 1897, *Boner v. Com.*, — id. —, 40 S. W. 700 (same; but only for civil cases); *Mich.*: 1898, *Breitenwieser v. Clough*, 116 Mich. 340, 74 N. W. 507 (bill of exceptions excluded); *Mo.*: 1865, *Jaccard v. Anderson*, 27 Mo. 91, 96 (bill of exceptions containing the substance of the witness' testimony, admitted); *Rev. St.* 1899, § 3149 (evidence preserved in a bill of exceptions may be used as if it had been preserved in a deposition in the cause; but the opponent may prove "any matter contradictory thereof" as though the witness were present); *N. Y.*: 1896, *Neilson v. Ins. Co.*, 1 John. 301 ("case made" on a former trial, corrected before the judge, not admitted to prove inconsistent statements, because "not conclusive against third persons whose veracity or credit is called in question"; a poor reason, because no claim that it is "conclusive" is involved); *Ok.*: *Rev. St.* 1899, § 5242 a (bill of exceptions purporting to incorporate "all the evidence given by such party or witness," admissible); 1874, *Kirk v. Mowry*, 24 Oh. St. 581 (bill of exceptions, excluded); *Pa.*: 1902, *Edwards v. Gimbel*, 302 Pa. 30, 51 Atl. 357 (testimony in a bill of exceptions, not admitted in impeachment on a later trial); *Tex.*: 1891, *McCamant v. Roberts*, 30 Tex. 327 (a statement of facts as testified to, made up by either counsel or Court, inadmissible to contradict a witness by his former testimony); *Wis.*: 1874, *Wilson v. Noonan*, 35 Wis. 343 (admissible, because the bill is consented to by the parties); 1875, *Zitske v. Goldberg*, 36 id. 216, 229 (undecided).

In any case the bill may be availed of by witness or counsel (on the principles of §§ 757, 761, *ante*) as an *aid to memory*: 1885, *Solomon R. Co. v. Jones*, 34 Kans. 443, 453, 8 Pac. 730.

Whether the *whole of the testimony* must be proved (*post*, §§ 2098, 2099), and whether the witness whose testimony is reported must be shown to be *deceased* or otherwise unavailable (*ante*, §§ 1401-1413) involve independent rules.

official stenographer as admissible under the present Exception.¹ It has been left for statutes, in many jurisdictions, to provide expressly for the admission of such reports.²

¹ 1894, *Jenkins v. State*, 35 Fla. 787, 14 Fla. 162, *semble*; 1887, *Hardeman v. English*, 79 Ga. 367, 390, 5 S. E. 70; 1899, *State v. Adams*, 78 Ia. 392, 43 N. W. 194 (report of stenographer appointed by justice of peace, excluded); 1899, *State v. Reinheimer*, 100 Id. 624, 80 N. W. 666 (similar); 1891, *Herrick v. Swomley*, 84 Md. 4; 1890, *Minor v. Darling*, 44 Mich. 438, 7 N. W. 77 (Cooley, J.: "There is no law making them evidence generally, nor should there be"); 1891, *Edwards v. Heuer*, 46 Id. 95, 97, 8 N. W. 717 ("The Legislature, in providing for the assistance of shorthand writers, did not intend that their notes should have more force than judge's minutes," which could not be used); 1887, *People v. Carr*, 64 Id. 702, 704, 31 N. W. 590 (Minor v. Darling approved); 1898, *Tooke v. Plummer*, 69 Id. 345, 350, 37 N. W. 297; 1895, *People v. Considine*, 105 Id. 149, 65 N. W. 196; 1896, *Lipacomb v. Lyon*, 19 Neb. 521, 27 N. W. 731, *semble*; 1894, *Smith v. State*, 43 Id. 356, 359, 60 N. W. 535 (official stenographer's report of proceedings at a trial, not receivable as a public document); 1898, *Kerr v. Lunsford*, 31 W. Va. 677, 8 S. E. 498; 1893, *Rounds v. State*, 57 Wis. 52, 14 N. W. 865, *semble*.

As to the standing of an official stenographer's notes in regard to the certifying of a bill of exceptions, distinguish a series of cases in Pennsylvania: *Taylor v. Preston*, 79 Pa. 436; *Chase v. Vandegrift*, 88 Id. 217; *Janney v. Howard*, 150 Id. 339, 24 Atl. 740; *Rosenthal v. Ehrlicher*, 154 Id. 396, 26 Atl. 435; *Connell v. O'Neil*, ib. 522, 26 Atl. 607; *Com. v. Arnold*, 161 Id. 320, 326, 29 Atl. 270; *Pool v. White*, 171 Id. 500, 33 Atl. 579; *Smith v. Hine*, 179 Id. 203, 36 Atl. 222; *Woodward v. Heist*, 180 Id. 161, 36 Atl. 645; *Harris v. Traction Co.*, ib. 184, 36 Atl. 727; see also *Cummings v. Armstrong*, 34 W. Va. 1, 11 S. E. 742.

² *Canada*: N. W. Terr. St. 1902, c. 5, § 2, and St. 1903, c. 8, § 1 (official shorthand reporter's report of testimony, admissible, when certified by himself or the clerk of court where filed); P. E. I. St. 1899, c. 15, §§ 5, 8 (official stenographer's certified transcript, to be admissible); *United States*: Ariz. St. 1893, Mar. 6, No. 4 (official stenographer's certified report of testimony, in a criminal case, admissible); Cal. C. C. P. 1872, § 273 (official reporter's report of testimony, admissible); 1880, *People v. Lee Fat*, 54 Cal. 527, 529 (official stenographer's report, made evidence by statute, excluded, partly on the principle of confrontation, *ante*, § 1398); 1899, *People v. Plyer*, 126 Id. 379, 68 Pac. 904 (statute applied); 1901, *Benton's Estate*, 131 Id. 472, 65 Pac. 775 (C. C. P. § 273 admits the official transcript, but only when filed); Conn. Gen. St. 1887, §§ 738, 742, 766 (exemplified transcript of testimony and proceedings by an official stenographer, to be *prima facie* evidence); St. 1895, May 7, c. 116 (testimony of a witness absent, etc., is provable in civil cause by a cer-

tified copy of the court stenographer's notes, "verified by his oath"); Fla. St. 1908, c. 5122, § 5 (official stenographer's transcript, certified and acknowledged, to be "*prima facie* a correct statement of such testimony"); Ia. St. 1890, c. 9, § 1, Code Suppl. 1902, § 246 (original or transcribed notes of testimony, "by the shorthand reporter of such court," are admissible on a retrial of the same case, "and for purposes of impeachment in any case," with the same effect as a deposition; after office ended, the reporter's transcript sworn to by him before an officer is admissible; further regulations in detail); 1896, *Grieve v. R. Co.*, 104 Ia. 659, 74 N. W. 192 (statute applied); 1902, *Walker v. Walker*, 117 Id. 609, 61 N. W. 908 (official reporter's certified transcript of testimony in another trial, not admitted except for the limited purpose of c. 9, 27th Assembly, 1896; § 2777 of the Code of 1878 being omitted from the Code of 1897); Ky. Stata. 1899, § 4643 (official stenographer's report of testimony, admissible); 1903, *Stevenson v. H. Co. Curil*, — Ky. —, 71 S. W. 506 (official stenographer's transcript, admitted at a second trial, under Stata. § 4643); 1901, *State v. Hanks*, 106 La. 480, 31 So. 53 (Art. 123, of 1898, admitting a stenographer's certified report of testimony in Orleans parish, applied); Mass. Rev. L. 1902, c. 165, § 85 (official stenographers are authorized "to read from such notes in open court any portion of the testimony so taken"); Id., c. 175, § 68 ("transcripts from stenographic notes duly taken in the superior court under the authority of law, when verified by the certificate of the official stenographer or assistant taking them" are admissible, when the testimony itself is competent); Mont. C. C. P. 1895, § 377 (certified report of a court stenographer "is *prima facie* a correct statement of such testimony, etc."); N. J. St. 1900, c. 150, § 11 (official stenographic report of testimony of a deceased witness, admissible on a new trial); Oh. Rev. St. 1898, § 5242 (a "competent official stenographer's" report of testimony, admissible); Okl. Stata. 1893, § 1586 (official reporter's certified transcript of notes of testimony, admissible "in all cases" with like effect as testimony taken by deposition); Or. St. 1889, Feb. 25, § 5 (official reporter's certified transcript of testimony, admissible); R. I. Gen. L. 1896, c. 244, § 25 (stenographer's sworn transcript of shorthand dictation, admissible); Utah Rev. St. 1898, §§ 3475, 5013 (official stenographer's report, certified by him, receivable when the witness is dead, etc.); § 725 (official stenographer's certified transcript of testimony, to be "*prima facie* a correct statement of such testimony"); Vi. Stata. 1894, § 1028, (official stenographer's certified transcript of "evidence or proceedings," admissible); Wis. Stata. 1898, § 4141 (official stenographer's certified transcript of testimony, admissible without calling him in person); Wyo. Rev. St. 1887,

(b) The reports of an ordinary *private stenographer* are of course not receivable, being merely hearsay reports by a person not produced.³ If the stenographer is accounted for as deceased or otherwise unavailable, they should perhaps be received as coming fairly within the Exception for Regular Entries (*ante*, § 1523).⁴ If the stenographer is produced, the notes may of course be used as an *aid* to memory,⁵ under the general principles of that subject (*ante*, §§ 735, 758); or may be read to *contradict the stenographer* himself, under the rule for self-contradictions (*ante*, § 1259), if shown to him (when called for the opponent) and admitted by him to be genuine.⁶

(c) No member or clerk of a *grand jury* is authorized by his office to report testimony, and his notes are not receivable as an official statement.⁷

(d) Nor is an *attorney* vested by his office with such authority, so as to make his notes admissible.⁸

§ 1670. Reports and Inquisitions, in general; Inquisitions (1) of Domain; (2) of Escheat (Pedigree and Title); (3) of Title to Personality (Sheriff); (4) of Pedigree (Heralds' Books). A report is to be distinguished from a return, as already defined (*ante*, § 1664), in that the latter is typically concerned with something done or observed personally by the officer, while the former embodies the results of his investigation of a matter not originally occurring within his personal knowledge. The older term customarily applied to the former type of statement — "inquisition" or "inquest" — suggests more clearly its special quality, namely, that of resting upon means of information other than original personal observation.

Now an inquisition or report, if made under due authority, stands upon no

§ 1765 (official stenographer's certified transcript of testimony, filed with papers in the case, admissible); St. 1891, c. 24, § 6 (official stenographer's transcripts of testimony, with certificate of his official position by the clerk of court, admissible); St. '903, c. 29 (official stenographer's transcript, certified by the clerk of court as to his official character, is *prima facie* evidence of the testimony).

Whether the *whole of the testimony* must be proved (*post*, §§ 2098, 2099), and whether the witness whose testimony is reported must be shown to be deceased (*ante*, §§ 1401-1418), involve other principles.

§ 1843, R. v. O'Connell, 5 State Tr. N. S. 1 (report of trial of Feargus O'Connor, taken in shorthand and published by himself; received, at 391, but rejected at 571); 1871, Phares v. Barber, 61 Ill. 271, 276 (transcribed stenographic report, excluded); 1882, People v. Sligh, 48 Mich. 58, 11 N. W. 782; 1867, Morris v. Hammerle, 40 Mo. 489, 490; 1896, Redford v. R. Co., 15 Wash. 419, 46 Pac. 650; 1888, Kerr v. Lunsford, 31 W. Va. 659, 677, 8 S. E. 493.

• This has been provided by statute in New York: C. C. P. 1877, § 830 (notes of former testimony, taken by a stenographer now deceased or incompetent, may be read by a competent person).

• 1898, People v. Lem You, 97 Cal. 224, 227, 32 Pac. 11; 1898, State v. Bartmess, 33

Or. 110, 54 Pac. 167; and cases cited *ante*, §§ 737, 761.

• People v. Sligh, Kerr v. Lunsford, note 1, *supra*.

Whether the *whole of the testimony* must be proved (*post*, §§ 2098, 2099), and whether a *copy*, not the original, of the notes may be used (*ante*, § 749), are independent questions.

• 1805, State v. Ostrander, 18 Ia. 435, 455 ("minutes of testimony taken before the grand jury" under statute, excluded); 1876, State v. Hayden, 45 id. 11, 13 (cited *ante*, § 1667; here a statute required notes to be taken); 1898, State v. Porter, 105 id. 677, 75 N. W. 519 (minutes of grand jury testimony are not "independent evidence"); 1889, State v. Thomas, 99 Mo. 235, 255, 261, 12 S. W. 643 (minutes of testimony taken by a grand juror and signed by the witness, excluded, partly because the juror could not remember the testimony, partly because the minutes were too brief; apparently erroneous); 1890, State v. Wheelon, 102 id. 17, 22, 14 S. W. 730 (minutes taken by a grand juror acting as clerk, according to statute, inadmissible).

• 1895, Jenkins v. State, 35 Fla. 737, 18 So. 182 (State's attorney); 1873, Waters v. Waters, 35 Md. 539.

For *interpreters* and *official translations*, see *ante*, § 811, *post*, § 1810.

less favorable a footing than other official statements. As a statement made under official authority or duty, it is admissible under the general principle (*ante*, §§ 1633, 1635):

1824, Mr. Thomas Starkie, Evidence, 260: "Inquisitions, which are of a public nature, and taken under competent authority, to ascertain a matter of public interest, are, upon principles already announced, admissible in evidence against all the world. . . . It is not essential to the reception of evidence of this nature that the inquiry should have been made by virtue of some judicial authority and by means of witnesses examined upon oath;¹ it is sufficient if it was made by virtue of competent authority on behalf of the public, and on a subject-matter of public interest. . . . It is, however, of the very essence of evidence of this nature that the inquiry should have been made under proper authority; in general, therefore, unless the authority be in its nature notorious, it must be proved by the production of the commission; as in the case of an inquisition *post mortem*, and such private offices."

But the fundamental doctrine of the common law seems to have been that no authority to make an inquisition will be implied merely from the general nature of the office, and that an *express authority must be created* for the purpose; the report or inquisition thus being sharply distinguished in principle from the return proper (*ante*, § 1664) and the register (*ante*, § 1639). The general quality of a statement made under authority (should it exist) will suffice to admit it; but the authority which can be implied from the nature of an office is (sensibly enough) an authority to record or return only those things personally done by or before the officer (*ante*, § 1635, par. 3). An authority to record matters out of his personal knowledge—matters to which he could ordinarily not testify even if called to the stand—must therefore properly be sought in an express command,—a command involving the special task of seeking extrinsic sources of information and thus qualifying himself for the unusual duty. The command need not be renewed for each instance; it may be a general command, or a special command; but it must be an express command. It is this principle of express authority which serves to explain the attitude of the common law toward the use of inquisitions or reports. The principle is best illustrated in the doctrines about certain older forms of inquisition, now fallen into disuse, but valuable as embodying the fixed policy of the law.

(1) Beginning with Domesday Book itself,² there is a lengthy and numerous series of inquisitions into the state of the regal or baronial *domain*, the kinds and incidents of feudal privileges, the rights of tithe and toll, and other local customary rights.³ In the following passage, one only of the various sorts is illustrated:

1793, Kenyon, L. C. J., in *Beebe v. Parker*, 5 T. R. 14: "Near a century and a half ago the homage (the tenants holding under the lord of the manor) being convened together *eo nomine* as the homage (not for the purpose of extending their claims either against the lord or strangers) . . . proceeded to describe the several customs which

¹ That it is *ex parte* is no inherent objection (*ante*, § 1385).

² 1897, Maitland, *Domesday Book* and Beyond.

³ 1814, Phillippa, Evidence, II, 101 (referring to numerous instances, not in judicial archives).

regulated the descent of the different species of tenure within this manor. Now can it be supposed that these persons, acting under the sanction of an oath, could for no purpose whatever give a false representation of these customs? or is it not more probable that their account was the true one? Common sense and common observation would induce us to believe the latter."⁴

These proceedings all rested for their sanction on warrants ordering the inquisition or "survey," and would no doubt be admissible to-day, had they ever any bearing; although it has long been the rule, by reason of the antiquity of the proceedings, to dispense with a distinct showing of the express authority and to presume that it existed.⁵

(2) There was also, as a once common proceeding, the inquisition of *escheat* (usually termed "*post mortem*"), which, when made by express authority, was always received and highly valued:

1844, Mr. J. Hubback, *Succession*, 584, 589: "Upon the death of each tenant *in capite* of the Crown, a jury was summoned to inquire, first, of what land the party died; secondly, by what rents or services the same were held; thirdly, who was his heir; and of what age the said heir then was. The inquest was taken upon oath, and the verdict, under the seals of the jury, was returned to the officer by whose summons the jury was assembled. This duty appears first to have belonged to the justices in eyre, but was afterwards transferred to the escheators, officers appointed by the Crown for the purpose. . . . They were continued until the restoration of Charles II, when the practice of taking them ceased, in consequence of the abolition of military tenures. . . . A genealogical utility unequalled by any later institution has been ascribed to these proceedings by very high authority. . . . [Lord Mansfield said:] 'The proof of pedigrees has become so much more difficult since inquisitions *post mortem* have been disused, that it is easier to establish one for five hundred years before the time of Charles II, than for one hundred years since his reign.' . . . The true ground of their admissibility is the fact that they are the results of inquiries made by virtue of competent public authority. . . . An inquisition *post mortem* cannot be read in evidence unless it be proved that a commission was issued to warrant it."

This form of inquisition has been availed of in evidence in fairly modern times, and even in our country.⁶

⁴ *Accord*: 1786, *Ashhurst, J.*, in *Goodwin v. Spray*, 1 T. R. 473.

⁵ 1747, *Kellington v. Trinity College*, 1 W'ls. 170 (ancient "survey," from the first-fruits office, of the possessions of a nunnery, admitted to show tithe customs; on objection that the authority for the survey did not appear, it was answered "that these surveys have always been allowed as proper evidence, and to be read, notwithstanding the commissions under which they were taken be lost").

⁶ 1709, *Burridge v. Sussex*, 2 Ld. Raym. 1292 (inquisition *post mortem* of 5 Car. I.; "resolved by the whole Court, that it was good evidence, and did prove the deed and entail"); 1712, *Newburgh v. Newburgh*, 3 Brown P. C. 553 (inquisition *post mortem*, about 1636, excluded because no commission to warrant it was shown; but if its issuance is shown, production is not indispensable); 1720, *Leighton v. Leighton*, 1 Stra. 308 (inquisition *post mortem* of 25 H. VIII, admitted to prove the deceased's seisin in fee); 1726, *Anderton v. Magawley*, 3 Brown

P. C. 588 (like *Newburgh v. Newburgh*); 1757, *Tooker v. Beaufort*, 1 Burr. 146 (return under an inquisition under commissioners in 1591 as to the seisin of a priory; objected to because the defendant, not being a party, "could have no notice nor opportunity to defend it"; admitted, but no reasons given); 1810, *Banbury Peerage Case*, in App. to *LeMarchant's Gardner Peerage Case*, 409, 442, 460, 476 (inquisitions of escheat on the earldom of Banbury, admitted; other instances of such inquisitions cited at p. 476); 1837, *Vaux Peerage Case*, 5 Cl. & F. 526, 540 (inquisition *post mortem*, dated 18 Jac. I. reciting the marriage of the deceased's son in 2 Jac. I, admitted; inquisition in 10 Jac. I, after the coming of age of Lord Vaux, on his attainder for recusancy, reciting an indenture, admitted); 1826, *Stokes v. Dawes*, 4 Mas. 268 (attorney-general's inquest of office as to an escheat, admitted, though the tenant was not privy; Story, J.: "The inquest of office is undoubtedly evidence in this case of a very high nature").

(3) The *sheriff's* inquisition into the *title of personally*, seized by him under a writ and claimed adversely by some third person, may originally have been receivable. But by the 1800s it began to be rejected, for the very reason that it did not fulfil the fundamental doctrine of express authority, since no writ commanded the sheriff to investigate the title; and, while it might serve as indirectly indicating the sheriff's good faith and negating malice, it would not be received (for example) as evidence of a third person's title in support of the sheriff's allegation that his return of *nulla bona* was true.⁷

(4) But the most informing illustration is found in the judicial treatment of the *heralds' records*. There were various sorts of books kept of old by the heralds, and concerned in various ways with the pedigree and privileges of peers and gentry. That one, however, which alone was allowed to be availed of in evidence, as an official statement by the heralds, was the visitation-book, or record of inquisitions of pedigree made from time to time by warrant from the chief of their order, who as head of the Court of Chivalry had jurisdiction over the privileges of honor and rank:

1844, Mr. J. Hubback, *Succession*, 541, 543: "These visitation-books contain the pedigrees and coats of arms of the nobility and principal gentry of England. . . . By the terms of the royal commissions the heralds were authorized to make circuits through the different counties within their respective provinces, and 'to peruse and take knowledge, survey, and view all manner of arms, cognizances, crests, and other like devices, with the notes of the descents, pedigrees, and marriages of all the nobility therein; and also to reprove, control, and make infamous, by proclamation, all such as unlawfully and without just authority usurped or took any name or title of honor or dignity.' . . . [One of the orders for their work provides] that 'in all entries of descents in visitations, the said provincial kings of arms and their deputies shall not enter more descents or collateral branches with their hatches (unless the same be made out by deed, evidences, or other authentic proof) than that the partie appearing shall either probably affirm of his own knowledge to be true or [shall] manifest that that he hath received from his parents or neer relations, or which shall be attested by one or more persons of good quality of the neighborhood or some other credible testimony.' . . . It is obvious that, where the instructions contained in these commissions and orders were fully acted up to, a very copious and accurate genealogical history of the principal families of the kingdom would be compiled. . . . It has been stated that the visitation-books are of authority as evidence in the nature of official records. It does not appear that their admissibility has ever been judicially questioned."

When these books were offered in evidence, the reports of the heralds were received whenever they appeared to have been made by virtue of an express warrant or commission authorizing them to investigate a particular pedigree

⁷ *Eng.*: 1795, *Lathow v. Eamer*, 2 H. Bl. 437 (after serving a writ of execution, the sheriff summoned a jury to try the title to the goods; their inquisition was excluded; *Buller, J.*: "The inquisition is not under the king's writ, but merely a proceeding by the sheriff of his own authority"); 1814, *Glossop v. Pole*, 3 M. & S. 175 (levy upon debtor's goods, returning *nulla bona*; defendant's inquisition as sheriff as to the property of the goods, not admitted, even to mitigate damages; repudiating a dictum of C. J. Eyre in *Lathow v. Eamer*); 1817, *R. v. Bickley*,

3 Price 454 (sheriff's inquisition of title to goods; the claimant held entitled to appear and cross-examine and give evidence; admissibility not referred to); *U. S.*: 1811, *Bayley v. Bates*, 8 John. 185, 188 (inquisition of office, made in good faith, held a defence for the sheriff in an action for false return); 1813, *Townsend v. Phillips*, 10 id. 98 (inquisition admissible in mitigation of damages, in an action of trespass); 1818, *Van Cleaf v. Fleet*, 15 id. 147 (action for a false return; inquisition excluded, because the actual value of the goods was alone asked).

or group of pedigrees; and they were rejected when they appeared to have been made without such a warrant. In the following passages this distinction is clearly illustrated:

1857, *Shrewsbury Peerage Case*, 7 H. L. C. 1, 20 (a book enrolling the pedigrees of subscribers to a building fund of the Heralds' College was offered; the book had been compiled under a royal commission authorizing the raising of the fund and the enrolment of subscribers' pedigrees); Mr. Serj. Byles, objecting: "Here there was no power to inquire officially into anything. The authority given was merely to receive money from all who were willing to subscribe it, to become 'benefactors' for the purpose of rebuilding the college; and, as an encouragement to subscribe, they were permitted to deposit their own statements of their own pedigrees in the College. The maker of this pedigree appears to have subscribed £20; his statement was therefore received; but no authority can be attached to it, for there was no authority in the Heralds' office to inquire into the truth of it, or to reject it if untrue. It cannot therefore be received as an official document"; L. C. Cranworth, excluding it: "This pedigree certainly does not stand on the footing of a Heralds' visitation, for that is a document made upon authority and with means of investigation, and it is the right and duty of the persons who make these visitations to inquire and to report the result of their inquiries."

1880, Lord Blackburn, in *Sturt v. Freccia*, L. R. 5 App. Cas. 623, 644: "The visitations of heralds were proof. There the Court of Chivalry was a prescriptive court, and the object of the Court of Chivalry and the inquiry of the heralds . . . was that they should inquire into the arms and pedigrees for the very purpose of making a register of them, and for both these reasons it is clear that, when the visitation of the heralds appointed for this purpose had been made, these things could be and they always have been received in evidence."

It was upon this principle that the heralds' books were treated when offered in evidence.⁹ Accordingly, when the old practice of issuing commissions of inquisition fell into disuse (probably in the 1700s), and the heralds thereafter made up their records solely by compilation from other books, or by mere enrolment, without inquiry, of such *ex parte* statements as claimants chose to bring for the purpose, these modern heralds' books ceased to satisfy the fundamental requirement of the law, and were no longer receivable as official statements by the heralds:

⁹ 1683, *Thanet v. Foster*, T. Jones 224 (to prove an heirship, the heralds were sworn to a pedigree-tree made from the records of the office; but the Court required production of "the books and records from which it was deduced"); 1688, *Matthews v. Port*, Comb. 63 (visitation-book of Worcester county admitted); 1692, *Stayner v. Droitwich*, 12 Mod. 86 ("Herald's books have been allowed evidence in pedigrees"); 1717, *Pitton v. Walter*, 1 Stra. 162 ("to prove the pedigree, the Chief Justice [Pratt] admitted a visitation in 1623, made by the heralds, entered in their books, and kept in their office, to be read in evidence"; also "the minute book of a former visitation" found in Lord Oxford's library); 1719, *Anon.*, 12 Vin. Abr. 119, "Evidence," A, b, 39 (herald's books, not received by Fortescue, J., to prove a pedigree, "for he said it was made up by the party that signed it and returned into the office, and not the entries of any public office"); 1781, *Norris v. Le Neve*, 2

Barnard. 26 ("A book out of the Heralds' office was produced to prove the pedigree; . . . the Chief Justice at first doubted; but as it appeared that this pedigree was taken upon an inquest made on a visitation, he allowed it to be good evidence"); 1857, *Shrewsbury Peerage Case*, 7 H. L. C. 1, 25, 34 (a book from the College, not appearing to have been compiled under authority, "but probably more as a part of their pleasure than their duty," withdrawn on objection; a book of 1671, enrolling the pedigrees of benefactors who had subscribed to the rebuilding of the College, not admitted as a heralds' statement; an ordinary heralds' visitation under a commission, received; quoted *supra*); 1879, *Polini v. Gray*, L. R. 12 Ch. D. 411, 432, 436 (Brett and Cotton, LL.J., doubt as to the admission of heralds' visitation-books outside of the Committee on Privileges; yet the Committee professed to act on a general rule of law).

1857, *De Lisle Peerage Case*, quoted in Hubback on Succession, 546: "The House made a distinction in receiving as evidence books from the Heralds' College. When those books contained the substance of the information obtained in consequence of inquiries which were made under judicial authority, when the heralds were in the habit of traveling round the country and examining the witnesses, they were held to be evidence, and had been produced in Committees of Privilege; but when that ceased, and the books were mere entries of that which the parties had chosen to have entered on those registries, without any due authority being shown for the entry, they had not been received in evidence."⁹

In this fate which overtook the heralds' books in the days of their degeneration is notably illustrated the orthodox doctrine of the common law, — a doctrine maintained with fair consistency in the present day for the very different sorts of inquisitions and reports which the novel conditions of other generations and another nationality have made familiar. The Court of chivalry and the heralds with their inquisitions of pedigree were the prominent figures in the working out of the common-law principle; their place is now taken by the State railroad commission, with its reports of overcharges and of collisions, and the State chemist, with his analysis of food-samples; but the sagacious principle of the common law has still survived as a fair and adequate foundation for testing the propriety of modes of proof, — namely, the principle of express authority to investigate and report.

§ 1671. *Same*: Inquisitions (5) of Lunacy; (6) of Death (Coroner); (7) of Population (Census). (5) An inquisition of lunacy is founded on a commission authorizing expressly the investigation of the person's condition and a finding as to his lunacy:

1812, Mr. G. D. Collinson, *Idiots and Lunatics*, c. XII, §§ 2, 29, 31: "By the common law, the king's officers, his sheriff, coroner, and escheator, were bound *virtute officii* to make inquiry concerning any matter which gave the King a title to the possession of lands, tenements, goods or chattels. . . . On special occasions, writs were directed to them to make the inquiry, and commissioners were sometimes appointed for the same purpose. When idiots and lunatics came within the jurisdiction of the crown, the king's title was found in like manner by these officers, assisted as in other cases by a jury of the county, whose verdict was called an inquisition, or inquest of office. . . . As the inquiry might be made either by writ or by commission, the latter being the more large and general, was universally adopted in preference to the former. . . . Commissions in the nature of the ancient writs are made by letters patent under the Great Seal, directed to five persons as commissioners, who, any three or more of them, are to inquire upon the oaths of good and lawful men of the county, as well within the liberties as without, by whom the truth of the matter may be better known, whether the party against whom the commission has issued be an idiot and without understanding from his nativity, or (according to the commission) a lunatic, or in the enjoyment of lucid intervals, so that he is not sufficient for the government of himself, his manors, messuages, lands, tenements, goods, and chattels; and if so, from what time, after what manner, and how; . . . [and whether and to whom he has alienated lands, etc., etc. The commissioners are ordered] diligently to make inquisition in the premises, and to send the same without delay [to Chancery; . . . and the sheriff is to cause to appear so many good and lawful men of his bailiwick as the commissioners shall direct,] by whom the truth of the matters in the premises may be better known and inquired into."

⁹ Accord: 1844, Hubback Succession, 551 ff. (citing other peerage cases).

(a) There is not, therefore, and never has been, any doubt as to the admissibility of an inquisition of lunacy, in any litigation whatever, to prove the person's mental condition at the time. The only controversy has been whether it is conclusive, i. e. whether it is to be regarded as a judicial proceeding and a judgment *in rem*, binding upon all persons whatsoever.¹ There also arises for it the question whether the person's mental condition at the time of the inquisition is evidence of his condition at the time in issue; but this is merely a question of the relevancy of the fact evidenced by the inquisition (*ante*, § 233) and not of the admissibility of the inquisition.²

(b) But this traditional proceeding upon a writ *de lunatico inquirendo* had originally for its object (as the passage above quoted explains) the sequestration of the lunatic's property into the king's hands as guardian, and this character it has preserved in the modern equivalent proceedings for appointing a guardian and taking from the lunatic the management of his property. Its scope was thus strictly limited to the ultimate purpose of caring for his property. In the enlightenment of modern times, however, a second proceeding has grown up, having an analogous object, but capable of being independently pursued, — the proceeding to *confine the lunatic in an asylum* or hospital, i. e. to care for his person, not his property. Either or both may be necessary according to the particular nature of the hallucination or disease; but the insanity cannot be said to be less or greater that suffices to justify the one or the other proceeding. Nevertheless, by a few Courts the singular distinction has been made that the finding of an inquisition of the former sort is admissible in evidence, while that of the latter sort is not; this has been justified in the following passage:

1873, *Morton, J.*, in *Leggate v. Clark*, 111 Mass. 308, 310 (excluding an order of commitment to an asylum): "The order of the judge of probate was in a proceeding to which

¹ *England*: 1742, *Sergeon v. Sealey*, 2 Atk. 412 (objection made "because it is offered as evidence to affect the right of a third person [the issue being as to the mental capacity of an ancestor at the time of a purchase], and as it likewise had a retrospect of 8 years"; Lord Hardwicke "overruled the objection, and said that inquisitions of lunacy, and likewise other inquisitions, as *post mortem*, etc., are always admitted to be read, but are not conclusive evidence"); 1804, *Hall v. Warren*, 9 Ves. 605 (admissible against third person); 1811, *Faulder v. Silk*, 3 Camp. 125 (capacity of the obligor of a bond, defendant's intestate; inquisition under a commission, held admissible); *United States*: 1828, *Den v. Clark*, 5 Halst. 217 (capacity of a mortgagor; inquisition of lunacy, admitted; the only question being as to its conclusiveness); 1831, *Hart v. Deamer*, 6 Wend. 497 (capacity of defendant as obligor of a bond; inquisition under a writ *de lunatico*, held admissible); 1842, *Osterhout v. Shoemaker*, 3 Hill 513, 516 (*Bronson, J.*: "It seems to be settled that such evidence is admissible though not conclusive"); 1847, *Rogers v. Walker*, 6 Pa. St. 371, 378 (admissible against third persons); 1902, *Com.*

v. Harrold, 204 id. 154, 58 Atl. 760; 1903, *Hottle v. Weaver*, 206 id. 87, 55 Atl. 838; 1899, *Small v. Champney*, 102 Wis. 61, 78 N. W. 407 (admissible in an action by the lunatic's representative to set aside a transfer); see other cases cited in *Buswell, Insanity* (1885), §§ 194 ff.

No distinction is made for *criminal cases*, the inquisition being equally admissible to prove the defendant insane: 1760, *Earl Ferrers' Trial*, 19 How. St. Tr. 885, 937 (insanity; to prove one of the defendant's relations insane, the fact that he has been confined under a commission was proved); 1812, *R. v. Bowler*, cited *Phillippe, Evidence*, II, 99 (inquisition admitted to show the accused insane); 1878, *Wheeler v. State*, 34 Oh. St. 394 (same).

On direct appeal the finding may in any event be *prima facie* valid: 1873, *McGinnis v. Com.*, 74 Pa. 245, 247 (inquisition of habitual drunkenness).

² An inquisition may for this reason alone be excluded, just as any other mode of proof would be; e. g.: 1897, *Rhoades v. Fuller*, 139 Mo. 179, 40 S. W. 760 (inquisition held after the time of the sale in issue, excluded).

the tenant [here defendant] was not a party, and as to which he had no opportunity to be heard, and was upon an issue different from the issue on trial. The demandant contends that it is analogous to an inquisition of lunacy or a decree of a judge of probate appointing a guardian of an insane person, and therefore admissible against strangers. But an inquisition of lunacy under the English system, and proceedings under our system to appoint a guardian of an insane person, are in the nature of proceedings *in rem*, and are designed to fix the status of the person proceeded against. Under our system careful provision is made for notice to the alleged insane person, and for a full hearing, and the decree fixes the status of the ward as an insane person 'incapable of taking care of himself.' . . . The necessary effect of the decree is that the ward is in law, what the decree declares him to be, incapable of taking care of himself, as to all the world; otherwise the object of the statute would be entirely defeated. But an order under the statute of 1863, c. 228, § 3, [committing to an insane hospital.] is not of this character. . . . It affords a justification for the restraint of his person, but is not designed to fix his status."

As to this reasoning, it may be answered: (1) The authority of the inquisition is the same in both cases; no statute makes either expressly admissible; the common-law principle of an express authority to investigate suffices for both; (2) the fact that the present opponent "was not a party and had no opportunity to be heard" in the other proceeding is as good an objection to the guardianship-proceedings as to the committal-proceedings;³ to say that the former is a "proceeding *in rem*" is mere assertion, for the true nature of a proceeding *in rem* implies a notice (by advertisement at least) to all the world, and if a proceeding without that feature can in despite be made a proceeding *in rem* by calling it so, then it is quite as easy to call the committal-proceedings by the same name; (3) the one proceeding, as much and as little as the other, "fixes his status," that is, the one confines itself to his property, and the other to his liberty, — the latter right being hardly less important than the former. In short, there seems to be no real reason for enforcing a distinction, as to admissibility in evidence, between the two sorts of inquisition. But the erroneous reasoning in the passage above quoted has led a number of Courts to the contrary conclusion.⁴

(6) *Coroner's inquisitions*, so far as criminal proceedings are concerned,

³ In most States, at least, there is no notice other than to the alleged lunatic and (perhaps) his relatives. But the objection is not valid: *ante*, § 1585.

⁴ *Excluded*: 1884, *Goodwin v. State*, 96 Ind. 550, 557, *semble* (capacity of accused; judgment of insanity by a commission for confinement in asylum, held not conclusive, "even if competent evidence at all"); 1896, *Naanes v. State*, 143 id. 299, 42 N. E. 609 (examination under statute for committal of defendant, excluded); 1873, *Leggate v. Clark*, 111 Mass. 308 (insanity of demandant's husband, as voiding a deed; order of the Probate Court committing him to the asylum, excluded, partly because the issues as to mental condition would not be the same, and partly because of the reasons stated in the quotation *supra*; no precedents cited on the point); 1893, *Dewey v. Algire*, 37 Nebr. 6, 9, 55 N. W. 276 (action by a guardian to set aside a convey-

ance; commitment proceedings not admissible to show lunacy); 1896, *Pfueger v. State*, 46 id. 493, 64 N. W. 1094, *semble* (holding such an adjudication of insanity not conclusive as to an accused person, but apparently leaving open the question of its admissibility). *Admitted*: 1894, *Rodgers v. Rodgers*, 56 Kan. 483, 43 Pac. 779 (adjudication for commitment, admitted in a divorce action by a wife); 1878, *Wheeler v. State*, 34 Oh. St. 394 (probate judge's finding, for committal to asylum, admitted to show the accused insane, under a statute by which the finding "was in effect the same as where a guardian was appointed"; the reasoning in *Leggate v. Clark* disapproved); 1900, *Maass v. Phillips*, 10 Okl. 302, 61 Pac. 1057, *semble* (on a motion in arrest of judgment, based on the defendant's insanity, an order of confinement by the county board of insanity is not controlling upon the Court).

are "in the nature of indictments";⁶ and it would therefore be superfluous (rather than improper) to offer them against the accused on trial;⁶ they are the foundation of the charge against him, and are a part of the formal proceedings rather than a source of evidence. If this be so, the inquisitions of the coroner would still be admissible on the part of the accused if the findings declared another person to be the wrongdoer. They would at any rate be admissible in civil proceedings as duly authorized official statements, and this seems once to have been the law,⁷ but most Courts to-day appear disinclined to recognize them.⁸ It may be noted that the lack of a special commission to investigate in each instance is here immaterial; since the coroner by his office has a general warrant to investigate the circumstances of a death.

⁶ 1803, *East, Pleas of the Crown*, I, 399; compare 380 ff.; 1680, *Hale, Pleas of the Crown*, I, 416 ("An inquisition taken before the coroner *super visum corporis* in the point of *felo de se* is of great authority and a sufficient record whereupon process may be made upon those that detain the goods found in the inquisition").

The early history of the coroner's functions has been fully examined by Professor Gross, in his *Introduction to Select Cases from the Coroners' Rolls*, 1896, *Seld. Soc. Publ.*, vol. IX.

⁷ The following rulings have been made: 1832, *State v. Parker*, 7 La. An. 33 (the finding admitted as to the "physical facts as to the death of the deceased," but not as to the tracing of the death to the accused); 1855, *State v. Melville*, 10 Id. 456 (*State v. Parker* followed); 1898, *State v. Tate*, 50 Id. 1183, 24 So. 592 (verdict admissible "to show the fact of a homicide having been committed," but not "the recitals of fact therein contained"; no authority cited); 1906, *Com. v. Selfridge*, Mass., Lloyd & Caines' Rep. 22 (manslaughter; inquisition offered to prove the fact of death; practice said to vary; no decision); 1931, *State v. Turner*, Wright 20 (coroner's inquest not received against the accused); 1878, *Wheeler v. State*, 34 O. St. 394, 398 (*State v. Turner* approved); 1901, *Com. v. State*, 107 Tenn. 381, 64 S. W. 713 (murder; coroner's verdict as to the cause of death, held inadmissible in criminal cases).

⁸ 1660, *Toomes v. Etherington*, 1 Wms. Saund. 361 (issue as to an intestate's *felo de se*; an inquisition *super visum corporis*, admitted); 1718, *Jones v. White*, 1 Stra. 68 (issue upon a testator's capacity; a coroner's inquest, finding him lunatic, was offered; the Court were divided; but the discussion treated it from the point of view of judgments).

⁹ *Ala.*: 1838, *Memphis & C. R. Co. v. Womack*, 84 Ala. 149, 4 So. 618 (coroner's verdict, not admitted to show that the deceased was "accidentally run over," etc.); *Cal.*: 1898, *Holister v. Cordero*, 76 Cal. 649, 18 Pac. 855 (inheritance of persons murdered, and an issue of survivorship; the coroner's verdict excluded); 1901, *Rowe v. Such*, 134 Id. 573, 66 Pac. 862, 67 Pac. 760 (coroner's verdict, not admitted to show the cause of death); *Colo.*: 1897, *Germania L. Ins. Co. v. Rose-Lewin*, 24 Colo. 43,

51 Pac. 498 (coroner's verdict not admitted to show suicide); *Ga.*: 1878, *Central Railroad v. Moore*, 61 Ga. 151, 152 (death of a husband; "that there was a verdict at the inquest," excluded); *Ill.*: 1885, *Pittsburgh C. & St. L. R. Co. v. McGrath*, 115 Ill. 172, 3 N. E. 439 (point not raised); 1887, *U. S. Life Ins. Co. v. Kielgast*, 26 Ill. App. 567, 571 ("that the record of the coroner's inquest" and the depositions "are not competent evidence in this suit would seem to be settled" by the foregoing case); 1889, *J. S. Life Ins. Co. v. Voeke*, 129 Ill. 557, 562, 567, 22 N. E. 467 (on appeal from the preceding ruling; coroner's verdict of insane suicide, admitted as an "inquisition made by a public officer, acting under the sanction of an official oath, in the discharge of a public duty enjoined upon him by law"; leading case; good opinions by Craig and Baker, JJ.); 1892, *Lake Shore & M. S. R. Co. v. Taylor*, 46 Ill. App. 506, 509 (verdict admitted to show how the deceased came to his death, but not a finding that "the switch stand was negligently placed" by the defendant, this being "extraneous to the province of the inquest"); 1892, *Chicago M. & St. P. R. Co. v. Staff*, 1b. 490, 501 (similar; finding as to the defendant's negligence in the rate of speed, etc., held no evidence); 1895, *Pyle v. Pyle*, 153 Ill. 289, 300, 41 N. E. 999 (verdict of suicide, admitted); 1897, *Grand Lodge v. Wieting*, 168 Id. 408, 48 N. E. 59 (verdict admitted); *Md.*: 1880, *State v. County Commissioners*, 54 Md. 426 (death by wrongful act; coroner's verdict not received to show that the death was due to an unsafe crossing); 1899, *Supreme Council v. Brashears*, 89 Id. 624, 43 Atl. 866 (not admitted to show suicide); *Mich.*: 1901, *Wasey v. Ins. Co.*, 126 Mich. 119, 85 N. W. 459 (coroner's verdict, not admitted to prove suicide); *Miss.*: 1901, *Supreme Lodge v. Fletcher*, 78 Miss. 377, 28 So. 872, 29 So. 523 (verdict admissible to evidence the cause of death); *Or.*: 1903, *Cox v. Royal Tribe*, 42 Or. 365, 71 Pac. 73 (coroner's verdict not received to show suicide).

Distinguish the use of the verdict as an admission, in proofs of loss by an insured's beneficiary (*ante*, § 1078), and the use of testimony given at an inquest (*ante*, § 1374).

(7) The census is an *inquisition of population*, manufactures, agriculture, wealth, and many other classes of sociological data, and is made under an express legislative warrant and authority; it is therefore admissible under the general principle already considered.⁹ But the authority is to report general classes of facts; the details as to individual persons, factories, farms, and the like, are noted only as a necessary basis for the general and anonymous summaries; hence the census reports are not receivable to show the age of a particular person, or the product of a particular factory, or the area of a particular farm.¹⁰ Nevertheless, if by special authority a local census — as of an Indian tribe — is taken for the express purpose of registering individuals, it would become admissible.¹¹ Distinguish the process of *judicially* noticing a fact, such as the population of a town; thus to dispense with all evidence (*post*, § 2580) is a different thing from receiving the census as evidence.

§ 1672. **Sundry Instances of Returns and Reports, at Common Law and by Statute.** The principle illustrated in the foregoing instances, that a report or inquisition as distinguished from a return proper, must be founded on an express warrant or authority to investigate and report, has received a fairly consistent recognition in its application to the miscellaneous official documents of that sort. The following illustrations, more than a century apart, are typical:

1784, *Com. v. Fairfield, Mass.*, Dane's Abr. c. 84, art. 2, § 3: "Indictment for passing a forged government security; the Legislature prescribed the forms of said securities and directed the treasurer to publish a list of those notes, made out in the newspapers; this he did. This list was produced to show the note in question was not in it; objected it was no part of the treasurer's official duty to publish such list, and there was no oath it was a true one, but he ought to be in court to swear it is a true one; and the Court allowed the objection."

1894, *Lumpkin, J., in Jones v. Guano Co.*, 94 Ga. 14, 20 S. E. 265, rejecting an analysis of a fertilizer made by the State chemist: "[In the official analysis], samples are taken by the inspectors and submitted for analysis to the State chemist, who makes reports to the commissioner of agriculture. . . . We know of no law making official an analysis by the State chemist at the instance or request of a purchaser of fertilizers. Indeed, as we understand it, the State chemist is under no obligation to make an analysis for any private person at all. If he does so, it is simply a matter of courtesy; and although he may report an analysis thus made to the department of agriculture and it may be en-

⁹ Colo. Annot. Stata. 1891, § 384 (State census report, admissible to prove "the number of inhabitants of the State or of any part thereof"); 1862, *Charlotte v. Chouteau*, 33 Mo. 194, 201 (printed census report of Canada, admitted); 1895, *State v. Mari n Co.*, 128 id. 427, 30 S. W. 103, 31 S. W. 25 U. S. Census admitted to show the population of a county; 1902, *State v. Evans*, 166 id. 347, 66 S. W. 355 (U. S. Census); N. Y. St. 1899, c. 99 (amending C. C. P. § 944 by adding: "a certificate of the director or other officer in charge of the census of the United States, attested by the Secretary of the Interior, stating the population of any part of the United States, or giving the result of said census otherwise, shall be received as *prima*

facie evidence of such facts"); 1888, *Fulham v. Howe*, 60 Vt. 351, 357, 14 Atl. 652 (Compendium of U. S. Census, admissible to show a town's population); 1901, *State v. Neal*, 25 Wash. 264, 65 Pac. 188, 68 Pac. 1135 (U. S. Census).

¹⁰ 1902, *Edwards v. Logan*, — Ky. —, 70 S. W. 852 (school census not admitted to show the minority of certain individuals). *Contra*: 1896, *Flora v. Anderson*, 75 Fed. 217, 231 (census reports, for the age of a person, admitted).

¹¹ Kan. Gen. St. 1897, c. 97, § 14 (census-roll and allotment-roll of treaty Indian tribes in Kansas, admissible to prove tribe-members, families, etc., of allottees); 1840, *Newman v. Doe*, 4 How. Miss. 522, 554 (official register of Choctaw heads of families, admitted).

tered upon the records of that department, this will not give to that analysis an official character by virtue of which a copy of it will be rendered admissible as evidence in the courts."

It may be said that the tendency of the Courts is to disapprove rather than to favor the admission of such reports or inquiries, and to require a clear showing of an express authority to investigate and report. Nevertheless it is impossible to reconcile all the precedents.¹

¹ In the following list, sundry instances both of returns proper (*ante*, § 1664) and reports are included, because it is sometimes difficult to draw the line; for government *land-office reports*, compare also §§ 1659, 1665, *ante*, and the cross-references there given; compare also the rulings dealing with sundry *certificates and registers*, *post*, § 1674, *ante*, § 1689: *England*: 1799, *Wright v. Barnard*, 2 Esp. 701 (report of condemnation of a ship as not worth repairing, made by certain ship-carpenters in a foreign country, excluded); 1801, *Robert v. Eddington*, 4 id. 88 (consul's report of arrival of ships abroad, excluded); 1815, *Watson v. King*, 4 Camp. 272, 275 (official report to the Admiralty, at the end of a voyage, by the captain of a royal vessel, received); 1880, *R. v. Labouchere*, 14 Cox Cr. 419, 427, *Cockburn, C. J.* (report from the Prefect of Police in Paris to the head of the Criminal Investigation Department in Scotland-Yard, describing, in answer to the latter's request, the criminal record of a person whose conduct had been libelled by the defendant, excluded); 1880, *Sturla v. Freccia*, L. R. 5 App. Cas. 623 (inheritance; issue as to the birthplace of one Mangini, a Genoese diplomatic agent; the report of an official committee, appointed to investigate his application for office, reporting in his favor and stating among other things his birthplace, excluded; by L. C. Selborne, because it did not appear to be founded upon inquiry in M.'s family; by Lords Hatherley and Watson, because it did not appear to be founded on sufficient inquiry as to the fact in issue; by Lord Blackburn, because it was not a "public" document in the sense of § 1634, *ante*; the decision is certainly over-technical; the fear expressed by L. J. James, in the case below, 12 Ch. D. 437, that there might be "misapprehension on the part of the Italian Government" was natural, for it would certainly be difficult for one not aware of the narrow spirit dominating many of our evidential rulings to suppose that this extreme ruling represented the general practice under a rational system of proof); *United States*: 1903, *Culver v. Caldwell*, 137 Ala. 125, 34 So. 13 (report of an examiner of public accounts upon the accounts of the department of agriculture, excluded); 1892, *Birmingham v. Pettit*, 21 D. C. 209, 213 (report of a board of boiler-inspectors, as to the cause of explosion, the statute not requiring a report, excluded); 1900, *Bridges v. State*, 110 Ga. 246, 34 S. E. 1037 (embezzlement of a school fund; the findings of a board of education, inadmissible); 1874, *Gordon v. Bucknell*, 38 Ia. 433 (report of a land-office register as to the ownership of land,

excluded); 1876, *Butler v. Ins. Co.*, 45 Id. 93, 96 (return of a physician examining for commitment to the State insane hospital, excluded); 1897, *State v. Krause*, 58 Kan. 631, 50 Pac. 892 (action on a treasurer's bond; an official examiner's report as to the condition of the treasury, excluded); 1893, *Wellington v. R. Co.*, 158 Mass. 185, 187, 33 N. E. 393 (award of land-damage commissioners, to show value, excluded); 1868, *Woods v. Monroe*, 17 Mich. 236, 242 (administrator's report of sale, used to prove publication of notice); 1852, *Childress v. Cutter*, 16 Mo. 24, 31, 45 (official Spanish inventory of deceased's property, admitted as evidence of survival of two minor children); 1902, *Sovereign Camp v. Grandon*, 64 Nebr. 39, 69 N. W. 448 (physician's death-certificate, required by ordinance before burial, excluded); 1821, *Davis v. Clements*, 3 N. H. 391 (a surveyor was bound to pay over balances, but not to make on his warrant the return offered in evidence, excluded); 1842, *State v. Wells*, 11 Oh. 281 (auditor's account current, not admitted to prove a treasurer's default); 1846, *Lyon v. McCadden*, 15 id. 551 (to show the amount of work done under a public contract, the official engineer's estimates were received); 1782, *Morris v. Vanderon*, 1 Dall. 64 (official list of original purchasers of land from William Penn, received); 1774, *Hurat v. Dippo*, ib. 20, *semble* (same); 1823, *Kingston v. Lesley*, 10 S. & R. 383, 387 (same); 1900, *State v. Missio*, 105 Tenn. 218, 58 S. W. 216 (Secretary of State's annual official list of corporations, not admissible to prove the existence of a foreign corporation filing a charter); 1860, *Allbright v. Governor*, 25 Tex. 687, 694 (comptroller's unauthorized book-account, excluded); 1860, *Highsmith v. State*, 25 (Suppl.) id. 137, 139 (assessor's unauthorized accounting, excluded); 1856, *Bryan v. Forsyth*, 19 How. 334, 338 (report of a land-register to the Secretary of Treasury upon titles; "the competency of these documents as evidence in the investigation of claims to land in the Courts of justice has not been controverted for twenty years, and is beyond question"); 1842, *Watkins v. Holman*, 16 Pet. 25, 56 (report of commissioners under a legislative act confirming a title, admitted); 1898, *Bardley v. Sternberg*, 18 Wash. 612, 52 Pac. 251 (payment of city warrants; to show that funds were in treasurer's hands, the council finance-committee's report of their examination of the treasurer's books was received). Distinguish the use of a report (for example, of a municipal council) as an *admission*, *s. g.*: 1850, *Collins v. Dorchester*, 6 Cush. 396.

This attitude of the Courts has been, on the whole, far too strict. There has thus arisen increasingly a need for the more liberal recognition of an authority such as would make admissible various sorts of reports dealing with matters seldom disputable and only provable otherwise at disproportionate inconvenience and cost. Accordingly, the Legislature in many jurisdictions has, for various officials, not merely granted special authority to report, but has expressly declared these reports admissible. This policy, when judiciously employed, greatly facilitates the production of evidence without introducing loose methods.² It may be noted that three classes of statutory reports sometimes thus provided for are not properly to be regarded

² In the following list are collected sundry instances both of returns proper (*ante*, § 1664) and of reports, because the distinction is sometimes difficult to draw; statutes dealing with *magistrates' returns upon a deposition*, are not included, because they deal rather with a matter of procedure and also because their multiplicity of details forbids the surrender of so much space; instances of *registers and certificates* (so-called, but sometimes difficult to distinguish from reports) are placed *ante*, § 1639, and *post*, § 1674: *England*: 1893, St. 56 & 57 Vict. c. 23, § 3 (a written statement, made by an officer having power to stop a ship engaged in the seal fishery, of the circumstances of the stopping, etc., to be admitted); *Canada*: 1894, *Ship Minnie v. R.*, 23 Can. Sup. 478 (official statement of captain of war ship on duty at the seal fisheries, received under St. 56 & 57 Vict. c. 23, § 3); *Newf. Consol. St.* 1892, c. 72, § 10 (injuries to submarine telegraph cables; certain reports by ship-captains and others, made admissible to prove the facts stated, and without proof of signature); *United States*: *Ala.* Code 1897, § 395 (on a trial involving "the merits of such fertilizer or chemical," an official analysis of it by the department of agriculture, proved by copy under seal, admissible); § 1879 (examiner of public accounts; his report to be a "public record"); § 1823 (Secretary of State's schedule, printed in pamphlet Acts, of the "rate of interest of each State and Territory," receivable); 1888, *Camp v. Randle*, 81 Ala. 240, 2 So. 247 (Code § 1823 applied); 1899, *Holley v. Coffee*, 123 id. 406, 26 So. 238 (same); *Colo.* Annot. Stats. 1891, § 15 (dairy commissioner's report on the analysis of articles of food and drink submitted to him, receivable in proceedings under the Act against food adulteration); § 3706 (report of appraisers as to the amount of damage by fire set by a railroad, to be evidence of the amount); § 3738 (railroad commissioners' report on a railroad accident, not to be evidence); *Conn.* Gen. St. 1887, § 2270 (returned notice by a factory inspector, to be evidence of notice given); *Ga.* Acts 1897, p. 107, *Van Epps' Suppl.* § 6527 (transcript of roster of Confederate soldiers, as made up by reports from roster committees "shall be *prima facie* true"); *La.* Rev. L. 1897, § 1439 (*procès verbal* by the recorder of New Orleans or a justice of the peace, as to a fire, admissible); *Mass.* Gen. St. 1894,

§ 3152 ("Every instrument executed by the [insurance] commissioner of this State or any other State in which the substantial provisions of this act shall be enacted, pursuant to authority conferred by this act," and under official seal, is admissible); §§ 381, 386, 392, 393, 399 (railroad and warehouse commission's reports as to rates, etc., admissible); §§ 2397, 2400 (surveyor-general's scale-bill of logs, timber, or lumber surveyed, admissible); 1885, *Clark v. Lumber Co.*, 34 Minn. 289, 25 N. W. 628 (scale-bills of surveyor-general, admitted under statute); 1888, *Pratt v. Ducey*, 38 id. 517, 38 N. W. 611 (scale-bill partly rejected on the facts); 1893, *Douglas v. Leighton*, 53 id. 176, 54 N. W. 1053 (similar); 1899, *Lindsay & P. Co. v. Mullen*, 176 U. S. 126, 20 Sup. 325 (Minnesota surveyor-general's certified scale-bills, admitted); *Miss.* Annot. Code 1892, § 4315 (railroad commission's finding as to the unsafe condition of a bridge, roadbed, etc., to be *prima facie* evidence of negligence); § 2571 (land-commissioner's finding as to a claim to public lands, to be *prima facie* correct); § 3938 (board of supervisors' valuation of timber taken for a road to be *prima facie* evidence); *N. H.* Pub. St. 1891, c. 104, § 9 (militia clerk's certificate of an offence making liable to a fine, admissible); *N. Y.* Laws 1870, c. 291, t. 5, § 5 (village collector's return of unpaid tax, admissible); *Laws* 1892, c. 690, § 39 (insurance superintendent's report of the condition of an insurance corporation, admissible in a State proceeding against the corporation or officers); *Laws* 1895, c. 927, § 6 (court clerk's return of naturalization, admissible to prove the facts stated); *N. D.* Rev. C. 1895, § 3044 (findings of a railroad commission on investigation of a complaint against a common carrier, admissible); *Or.* St. 1891, Feb. 20, § 4 (railroad commission's report as to a complaint against a common carrier, admissible "in all judicial proceedings involving the same questions between the same parties"); *Tenn.* Code 1896, § 2033 (Secretary of State's published list of corporations, admissible to prove the corporation's existence); *Vt.* Stats. 1894, § 4329 (test of milk by the agricultural experiment station, admissible); § 3992 (railroad commissioners' reports, not to be evidence); *Wash. C. & Stats.* 1897, § 180 (State geologist's notice of dangerous condition of mine, admissible to show negligence).

as coming within the present principle; (1) the findings of an auditor, in the judicial system of New England and elsewhere,³ are in effect equivalent to the report of a master in chancery; he is a part of the Court, not an extraneous officer, and his report is a preliminary finding of the Court; (2) the report of an appraiser, appointed to value a decedent's estate, is admissible at common law in the same proceedings, and the statutes appear not to do more than declare this;⁴ whether the order of the Court would suffice as an express warrant to make the report admissible in other litigation may be doubted; (3) the findings of a jury of *fence-viewers*,⁵ or such other body as concerns itself with highway repairs and the like, are in fact the verdict of a special tribunal, whose judgment is enforceable in its own right; the principles of judgments, not of evidence, are involved.

3. Certificates (including Certified Copies).

§ 1674. *Certificates, in general; Sundry Instances at Common Law and by Statute; Certificates by Private Persons.* A certificate, as already defined (*ante*, § 1637), differs from a return in that it is not preserved by the officer, but is given out by him to the applicant and is kept by the latter. This distinction is not always observed in common usage, for the term "certificate" is often applied to what is properly a return. But the distinction is a plain one; it is based on real difference of policy, and is attended with an important legal and practical result. The policy applicable to the conditions of the two is different, because the certificate, by remaining in the custody of the applicant, is not only more liable to injury or fraudulent alteration than if it had remained in official custody, but is also more open to initial forgery and more difficult to authenticate. The legal consequence of the distinction (a consequence based probably on some notion of this difference of trustworthiness) is that at common law (with two exceptions) *no authority to give certificates was implied from the office alone*. An authority to keep a register (*ante*, § 1639) or to make a return (*ante*, § 1664) might be implied from the nature of the office; but the marked tendency of the Courts was to require an express authority to make a certificate, before it could be received to prove the facts certified. The earliest definite utterance upon this subject, often quoted in later times, is broad enough in its terms:

1744, *Willes, L. C. J.*, in *Omichund v. Barker*, *Willes* 538, 549 (disapproving the latter part of the ruling in *Alsop v. Bowtrel*,¹ where a foreign clergyman's certificate was ad-

³ *Ariz. Rev. St.* 1887, § 929; *Me. Pub. St.* 1883, c. 82, § 69; *Mass. Pub. St.* c. 159, § 51; *Mich. Comp. L.* 1897, § 10013; *N. H. Pub. St.* 1891, c. 227, § 8.

⁴ *Fla. Rev. St.* 1892, § 1904 (inventories and appraisements of decedents' estates, admissible in actions by and against executors or administrators); *Ill. Rev. St.* 1874, c. 3, § 56 (inventories and bills of appraisement of decedent's estate may be given in evidence "in any suit by or against the executor or administrator"); *Mo. Rev. St.* 1899, § 85 (inventories and appraisements of de-

ceased's estate, admissible); *S. C. St.* 1839, Gen. St. c. 64, § 1921 (official appraisement of decedent's estate, admissible, in actions against representatives, to show value of estate); *Wyo. Rev. St.* 1887, § 2055 ("inventories and appraisements may be given in evidence").

⁵ *N. Y. Laws* 1890, c. 569, § 108 (fence-viewers' certificate of damage by beasts, admissible); *Laws* 1892, c. 686, § 119 (fence-viewers' certificate of damage to sheep, admissible).

¹ Cited *ante*, § 1645.

mitted to show not only his performance of the marriage ceremony, but also the parties' subsequent cohabitation): "For our law never allows a certificate of a mere matter of fact, not coupled with any matter of law,¹ to be admitted as evidence. Even the certificate of the King under his sign manual of a matter of fact (except in one old case in Chancery) has been always refused. . . . Besides, it is not the best evidence that the nature of the thing will admit; but the proper and usual evidence of a fact arising beyond the seal of the place or the principal officer of the place; which had been admitted as evidence in some cases, where it would be too expensive, considering the nature of the cause, to take out a special commission [for a deposition]."

It is apparent, however, that Chief Justice Willes, in his unqualified statements about certificates, had in mind those certificates only which were made without specific order and under an authority implied from the general nature of the office. He clearly did not mean to disown certificates made by specific and express authority; for in the same case of *Omichund v. Barker*, where Chancery commission had been sent to Calcutta to take the testimony of Hindus and had received instructions to alter the form of the oath and to "certify in what manner the oath was administered to the witnesses and what religion they were of," the Chief Justice refers repeatedly to this return or certificate as proving the facts necessary to justify the oath and the witnesses' capacity.² It is evident, then, that the passage above quoted from his opinion is to be understood of those certificates only which are given under a supposed duty implied by the nature of the office. In effect, he denies that there can be any such implied duties. No one, probably, has ever supposed that a duty or authority expressly given by judicial order is insufficient to admit a certificate thus authorized. Indeed, it is precisely this distinction upon which turns the orthodox common-law rule for the admission of certified copies of judicial records (*post*, § 1677). But his words serve to show, at any rate, what is undoubted in the law, — the traditional inclination of the Courts to reject certificates, and the necessity at common law of showing an express authority, judicial or statutory, for the making of the certificate.

It follows, then, on the general principle (*ante*, § 1633), that the certificate is admissible only for those facts covered by the terms of the authority, and, conversely, that it is admissible to prove all the facts thus included:

1840, *Sharkey, C. J.*, in *Newman v. Doe*, 4 How. Miss. 555: "Certificates and other documents made by persons entrusted with authority for the purpose are evidence of the facts which they are required to certify to, to the extent of their authority."

1886, *Devens, J.*, in *Com. v. Richardson*, 142 Mass. 74, 7 N. E. 20: "As to matters which the officer is not authorized by law to attest, his certificate is extra-official, can have

¹ This phrase "matter of law" apparently refers to the bishops' certificates of marriages, considered in a prior part of the same opinion; these could be used in some cases as conclusive proof of marriage; they were a mode of trial, and the bishop's certificate was in reality the adjudication of another tribunal, as already noticed (*ante*, §§ 1347, 1645). The language of L. C. J. Willes

seems to signify that a certificate not amounting to a lawful adjudication by a competent tribunal ("not coupled with any matter of law," he says), i. e. in effect every certificate, in the sense now employed, was inadmissible.

² *E. g.*: "This certificate, I think, fully answers the objection that it does not appear that the witnesses believe a God."

no higher weight than that of a private citizen, and is therefore inadequate to make the proof required."⁴

In the application of this principle, only five classes of cases call for special consideration. (1) The admission of the *King's certificate* (it may have been given in the form of a return) was perhaps an exception based on necessity, for he was privileged from summons into court (*post*, § 2369), perhaps even from testifying at all (*post*, § 2370), and the taking of his deposition would not (in former times) have been consistent with his dignity. Yet it is possible to say that this instance is no exception, and that the King, as the source of authority, could, with the same stroke of the pen that wrote the certificate, give himself the authority to make it.⁵

(2) The case of the *notary's protest* was the single well-settled exception at common law (*post*, § 1676). (3) The use of *certified copies* by the official custodian of the original (*post*, §§ 1678-1683) was not recognized in the English common law, apart from an express authority to make a copy, and therefore was no exception to the rule. But in the United States many Courts did recognize an exception in this respect, and implied an authority from the nature of the office. (4) The case of an *official printer's copy* (*post*, § 1684) was not an exception, for there was here an express though general authority. (5) The proof of a *deed's execution* by a *notary's* or *registrar's certificate* (*post*, § 1677) was not allowed at common law; and the modern practice rests on express statutory authority.

The various judicial rulings⁶ dealing with the use of certificates show a

⁴ 1789, *Johnson v. Hocker*, 1 Dall. 407 (a certificate of more than is authorized is admissible; the surplusage being rejected).

⁵ Historically, to be sure, the rule probably went back to the early doctrine that the King's word was indisputable and that his seal imported absolute verity: 1224, Bracton's *Notae*, Book, II, No. 239 ("Testificacio domini Regis per cartam vel viva voce omnem aliam probationem excedit"); and the citations *post*, § 2426. The rule is later mentioned in the following places: 1532, Perkin's *Profitable Book*, 142 ("in time of war" divers things shall be "tried by the certificate of the king's marshal"; but this was really a case of separate jurisdiction, like the bishop's, *supra*); 1613, *Lea's Case*, Godb. 198 (that A had promised the King according to a certain tenor, was proved in the Court of Requests by "a certificate made by the King's majesty that he made such a promise to him"); ante 1635, Hudson, *Treatise of the Star Chamber*, part III, § 21, in Hargr. *Collect. Jurid.* 206 ("The king may yield a testimony in any cause, for so did King James . . . in chancery by his letters under his signet in the lord Auberville's cause. The great judges of the realm may yield testimony; but that they do by certificate under their hands, if not by oath; but upon their bare certificate many men have been sentenced; . . . but that was only where they were authorized under the broad seal to take their verdict, for otherwise I conceive not any man should be punished under a certificate without oath");

1690, *Hale, Pleas of the Crown*, II, 282 (after declaring the King disqualified by interest on a charge of treason, he names other cases, not open to that objection, in which "the King's testimony under his great seal is allowable"); 1699, *Litcot v. Blackwell*, 2 Keb. 349 (trover; one Tytus, "sent by the King to this purpose," was excluded, "this being a difference between party and party; but were the matter only concerning the King, his testimony were good, as a letter, in Sir Gerrard Fleetwood's case"); 1694 (?), *Abigny v. Clifton*, Vin. Abr. Evidence, R, b, I, pl. 6, vol. XII, 190 ("the King under his sign manual certified to the Lord Chancellor a promise made to him in behalf of another, and this certificate was allowed good evidence").

⁶ Compare with the following list the other instances cited under *registers* (*ante*, § 1639), *returns* (*ante*, § 1664), *surveyors* (*ante*, § 1665), *certificates of administrators' appointments* (*ante*, § 1238), *post-marks* (*post*, § 2152), *land-office records* (*ante*, § 1659), and *certified copies* (*post*, § 1681), the varying nomenclature making it difficult to classify the documents accurately; compare also the rules for *admissions* (*ante*, § 1048), and for *hearsay statements against interest* (*ante*, § 1455), under which some of the following documents may sometimes become admissible: *England*: 1796, *R. v. Mawbey*, 6 T. R. 619, 630, 635 (indictment for presenting a false certificate of justices that a road was in repair; the certificate, apparently in effect a judgment, and so treated in counsel's argument, was held

fairly consistent application of the general principle already noticed, with the marked tendency to exclude them in the absence of a clear showing of

to be a legal instrument of evidence; their admission was justified as "now become too inveterate to be overturned"; 1799, *Moises v. Thornton*, 8 id. 303 (treating a diploma of medicine as a certificate of an act of the corporation conferring the degree; it must appear that "the persons whose names were subscribed had authority to grant the same"; per *Kenyon*, L. C. J.); 1806, *Johnson v. Ward*, 6 Esp. 48 (to prove goods to have been on board a ship, the official certificate based on a report by the customs-searcher was admitted as "a paper made by authority of an act of Parliament by an officer of the customs appointed for the purpose"); 1828, *Rowe v. Brenton*, 8 B. & C. 737, 743 (document made by the Duke of Cornwall, admitted as a public document because of the Crown's interest in his lands); 1847, *R. v. Bourdon*, 2 Cox Cr. 169 (excluding the clerk of assize's list of prisoners sent to the jail in specifying the term, etc.); 1837, *Vaux Peerage*, 5 Cl. & F. 526, 541 (funeral certificate, made by the heralds, on the faith of the signatures of the executors and mourners, but required by special order of the Earl Marshal of England, admitted "as an official document taken by persons whose duty it was to make it up"); 1844, *Hubback, Succession*, 554 (other instances cited from records of peerage cases); 1880, *Sturte v. Freccia*, L. R. 5 App. Cas. 623, 633 (L. C. Selborne: "[The funeral certificates entered in the heralds' books] stand upon this ground; it was the official duty of the heralds to receive such certificates from persons who were by law competent witnesses, and to record the statements of those persons in their books"); *Canada*: 1898, *Quintal v. Chalmers*, 12 Man. 231, 235 (grain inspector's certificates, excluded); *United States*: 1853, *Powell v. Hendrick*, 3 Cal. 427, 430 (tax collector's certificate of payment, excluded); 1870, *Hastings v. Devlin*, 40 id. 358, 364 (certificate of the U. S. land register, as to a survey, etc., held not an official statement within any statute); 1876, *Wilson v. School District*, 44 Conn. 157, 160 (clerk's unauthorized certificate, excluded); 1902, *U. S. v. Lew Poy Dew*, D. C., 119 Fed. 786 ("the certificate of an officer is worthless as evidence unless the making of it was an official duty, and even then it is not evidence except so far as made such by some statute"; excluding a U. S. commissioner's certificate of the adjudicated status of a Chinese immigrant); 1903, *Trentham v. Waldrop*, — Ga. —, 45 S. E. 988 (county clerk's certificate of physician's licensing, admissible); 1871, *Harbers v. Tribby*, 62 Ill. 56 (certificate of enlistment, not admitted); 1899, *Consolidated Coal Co. v. Seniger*, 179 id. 370, 53 N. E. 733 (State mine examiner's certificate of an engineer's competency, admitted); 1899, *Chicago v. English*, 180 id. 476, 54 N. E. 609 (comptroller's certificate of the amount of a city debt, excluded); 1893, *Fry v. State*, 27 Ind. 343, 350 (State auditor's unauthorized certificate of account, excluded); 1898, *Lacy v. Kossuth Co.*, 106 Ia. 16, 75 N. W. 629 (board of health's certificate of services performed by a physician, admitted); 1902, *Wilbur v. R. C.*, 110 I. 65, 89 N. W. 101 (letter from the general land-office commissioner to a land-office register, excluded); 1838, *Stein v. Seaman*, 9 La. 277, 280 (consular certificate of a foreign official's signature, excluded); 1841, *Morton v. Barrett*, 19 Me. 109 (consul's certificate of the death of an American seaman, excluded); 1874, *Hanson v. South Scituate*, 115 Mass. 340 (certificate of discharge from the army, admitted); 1877, *Smith v. Rich*, 37 Mich. 549, 553 (county surveyor's certificates, not made according to statute, excluded); 1896, *Ripon College v. Brown*, 66 Minn. 179, 68 N. W. 840 (tax receipts by a county treasurer, admitted); 1868, *Williams v. Carpenter*, 42 Mo. 327, 345 (land-office certificate of "confirmation of title" and "Hunt's minutes" receivable; but questions of substantive and statutory law are involved; compare the cross-references in § 1659, *ante*, for other Missouri authorities on related points); 1887, *State v. Pagels*, 92 id. 300, 310, 4 S. W. 931, note 4 (certificate of superintendent of poorhouse, excluded); 1892, *State v. Austin*, 113 id. 538, 544, 21 S. W. 31 (prison warden's certificate of discharge, admitted, the warden being required to record discharges); 1899, *State v. Spotted Hawk*, 22 Mont. 33, 55 Pac. 1026 (certificate of discharge from the army, not admissible to show the facts for which discharge was given); 1869, *Western Union T. Co. v. Atl. & Pac. S. T. Co.*, 5 Nev. 102, 110 (postmaster-general's letter stating a party's acceptance of a privilege, probably sufficient); 1833, *Dunlap v. Waldo*, 6 N. H. 450 (county clerk's certificate of appointment of a justice of the peace in New York, admissible under the law of that State); 1871, *Hawthorne v. Hoboken*, 35 N. J. L. 247, 252 (provost-marshal's certificate of enlistment, admitted); 1815, *Jackson v. Belknap*, 12 John. 96 (surveyor-general's statutory certificate that certain lands had been forfeited by attainder, etc., received); 1830, *Jackson v. Cole*, 4 Cow. 587, 506 (similar certificate, by commissioners of forfeiture, of the location and appraisal of lands, received); 1820, *Governor v. Jeffreys*, 1 Hawks 208 (adjutant-general's certificate of delinquency, excluded on the facts; cited *ante*, § 1635); 1842, *State v. Wells*, 11 Oh. 261 (county auditor's certificate of payment of land fees, excluded); 1782, *Morris v. Vanderen*, 1 Dall. 64, 65 (certificate of a former surveyor-general that a survey had been made, received); 1789, *Johnson v. Hocker*, ib. 406 (State treasurer's certificate, admitted to show the receipt of money from H., but not to show a tender elsewhere made by H. to J.); 1792, *Jones v. Ross*, 2 id. 143 (certificate of a list of prisoners in Hamburg, by the "late directors" of the prison, excluded as not official); 1793, *Todd v. Ockerman*, 1 Yeates 295, 299 (similar to *Morris v. Vanderen*; received as an official certificate of a sworn officer); 1895, *Sewell v. Moore*, 166 Pa. 570, 31 Atl. 370 (certificate of a fire-escape in-

authority. This tendency, while sufficiently proper as a judicial policy, has, however left the process of proof often encumbered by disproportionate inconvenience and cost, in summoning witnesses to prove official acts not fairly disputable by the opponent. A need certainly existed for the liberal grant to certain classes of officials of express statutory authority to give certificates. Accordingly, in most jurisdictions the Legislature has not merely granted express authority to certify specified classes of facts, but has declared such certificates admissible in evidence.⁷ These statutes are of great variety;

spector, rejected because made at a time not sanctioned by the statute); 1845, *Foster v. Montgomery*, 6 Humph. 231 (clerk's certificate of the making of a lost affidavit preliminary to a deposition-order, received); 1804, *Church v. Hubbart*, 2 Cr. 187, 239 (translation certified by a consul, excluded); 1811, *U. S. v. Mitchell*, 2 Wash. C. C. 418 (U. S. consul's certificate to deposit of a ship's register, admitted); 1811, *U. S. v. Mitchell*, 2 id. 95 (certificate of governor of St. Thomas that permission had been refused by him to take away ship's cargo, admitted); 1836, *Levy v. Burley*, 2 Sumn. 357 (consul's certificate of non-deposit of a ship's register, excluded); 1887, *Coan v. Flagg*, 123 U. S. 117, 130, 8 Sup. 47 (letters by the land office commissioner as to the time of filing a survey, admitted); 1898, *Rollins v. Board*, 33 C. C. A. 181, 90 Fed. 575 (semi-annual statement of indebtedness by the clerk of a county board, not admitted on the facts); 1832, *Seymour v. Beach*, 4 Vt. 493, 497 (the register's certificate of administration is evidence of an administrator's appointment); 1836, *Wilkinson v. Jett*, 7 Leigh 115 (certificate of a postmaster-general as to irregularities in mail-carrying, excluded); 1858, *Ushers v. Pride*, 15 Gratt. 190, 195 (auditor's certificate of delinquent tax-land, admitted).

⁷ Compare the cross-references at the beginning of the preceding note; compare also, as to certificates of *forgery of official signatures* on bills, and of *analysis by chemists*, § 1707, *post*, for such certificates are sometimes admitted only as affidavits; compare also § 1678, *post* (certificate of contents); *Canada: Dom. Rev. St.* 1886, c. 107, § 11 (official analyst's certificate of adulteration of a sample, admissible, subject to the defendant's "right to require the attendance of the analyst for the purpose of cross-examination"); c. 69, § 32 (animal inspector's certificate that an animal is diseased, admissible); c. 32, § 156 (official customs certificates, admissible); *Man. Rev. St.* 1902, c. 138, § 110 (medical practitioner's certificate of vaccination, admissible); c. 111, § 55 (purporting certificate of a council registrar of a medical man's registration is admissible); c. 131, § 38 (similar for pharmacists); c. 172, § 27 (similar for veterinarians); c. 36, § 5 (registrar's certificate of incorporation of cooperative associations, admissible); c. 134, § 52 (land-surveyor's association; secretary-treasurer's certificate, under the common seal, countersigned by the president, to be evidence); c. 52, § 289 (election returning officer's certificate, admissible); c. 21, § 18 (inspector's certificate of immigrant child's

age, to be conclusive); c. 71, § 24 (half-breed land titles; certain officers' certificates of birth, parentage, or death of any half-breed or descendant, or an allotment list or notice, admissible); c. 6, § 9 (official veterinarian's certificate of animal's disease, admissible); c. 116, § 337 (provincial Secretary's certificate of municipal auditor's appointment, admissible); *N. Br. Consol. St.* 1877, c. 99, § 87 (secretary-treasurer's certificate of appointment of any parish or county officer, under the municipal seal, admissible without proof of seal, signature, or official character); *N. Sc. Rev. St.* 1900, c. 163, § 12 (certain certificates under the Canadian Banking Act, admissible on proof of the signature); *Ont. St.* 1900, c. 27, § 14 (certain certificates of the registrar of loan corporations, admissible); *Ala. Code* 1897, § 3234 (support of indigent relatives; certificate of a county probate judge, that the person maintained by the county was a pauper and was so maintained, admissible); § 3265 (medical examiners' certificate is evidence of the holder's authority to practise); § 1449 (same for dental examiners); § 2889 (militia commander's certificate of membership, admissible to prove exemption from poll-tax and jury-duty); § 1758 (treasurer's certificate, admissible to prove judge of probate's failure to pay over escheat-money); § 3797 (Supreme Court clerk's certificate of the neglect of a circuit court clerk to send a transcript in an appealed criminal case, admissible); § 3780 (Supreme Court clerk's certificate of the sending of an execution to a sheriff, or its receipt by him, admissible); § 3840 (his certificate of a rehearing, etc., admissible); § 2483 (road-overseer's sworn certificate of defaulters in road-duty, admissible); *Ark. Stats.* 1894, § 2882 (certified copy of balance due, by a public officer whose duty it is to audit and keep account, admissible to prove a balance of debt due to the State); *Cal. C. C. P.* 1872, § 1379 (certificate of a foreign officer to take acknowledgment and oaths, receivable to prove the identity of a claimant for administration, conditionally); § 1798 (non-resident guardian's claim to appointment, provable by a certificate that by the laws of his residence-country he is entitled to the estate's custody without judicial appointment; the certificate to be under seal of clerk of the court having jurisdiction, or of the highest court, attested by a minister, consul, or vice-consul of the United States resident there); *Colo. Annot. Stats.* 1891, § 2206 (certificate of the superintendent of insurance made under authority of law, admissible); § 3786

but they seem in few instances only to have exceeded the limits of that cautious policy of the common law which is exhibited in its principles applicable

(county assessor's certificate of assessment of stock, admissible); § 3830 and St. 1893, p. 423, § 18 (treasurer's receipt, indorsed by a county clerk or assessor, admissible to prove payment of taxes on personalty); § 3910 (certificate of redemption, indorsed by the county clerk, to be evidence of redemption of land); § 3876 (State auditor's certificate of a county treasurer's default, admissible); § 3827, and St. 1893, p. 420, § 15 (State auditor's certificate, under official seal, of a county clerk's or assessor's failure to forward an assessment-roll, admissible); § 3771 (county treasurer's certificate of unpaid taxes on personalty, admissible); St. 1894, p. 74, § 8 (certificate of registration of a voter, admissible); p. 53, § 6 (certificate of sale by a trustee under a trust-deed of land, admissible); Conn.: Gen. St. 1887, § 2106 (school certificate of child's attendance, to be evidence of attendance); § 2659 (certificate of a director of the agricultural experiment station, admissible to show a defect in milk); §§ 2618, 2620 (certificate of an analyst of the above station, or of a State chemist, admissible to show a defect in butter or molasses); § 3117 (State chemist's certificate of analysis of liquor presented to him officially, admissible to show the facts stated); Del. St. 1816, c. 209, § 2 (State chemist's certificate of analysis of a sample of imitation butter, admissible in a prosecution under this act); Fla.: Rev. St. 1892, § 1113 ("The certificate of any State officer under his seal of office as to any official fact occurring in the course of the official business of the office in which he presides shall be *prima facie* evidence of that fact"); § 1112 (commissioner of agriculture's certificate, under official seal, as to ownership of land by the State or by a school, seminary, or internal improvement fund, admissible); § 1119 (U. S. land-office receiver's receipt, to be evidence of title in the payee named); 1895, Yellow River R. Co. v. Harris, 35 Fla. 385, 17 So. 568 (certificates of the land-office receiver, admissible as evidence of title under certain conditions); Ind. Rev. St. 1897, § 6599 (commissioners' certificate of a recount of ballots, admissible to prove the facts recited); §§ 3590, 3696 (city treasurer's certificate of the facts of a tax-sale and assessment-sale, admissible); § 8016 (Secretary of State's certificate of the date of receipt of laws in counties, admissible); § 4916 (county recorder's certificate of the filing of a road-corporation's articles, admissible in an action for or against the latter); § 4995 (Secretary of State's certificate of an increase of an insurance-company's capital stock, admissible); St. 1903, c. 127 (Secretary of State's certificate to be evidence of a foreign corporation's compliance with local laws of registration); Ky. Stats. 1899, § 1631 (auditor's certificate of returns of delinquent taxes, sale, etc., admissible); La. Rev. Civ. C. 1883, § 6 (publication of a law, provable by the Secretary of State's certificate under official seal, "delivered from" his register); Md. Pub. G. L. 1888, Art. 19, § 22 (comptroller's certificate of account of an officer collecting State moneys, admissible in an action against officer); Art. 32, § 5 (dentistry board's certificate of a practitioner's qualifications, admissible to show his right to practise); Mass. Pub. St. c. 100, § 29, Rev. L. 1902, c. 100, § 67 (certificate of an official inspector of liquors, admissible to show the nature of liquors officially given to him for analysis); P. S. c. 56, § 20, c. 57, § 2, R. L. c. 56, §§ 42, 52 (sworn certificate of an analysis of milk, butter, cheese, etc., by an analyzer appointed for the purpose by the official milk inspector, admissible; provided a part of the sample is given to the owner); St. 1882, c. 221, Rev. L. c. 100, § 67 (liquor-inspector's certificate of analysis of liquor seized, admissible); St. 1887, c. 137, § 4, R. L. c. 76, § 26 (board of dentistry-registration's certificate, to be evidence of the right to practise dentistry); St. 1886, c. 318, § 3 (milk-inspector's analysis, not to be admitted unless a portion of the sample has been returned on request); St. 1895, c. 496, § 12 (certificate by the secretary of the cattle-commissioners of any order, etc., of the board, admissible); Mich. Comp. L. 1897, § 9041 (certificate of appointment of an executor, etc., admissible); § 48 (dates of a legislative session, provable by certificate of the Secretary of State printed with the session-laws); § 74 (amount of an extradition fee, provable by certificate of the proper officer in the other State); § 2758 (publication of a village ordinance, provable by the clerk's certificate); § 3087 (same for a city ordinance); §§ 3242, 3407 (municipal or county treasurer's certificate of the amount of compensation in the treasury for land or improvement condemnation, admissible); § 3476 (municipal clerk's certificate of a fireman's service, admissible); § 3541 (notice of register of electors, provable by certified copy by the county clerk); § 3871 (collector's certificate of tax, valuation, etc., admissible); § 3922 (all tax records, certificates, etc., to be *prima facie* evidence of facts stated); § 4032 (auditor-general's certificate of tax due from a corporation, etc., admissible); § 4277 (court's certificate of proceedings to lay out county road, admissible); Minn. Gen. St. 1894, § 2405 (surveyor-general's certificate of a recorded log-mark, to be evidence of ownership); § 2245 (certificate of a licensed physician as to violation of duty to furnish seats to female employees, admissible); § 4754 (official certificate of approval of an apprentice's indenture, to be sufficient evidence of his age); Miss. Annot. Code 1892, § 1788 (certificate by the clerk of a county board of supervisors of the default of any clerk or district attorney in transmitting a list of executions or statement of sheriff's returns, admissible); §§ 3912, 3918, 3924 (certain official certificates to be evidence of delinquencies in road-labor); § 2070 (State chemist's certificate of analysis, to be evidence of the percentage of valuable elements in a fertilizer an-

to certificates. They are, however, cumbersome in their number and variety, and could easily be simplified under some such general form as that sanctioned in New York or Florida.

alyzed by him); *N. H. Pub. St. c. 164, § 3* (Secretary of State's certificate of bank's failure to make returns, admissible); *Mo. Rev. St. 1899, §§ 5399, 5404, 5683, 5848, 5858, 5863, 5891, 5970, 5986, 6016, 6020, 6083, 6267, 6284, 6289, 6314* (certain tax-bills made evidence of the amounts due, etc.); § 9459 (collector's delinquent list for certain taxes, admissible); *Nev. Gen. St. 1885, § 1695* (Secretary of State's certificate, under State seal, of the failure of local officials to make due return of election, admissible); § 1816 (State comptroller's account, admissible in an action to recover a debt due to the State); *N. Y. C. C. P. 1877, § 922* (official certificate or affidavit, required to be made and filed, admissible to prove facts therein alleged); *R. v. St. I, 173, §§ 24, 28* (comptroller's certificate of a balance of account, admissible); *Laws 1870, c. 291, T. 5, § 2* (village inspectors' certificate of election, admissible); *Laws 1851, c. 134, § 33* (official sealer's certificate of correctness of a surveyor's measure, admissible); *Laws 1878, c. 290, § 1* (certificate under seal of a prison warden, etc., admissible on a trial for a subsequent offence, to prove the imprisonment and discharge); *Laws 1896, c. 376, § 29* (transportation superintendent's certificate of appointment of a milk-can agent, admissible); *Laws 1892, c. 683, § 82* (county clerk's certificate under seal of a notary's appointment and the genuineness of his certificate, admissible); *Laws 1886, c. 21, § 15* (prison official's certificate of sentence-commutation, admissible in a prosecution for a subsequent felony); *Laws 1892, c. 682, § 41* (Governor's or Secretary of State's certificate, admissible to prove the time of a bill's becoming law); *Laws 1890, c. 569, § 57* (town-meeting clerk's certificate of election of a justice of peace, admissible); *Laws 1896, c. 908, § 128* (State treasurer's and comptroller's certificate as to tax-redemptions, admissible); *Laws 1844, c. 326, § 3* (loan-commissioners' certificate under seal of foreclosure-sale proceedings, admissible); *Laws 1870, c. 291, T. 6, § 7* (village trustees' certificate under seal of a tax-sale, admissible); *Laws 1869, c. 888, § 13* (drainage-commissioners' certificate of an assessment-sale, admissible); *Laws 1831, c. 294* (railroad corporation's certificate of abandonment of a right of way, admissible); *N. C. 1880, Palmer v. Love, 82 N. C. 478* (legislative scale of Confederate money-values; *St. 1865-66, c. 39, § 1*, applied); *N. D. Rev. C. 1895, § 294* (certificate of the secretary of the State board of dental examiners under the board seal, that a person is or is not a registered dentist, admissible); *Ok. Rev. St. 1898, § 271* (certificate under seal of the insurance superintendent, made in pursuance of law, admissible); § 2668 (port-warden's surveys, etc., receivable); *Pa. St. 1837, P. & L. Dig., Evidence, 46* (certified translation by U. S. consul of an extract of certain foreign burial registers, receivable); *St. 1869, P. & L. Dig., Interpreters, 4* (translations, by an official interpreter in Philadelphia, of any paper in a foreign language, attached to the original, receivable); *S. D. Stats. 1899, § 3573* ("before an officer executes an indenture [of apprenticeship], or consents thereto, he must inform himself of the age of the apprentice," and the statement of such age in the indenture is presumptive evidence thereof); *Tenn. Code 1896, § 1045* (comptroller's "statement" of the amount due from a delinquent tax-collector, admissible); § 347 (official chemist's certificate of analysis of a fertilizer submitted by the inspector, admissible); *Tex. Rev. Civ. St. 1895, § 2316* (comptroller's certificate, from the rolls in his office, of assessment or payment of taxes, admissible); *U. S. Rev. St. 1878, § 884* ("every certificate" executed by the comptroller of currency "in pursuance of law, and sealed with his seal of office," admissible); § 890 (in suits for balances due from postmasters, a certificate of demand by the proper officer, stating certain details, admissible); 1892, *U. S. v. Dumas, 149 U. S. 278, 285, 18 Sup. 874* (statement of a postmaster's account under statute, admitted); 1896, *National Bank v. Galland, 14 Wash. 502, 45 Pac. 35* (certificate of the comptroller of the currency, admitted to show the organization of a national bank); 1898, *U. S. v. Marks, — Ariz. —, 52 Pac. 773* (to show money illegally retained by a postmaster, the departmental statement of his accounts and an order of the postmaster-general reciting his false returns, received); *Utah Rev. St. 1898, § 2425* (State auditor's account, to be evidence of default of money due to the State); *Vt. Stats. 1894, § 4146* (Secretary of State's certificate of service of process on a foreign corporation, admissible); *Va. Code 1887, §§ 3334, 3335* (certificate of the auditor of public accounts as to tax-sales, etc., and of the auditor of West Virginia on similar matters, receivable, conditionally in certain cases of 20 or 40 days' notice to the opponent); *Wash. C. & Stats. 1897, § 2658* (certificate of the superintendent of a State insane-hospital, to be evidence of employment therein as exempting from jury-duty, etc.); *St. 1899, c. 100, § 3* (hop inspector's certificate of the grade or quality of hops, admissible); *W. Va. Code 1891, c. 130, § 5* (auditor's certificate of a return or sale of delinquent land, or of payment or not of taxes thereon, or of non-entry for taxes, admissible if filed beforehand and 20 days' notice given before the first day of the term); § 5 a (same for a county court clerk's certificate of the last two matters, and of the amount of taxes due); § 7 (same for a Virginia auditor's certificate, with 40 days' notice); *Wis. Stats. 1898, § 4152* (list of land certified by a U. S. officer as conveyed to the State, admissible); § 4164 (substantially like *N. Y. C. C. P. § 922*); § 4766 (justice's certificate of con-

From the use of certificates under these statutes, distinguish certain other things superficially related. (1) An officer authorized to certify a copy cannot at common law certify merely the *effect of the record*; but sometimes by statute he is authorized to do so; these statutes, which are sometimes impossible to be discriminated from those of the above class, are later dealt with (*post*, § 1679). (2) When a certificate is authorized, the question may arise how far the detailed steps of official action need to be set out in it, or can be supplied by implication without other evidence, — for example, whether with a tax-collector's certificate of sale it is necessary also to evidence the advertisement of notice; this involves usually either the *presumption of regularity* of official doings (*post*, § 2534) or the rule of *completeness* (*post*, § 2108). (3) Courts are bound, in recognizing the existence of *foreign States* or sovereigns, by the action of the Executive (*post*, § 2574); recognition by the Executive is sometimes to be ascertained by a "certificate" furnished by the Executive; but this is not an evidential use of the certificate, for the act of furnishing it is itself an act of recognition.⁹ So, too, the use of a *certificate of foreign law*¹⁰ seems to be an instance of the judge's informing himself, under the doctrine of judicial notice (*post*, § 2569), rather than of the prescriptive principle.

There may also be noted here a restricted class of *quasi-official certificates by private persons*. Where a statute creates a duty or an authority for a private person to give a certificate, it may be argued that this authority is in its nature official, at least for the purpose of making such a certificate admissible. The principle has already been examined (*ante*, § 1633, par. 10); and one instance of its application — certificates of marriage by ministers — has been considered (*ante*, § 1645). At common law such an authority has occasionally been deemed sufficient;¹⁰ and by several statutes, based on convenience in proving certain formal and not disputable matters, such certificates by private persons have been expressly declared admissible.¹¹

viction, admissible); § 2276 a (county judge's certificate of heirs, etc., of a person deceased, when recorded with the register of deeds, admissible); § 959 (38) (city clerk's certificate, under city seal, of a special assessment lien, admissible); St. 1903, c. 362 (county judge's certificate of death of a life tenant, etc., admissible in certain cases).

⁹ 1830, U. S. v. Benner, 1 Baldw. 234, 237 (certificate of a Secretary of State that a person is a foreign minister or a member of the diplomatic staff "is *per se* an authorization and reception of him").

¹⁰ 1806, *Pioton's Trial*, 30 How. St. Tr. 561 (certificate of the Chief Justice of Trinidad as to the law there prevailing, offered and apparently received); 1832, *Dormoy's Goods*, 3 Hagg. 767 (probate law of St. Martin's French Island; the ambassador's certificate, or *semble* the consul-general's, sufficient); 1862, *Klingemann's Goods*, 3 Sw. & Tr. 18 (certificate of the minister of the King of Hanover, to probate law, admitted); 1884, *Prince Oldenburg's Goods*, L. R. 9 P. D. 234 (Russian ambassador's cer-

tificate, admitted, to show the probate law of Russia for the royal family); 1859, St. 22 & 23 Vict. c. 63 (provisions for obtaining from a Court in some other part of the British Dominions, having a different law, a judicial certificate of the law there obtaining); 1861, St. 24 Vict. c. 11 (similar, for the law of foreign countries with whom a convention may have been made); the latter statute has remained futile, because no such convention has yet been made: 1902, *Phipson, Evidence*, 3d ed., 342.

¹¹ 1827, *Dole v. Allen*, 4 Greenl. 527 (certificate of membership in the Quaker sect, authorized by statute, admitted, as showing membership to procure immunity from militia service). The following case seems to belong here: 1859, *Stearns v. Doe*, 12 Gray 482, 486 (residence-port of owner of a vessel; a Federal statute requires it painted on the vessel's stern; this painted name of a port held admissible, as made presumably in compliance with the law).

¹² With the following compare the citations *post*, § 1643 (certified copies by bank-officers, etc.), § 1710 (affidavits), §§ 1698, 1702 (eciam-

§ 1675. **Notary's Certificate of Protest.** A notary is a public officer, who takes an oath of office and (usually) is required to give an official bond. It follows that his statement made under some specific official duty is admissible in evidence without calling him; and his is the sole instance, universally accepted at common law, in which a duty to furnish a certificate is regarded as sufficiently implied from the nature of his office without the aid of an express warrant:¹

1843, *Abinger, L. C. B.*, in *Brain v. Preece*, 11 M. & W. 773, 775: "A notary is a public officer, and is sworn to do his duty as a notary. . . . [It is not necessary to call him, for] it is like any other case of a public officer who does anything in the course of business."

1861, *Dixon, C. J.*, in *Adams v. Wright*, 14 Wis. 413: "The notary's official oath is substituted for the ordinary judicial oath taken in the presence of the Court and jury."

And yet the limitations applied in practice were plainly inconsistent with this theory. At common law it was generally agreed that the notary's protest was admissible to evidence only the *dishonor* (i.e. presentment, demand, and refusal to accept or to pay) of a *foreign bill of exchange*; it was therefore not receivable for an inland bill,² nor for any note,³ nor for the fact of notice⁴ or any other facts except the dishonor. The last two

tific and (commercial reports): *Mass. Rev. St.* 1902, c. 40, Rule 164 ("The Court may obtain the assistance of accountants, merchants, engineers, actuaries, and other scientific persons in such way as it thinks fit, the better to enable it to determine any matter in evidence in any cause or proceeding, and may act on the certificate of such person"); *N. Br. Consol. St.* 1877, c. 49, § 87 (a reference may be made by a judge to "any scientific person or accountant, not interested, for any enquiry or other purpose," and the person shall "become for that purpose an officer of the Court"); *N. Sa. Rev. St.* 1900, c. 44, § 10 (medical practitioner's certificate of insanity for admission of patient to Government hospital is receivable); *N. W. Terr. Consol. Ord.* 1898, c. 21, § 490 (like *Ont. Rules*, § 94; *Ont. Rules of Court* 1897, § 94 (the Court may act on the certificate of experts); 1893, *Wright v. Collier*, 19 *Ont. App.* 298 (Court *Rules*, § 94, held not to justify the implicit acceptance of a certain marine expert's opinion as the basis of decision); *Cal. Civ. C.* 1872, § 2059 (certificate of the master or chief surviving officer of a wrecked ship that a seaman claiming wages exerted himself to the utmost to save the ship, etc., admissible); *Ind. Rev. St.* 1897, § 4871 (recorded certificate of election of certain church officers, admissible); § 5169 (same for election in lodges, societies, etc.); *Me. Pub. St.* 1883, c. 46, § 11 (clerk of corporation's recorded certificate of his appointment, admissible in proving service of process); *N. Y. Laws* 1890, c. 563, § 9 (corporation's filed certificate of incorporation or of other facts of existence or management "required or authorised by law to be stated therein," admissible); *N. D. Rev. C.* 1896, § 4161 (like *Cal. Civ. C.* § 2059); *Ok. Stats.* 1898, § 3155 ("an analysis made by a practical chemist shall be deemed competent testimony"

of liquor-adulteration); *R. I. Gen. L.* 1896, c. 244, §§ 16, 17 (written report of an expert appointed by Court to be admissible; but he is to attend trial until excused and to be subject to cross-examination if desired); *S. D. Stats.* 1899, § 5007 (like *Cal. Civ. C.* § 2059).

The ordinary corporate "certificate of organization" does not belong here; it is a constitutive, not an evidential document.

¹ It is true that the notary now often or usually keeps a register of protest and gives only a certified copy of this, so that the duty to keep a register might be implied, under § 1639, *ante*; but this was not the original practice as to protests; the notary gave an individual certificate, not a copy of his entry, and thus the case was, at least originally, a genuine one of an implied duty to give a certificate.

² 1815, *Cheeser v. Noyes*, 4 *Camp.* 129 (nor even of a foreign bill presented in England); 1824, *Robinson v. Johnson*, 1 *Mo.* 424; 1829, *Towneley v. Simrell*, 2 *Pet.* 170, 179; 1844, *White v. Englehard*, 10 *Miss.* 33 ("The only competent evidence would have been his deposition taken according to law, or a *visu voce* examination in open court"). Each of the United States was here as to another a foreign State: 1829, *Towneley v. Simrell*, 2 *Pet.* 170, 180; *Buckner v. Finlay*, *ib.* 586.

³ 1823, *Nicholls v. Webb*, 5 *Wheat.* 326, 331 (Story, J.: "If he had been alive at the trial, there is no question that the protest could not have been given in evidence, except with his deposition or personal examination to support it"); 1819, *Welsh v. Barrett*, 15 *Mass.* 3, 384; 1855, *Layman v. Brown*, 1 *Disney* 78, 1.

⁴ 1850, *Rives v. Parmley*, 18 *Ala.* 256, 259; 1854, *Schneider v. Cochrane*, 9 *La. An.* 235; 1842, *Bank of Rochester v. Gray*, 2 *Hill N. Y.* 227.

limitations could be explained by declaring that such facts were not within the scope of his duty (although this was a forced distinction); but the first was clearly inconsistent with the theory of official duty, for a domestic notary was equally an officer with the foreign notary, and any recognition of the office would naturally discriminate, if at all, against the latter.⁶ Accordingly, it was attempted by some judges to explain the law by another theory, namely, that the notary's certificate of protest was not received as an official statement, but as the statement of a private person whose certificates were by commercial usage deemed trustworthy, and that hence, when the maker was not available for testimony on the stand, and then only, — i. e. when he was deceased⁶ or resided out of the jurisdiction —, his certificate or entry could be received, on the analogy of the Exception for Regular Entries (*ante*, § 1521):

1823, *Story, J.*, in *Nicholls v. Webb*, 8 Wheat. 826, 833, and *Townley v. Simrell*, 2 Pet. 170, 179: "Upon what foundation does this doctrine rest, but upon the usage of merchants and the universal convenience of mankind? There is not even the plea of absolute necessity to justify its introduction, since it is equally evidence, whether the notary be living or dead. The law, indeed, places a confidence in public officers, but it is here extended to foreign officers acting as the agents and instruments of private parties. . . . Where parties reside in the same kingdom or country, there is not the same necessity for giving verity and credit to the notarial protest; the parties may produce the witnesses upon the stand, or compel them to give their depositions."

1854, *Shaw, C. J.*, in *Porter v. Judson*, 1 Gray 175, 176: "[A deceased notary's protest of a promissory note is admissible], not because the protest of a promissory note is necessary and strictly an official act, . . . [but] because it is in the usual course of their duty and business to keep such memoranda."

The traces of this theory are still found in the statutes of some of the older States.⁷ It successfully explained why a foreign but not a domestic protest was receivable; but it was in its own turn inconsistent in not applying the doctrine to protests of notes and to the fact of notice, for the common usage and duty of notaries was notoriously both to protest notes and to certify the fact of notice.⁸ This inconsistency was perceived by a few Courts; and it seems to have been as a logical development of the theory of usage and regular entries that by those Courts the protest was admitted, as under common-law doctrine, both for notes⁹ and for the fact of notice.¹⁰

⁶ The truth seems to be that the common-law Courts merely gave recognition to international commercial usage as far as they were forced to, the notary not being a native common-law officer. For his history, see Bresslau, *Handbuch der Urkundenlehre*, 1889, I, 493-499, 549-551. In Louisiana, under the civil law, they naturally ignored the limitation as to foreign protests: 1827, *Allain v. Whitaker*, 5 Mart. n. s. 511, 513.

⁷ 1854, *Porter v. Judson*, 1 Gray 175, 176 (promissory note).

⁸ For example, New Jersey, New York, and South Carolina.

⁹ 1855, *Storer, J.*, in *Layman v. Brown*, 1 Disney 75, 76 ("Although the practice pre-

vailed in all the commercial cities of the Union to employ a notary to present dishonored notes, and to notify the indorsers if payment should be refused, it was never decreed that the practice changed the general rule of law"); 1838, *Cowen, J.*, in *Halliday v. McDougall*, 20 Wend. 81, 85 (states it as the notary's practice to give and certify the notice).

¹⁰ 1844, *Williams v. Putnam*, 14 N. H. 540 ("There can be no sound reason given for establishing or preserving a distinction between them"); 1895, *Nelson v. Bank*, 16 C. C. A. 425, 69 Fed. 798 (Minnesota statute applied to admit the certificate of protest of a note; the same result approved as a common-law rule).

¹¹ 1841, *Fidler v. Morris*, 6 Whart. 406, 415.

Nevertheless, the theory of official duty, with its inconsistent and impractical limitations, prevailed almost universally. The situation stood in need of statutory reform, both to abolish the untenable limitations and to specify the particulars of the scope of the duty. Accordingly, in almost every jurisdiction, statutes have abolished the three chief restrictions above-named, and have in some instances specifically added other facts—such as the mode of notice and the residence of the parties—to those provable by the certificate.¹¹

¹¹ Of the rulings interpreting these statutes only a few are here given, since so much of substantive law is incidentally involved: *Canada: Man. Rev. St. 1902, c. 57, §§ 28-30; N. Br. St. 1859, c. 22, § 4 (in Consol. St. 1877, p. 1064); N. Sc. Rev. St. 1900, c. 163, §§ 28, 29; Ont. Rev. St. 1897, c. 73, §§ 34, 35; P. E. I. St. 1889, §§ 35-37; United States: Ala. Code 1897, § 3030 (a certificate evidences presentment, demand, protest, service of notice, mode of notice, and reputed place of residence and post-office of the person notified, for "any instrument governed by the commercial law"); 1894, O'Connell v. Walker, 1 Port. 263 (not evidence of the fact of agency of the person notified); 1840, Castles v. McMath, 1 Ala. 326, 328 (same); 1851, Phillips v. Poindexter, 18 Id. 579, 582 (protest is evidence of the agency of the person of whom demand is made as against the acceptor, where the bill is foreign); 1877, Bradley v. Bank, 60 Id. 252, 259 (Louisiana notary's certificate of presentment, non-payment, and notice, received; the statute applies equally to foreign notaries); 1890, Gorce v. Wadsworth, 91 Id. 416, 2 So. 712 (same); Texas notary's certificate of acknowledgment of a power of attorney received); *Aris. Rev. St. 1887, § 1871* ("all declarations and protests made and acknowledgments taken by notaries public," admissible); *Ark. State. 1894, § 2934* (notary public's protest under official seal, admissible to prove the facts stated); § 2885 (his like certificate of notice of protest, admissible); *Cal. Pol. C. 1872, § 795* (notary's protest of a bill or note, stating presentment, dishonor, service and mode of notice, and reputed residence of parties and nearest post-office, admissible); *Colo. Annot. State. 1891, § 3287* (notary's record of notice of protest, with time and manner of service, admissible); *Conn. Gen. St. 1887, § 1084* (protests of notes and inland bills, protested without the State, admissible to prove the facts stated); *D. C. Comp. St. 1894, c. 11, § 14* (notary's protest; similar to Cal. Pol. C. § 795); *Ga. Code 1895, § 5235* (notarial acts required by law as to bills and notes, provable by notary's certificate under seal); 1847, Walker v. Bank, 3 Ga. 436, 493 (the statute impliedly makes the certificate evidence of notice also); *Haw. Civil Laws 1897, §§ 1864, 1866; Ida. Rev. St. 1887, § 290* (notary's protest of a bill or note, admissible to prove dishonor, service and mode of notice, and parties' reputed residence and post-office); *Ill. Rev. St. 1874, c. 98, § 14* (notary's record of notice of protest and time and manner of service, admissible); *Ind. Rev. St. 1897, § 469* (certificate under seal of a notary*

in the U. S., admissible to prove the facts stated); § 8428 (notary's certificate under seal, admissible to prove the facts which he is authorized to certify); *Ia. Code 1897, § 4624* (notary's protest admissible to prove dishonor and notice of bill or note); 1850, Sather v. Rogers, 10 Ia. 231 (certificate must expressly state the fact of notice); 1860, Thorp v. Craig, ib. 461, 465 (same); 1860, Bradshaw v. Hedge, ib. 402, 405, *semble* (not evidence of residence or address); 1865, State v. Reidel, 26 Id. 430, 436 (not receivable in a criminal case to show lack of funds at a bank drawn on; see *ante*, § 1898); *Ky. State. 1899, §§ 479, 3725, 3726* (protest to be evidence of dishonor and notice, for all bills and notes; effect to be given to protests of notaries in other States, on certain conditions); *Md. Pub. G. L. 1886, Art. 13, § 6* (notary's protest of any bill or note, admissible to show non-acceptance, non-payment, presentment, and time and manner of notice); 1843, Whiteford v. Barckmyer, 1 Gill 127, 149 (at common law, it was evidence of presentment and of protest; by St. 1837, c. 253, additionally, of notice sent or delivered; the whole to apply to inland and foreign bills); *Mass. Pub. St. 1882, c. 77, § 22, Rev. L. 1902, c. 73, § 13* (protest is to be evidence of the facts stated therein and of notice); *Mich. Comp. L. 1897, § 2635* (notary's certificate under official seal of "official acts done by him," admissible, but not to prove notice of non-acceptance or non-payment, if denied by affidavit); 1898, Union N. B. v. Milling Co., 117 Mich. 538, 76 N. W. 1 (statute applied); 1901, Sexton v. Ferrigo, 126 Id. 542, 85 N. W. 1096 (under C. L. § 2635, a notary's certificate of protest was held not admissible after his death, where the fact of notice is denied by affidavit); *Miss. Gen. St. 1894, §§ 2274, 2275* (instrument of protest of a notary of this State or a U. S. State or Territory, for a bill or note, admissible to prove the facts certified); *Miss. Annot. Code 1892, § 1802* (the "record of any officer protesting any" note or bill, and verified by his oath, to be evidence of facts therein stated touching dishonor, giving of notice, and post-office address); *Mo. Rev. St. 1899, § 3134* (notary's certificate of protest of a bill or note, admissible to prove dishonor, notice thereof, "and the manner of each of said acts," when verified by his affidavit and filed fifteen days before trial); § 463 (notarial protest "is evidence of a demand and refusal to pay" a bill or note "at the time and in the manner stated"); 1840, Moore v. Bank, 6 Mo. 379 (protest of an inland bill, received, under a statute providing

Certain other principles concerning notarial certificates are to be discriminated. (1) A notary's certificate may evidence the *execution of a deed* or the *making of an affidavit* (*post*, § 1676); his functions in that respect are not here involved. (2) When a notary enters his protests originally in the form of a register, and furnishes the party with a *copy of the register* to serve as a certificate of protest (as is the practice in many jurisdictions), the general principle as to certified copies of public documents becomes applicable (*post*, § 1680). (3) An officer certifying a copy under this principle must set out the *literal words*, not merely a summary of *their effect*; this principle may be applied to notaries' copies, or statutory exceptions may be recognized (*post*, § 1678). (4) The *genuineness* of a notary's certificate is sufficiently evidenced by an impression purporting to be that of *his seal of office*; this doctrine involves the principle of Authentication (*post*, § 2165).

§ 1676. **Certificates of Execution of Deeds (Recorded and Unrecorded), of Affidavits, and of Depositions.** (1) Where a registry system is provided, and

"like remedy" as for foreign bills); 1855, Williams v. Smith, 21 id. 419 (protest of a non-negotiable note, excluded); 1880, Faulkner v. Faulkner, 73 id. 327 (certificate not receivable under a statute to prove notice, unless verified by affidavit); Mont. Pol. C. 1898, § 914 (notary's protest of a bill or note is evidence of presentment, dishonor, service and mode of notice, and parties' reputed residence and nearest post-office); Neb. Comp. St. 1899, § 3853 (notary's certificate of demand, protest, and notice of any bill, note, or other obligation, admissible); § 5923 (notary's protest, admissible to prove dishonor and notice of a bill or note); Nev. Gen. St. 1885, § 2246 (notary's protest of a bill or note, admissible to prove dishonor, service and mode of notice, and reputed residence and nearest post-office of parties notified); N. H. Pub. St. 1891, c. 18, § 3 (protest of a bill or note, to be evidence of the facts stated and of notice); N. J. Gen. St. 1896, Evidence, § 20, St. 1900, c. 150, §§ 21, 22 (notary's certificate, admissible to prove the facts stated as to presentment, dishonor, and notice; unless the opponent has notice of intention to dispute the facts); Promissory Notes, § 12 (record of protest, or certified copy, by a notary or justice deceased or removed out of the State or not to be found after diligent inquiry, admissible to show the facts of demand and notice of bill or note); N. Y. C. C. P. 1877, § 923 (notary's certificate under seal, of presentment, protest, or service of notice, of a bill or note, admissible; unless, perhaps, the opponent by affidavit denies receipt of notice; in case of his death or insanity, or absence or removal preventing testimony in court, the original protest and memorandum, or register is admissible); N. C. Code 1883, § 43 (notary's certificate, or "for want of a notary," that of a justice of the peace or a clerk of a court of record, admissible to show demand, or notice and manner thereof, for bill or note); N. D. Rev. C. 1895, § 469 (notary's record of protest, to be evidence of notice and time and manner of service); Pa. St. 1815, P. &

L. Dig., Evidence, 44 (official acts, protests, and attestations of all domestic notaries public, admissible "in evidence of the facts therein certified"); St. 1876, id. 50 (official acts and exemplifications of foreign notaries, made according to law of the country, are *prima facie* evidence of the matters therein set forth; the U. S. consul to verify the document as specified); S. C. St. 1822, Rev. St. 1893, § 1398, Code 1902, § 1670 (notary's protest of an inland bill or note, admissible to prove notice, if he is deceased or lives out of the county); 1826, Dobson v. Laval, 4 McC. 57 (the statute making the protest evidence of notice was intended to make it evidence of demand also); Tenn. Code 1896, §§ 3203-3206 (notary's "attestations, protestations, and other instruments of publication" under seal, admissible); Tex. Rev. Civ. Stats. 1895, § 2309 ("all declarations and protests made and acknowledgments taken by notaries public," admissible); Utah Rev. St. 1898, § 1670 (notary's record of notice of protest, admissible "to prove such notices"); Vt. Stats. 1894, § 2310 (notary's certificate is evidence of protest, non-payment, and notice, for notes and inland bills, as in the case of foreign bills); 1898, First Nat'l Bank v. Briggs, 70 Vt. 599, 41 Atl. 586 (a foreign protest is not evidence of notice); Va. Code 1887, §§ 2849, 2850, as amended by St. 1894, p. 493 (a notary's protest is evidence of the facts stated as to presentment, demand, dishonor, and notice, both of inland and foreign bills and also of certain notes payable in this State, whether protested in or out of the State); Wash. C. & Stats. 1897, § 250 (notary's record of notice of protest, with the time and manner thereof, and the names of parties notified, admissible to prove the facts stated); Wyo. Rev. St. 1897, § 1667 (notary's certificate under official seal, to be evidence of "the facts contained in such certificate").

Whether the certificate must be founded on the notary's *personal knowledge* has been already considered (*ante*, § 1625).

the registrar is authorized to record a deed as executed, upon information furnished him in the shape of an acknowledgment or other appropriate proof, the register-entry (or a certified copy) is an authorized official statement of the deed's execution, and is to-day everywhere in the United States admitted for that purpose (*ante*, § 1651). But suppose that the *recorded original deed itself* is produced, bearing the *certificate of due acknowledgment or proof* by the registrar or other officer to whom proof or acknowledgment was made, is not this certificate equally receivable to evidence the deed's execution? If it were not, the law would place the offeror in the absurd position of being required to bring witnesses for a deed in court but not to bring them for a deed not in court. That any doubt could have been suggested is due merely to the faulty wording of the earlier group of statutes; these usually declared merely that the register (or a certified copy) could be used when the original deed was shown to be lost or otherwise unavailable, and the argument was made that the statutory authority for the use of the register was confined to the specific cases of a deed lost or the like, and furthermore that no express authority was given to the registrar or other officer to place a certificate upon the original deed. As to the latter argument, it is enough to answer that the practical inconsistency produced by the contrary result must suffice to imply such an authority. As to the former argument, it is clear that the statutory proviso was in reality intended to sanction the rule requiring the production of the original (*ante*, § 1224), and had no other limitations in view; so that, when that rule was satisfied, and the execution remained to be proved, the officer's statutory authority to take the probate of execution was still in full effect and could be availed of to evidence execution, even though it was not needed for evidencing the contents:

1833, *Mellen*, C. J., in *Knox v. Silloway*, 1 Fairf. 201, 218 (after pointing out that an office-copy would suffice): "Now by what magic has a copy from the registry acquired more solemnity and virtue than the original, and why is it entitled to more credit in a Court of justice? Why is not a registered, unproved, original deed as good, as safe, and as satisfactory evidence, as a certified copy of such unproved original, or rather as a certified copy of the record, which is no more than a copy of the original? Is not the supposed distinction the merest phantom? . . . It must be remembered that, in the above-mentioned cases in which certified copies are admitted in evidence, they are admitted not because the registry of the original deed is full and conclusive proof of the legal execution of it, but because it is presumptive and *prima facie* proof that the original is what it appears to be, namely, a fair and perfected contract, inasmuch as the person claiming under it has voluntarily placed it on the public records of the county. The Court, therefore, for these reasons and in these cases, presume the original deed to have been duly executed, and thus throw the *onus probandi* upon the other party, who if he can may impeach the deed as a forgery or show that it was never delivered and perfected by the grantor."

This result was generally reached by judicial construction; but the modern statutes have often taken care to declare expressly that the original deed

¹ 1843, *Woods*, J., in *Wark v. Willard*, 13 N. H. 389, 398 ("The whole office of an acknowledgment is the verification of the due execution of the deed").

bearing the proper officer's certificate of due acknowledgment or probate shall be admissible.¹

¹ *Admissible: Man. Rev. St. 1902, c. 150, § 50* (registrar's certificate of due registration on an original instrument shall be evidence "of the due execution of the instrument"); *N. Br. St. 1894, c. 20, § 50* (registrar's certificate and indorsement of registration shall be evidence "of the due execution of the instrument," and no proof of the registrar's signature or office is needed); § 52 (all such instruments shall be "as good and sufficient evidence as any bargains and sales enrolled" were in England); *P. M. I. St. 1889, § 47* (certificate of registration indorsed on a deed or mortgage, purporting to be signed by the registrar or assistant, shall be presumed genuine and be evidence "of the facts therein stated"); § 50 (deed or mortgage executed out of the Province; annexed certificate and affidavits "required for the registration thereof," with the registrar's certificate of due registration, is evidence of "the due execution thereof"); *Ala. Code 1897, §§ 992, 995* ("conveyances of property," duly acknowledged or proved and recorded, receivable in evidence "without further proof"); § 1018 (same for conditional sales of personalty); *St. 1899, Feb. 1, No. 241* (conveyances duly acknowledged or proved and recorded heretofore or within 12 months, may be received "without further proof"); 1834, *Toulmin v. Austin*, 8 *Stew. & P.* 410, 418; 1870, *Harrison v. Simons*, 55 *Ala.* 510, 515; 1877, *Hart v. Rom*, 57 *Id.* 515, 520; *Aris. Rev. St. 1887, § 1873* ("every instrument of writing," lawfully recorded after proof or acknowledgment, is admissible "without the necessity of proving its execution," provided (1) the offeror deposits it with the clerk of court at least three days before trial begun and notifies the opponent, and (2) the opponent does not "within three days" before trial file an affidavit alleging forgery); *Ark. Stats. 1894, §§ 721, 726* (every "instrument in writing conveying or affecting real estate," when duly recorded, "may be read in evidence without further proof of execution") 1853, *Hogins v. Brashers*, 13 *Ark.* 242, 250; 1856, *McNeill v. Arnold*, 17 *Id.* 154, 169; *Cal.: 1862, Clark v. Fry*, 20 *Cal.* 219, 223; 1864, *Landers v. Bolton*, 26 *Id.* 393, 405; *Ga.: 1859, Bell v. McCawley*, 29 *Ga.* 355, 360; 1860, *Oliver v. Persons*, 30 *Id.* 391, 398 (under St. 1856 the record certificate, when the records of office are destroyed, is only presumptive of execution, and may be contradicted, the issue being for the Court); 1861, *Gill v. Stoxier*, 32 *Id.* 685, 694 (applies only to documents authorized to be recorded); 1867, *Doe d. Hollis v. Stevens*, 36 *Id.* 463, 472; 1884, *Ross v. Campbell*, 78 *Id.* 309, 315; *Ill. Rev. St. 1874, c. 30, § 35* (quoted *infra*, note 11); *St. 1897, May 1, § 37* (a duly witnessed or acknowledged receipt of the owner of a registered title to land shall be "prima facie evidence of the genuineness of such signature"); *Ind.: 1860, Lyon v. Perry*, 14 *Ind.* 515; 1865, *Allen v. Vincennes*, 25 *Id.* 531; 1884, *Carver v. Carver*, 97 *Id.* 497, 509, 513 ("In all cases where

the record is competent evidence, the deed is also competent, without further proof of its execution"); 1896, *Krom v. Vermilion*, 143 *Id.* 75, 41 *N. E.* 539; *Mo.: 1833, Knox v. Sillo-way*, 1 *Fairf.* 201, 216, 219 (quoted *supra*); 1841, *Ayers v. Hewitt*, 1 *Appl.* 281, 286; *Md.: 1854, Harry v. Hoffman*, 6 *Md.* 78, 87; *Warner v. Hardy*, *ib.* 525, 537; *Mich.: 1854, Lacey v. Davis*, 4 *Mich.* 140, 150; 1897, *Webb v. Holt*, 113 *Id.* 338, 71 *N. W.* 637; *Minn.: Gen. St. 1894, § 5759* (an instrument authorized to be recorded, and duly acknowledged or proved, is admissible "without further proof"); *Mo.: Rev. St. 1899, § 3106* (deeds, etc., before officers of the French or Spanish government, receivable "without further proof" when certified as recorded by the recorder of land-titles); § 3141 ("marriage contracts, duly proved or acknowledged and certified and recorded," admissible "without further proof of their execution"); *N. J.: Gen. St. 1896* (quoted in note 11, *infra*); *N. M.: Comp. L. 1897, § 3964* ("all writings conveying or affecting real estate, having been certified to and registered," are admissible, with the certificate of acknowledgment, "without further proof"); *N. Y.: C. C. P. 1877, § 935* (a duly recorded conveyance is provable by certificate entitling to record); *N. C.: 1900, Griffith v. Richmond*, 126 *N. C.* 377, 35 *S. E.* 620 (chattel mortgage); *S. C.: 1834, Monk v. Jenkins*, 2 *Hill Ch.* 9, 15, *semble*; 1840, *Edmonston v. Hughea*, *Cheves* 51, 55, *semble*; *St. 1898, No. 463, § 1* ("the production, without further or other proof, of the original of any and every instrument in writing, other than wills, required by law to be recorded" shall be "prima facie evidence of the execution of such instrument," provided it is duly recorded and ten days' notice of intention to produce is given to the opponent); § 2 (the foregoing is not to apply where fraud in the execution is claimed, provided ten days' notice of the claim is given); *St. 1902, No. 581* (the notice of twenty days heretofore required is reduced to ten days,—the original ten of St. 1898 having been increased to twenty in § 2897 of the Code of 1902; a certificate of recording by the proper clerk is also required); *S. D.: Stats. 1899, § 6538* ("Every instrument in writing, which is acknowledged or proved, and duly recorded, is inadmissible [*sic?*] as evidence without further proof"); *Tex.: Rev. Civ. Stats. 1895, § 2312* ("Every instrument of writing," lawfully recorded with the clerk of the county court and proved or acknowledged according to law at the time, is admissible "without the necessity of proving its execution," on conditions stated *ante*, § 1651); § 4667 (certain instruments recorded before Feb. 9, 1860, as noted in § 1651, *ante*, admissible); *U. S.: 1830, Carver v. Jackson*, 4 *Pet.* 1, 83; *Fl.: 1827, Hubbard v. Dewey*, 2 *Alk.* 312, 315 (clerk's certificate of the fact of record or execution of a deed, etc., receivable); 1827, *Williams v. Wetherbee*, *ib.* 329, 335 (admissible "without other proof of its execution than was

(2) Not only did the common law not recognize any officer having power to certify to the execution of an unrecorded deed or other instrument of grant or contract; but its peoples seem also to have felt a repugnance to any system of authenticating deeds in that manner; so that a long time elapsed, even after the institution of the registry system, before such an innovation was attempted. The notary, that prominent figure in the legal profession on the Continent, who draws up the "act" for the parties and proves its execution by his certificate, is wanting in our legal history.³ First appearing with the introduction of written documents, in the countries of southern Europe, he seems never to have found favor among Germanic peoples, except as a character imported with the Roman and Italian law.⁴

In this country an occasional early statute⁵ made provision for recognizing the certificates of foreign notaries or magistrates. The habits of the civil law of Europe had been adopted from the beginning into Louisiana practice,⁶ and had also become familiar to the profession in Missouri, Texas, and California, where the French and Spanish archives of the original governments were a part of the legal source. Moreover, in Pennsylvania, the practice was already sanctioned before the 1800s by a venturesome piece of judicial legislation.⁷ But these instances seem to have remained purely local.⁸ The doctrine of the common law, refusing to recognize such certificates, prevailed in the general understanding and practice.⁹ The codification reforms in New York, between 1830 and 1840, under the leadership of Mr. David Dudley Field, made apparently the first important attempt to introduce the broad functions of the Continental notary into our jurisprudence. The draft of those laws served as a model for the early Codes of Dakota, California, and Iowa. The lack of appurtenant traditions, and of a true notarial

furnished by its containing all the statutory requirements of witnessing, acknowledging, and recording; 1892, *Johnson v. McGuire*, 4 Vt. 327 (it is not made evidence by any statute); but is admissible); *Wash.*: 1900, *Blewett v. Bash*, 22 Wash. 536, 61 Pac. 770; *Wis.*: *Stats.* 1898, § 4156 (quoted in note 11, *infra*).

Inadmissible: Possibly in Connecticut, Massachusetts, and New Hampshire; see the citations *ante*, § 1651. In Indiana, *Mullis v. Cavina*, 1839, 5 Blackf. 77, excluding it when offered by a grantee, is probably not law since the rulings *supra*.

Undecided: 1888, *Lander v. Propper*, 6 Dak. 64, 65 (chattel mortgage; question not decided); 1852, *Sanders v. Pepon*, 4 Fla. 465, 469 (undecided; but not admissible where not duly acknowledged).

³ In de Balzac's novels of "Two Brothers" and "Cousin Pons" may be seen depicted the ways of the French notary.

⁴ *Breslau*, *Handbuch der Urkundenlehre*, 1889, I, 493-499, 549-551.

⁵ As in Mississippi, South Carolina, and Virginia; possibly also in Alabama.

⁶ An account of "Louisiana: The Story of Its

Jurisprudence," is given by the present writer in 22 *American Law Review* 890.

⁷ Note 11, *infra*.

⁸ On the principle of § 1633, par. 2, *ante*, the Courts might at least have recognized the authority of a foreign notary in a country under the Continental system where he had the function of taking proof of deeds; and this they seem usually to have done, as indicated in the rulings *infra*, note 11, in England, Louisiana, Mississippi, New Hampshire, and New York. But this was made easier for them by the fact that the original, in the Continental system, was the "public act" kept by the notary in his office as his public record and that what he gave to the parties was in theory a copy of this; so that this latter could be received as a certified copy, under the principle of § 1680, *post*.

⁹ Possibly, a Dutch tradition survived; but it is a little singular that nothing appears of the Dutch civil-law practice in New Jersey or New York. In Mr. Douglas Campbell's "The Puritan in England, Holland, and America," this interesting history of Dutch influence is traced, but his claims are probably too large; Judge Daly has examined the Dutch traces in New York in 1 *R. D. Smith*, Introduction.

profession, and the loose and informal methods thus likely to prevail, were unfavorable to a wide recognition of the notary's functions and a thorough trust in his services. Yet the new system was carried by these Codes into a number of other jurisdictions,¹⁰ and finally found a legal recognition even in the home of the great Code champion himself. Still, however, the marks of racial tradition and cautious hesitation are easily to be traced; for the method is in several States adopted to a limited extent only, and is expressly refused sanction for commercial paper and testaments.¹¹ There is no reason why the

¹⁰ No attempt has here been made to examine the detailed statutory development in each State. But it seems clear that the main source of the spread of the system was these Codes; they served to make its history.

¹¹ In the following list are included both common-law rulings refusing to receive the mere certificate of a notary or a magistrate, and also statutes and interpretative rulings receiving the certificate; the rulings in note 2, *supra*, and also those in § 1651, *ante* (record as evidence of a deed's execution), should be compared: *England*: 1725, *Walton v. Van Mow*, 8 Mod. 322 ("copy of an agreement registered in Holland, and attested by a public notary there," admitted on the facts; see *supra*, note 8); 1822, *Ex parte Church*, 1 Dowl. & R. 324 (U. S. notarial certificate of execution of a power of attorney, excluded; "probably in a court of civil law the notarial certificate would be sufficient"; see *supra*, note 8); *Canada*: *B. C. Rev. St.* 1897, c. 111, § 58 (every instrument duly proved and certified under the registry act shall be admitted "without further proof of execution"); *N. S. Rev. St.* 1900, c. 163, § 26 (a deed executed out of the Province, as well in foreign countries as in the British dominions, is receivable if indorsed with "such a certificate of its execution as is required by the Registry Act for the registration of such deed"); *United States*: *Ala. Code* 1897, § 3029 (notaries may take and certify acknowledgments of conveyances, oaths, affidavits); 1859, *St. John v. Richmond*, 9 Port. 428, 433 (notary's certified acknowledgment of a power of attorney to accept a bill, received); 1841, *Hill v. Norris*, 2 Ala. 640 (certificate of a release of debt, not admissible at common law or under the then statute); *Alaska Civ. C.* 1900, § 94 (like Or. Annot. c. 1892, § 3023); *Ark.* 1839, *Wilson v. Royston*, 2 Ark. 315, 327 (deed acknowledged before a notary in another State, not received); 1881, *Wilson v. Spring*, 38 id. 181, 190 (due acknowledgment, without recording, insufficient); 1881, *Watson v. Billings*, 1b. 278, 282 (same); 1882, *Dorr v. School District*, 40 id. 237, 242 (same); 1884, *Grisler v. McKennon*, 44 id. 517, 521 (same); *Cal. C. C. P.* 1872, § 1948 ("Every private writing, except last wills and testaments, may be acknowledged or proved and certified" like conveyances of realty, and the certificate is evidence of execution); § 1951 (quoted *ante*, § 1651); *Colo. Annot. Stats.* 1891, § 447 (a duly acknowledged or proved instrument in writing "may be read in evidence without in the first instance additional proof of the execution thereof"); 1894, *Knight v. Law-*

rence, 19 Colo. 425, 36 Pac. 242 (statute applied to a married woman's deed); 1897, *Trowbridge v. Addoma*, 23 Id. 518, 48 Pac. 535 (deed acknowledged in Canada, conveying land in Colorado, no statute then providing for such certificates, excluded); *Conn.*: 1901, *Harber v. International Co.*, 73 Conn. 587, 48 Atl. 758 (genuineness of a certified copy, by a foreign official corporation-registrar, of a filed contract and schedules, allowed to be proved by a notary's certificate, attested by the U. S. deputy consul-general; good opinion by Baldwin, J.); *Del. Rev. St.* 1893, c. 83, § 15 (mere certified acknowledgment or proof of deed is not to make it evidence without being recorded); *D. C. Comp. St.* 1894, c. 20, § 84 (an instrument of writing not required to be recorded; execution is provable by oath or affirmation of a subscribing witness before an authorized officer, and a certificate of the latter's authority by a governor, chief magistrate, or notary public, under seal; or, if all the witnesses have died, by such oath, etc., by a credible witness to the handwriting of the maker or a subscribing witness; provided that a party suing for money or value due under it shall make affidavit of due execution and non-satisfaction); *Ga.*: 1903, *Durrence v. Northern Nat'l Bank*, 117 Ga. 385, 43 S. E. 726 (under Code 1895, § 3628, quoted *ante*, § 1651, a deed filed for recording, but not yet recorded, is admissible without further evidence); *Haw.* (Civil Laws 1897, § 1848 ("every conveyance or other instrument, stamped and acknowledged or proved, and certified in the manner hereinbefore prescribed," may be "read in evidence without further proof"); *Ida. Rev. St.* 1887, §§ 5997, 5998 (like Cal. C. C. P. §§ 1948, 1951); *Ill. Rev. St.* 1874, c. 30, § 20, as amended by St. 1903 (quoted *ante*, § 1651); c. 30, § 35 (an instrument affecting land, duly acknowledged or proved, "whether the same be recorded or not, may be read in evidence without any further proof of the execution thereof"); c. 103, § 1 (certificate of acknowledgment of an official bond shall be *prima facie* evidence of signing, sealing, and acknowledgment, and shall have the same effect as evidence as for a deed of realty); 1902, *Ramsey's Estate*, 197 Ill. 572, 64 N. E. 649 (R. S. c. 103, § 1, applied); *Ind.*: 1841, *Sheets v. Dufour*, 5 Blackf. 549, 551 (certificate of acknowledgment by a justice, insufficient); *Ia. Code* 1897, § 4621 ("Every private writing, except a last will and testament, after being acknowledged or proved and certified in the manner prescribed for the proof or acknowledgment of conveyances of real property, may be

system should not with us be as extensive in scope and practice as on the Continent and in the rest of the world, provided only the administrative machinery is duly furnished and safeguarded.

read in evidence without further proof"); § 4629 (so also for a written instrument affecting realty or a minor's adoption, if acknowledged or proved and certified "as required"); *La.*: in this State not only is there a cumbersome mass of statutes (quoted *ante*, § 1651), but the application of the civil-law theory involves local peculiarities; these will be found explained in the following cases: 1816, *Las Caygas v. Larienda*, 4 Mart. N. a. La. 283 (Spanish notary public's certificate of execution of power of attorney, admitted to have "the same credit in our courts of judicature which it would have in those of Spain"; see *supra*, note 8); 1830, *Walden v. Grant*, 3 id. 565, 568; 1832, *DeLoigny v. Smith*, 3 La. 418, 419; 1857, *Leibe v. Hebersmith*, 39 La. An. 1050, 3 So. 283; *Md.* Pub. G. L. 1888, Art. 35, §§ 39, 40 (an instrument executed in another of the U. S. or in a foreign country; proof of execution allowable by certificate of a commissioner, judge, etc., of the proof by witnesses, etc., made before him, and authenticated by official seal, if a commissioner or notary, or otherwise by certificate under seal of Governor, etc.); *Mich.* Comp. L. 1897, § 8990 ("conveyances and other instruments authorized by law to be recorded," and duly acknowledged or proved, "may be read in evidence . . . without further proof thereof"); § 10168 ("every written instrument," except notes, bills, and wills, may be proved by certificate of execution made as for conveyances of realty); *Miss.* Gen. St. 1894, § 5727 ("every written instrument," except bills and notes and wills, may be proved or acknowledged like a conveyance of realty, and then "the certificate of the proper officer endorsed thereon" entitles it to be read); 1891, *Lydiard v. Chute*, 45 Minn. 277, 278, 280, 47 N. W. 967 (deed acknowledged abroad but not under statute, excluded); 1893, *Romer v. Conter*, 53 id. 171, 173, 54 N. W. 1032 (admitting a bond proved under statute by certificate of acknowledgment); *Miss.* Annot. Code 1892, § 1777 (the original of all instruments "acknowledged or proved according to the laws of the [foreign] country where they are executed, so as to be entitled to be recorded there, shall be evidence without further proof of the execution thereof"); § 1776 (same for a U. S. State or Territory); § 1779 (same for an instrument in this State, when duly certified, and "whether the same shall have been recorded or not, or disputed by the opposite party or not"); 1846, *Sessions v. Reynolds*, 7 Sm. & M. 180, 154 (certificate of deed from Liverpool, sufficient on the facts); 1849, *Routh v. Bank*, 12 id. 161, 185 (notarial certified copy of a document authorized by Louisiana law to be kept by him, admitted under the Federal statute; see *supra*, note 8); 1854, *Hardin v. Ho-yo-pu-nubby*, 27 Minn. 567, 580 (certificate of a clerk of the D. C. Court to a power of attorney, excluded);

1859, *Morris v. Henderson*, 37 id. 492, 501 (undecided, as to general principle); 1860, *Lock v. Mayne*, 39 id. 167, 164 (the existing statute makes an acknowledged deed admissible without other proof of execution only when it has properly been recorded; see the later St. § 1779, *supra*); *Mo.* Rev. St. 1899, § 932 ("every instrument in writing, conveying or affecting real estate," duly acknowledged or proved and certified, is admissible "without further proof"); *Mont.* C. C. P. 1895, § 3239 (like Cal. C. C. P. § 1948); *Nebr.* Comp. St. 1899, § 5921 ("Every private writing," except wills, "after being acknowledged or proved and certified in the manner prescribed for proof of acknowledgment of conveyances of real property, may be read in evidence without further proof"); § 4105 (same for deeds); 1898, *Linton v. Cooper*, 53 Nebr. 400, 78 N. W. 731 (deed acknowledged, receivable without other proof of execution and delivery; here acknowledged before a consular agent); 1901, *Brown v. Collins*, — id. —, 96 N. W. 173 (statute applied to a mortgage); *Nev.* Gen. St. 1885, § 2598 ("every conveyance, or other instrument conveying or affecting real estate," admissible, if duly acknowledged or proved and certified, "without further proof"); 1885, § 2801 (notary's certificate under seal, admissible to prove rejection of a claim by executor or administrator); *N. H.*: 1852, *Pickard v. Bailey*, 28 N. H. 152, 169 (notary's copy of his register, admitted under the law of Canada; because the originals are retained by the notary; see *supra*, note 8); *N. J.* Gen. St. 1896, Conveyances, § 4 (deed bearing a due official certificate of proof or acknowledgment before a deed commissioner, etc., admissible as if "then and there produced and proved"); § 100 (same for deeds otherwise not lawfully so provable, which have been proved in Circuit Court, recorded, and certified); § 7 (same, for deeds proved or acknowledged before specified officials elsewhere in the U. S.; see further §§ 50-57, 86, validating certain acknowledgments); St. 1898, c. 232, §§ 21-24 (revised and enlarged provisions as to the officers certifying to the acknowledgment, the seals of authentication, and the classes of documents, for domestic and foreign acknowledgments); St. 1903, c. 217 (amends the provision for acknowledgments out of the State); *N. Y.* Laws 1892, c. 683, §§ 82, 85, 88 (commissioner's or notary's certificate of acknowledgment or proof of a written instrument, sufficient to admit it in evidence, except for bills, notes, or wills); 1816, *Mauri v. Heffernan*, 13 John. 58, 78 (notarial certificate of the execution and contents of an obligation entered into in Spanish Venezuela, received; see note 8, *supra*); *N. D.* Rev. C. 1895, § 5696 ("every instrument conveying or affecting real property, acknowledged or provided and certified as provided in the Civil Code," admissible); St. 1901, c. 145 (amending Code § 8597, so that "all instru-

(3) When an *affidavit* is offered—i. e. a document purporting to have been sworn to by a particular person—the due taking of the oath by the named person must somehow be evidenced. The *jurat*, or certificate of the officer administering the oath, purports to make the necessary statements for this purpose; and this certificate was at common law recognized as admissible, so far as it was made by an officer having the proper authority.¹³ The admissibility of the certificate thus depends upon

ments entitled to record" may be "read in evidence without farther proof"; *Ok.*: 1827, *Allen v. Parish*, 3 *Oh.* 107, 110, 124 (notarial copy of a deed, by a deceased notary in another State, admitted after evidence of existence of the deed; see *supra*, note 8); *Ok.* *St.* 1893, § 1621 ("All deeds, agreements, writings, and powers of attorney, duly acknowledged or proved under Territorial act are admissible 'without additional proof of the execution thereof'"; *St.* 1897, c. 8, § 25 (instruments affecting real estate and duly acknowledged are receivable "without further proof of their execution"); *Or.* *Annot.* Code 1892, § 3023 (a conveyance acknowledged or proved and certified as required for record is admissible "without further proof thereof"); 1897, *Laurent v. Lanning*, 32 *Or.* 11, 51 *Pac.* 80 (notary's certificate of a deed-acknowledgment, admitted); *Pa.*: 1782, *McDill v. McDill*, 1 *Dall.* 63 (a deed lawfully proved by one witness before a justice according to *St.* 1715, but not recorded, admitted; see this statute *ante*, § 1651); 1784, *Hamilton v. Galloway*, *ib.* 93 *d* (same; "the recording does not contribute to the proof of the deed, which is established by the oath before the justice; the recording only gives the deed a special operation by the express provisions of the Act of Assembly"); 1833, *Duncan v. Duncan*, 1 *Watts* 327 (same, though the statute did not expressly provide for this); 1831, *Foster v. Shaw*, 7 *S. & R.* 156, 163 (same for a deed so probated abroad); *S. C.* *St.* 1731, *Gen. St.* 1882, §§ 2226, 2227, Code 1902, §§ 2899, 2899 *bis* (deeds, bonds, other specialties, letters of attorney, etc., attested to have been proved before a Mayor, Governor, or notary of one of the United States or a foreign State, receivable "as if the witnesses to such deeds were produced and proved the same *vis* vocis"; but not to show a claim against a resident of this State, unless in "such foreign country" similar treatment is given to instruments from this State); *U. S.*: 1807, *Mulatto Lucy v. Slade*, 1 *Cr. C. C.* 422 (justice of the peace's certificate of acknowledgment, not admissible against a third person); 1815, *Penbody v. Denton*, 2 *Gallia* 351 (notarial copy of a note, admissible to show contents, but not to show genuineness); *Utah Rev. St.* 1898, § 2407 (like *Cal. C. C. P.* § 1948); *Va.* Code 1887, § 3344 (declaring admissible a deed or power of attorney executed out of the State and certified as duly proved so as to be eligible for record; or a policy of insurance, or charter-party, attested by a notary under seal of office, certified by a court of record or mayor or under the seal of State of the kingdom, province, etc.); 1823,

Kidd v. Alexander, 1 *Rand.* 456, 457 (execution of a release of a claim under seal; notarial certificate excluded); 1825, *Sexton v. Pickering*, 3 *id.* 463, 470 (certificate of execution of a deed by a *feme covert*, or by a husband; when made by a magistrate of a domestic State, receivable for the former case by *St.* 1814, but for the latter not until *St.* 1819); *Wash.*: 1894, *Gardner v. Port Blakely M. Co.*, 8 *Wash.* 1, 5, 35 *Pac.* 402 (original domestic deed, improperly recorded, provable by certificate of acknowledgment); *W. Va.* Code 1891, c. 130, § 21 (a deed or power of attorney executed out of the State and certified so as to entitle to record here, and a policy of insurance or charter-party, executed out of the *U. S.* (1), is provable by a notary's certificate under seal, authenticated by a court of record, or the chief magistrate of a county or city, or the great seal of State); *Wis.* *St.* 1898, § 4156 ("every conveyance" executed and acknowledged or proved so as to be entitled to record, and every land-patent from the *U. S.* or this State, and every document "affecting land or the title thereto" kept lawfully with a register of deeds, is admissible "without further proof thereof"); § 4185 ("every written instrument," except bills, notes, and wills, when proved or acknowledged and certified as provided for a conveyance of realty, admissible as if a conveyance); *Wyo. Rev. St.* 1887, § 20 (instruments concerning an interest in land in this Territory, duly acknowledged or proved, "may be read in evidence, without in the first instance additional proof of the execution thereof").

The sufficiency of an *identity of name*, to indicate the identity of the person acknowledging with the party in issue, is considered *post*, § 2529, under the presumption of identity. The propriety of taking an *acknowledgment over the telephone* is noticed *ante*, § 669, *post*, § 2155. The operation of an acknowledgment, though defectively taken, as an *admission* is considered *ante*, § 1654, *par. 6*.

¹³ 1728, *Ex parte Ruddock*, *Mosely* 78 (*L. C.* King said "he had known an affidavit sworn before one of our consuls abroad, allowed to be read by the courts of law"); 1744, *Willea, L. C. J.*, in *Omichund v. Barker*, *Willea* 538, 550 ("The proper and usual evidence of a fact arising beyond sea is an affidavit or deposition taken before a public notary and certified to be so under the seal of the place or the principal officer of the place; which has been admitted as evidence in some cases where it would be too expensive, considering the nature of the cause, to take out a special commission"); 1810, *R. v.*

whether the officer has under the law an authority to administer oaths. This, however, is a matter of administrative law, and is now everywhere covered by statutes, often containing elaborate provisions, which do not fall within the present purview.

(4) In the same way, the admissibility of a certificate of the taking of a deposition depends upon the authority of certain officers to take a deposition and upon the statutory provisions enumerating them and prescribing the formalities of their proceedings. This also is a matter of administrative law and of procedure, not here to be dealt with.

(5) When the execution of an affidavit, a deposition, or a deed is certified by a purporting officer, whose certificate would be admissible for the purpose, some evidence as to the genuineness of the certificate itself must be offered, *i. e.* the certificate must be authenticated. The purporting seal of a notary is by long tradition regarded as sufficient evidence; so also the great seal of State (*post*, §§ 2161-2166). But when the seal does not suffice, it remains to evidence three essential elements, namely, the authority of the officer (if a foreign one), the fact that the person named was such an officer, and the fact that the seal and signature were affixed by him and by no other. For this purpose, then, additional certificates may have to be employed. The general principle applicable is the same that governs the authentication of certified copies (*post*, § 1679).¹³

§ 1677. **Certified Copies; General Principle (Scope of Authority; True Copies; Time and Manner of Certifying; Genuineness of Documents on File in the Office).** It might have been supposed that, for the lawful custodian of documents in official custody, an authority could be implied (*ante*, § 1633), from the very nature of his office, to furnish copies that should be receivable in evidence. The policy that militated against the admission of certificates

Benson, 2 Camp. 508 (perjury in an answer in chancery; to prove the oath, the handwriting of the master's jurat was sufficient, without calling the master); 1824, *R. v. Hailey*, 1 C. & P. 253 (affidavit of an illiterate, which should have been read over to her; *Littledale*, J.: "If in such a case the master, by the jurat, authenticates the fact of its having been read over, we give him credit"); *R. v. Spencer*, ib. 260 (an answer in chancery, *Abbott*, C. J.: "The Courts always give credence to the signature of the magistrate or commissioner; and if his signature to the jurat is proved, that is sufficient evidence that the party was duly sworn; and if the place at which it was sworn is mentioned in the jurat, that is sufficient evidence that it was sworn at that place"); 1835, *R. v. Foster*, 6 id. 148, per *Alderson*, B. (magistrate's jurat to an affidavit, evidence of the due swearing).

For the necessity of evidence of identity, see *post*, § 2529.

¹³ The authorities for its application to certified copies of official and judicial records are collected *post*, §§ 1680, 1681, and for deed records, *ante*, § 1651. The authorities for thus authenticating certificates of affidavits and depo-

sitions are inextricably mingled with the administrative law above-mentioned, declaring such officers' authority, and cannot be considered here, but the statutes cited *post*, § 1681 (judicial records) and §§ 2161-2166 (authentication by official seal) will furnish a guide. The following illustrate the statutes and the questions which they raise: Conn. Gen. St. 1887, § 1068 (Secretary of State of United States' certificate, admissible to prove the official character of an officer taking a deposition out of the State); Ill. Rev. St. 1874, c. 51, § 30 (depositions taken out of the State "by any judge, master in chancery, notary public, or justice of the peace out of this State, or other officer"; the return "shall be accompanied by a certificate of his official character, under the great seal of State, or under the seal of the proper court of record of the county or city where the deposition shall be taken"); 1900, *Scott v. Bennett*, 186 Ill. 96, 57 N. E. 835 (foreign deposition before a notary public; the certificate of the notary's official character need not "accompany" the deposition under R. S. c. 51, § 30, but may be produced at the trial); compare § 2165, *post*.

in general (*ante*, § 1674) could hardly be thought to forbid the recognition of certificates of copies of public records; for there were ample means of authenticating them, there was little risk of forgery, and the original record itself was open to all for the purpose of verifying doubt as to the copy's correctness. Moreover, the expense and the inconvenience of using a sworn copy¹ was greater, and the frequency of the need of resorting to copies of public records emphasized this consideration. It is difficult to learn the precise nature of the policy (if there was any conscious one) which sufficed to support this unenlightened doctrine. Considering the strong grasp which professional selfishness, with its deliberate multiplication of fees, had upon the methods of English law up to the middle of the 1800s,² and of the fixed notion (still there prevailing) as to the undesirability of making litigation less expensive, it may be surmised that these had some influence upon the professional satisfaction with that profitable rule of proof which retained the copying-fees and witness-fees chiefly in the hands of the attorneys' clerks.³ Whatever the policy, the theory of the rule was perfectly clear: it was merely the general one, already noticed (*ante*, § 1674), that an authority to certify copies would not be implied from the nature of the office of a custodian of documents,⁴ and therefore that an express authority was necessary, either by means of a special order in each instance or by a general order or statute. This theory is expounded in the following passages:

1767, *Buller, J., Trials at Nisi Prius*, 229: "Here a difference is to be taken between a copy authenticated by a person trusted for that purpose, for there that copy is evidence without proof; and a copy given out by an officer of the court who is not trusted for that purpose, which is not evidence without proving actually examined. The reason of the difference is, that where the law has appointed any person for any purpose, the law must trust him as far as he acts under its authority; therefore the chirograph of a fine is evidence of such fine, because the chirographer is appointed to give out copies of the agreements between the parties that are lodged of record. So where the deed is inrolled, the indorsement of the inrolment is evidence without further proof of the deed, because the officer is intrusted to authenticate such a deed by inrolment;⁵ but if the officer of the court make out a copy, when he is not intrusted to that purpose, they ought to prove it examined, because being no part of his office, he is but a private man, and a private man's mere writing ought not to be credited without an oath. Therefore it is not enough to give in evidence a copy of a judgment, though it be examined by the clerk of the Treasury, because it is no part of the necessary office of clerk, for he is only intrusted

¹ The distinction between "certified" or "office" copies and "sworn" or "examined" copies has already been stated (*ante*, §§ 1648, 1273).

² Some account of this spirit and its illustrations may be seen in *A Century of Law Reform*, London, 1901, *passim*, and *Charles Dickens' Bleak House*.

³ Mr. (afterwards L. C. J.) Denman, on coming in 1826 to preside at the Old Bailey Criminal Court, found that in certain indictments for larceny the punishment was capital on certain facts, but these facts though alleged in the indictment were in mercy never proved; "on inquiring into the reason for thus charging

in the indictment a graver crime than is intended to be established in proof, I find that there is a higher fee for drawing an indictment for a capital offence!" (*Arnould's Life of Denman*, I, 212).

⁴ A striking illustration of the brevity which lawyers could attain, there being no interest to be verbose, is the judgment of death upon a felon, which, as there was no fee according to the number of words contained in it, was thus recorded: "*Sus. per coll.*" (*Campbell, Lives of the Chancellors*, VI, 118). Compare § 1846, *post*.

⁵ Except for the ancient instance of the chirographer of a fine, which was perhaps not an exception.

⁶ See *ante*, § 1650.

to keep the records for the benefit of all men's perusal, and not to make out copies of them. So if the deed inrolled be lost, and the clerk of the peace make out a copy of the inrolment, that is no evidence without proving it examined; because the clerk is intrusted to authenticate the deed itself by inrolment, and not to give out copies of the inrolment. The office copies of depositions are evidence in chancery, but not at common law without examination with the roll; for though that Court have, for their own convenience, empowered their officers to make out such copies as should be evidence; yet the particular rules of their Courts are not taken notice of by the Courts of common law, and therefore they are not evidence in those courts. Where the fine is to be proved with proclamations (as it must be to bar a stranger) the proclamations must be examined with the roll, for though the chirographer is authorized by the common law to make out copies to the parties of the fine itself, yet he is not appointed by the statutes to copy the proclamations, and therefore his indorsement on the back of the fine is not binding."⁶

1816, *Bayley, J.*, in *Black v. Braybrook*, 2 Stark. 8; *Appleton v. Braybrook*, 6 M. & S. 37 (a copy of a Jamaica judgment by a clerk of court, without the seal of the Island or of the court, was rejected): "Mr. Erskine [of counsel] has put the question on the proper ground, that it is the act of an officer appointed to authenticate copies. But the facts do not support the position. There are some officers whose duty it is to deliver out copies, and who have not discharged their duty until they have delivered out copies to persons whose title is concerned. The chirographer of a fine, till this is done, has not performed his duty. There is a distinction between such acts and the making copies of records by an officer who has the custody of them. . . . Therefore the receiving authenticated copies in evidence must be confined to cases where the officer would not have performed his duty until he had delivered out a copy of the record"; *Holroyd, J.*: "The distinction is plain between that which proceeds from the officer in the course of his duty in the office, and that which he is not specially authorized by his office to do. . . . An exemplification is under the seal of the court, which shows it to be the act of the Court, and it is equivalent when the act is done by an officer who has a duty cast on him for the express purpose."

This was for England the settled theory of the common law; and it naturally was found persisting, in some jurisdictions at least, in this country.⁷ But the Federal Supreme Court early broke away from this tradition. It is not necessary to suppose that there was a professional inclination any the less strong to prefer the orthodox rule; it is probable that the conditions of the newer country, less fixed by tradition, merely made it easier for the enlightened proposition of Chief Justice Marshall to find acceptance. Under him was laid down by the Court the general principle that *the lawful custodian of a public record has, by implication of his office, and without express order, an authority to certify copies*:

1804, *Marshall, C. J.*, in *Church v. Hubbard*, 2 Cr. 186, 236: "The sanction of an oath is required for their establishment [foreign laws], unless they can be verified by some other such high authority that the law respects it not less than the oath of an individual. In this case the edicts produced are not verified by oath. The consul has not sworn; he

⁶ This passage was founded closely upon Gilbert, *Evidence*, 24 (1726), and served to phrase the law for a century after its original framing; for it reappears also in substance in Peake, Phillips, and Starkie.

⁷ 1852, *Stewart v. Swansey*, 23 Min. 505, *semble*; 1839, *New Jersey R. & T. Co. v. Suydam*, 17 N. J. L. 25, 60; 1854, *State v. Oake*,

24 id. 516 ("Where an officer is merely entrusted with the custody of records or papers, and is not authorized by statute to make copies, he has no more authority for that purpose than any other person"); 1834, *West Jersey Traction Co. v. Board*, 57 id. 313, 316, 30 Atl. 581. See also under New York and North Carolina, *post*, § 1680, for other indications of the same sort.

has only certified that they are truly copied from the originals. To give to this certificate the force of testimony it will be necessary to show that this is one of those consular functions to which, to use its own language, the laws of this country attach full faith and credit. Consuls, it is said, are officers known to the law of nations and are entrusted with high powers. This is very true; but they do not appear to be entrusted with the power of authenticating the laws of foreign nations. They are not the keepers of those laws. They can grant no official copies of them. There appears no reason for assigning to their certificate respecting a foreign law any higher or different degree of credit than would be assigned to their certificates of any other fact."

1833, *Marshall, C. J.*, in *U. S. v. Percheman*, 7 Pet. 51, 85: "The counsel for the claimant offered in evidence a copy, from the office of the keeper of public archives, of the original grant on which the claim is founded. . . . We think that on general principles of law a copy given by a public officer whose duty it is to keep the original ought to be given in evidence."

With the influence of the Federal Supreme Court thus early enlisted in support of this innovation, it soon found wide favor. The need for invoking a common-law principle arose comparatively seldom, for statutes early began to correct the English rule, and to deal in multiplicity with specific kinds of records; and subsequently in many jurisdictions a statute sanctioned the principle in general form. But the principle laid down by Chief Justice Marshall may be said to have become the orthodox common law of the United States;⁸ and it still occasionally serves in practice where no statute has anticipated its need.

Certain deductions from the general principle may now be examined:

(1) *Existence and scope of the authority.* The certifier must be the lawful official custodian of the particular document; his authority, then, is to be sought in the administrative law which declares the classes of the various officers; the application of this principle to specific kinds of documents, under statute and precedent, is later examined (*post*, §§ 1680-1682). (a) It is this lawful custody which implies the authority to certify, and therefore the certificate need on principle merely state that the paper bearing it is a copy of a specified document existing in the certifier's custody. But where a statute has expressly made certain certified copies admissible, some Courts are found treating this statute as supplanting the common-law principle and as furnishing a definite rule which must be formally and precisely followed. Whether, for example, *the certificate must predicate a "correct" or "complete" or "true" copy*, is a question frequently considered, depending much on the wording of local statutes.⁹ The technical treatment of the subject shown by some

⁸ 1827, *Thomas v. Tanner*, 6 T. B. Monr. 52, 53; 1879, *Board v. Hernandez*, 31 La. An. 158, 159; 1882, *Shutesbury v. Hadley*, 133 Mass. 242, 247; 1827, *Bettis v. Logan*, 2 Mo. 2; 1852, *Childress v. Cutler*, 16 id. 24, 44; 1853, *Souard v. Allen*, 18 id. 590, 595; 1855, *Charlotte v. Chouteau*, 21 id. 590, 596; 1897, *Banking House v. Durr*, 139 id. 660, 41 S. W. 227; 1858, *Ferguson v. Clifford*, 37 N. H. 35, 95 ("the weight of authority seems to have established the rule"); 1896, *Barcello v. Haggood*, 118 N. C. 712, 24 S. E. 124 (and here that off-

cial custody was allowed to be shown from the fact of deposit with the officer as a record, without proof of the statute prescribing his duty); 1847, *Bryant v. Kelton*, 1 Tex. 436; 1850, *New York Dry Dock v. Hicks*, 5 McLean 111, 113.

⁹ A few may be noted as illustrations: Cal. C. C. P. 1872, § 1923 (when certified copies of writings are used, "the certificate must state in substance that the copy is a correct copy of the original, or of a specified part thereof, as the case may be"); 1881, *Painter v. Hall*, 75 Ind. 208, 214; 1883, *Anderson v. Ackerman*, 88 id.

Courts is unjustifiable. Whether a *single certificate* suffices to cover *copies of several documents* is a mere matter of the mechanical unity of the papers bearing the copies, and thus depends upon the circumstances of each case;¹⁰ for there is no reason why the certificate should be formally repeated for every copy forming a part of a series of papers inherently apparent to be one legal whole. (b) The authority must of course exist *at the time of certifying*; a certificate, for example, from one whose office had expired would have no standing.¹¹ The office and authority existing, it is immaterial that the act of certifying is done after trial begun.¹² That a *deputy* officer may properly certify for the chief officer nominally having custody has already been noticed (*ante*, § 1633, par. 8).

(2) *Genuineness of the original.* The officer's authority rests on his custody of the original; this custody, however, enables him to speak, not merely to the correctness of the copy, but also to the existence and genuineness of the original. The great obstacle, as already noticed (*ante*, § 1648), to the use of a register as evidence of a recorded private deed, was the registrar's inability to speak to the genuineness of the deed; and special means to qualify him in this respect had to be provided. This obstacle does not exist for an official record; for it is both originally prepared and thereafter preserved in the office; and although it may not have been prepared by the chief officer or custodian himself, still his knowledge of the affairs of the office as transacted by his subordinates is sufficiently direct to suffice as personal knowledge (*ante*, § 1635, par. 2):

1840, *Catron, J.*, in *U. S. v. Wiggins*, 14 Pet. 334, 346: "[A certified copy of an original in a public office] proves *prima facie* the original to have been of file in the public office when it was made; and for this plain reason, the officer's certificate has accorded to it the sanctity of a deposition; he certifies 'that the preceding copy is faithfully drawn from the original, which exists in the secretary's office, under my charge.'"

481, 490; 1887, *Yeager v. Wright*, 112 id. 230, 234, 13 N. E. 707; 1896, *Naanes v. State*, 143 id. 299, 42 N. E. 609 (the statute authorized the custodian of a public record to certify that the copy was "true and complete," and he certified only to "a true copy"; excluded); 1889, *Doe v. King*, 3 How. Miss. 125, 136 (certificate that "the above is a correct representation," etc., not sufficient as a copy of a map); 1825, *Edmiston v. Schwartz*, 13 S. & R. 135 (a certificate that a record is "truly copied" imports a copying of the whole); 1883, *Bonesteel v. Sullivan*, 104 Pa. 9, 13 (copy of a record of a domestic State, certified as true, will be assumed to be complete); 1843, *Treasurers v. Witsall*, 1 Speer S. C. 220, 222 (under a statute admitting an "exact copy," a certificate of a balance struck in Treasury books is not a copy of entries therein); 1830, *Burton v. Pettibone*, 5 Yerg. 443 ("truly copied from the records" is not equivalent to a full transcript); 1871, *Johnson v. Bolton*, 43 Vt. 303, 304 (adjutant-general's copy of a general order certified merely "official," not sufficient to show a "true copy").

Compare the citations *post*, § 1678 (certifying the effect of the document), and § 2108 (proving the whole of a document).

¹⁰ 1855, *Pike v. Oreshore*, 40 Ma. 503, 513 (copies of papers of record in a bankruptcy case; most of the papers, offered in a mass but separate, were not certified; on one of them was a proper certificate; all were held properly excluded); 1860, *Com. v. Ford*, 14 Gray 399 (one attestation at the end of all the documents on one paper, sufficient).

¹¹ 1850, *Brown v. Scott*, 2 Greene Ia. 454 (certificate of a justice of the peace after office expired, excluded).

Whether the second certificate of the officer authenticating the copying officer's certificate need state that his term exists, is a different question, considered *post*, § 1679.

¹² 1870, *Rogers v. Stevenson*, 16 Minn. 63, 70.

The mere fact of an *erasure* in the copy is not fatal; 1864, *Johnston v. Ewing Female University*, 35 Ill. 518, 523 (certificate of incorporation); 1864, *Holbrook v. Nichol*, 36 id. 161, 164 (power of attorney).

This result is clear enough for documents actually having their inception within the office, such as a book of accounts, a court roll, or an ordinary official register. But many kinds of documents, preserved in official custody, are prepared without the premises of the office by private persons and are then filed or deposited in the office under a requirement of law, — such as bonds or affidavits of various sorts. In some of these instances, no doubt, the document is customarily acknowledged before the officer or otherwise verified by him before filing; in others — affidavits, for example — there has been already a due verification certified by some other officer (*ante*, § 1676). Nevertheless, many instances remain in which the document, though required to be filed, has no means provided for the authentication of its genuineness before filing. Is the custodian's certified copy evidence of the genuineness of such documents? Singularly enough, no clear distinction on this point seems to have been generally taken by the Courts. They have definitely put on one side the case of a recorded deed (including under that term mortgages, powers of attorney, and the like), and have established the principle (*ante*, § 1648) that the registrar's certified copy shall not suffice where no means was provided for the register to inform himself of the deed's genuineness before recording. But, instead of classing with recorded deeds all other documents of private extra-official origin which were not authenticated before the filing, they have inclined rather to include all such documents indiscriminately with public or official records generally, as capable of being proved by a certified copy, in respect to genuineness as well as to contents. The question has rather been ignored than settled. In the few instances in which it has been dealt with, the rulings have been divided.¹³ But

¹³ With the following cases compare those cited *post*, §§ 2158, 2159 (official custody as sufficient evidence of the genuineness of original documents produced from that custody); compare also the statutes cited *post*, §§ 1680, 1681, which often cover the point, and the statutes and cases cited *ante*, § 1651 (recorded conveyances): 1807, *Duncan v. Scott*, 1 Camp. 100, 102 (certified copy of a deposition of G., admitted, with no further evidence; *Ellenborough, L. C. J.*: "If it is suspected that some one personated G., and that his signature is a forgery, I will send to Chambers for the original examination; otherwise, the copy so attested and delivered [by the clerk] must be received and relied on"); 1877, *R. v. Wright*, 17 N. Br. 363, 369 (under a statute making admissible certified copies of documents filed in a foreign court, a duly certified copy of an affidavit so filed is evidence of the affidavit's execution); 1869, *Monts v. Stephens*, 43 Ala. 217, 222 (constable's bond; a probate judge's certified copy is evidence only of the bond's being in his office, not of its execution, approval, or due filing); 1882, *Martin v. Hall*, 72 N. H. 587 (cited *post*, § 1680); 1887, *Stevenson v. Moody*, 85 N. H. 83, 4 So. 595 (cited *post*, § 1681); 1901, *Barber v. International Co.*, 73 Conn. 587, 48 Atl. 753 (certified copy of a judicial record containing an assignment of a judgment, admitted as proving the purporting paper's pre-

ence in the court files; the effect left undecided); 1881, *Jackson v. Johnson*, 67 Ga. 167, 180 (cited *post*, § 1680); 1897, *Reppard v. Warren*, 103 N. H. 198, 29 S. E. 817 (certified copy of State plat and grant, receivable to show execution, but *seemingly* only as preliminary to accounting for the absence of the State seal from the original, when, as here, in court); 1842, *Steel v. Pope*, 6 Blackf. 176 (justice's certificate that a warrant is on file in his office, sufficient to authenticate); 1903, *Burkhardt v. Loughridge*, — Ky. —, 76 S. W. 397 (a title-bond recorded; the record held not evidence of its execution); 1847, *Hammatt v. Emerson*, 27 Me. 308, 337 (copy of a document on file in court, sufficient if its signature is otherwise evidenced); 1886, *Com. v. Richardson*, 149 Mass. 71, 73, 7 N. E. 26 (if a duly certified copy, made evidence by statute, of a lease in official custody, had been offered, "it may be that no proof would have been necessary of the signatures or handwriting of those commissioners who had executed the original lease or of the town officers [signing it]; such a duly authenticated copy of a public document showing an official act done by commissioners in discharge of a lawful duty and produced from proper custody having been made competent evidence, proof of handwriting or signatures is necessarily dispensed with; such proof would indeed be impossible in rela-

the general tendency is illustrated in the statutes dealing with certified copies of official documents (*post*, §§ 1680, 1681), which often declared the certified copy admissible, "without further proof," for "all records, papers, and documents lawfully on file" in the office, and thus apparently authorize the certified copy to evidence the genuineness of documents filed with the custodian without any guarantee of their genuineness; although by some statutes (as in Kentucky) this consequence is avoided and other evidence of execution is expressly declared to be necessary.

The question is closely connected with another one, namely, the *presumption of identity* of person from identity of name (*post*, § 2529), and yet it is different; for the present difficulty is that the custodian filing a document bearing J. S. as signature cannot ordinarily know that any J. S. at all actually signed it; but, even supposing him to know that a J. S. did sign it, the question still remains whether that J. S. is the same person as the J. S. in the suit at bar. Thus this question of the presumption of identity arises equally for an adequate certified copy as well as for an inadequate one. The necessity of offering evidence of identity for affidavits, answers in chancery, marriage certificates, and other kinds of documents is considered under the presumption of identity of person (*post*, § 2529).

(3) Merely satisfying the rule of producing the original, by showing the original lost or otherwise unavailable, will not justify the use of a certified copy not made under due authority.¹⁴ But where the certified copy is thus not usable as such because of lack of authority in the certifier, the *defective copy* may of course be *proved in the ordinary way* (*ante*, §§ 1277-1281) by a competent witness making it a sworn copy.¹⁵ Obviously, however, no cer-

tion to a copy"); 1900, *Smith v. Paul* (Doyton Co., 176 id. 217, 57 N. E. 367 (certified copies of a filed certificate of corporate organization, etc.; "the fact that they purported to be made and filed in pursuance of the law made it right to infer, from the copies themselves, that they were genuine"; no authorities cited); 1878, *Lee v. Wisner*, 38 Mich. 82, 87 (bond filed in court; certified copy suffices); 1897, *Field v. Cain*, 9 N. M. 283, 50 Pac. 327 (an assignment of a judgment filed nearly seven years later; certified copy not evidence of genuineness); 1803, *Miller v. Livingston*, 1 Cal. 349, 356 (letters deposited in a foreign Admiralty Court; whether assumed genuine on production of copies deposited to by a registrar of court, undecided); 1845, *Butler v. Durham*, 3 Ired. Eq. 589 (certified copy of a bond filed in court; the bond's execution required to be shown); 1860, *Short v. Currie*, 8 Jones 42, *semble* (certified copy of a clerk's bond, registered after due probate, sufficient to prove execution, at common law and under statute); 1856, *Hartz v. Com.*, 1 Grant Pa. 359 (bond of a justice, certified by the clerk of Court where approved, receivable); 1879, *Amis v. Marks*, 8 Lea 568, 570 (cited *post*, § 1680); 1806, *U. S. v. Johns*, 4 Dall. 412, 415 (cited *post*, § 1680); 1831, *Robinson v. Gillman*, 3 Vt. 163, 165 (attested copy of a land-warrant proves "the existence of the original," while it

is "a part of the files"); 1836, *Mattocks v. Bellamy*, 8 id. 462, 467 (certified copy of a *Anteus corpus writ*, admissible; the rule applying to copies "not only of records, technically so called, but also of all papers, files, rolls, etc., legally deposited in his office and there required to remain"); 1870, *Benedict v. Heineberg*, 43 id. 221, 225 (certified copy of a county-clerk's record of execution, showing the return of the officer and the certificate of the town-clerk as to the fact of record with the town-clerk, is evidence of that fact).

For the question whether the certified copy must show or state the *existence of a seal* on the original, see *post*, § 2108.

Distinguish the following: 1877, *Aldrich v. Chubb*, 35 Mich. 350, 352, 354 (part of a record in one court introduced in evidence in another; whether a transcript of the latter record authenticates the former, undecided); 1897, *Stanhillber v. Graves*, 27 Wis. 515, 73 N. W. 46 (a copy of a recorded attachment does not prove due issuance of it).

¹⁴ 1872, *Musick v. Barney*, 49 Mo. 458, 461. Compare § 1183, *ante* (that proof of loss does not dispense with proof of execution).

¹⁵ 1877, *Post v. Rich*, 36 Mich. 16; 1872, *Gross v. Ramsey*, 19 Minn. 44, 60; 1872, *Musick v. Barney*, 49 Mo. 458, 460.

Compare § 1226, *ante*. Note that a certified

tified copy whatever may be used where the original record itself is not admissible under the rules of evidence for the purpose in hand.¹⁰

§ 1678. *Same*: Certificate as to Effect or Non-existence of Original. (4) The authority to certify a copy signifies that the terms set forth by the officer as representing the original in his custody must be a *literal copy, not merely the substance* or the effect, of the original's terms. An authority to copy can in its nature mean no less than this:

1833, *Morton, J.*, in *Onkes v. Hill*, 14 Pick. 448: "Clerks of religious and other corporations, and other recording officers, may make and verify copies of their records, and in so doing act under the obligation of their oath of office. Of the verity of such copies their certificates are evidence. But it is no part of their duty to certify facts, nor can their certificates be received as evidence of such facts."

1850, *Metcalf, J.*, in *Greene v. Durfee*, 6 Cush. 362, 363: "As a general rule an official certificate of what is contained in a record, deed, or other instrument is not admissible in evidence, any further than it is made so by statute."

1872, *Wells, J.*, in *Wayland v. Ware*, 109 Mass. 251: "The certificate . . . that it so 'appears from the records of this office' was improperly admitted. To prove a fact of record by a record not produced requires a duly authenticated copy of the record itself or of so much thereof as relates to the fact in question."

1885, *Ruger, C. J.*, in *Wood v. Knapp*, 100 N. Y. 114, 2 N. E. 632: "[The officer] has power to certify to the correctness of official papers . . . , but beyond that his certificate has no more effect than the opinion of any other person."

The policy of conceding to a custodian of documents no further authority than this rests on the common-law doctrine of Completeness (*post*, § 2108), which requires that the whole of a document be shown forth, in proving any part of it, so that the tribunal may judge better of the significance of the whole and the precise interpretation of any part. At common law, therefore, it was entirely settled that no custodian had authority to certify any less than the entire and literal terms of the original, — in short, a copy in the strict sense of the word; and the rule was applied to all varieties of documents.¹

copy is not preferred to a sworn copy (*ante*, § 1273).

¹⁰ 1842, *State v. Wells*, 11 Oh. 261; 1871, *Armstrong v. State*, 21 Oh. St. 357, 360; 1899, *Heints v. Thayer*, 92 Tex. 658, 50 S. W. 929 (overruling *Ammons v. Dwyer*, 78 id. 639).

Compare § 1226, *ante*. The statutes making certified copies admissible have sometimes expressly conditioned them as usable "equally with the original," to avoid this doubt. But no such doubt need ever have been suggested.

¹ Compare the cross-reference given in note 2, *infra*, and the cases cited *ante*, § 1677, note 9; and distinguish the question treated in § 1244, *ante* (testimony on the stand, summarizing the tenor of a series of documents): *Ala.*: 1884, *Bonner v. Phillips*, 77 Ala. 427, 428 (a certificate that the land-office "records . . . show that," etc., excluded); *Ariz.*: 1901, *Brill v. Christy*, — *Ariz.* —, 63 Pac. 757; *Ark.*: 1842, *Taylor v. Auditor*, 4 Ark. 574 (auditor's certificate that his books showed a sheriff indebted in certain sums, excluded); 1842, *Mays v. Johnson*, *ib.* 613, 616 (land-

officer's certificate that certain land-claims had been rejected by his office, inadmissible); 1848, *Johnson v. Mays*, 8 id. 386, 388 (*same*); *Conn.*: 1851, *New Milford v. Sherman*, 21 Conn. 101, 112; 1896, *Enfield v. Ellington*, 67 id. 459, 34 Atl. 818 (a certificate by a State adjutant-general that a certain name was on a regiment muster-roll, etc., excluded); *D. C.*: 1902, *U. S. v. Law Poy Dew*, D. C., 119 Fed. 786 (U. S. Commissioner's certificate of adjudication of a Chinese immigrant's status, excluded as not being a copy); *Ga.*: 1855, *Miller v. Reinhart*, 18 Ga. 239, 245 (clerk's certificate of the import of a naturalization record, excluded); 1857, *Dillon v. Mattox*, 21 id. 113, 116; 1892, *Lamar v. Pearre*, 90 id. 377, 281, 17 S. E. 92 (clerk's certificate that a cause was dismissed; excluded); 1901, *Daniel v. Braswell*, 113 id. 372, 38 S. E. 829; *Ill.*: 1840, *Greenwood v. Spiller*, 3 Ill. 503 (certificate of heirship by a judge of probate, excluded); 1859, *Morgan Co. Bank v. People*, 21 id. 304 (bank report filed with a State auditor; letter of the auditor summarizing the contents, excluded); 1883, *Golder v. Bressler*, 105 id. 419,

But decidedly this was too strict a rule for practical convenience. In a vast number of cases, the tenor of a record or an entry is quickly ascertainable, is open to no difference of opinion, and can be summarily stated without a literal transcription; the possibilities of harm are further diminished by the publicity of the record and its easy access for the detection of error. Accordingly, by statutory innovation, the use of certificates of the effect or substance of a document has been widely sanctioned.² Some of these stat-

424 (certificate, by a Secretary of State, of the fact of an officer's appointment, excluded); *Id.*: 1863, *Goodrich v. Conrad*, 24 La. 254, 256; 1828, *Bowlin v. Pollock*, 7 T. B. Monr. 26, 43 (register's certificate of dates, quantities, etc., of recorded warrants, excluded); *Ky.*: 1848, *Cornellison v. Browning*, 9 B. Monr. 50, 51 (clerk's certificate of the fact of proof of a foreign will, not received instead of copy of record); *La.*: 1812, *Kerham v. Collins*, 2 Mart. 245; 1823, *Smoot v. Russell*, 1 Mart. n. s. 522, 526; 1827, *Balfour v. Chew*, 5 id. 517, 520; 1841, *Taylor v. Jeffries*, 1 Rob. 1; 1841, *Briggs v. Campbell*, 10 La. 524, 526; 1842, *Judice v. Christen*, 3 Rob. 15; 1858, *Wiggins v. Guier*, 18 La. An. 356, 357; *Mo.*: 1838, *Owen v. Boyle*, 15 Mo. 147; 1842, *McGuire v. Sayward*, 9 Shepl. 230, 233 (certificate that a militia company "is designated in the records of this office as the B company," excluded); 1851, *English v. Sprague*, 53 Mo. 440, 442 (a justice's certificate as to a particular fact in a record, excluded); *Mass.*: 1833, *Oakes v. Hill*, 14 Pick. 442, 448; 1838, *Robbins v. Townsend*, 20 id. 251; 1850, *Greene v. Durfee*, 6 Oush. 362; 1872, *Wayland v. Ware*, 109 Mass. 251; 1874, *Hanson v. S. Scituate*, 115 id. 340; *Mich.*: 1894, *Teerman v. United Friends*, 103 Mich. 185, 51 N. W. 261; *Miss.*: 1839, *Doe v. King*, 3 How. 125, 135; 1840, *Cookerel v. Wynn*, 12 Sm. & M. 117, 123 (land-officer's certificate that a patent for C. was in his office, etc., excluded); *Mo.*: 1840, *Gurno v. Janis*, 6 Mo. 330, 333 (certificate of confirmation of land-title, received, though not a copy, because expressly authorized by statute); 1853, *Soulard v. Allen*, 18 id. 590, 595, *same's* (name); 1862, *Cutter v. Wadlingham*, 33 id. 269, 282 (certificate of official surveyor as to the identity of a lot, excluded); 1874, *Washington Co. v. R. Co.*, 58 id. 372, 377 (State auditor's certificate of valuation of property by Board of Equalization, excluded); 1878, *Wilbitt v. Barr*, 67 id. 284 (certified "abstract" of land-office records, received as a copy); *N. J.*: 1896, *Francis v. Mayor*, 58 N. J. L. 523, 33 Atl. 853 (certificate of the adjutant-general summarizing a soldier's record, excluded); *N. Y.*: 1885, *Wood v. Knapp*, 100 N. Y. 114, 2 N. E. 632; *N. C.*: 1796, *Wilcox v. Ray*, 1 Hayw. 410 (certificate that a judgment had been entered for so much and execution had issued; excluded); 1895, *State v. Champion*, 116 N. C. 987, 21 S. E. 700 (certificate of a record of property listed with the tax-register, excluded); *N. D.*: 1903, *Sykes v. Book*, — N. D. —, 96 N. W. 844 (certificate of a true copy of "all that pertains to the county tax levy," etc., excluded); *Oh.*: 1832, *Bank of*

U. S. v. White, Wright 51 (clerk's certificate that a sale-order had issued on a judgment, excluded); 1867, *Davis v. Gray*, 17 Oh. St. 330, 345 (certificate that a patent was issued, excluded); *Pa.*: 1795, *Talbot v. Jansen*, 3 Dall. 133, 137 (certificate of a collector of port that his book-entry showed payment, excluded); 1823, *Jones v. Hollister*, 10 S. & R. 328; 1826, *Vickroy v. Skelley*, 14 id. 372, 374 (certificate by a surveyor-general of a "connected draft of eleven tracts of land," though not a copy of any particular draft, received for convenience' sake, where not used to show title); *R. I.*: 1868, *Hopkins v. Millard*, 9 R. I. 41; *Tenn.*: 1808, *Barry v. Rhea*, 1 Overt. 345 (historical statement of judicial proceedings by a clerk, excluded); 1838, *Simmons v. Wood*, 6 Yerg. 518, 522 (clerk's certified statement that writs recorded were served, insufficient); 1849, *Harris v. Anderson*, 9 Humph. 779 (clerk's certificate of probate of a foreign will, not copying the probate, excluded); *Tex.*: 1877, *State v. Cuellar*, 47 Tex. 295, 302; 1882, *Buford v. Bostick*, 58 id. 63, 67; 1886, *Allen v. Read*, 66 id. 13, 19, 17 S. W. 115 (recorder's certificate of the existence of a lost deed, admitted, but not to prove execution or contents); *U. S.*: 1832, *Leland v. Wilkinson*, 6 Pet. 317 (Secretary of State's certificate as to the effect and tenor of certain laws, excluded); *Vt.*: 1867, *Barnet v. Woodbury*, 40 Vt. 264, 268 (clerk's certificate of extracts from grand lists of assessment, insufficient); *W. Va.*: 1874, *Hubbard v. Kelley*, 8 W. Va. 46, 53; 1899, *Roe v. Philippi*, 45 id. 785, 32 S. E. 224; *Wis.*: 1853, *Gates v. Winslow*, 1 Wis. 650, 657; 1881, *Cornelius v. Kessel*, 53 id. 395, 401, 10 N. W. 520; 1884, *Rigelow v. Blake*, 18 id. 520 (land-office receiver's certificate that A. B. appeared as purchaser, excluded); 1867, *Farrand v. R. Co.*, 21 id. 435, 438 (similar); 1879, *Culbertson v. Coleman*, 47 id. 193, 2 N. W. 124 (similar certificate admitted, under a statute cited *infra*, note 2); 1888, *Reed v. R. Co.*, 71 id. 399, 403, 37 N. W. 225 (similar certificate by a clerk of land-commissioners, excluded as not covered by statute).

² Besides the following statutes, compare those cited *ante*, under § 1674 (Sundry Certificates), § 1659 (Land-Office Registers), § 1675 (Notaries' Certificates), § 1676 (Certificates of Execution), § 1238 (Letters of Administration), and *post*, § 1705 (Abstracts of Title); the ambiguity of nomenclature renders it difficult to classify some of them: *Ala.*: 1901, *First National Bank v. Lippman*, — Ala. —, 29 So. 18 (certificate of clerk of Supreme Court, admitted under Code § 3860, cited *ante*, § 1674); *Ariz.* Rev. St. 1867, § 1870 (certificate by the Secre-

utes deal with specific classes of documents only, while others (not as numerous as they should be) are broadly inclusive in their terms. The policy of this innovation, when judiciously applied, can hardly be doubted.

(5) Upon the common-law principle closely related to that just stated, a custodian of documents equally lacked authority to certify that a specific document did not exist in his office or that a particular entry was not to be found in a register. Whether a Court would go so far in a given instance as to require a copy of the entire group of entries or integral series of documents was not entirely settled; but it was certain that the only evidence receivable would be the testimony on the stand of one who had made a search (usually of the custodian himself), and that the custodian's certificate of due search and inability to find was not receivable under the present Exception.³ But this

tary of the Territory, etc., "and all other persons holding public offices," attested by official seal, "certifying to any fact or facts contained in the papers, documents, or records of their office," is admissible where the originals would be; § 1879 (clerk's certificate under official seal that letters have issued to executor, administrator, or guardian, admissible); *Colo. Annot. State*, 1891, § 1748 (official certificate of the U. S. land-office register or receiver "to any fact or matter on record in his office," admissible); *Ga.*: 1854, *Henderson v. Hackney*, 16 Ga. 521 (certificate of data in records, admitted, though not a copy, under St. 1830, Code § 5211, cited *post*, § 1680); *Ida. Rev. St.* 1887, § 5403 (appointment of executor or administrator is provable by the clerk's certificate under court seal, that he has given bond and is qualified, and that letters unrevoked have issued, together with a copy of the minute of appointment); *Ill. Rev. St.* 1874, c. 51, § 20 ("the official certificate of any register or receiver of any land-office of the U. S., to any fact or matter on record in his office," is admissible, in particular, "of the entry and purchase of any tract of land within his district"; the Secretary of State's certificate under seal is receivable to prove the genuineness of the signature of the register or receiver); *Ia. Code* 1897, § 4641 (land-office receiver's certificate that the books show a sale, is proof of title against all but a holder of an actual patent.); § 4642 (land-office receiver's or register's certificate of entry of land, admissible); *Me. Pub. St.* 1883, c. 82, § 113 (adjutant-general's certificate as to the facts of service of a person from Maine enlisting in the Federal service, as found upon his records, admissible); *Md. Pub. G. L.* 1888, Art. 20, § 20 (court clerk's certificate of the securities on a constable's bond and the time of becoming such, admissible); Art. 93, § 8 (court clerk's certificate that letters testamentary have been granted to a party, admissible); *Miss. Gen. St.* 1894, § 5758 (certificate of an officer or acting officer of any department of the U. S. government, "to any fact appearing of record in his department," authenticated by official seal, if any, admissible); § 5758 (certificate by the register of a land-office of a survey, etc., "or other facts in relation to such land, taken from the books of such

land-office," or from a certificate indorsed on the original filed plat, admissible); 1867, *Dorman v. Ames*, 12 Minn. 451, 454 (land-office register's certificate of the filing of a declaration, admitted, under statute); *Tenn. Code* 1896, §§ 5363, 5364 (clerk's certificate of the effect of a record, in certain actions against public officers, admissible); *Tex. Rev. Civ. Stat.* 1896, § 2308 (certificate under official seal "to any fact or facts contained in the papers, documents, or records of their offices," by the officers enumerated *post*, § 1680, admissible); § 2321 (appointment and qualification of an executor, administrator, or guardian, provable by the proper clerk's certificate under official seal; so also *id.* § 1900, for an executor or administrator); § 646 (Secretary of State's certificate of filing of a charter, admissible); *Wis. Stat.* 1898, § 4166-4168 (provision made for certificates by the Secretary of State or register of a land-office to the title to lands as appearing from their books); § 4170 (adjutant-general's certificate as to "any facts which appear from the books, files, and records in his office," admissible); § 4171 (certificate of transcript, by a county clerk or treasurer, of tax records, admissible).

³ Compare with the following the cases cited *ante*, § 1244 (testimony to the non-existence of a record or entry, without producing the entire book or files): 1878, *Hendry v. Willis*, 33 Ark. 833, 834, 838 (letter from a U. S. land-office commissioner, stating that a location was not among the records, excluded); 1896, *Parker v. Cleveland*, 37 Fla. 39, 19 So. 344 (statement that no record existed, excluded); 1867, *Martin v. Anderson*, 21 Ga. 301, 308 (certificate that no entry of a name appears, excluded); 1898, *Greer v. Ferguson*, 104 id. 552, 30 S. E. 943 (certificate that no commission of a judge was on record, excluded); 1855, *Crown v. Pinckneyville M. Co.*, 17 Ill. 54 (certificate by the Secretary of State that no organization-papers had been filed, excluded); 1876, *Beardstown v. Virginia*, 81 id. 541, 544 (certificate of a clerk that no record of naturalization existed, excluded); 1855, *Stoner v. Ellis*, 6 Ind. 152, 161 (certificate of the patent-commissioner that no such patent had issued, excluded; deposition required); 1858, *Wright v. Bundy*, 11 id. 308, 407 (certificate of the Secretary of State that

rule, too, partook of an excess of formality, and imposed inconvenience and expense where it was unnecessary. The certificate of a custodian that he has diligently searched for a document or an entry of a specified tenor and has been unable to find it ought to be usually as satisfactory for evidencing its non-existence in his office as his testimony on the stand to this effect would be; and accordingly by statute in a few jurisdictions custodians' certificates of this sort have been expressly made admissible.⁴

§ 1679. *Same: Authentication of the Copy.* Suppose the law, in a given case, clearly to permit the use of a certified copy; it remains for the offeror to establish that the paper offered by him is indeed the certified copy allowed by the law,—in short, to *authenticate* it. For example, let it be settled that a custodian's certified copy is admissible, and let the public document whose contents are to be proved to be an order of survey by the county commissioners of highways; and let a paper be offered purporting to be a certified copy, by J. S. the county clerk, of the original warrant lawfully in his custody. Here it still remains to be ascertained that the county clerk is in fact the lawful custodian of that class of documents, that the person J. S. is in fact the county clerk, and that the signature J. S. was in truth placed there by the genuine J. S. (or, if there is a seal, that the seal was genuinely his seal placed there by him). These three elements are necessarily involved in the admission of the paper offered,—the *authority* of the county clerk, the *incumbency* of J. S. as clerk, and the *genuineness* of the signature or seal. The establishment of these three elements is commonly spoken of as *Authen-*

there was no other notary named S. S. but one, excluded); 1871, *Lacey v. Murnan*, 37 Id. 168, 171 (*Stoner v. Ellis*, approved); 1842, *Exchange & B. Co. v. Boyce*, 3 Rob. La. 308 (*Morphy, J.*: "Notaries can only legally certify copies of proceedings in their offices; any other fact within their knowledge must be disclosed on oath"; rejecting a notary's certificate that no protest had been filed); 1796, *Wilcox v. Bay*, 1 Hayw. 410 (certificate of loss, excluded. "the clerk not being appointed by law to certify the loss of a record"); 1806, *Ayres v. Stewart*, 1 Overt. 221 (certificate of a grant-custodian that no record could be found, excluded); 1843, *Hill v. Bellows*, 15 Vt. 727, 734 (clerk's certificate that no conveyance was on record, excluded). *Contra*: 1826, *Vickroy v. Skelley*, 14 S. & R. 372, 374 (certificate from a surveyor-general, etc., that a document was not in his office, receivable); 1846, *Apperson v. Ingram*, 12 Mo. 59, *semble* (certificate by a justice of the loss of his predecessor's records, sufficient).

⁴ Compare the statutes cited *ante*, § 1674 (sundry certificates): *Id.* Code 1897, § 4640 (like *Nebr. Comp. St.* § 5984); *Mich. Comp. L.* 1897, § 10176 (legal custodian's certificate that a paper, etc., after diligent examination cannot be found, admissible); *Miss. Gen. St.* 1894, § 5732 (certificate under official seal by the legal custodian of a document that "he has made diligent examination in his office for such paper, instrument, or document, and that it

cannot be found," admissible as if he had "personally testified to the same"); *Miss. Annot. Code* 1892, § 1795 (certificate under official seal by an officer having legal custody of a record or paper "that he has made diligent search in his office for the record or paper, and that it cannot be found therein," admissible "as if the officer personally testified"); 1832, *Tigner v. McGehee*, 60 Miss. 185, 192 (chancery clerk's certificate of inability to find a document, admitted under statute); *Nebr. Comp. St.* 1896, § 5984 (public officer's certificate of "diligent and ineffectual search" for a paper in his office, admissible); *N. Y. C. C. P.* 1877, § 921 (official custodian's certificate that a paper cannot be found after diligent search, admissible); *R. I. Gen. L.* 1896, c. 102, § 3 (clerk's certificate that a person is not recorded as having a liquor license, admissible); c. 152, § 4 (pharmacy-board secretary's certificate as to a matter of record or the "non-existence of any matter in the record," admissible); *Tenn. Code* 1896, § 5578 (certificate of "diligent and ineffectual search" for a paper in his office, by a public officer, receivable); *N. H. Stats.* 1898, § 4163 (legal custodian's certificate, under official seal, if any, "that he has made diligent examination in his office for such paper, instrument, or document, and that it cannot be found," admissible; so also for a certificate by a chief clerk of the commissioners of public lands under their official seal).

tication. Perhaps they may be assumed without evidence; or perhaps slight evidence will suffice, or perhaps definite kinds of evidence may be formally prescribed; but their establishment in some manner is inevitable. These elements are logically involved in the offer of evidence. Doubtless many who meet in practice the formalities of authentication, and do not attempt to analyze the principles involved, are apt to regard them as merely encrusted traditions or obnoxious technicalities having no reason for existence. But it is not so. Whatever the variety of mode or the seeming technicality of detail, these rules exist because there is an inherent element of fact that must somehow be met and disposed of.

(1) *Authentication by seal or by a second official certificate.* It is of course possible to meet this triple element of fact in the ordinary way, namely, by summoning competent witnesses to the stand, who will testify (in the above example) that the county clerk is the lawful custodian of the county commissioners' highway warrants, that J. S. is county clerk, and that this is J. S.'s signature or seal. But this summoning of witnesses is precisely the inconvenience which the use of officially certified copies is designed to avoid; and accordingly the policy of the principle would be in danger of substantial defeat if there were not other more convenient means of meeting the requirements of these elements involved in authenticating the copy itself. These other means are furnished by three well-established doctrines, which combine in various ways every expedient that is resorted to for the purpose,—the doctrine of *authentication* (*post*, §§ 2161-2169), the doctrine of *judicial notice* (*post*, § 2576), and some additional applications of the present Exception for *official statements*. By the doctrine of authentication, the existence, upon the document, of a purporting impression of a certain seal or signature is taken as sufficient evidence that the seal or signature is genuinely all that it purports to be. By the doctrine of judicial notice, no evidence need be offered that the local law prescribing the authority is as alleged, nor that certain persons are the officers they are alleged to be; these facts, being in theory known to the Court, may be assumed without evidence. By the doctrine of the present Exception, the hearsay statement of a higher officer, made in the shape of an official certificate, may be receivable to evidence the authority and the incumbency and the seal or signature of a lower officer; at common law, the Executive (represented by the great seal of State), as the source of all lower offices, was alone recognized as having authority to make such a certificate; but by statute the certificates of numerous other kinds of superior officers have been expressly recognized for specific purposes. By combining these three doctrines, then, the authentication of a certified copy can be easily accomplished. This may be illustrated by following out the application of these doctrines to the instance taken above, tracing it first as a domestic certificate, and then as a foreign one.

(a) Suppose a paper purporting to be a certified copy by J. S., as clerk of a domestic county, of a highway warrant lawfully within his custody. The three elements to be supplied are the authority of such clerks to be custo-

dians of such documents, the incumbency of J. S. as clerk, and the genuineness of the signature and seal. Here, (a') by the doctrine of judicial notice, the domestic law fixing the custody need not be evidenced, for the Court knows it; (a'') the incumbency of J. S. as clerk need not be evidenced, for the Court knows and therefore notices judicially the incumbencies of the principal domestic officers, and this would probably include the case of a county clerk (*post*, § 2578); (a''') the genuineness of the seal is presumed without other evidence (*post*, § 2166), though whether this would be done for the signature alone, lacking a seal, would be doubtful. The three elements are thus disposed of. For certified copies by other officers the result might or might not be the same; but the same processes and doctrines would be involved. The statutes often make express provision; yet they all involve some mode of employing the same processes. But for domestic certificates there has been little real need for express statutes.

(b) Suppose now a similar certificate purporting to come from the clerk of a county in a *foreign* State. Here the foreign law regulating the custody of such documents cannot be judicially noticed without evidence, for the Court in theory does not know it (*post*, § 2578). For the same reason the incumbency of J. S. as clerk cannot be judicially noticed; the Court in theory not knowing who are officers of a foreign State. So also, finally, the genuineness of the seal or signature of a foreign subordinate officer cannot be presumed; of foreign officers not representing the State (*post*, § 2163), the notary (*post*, § 2165) and perhaps the Supreme Court (*post*, §§ 1681, 2164) are the only ones whose seals may be presumed genuine. There is thus a halt in the process. Yet if possible a way must be found to authenticate the document without calling witnesses. Is there no other application of the doctrines in question which can be invoked to answer the purpose? Does the court know nothing and can it presume nothing that will suffice? The Court knows at least that the Executive (represented, in the English theory of the common law, by the King) is the source of office, the appointive and supervising functionary for all other officers; the symbol of this supreme executive authority is the great seal of State, the affixing of which is itself always an act of State; therefore, the statement of the King, or other supreme Executive, as to the proper custody of official documents, and as to the incumbent of a particular office, would be admissible testimony under any conditions; and the official certificate of this supreme Executive (unattainable in person) would be properly receivable under the present Exception as an official statement fulfilling its requirements. If such a certificate can be obtained, it will suffice. Now the affixing of the great seal of State has always been regarded as equivalent to such a certificate, whether words of certifying are expressly set forth or not; the act of affixing it is itself an Executive act, having such an import.¹ Moreover, the genuineness of a foreign seal of State is always assumed (*post*, § 2163); i. e. the fact of the presence upon a

¹ The authority for this can be sufficiently seen in §§ 1680, 1681, *post*.

document of an impression purporting to be that of the seal of State is sufficient without other evidence. With these two doctrines in combination, then, the purpose is attained. The impression of the foreign great seal of State is presumed genuine; being genuine, it is equivalent to a certificate by the Executive that the custody of the document in question is lawfully with the officer in question, that J. S. is that officer, and that the seal or signature of that officer (which must of course in theory be sufficiently known to the Executive or appointing power) is genuinely upon the certified copy. Such is the mode in which a certified copy by a foreign officer can be adequately authenticated, without calling witnesses and merely by resort to doctrines of law otherwise well accepted.

Suppose, however, that the certifying officer is a clerk of court, not an ordinary administrative officer; here, working through the same process, the result can be obtained with slightly different formalities. The clerk of court, by the English common law (*post*, § 1681), is not authorized, merely a custodian, to certify copies, but must receive a special order in each instance; the seal of his court (presumably affixed by the judge) is equivalent to such an order; consequently his authority is sufficiently shown by the affixing of the court seal. Now if the seal of a foreign court can be presumed genuine, the end is gained; for if the seal is genuine, then we have an order by the Court, borne upon the certified copy itself, authorizing him to make out this very paper, and in effect stating that this copy was genuinely made out by a person having authority to do so. Whether the seal of a foreign court would be presumed genuine was perhaps doubtful at common law (*post*, §§ 1681, 2164), but if it would be so presumed, the purpose of authentication, for that class of documents, was accomplished in this special way.

The numerous varieties of statutes, then, which sanction some form of authentication, all have the common purpose of meeting these unavoidable elements and of furnishing a definite, simple, and convenient method of authentication. The statutes aim sometimes merely to declare the common law and to make certain that which was unsettled. Sometimes they go further, and endeavor to lessen the supposed inconveniences of the common-law requirements; for example, they may accept the certificate of a foreign city mayor or of a county clerk as to the authority, incumbency, and genuineness of seal or signature of a subordinate official, and may presume the genuineness of the seal of the mayor or county clerk, instead of requiring the certificate of the supreme Executive under the seal of State and of presuming this seal genuine; the object being to forestall the inconvenience of going a long distance from a local district to a central office of government to obtain the affixing of the seal of State. There was certainly room for reform in this respect in the rules of the common law; and experience seems not to have indicated that the reforms were too radical. But, however these statutory modes may differ in detail from the common-law rules, the process involved is the same, and rests upon the inherent necessity of dealing in some manner with the logical elements of the proof. These statutory pro-

visions, it may be remarked, though dealing thus in effect with the widely separated doctrines of judicial notice, presumed genuineness, and hearsay official statements, are nevertheless usually associated in enactment with the statutory provisions authorizing certain kinds of officers, or custodian-officers in general, to furnish certified copies to be admissible. It was natural, when declaring certified copies admissible, to provide in the same place for a definite mode of authenticating them; and hence the two sets of rules — the admissibility of certified copies, and the proper modes of authenticating such copies — are customarily provided for at the same time by the same statutory act.²

(2) *Authentication by other testimony.* The whole purpose of the process of authentication by presumed genuineness, judicial notice, and certificates of authority, is to avoid the inconvenience and expense of calling witnesses in the ordinary way to prove that which is seldom fairly disputable. The formalities so available by the common law or by statute are thus clearly not prescribed for their own sake, as being a necessary accompaniment of the process of authentication, but merely as substitutes for a more tedious and undesirable method. If, then, a party wished to resort to the more cumbersome method which would otherwise be necessary, the law will interpose no obstacle. It has merely endeavored to facilitate his proof; if he chooses to repudiate this assistance and proceed by the other method, he is at liberty to do so. It follows that if he attempts to avail himself of the more convenient method specially furnished, and fails to employ it properly, he may then nevertheless fall back upon the more cumbersome method which would have been open to him in the beginning had he chosen. In other words, he may *supply by other testimony the defects of a certificate of authentication*. This as a general principle of evidence is clear enough; it is a corollary of common sense, for no doctrine of evidence penalizes the failure to use properly one kind of evidence by forbidding the unfortunate party thereafter to use any other kind of evidence for the same purpose. The party may not be ready with any other sort; but if he happens to be, he cannot be prevented from availing himself of it. This is illustrated (*ante*, § 1677, par. 3) by the principle that a party offering a certified copy which is inadmissible because made by an unauthorized officer may nevertheless employ it by calling a witness to prove it an examined copy; by the principle (*ante*, § 1226) that a party not able to exempt himself from producing a recorded deed, because the record was unlawful, may nevertheless account for it by proving it lost or destroyed; by the practice under the Hearsay Exceptions, in which a statement offered under one Exception, but not fulfilling its requirements, may be received under any other exception whose rules it satisfies; and by many other unquestioned instances.³ The doctrine

² Such statutes are therefore placed in the ensuing §§ 1680-1682; while statutes and decisions dealing solely with the presumed genuineness of seals and signatures in general and with the judicial notice of officers in general are

considered under the appropriate heads, *post*, §§ 2163-2168 (authentication), §§ 2174-2178 (judicial notice).

³ Compare the general principle of multiple admissibility (*ante*, § 13).

in its present application, that the defects of a certificate of authentication may be supplied by other testimony, seems equally unquestioned as a general rule.⁴

There are, however, instances in which this rule of evidence must give way to some mandatory policy of substantive law involved in the use of the document. For example, where a statute provides that a deed, in order to be recorded, must be authenticated in a specific way, and a deed is recorded without fulfilling the required forms of probate, the evidential permissibility of supplying the defects of the register-proof may be made to yield to a policy of substantive law which denies to a record of such a deed any validity by way of notice or the like.⁵ The general rule, and the reason for this apparent exception to it, are well set forth in the following passage:

1895, *Holt, P.*, in *Lockhead v. Berkeley Springs W. & L. Co.*, 40 W. Va. 553, 21 S. E. 1081 (refusing to allow other proof of the official character and signature of a foreign officer certifying a jurat of an affidavit of a mechanic's lien required to be recorded, the jurat not being itself authenticated, as provided by statute, by a certificate from a clerk of court under seal): "[The Courts of this State would take judicial notice that the class of officers here concerned had authority to administer an oath.] But they would still need to be certified in some way that the officer in question belonged to such class, and that his signature was genuine. . . . [The counsel, however, argues as follows:] 'To authenticate a writing is to perform certain acts upon it for the purpose of rendering it admissible as being what it purports to be, without proof by witnesses that it is such; authentication is, then, merely a convenient method of furnishing proof of certain things. When, therefore, the section in question says an affidavit will be sufficiently authenticated in a certain form, verifying the genuineness of the signature and the authority of the person administering the oath, it simply means [that] this is one method of making the affidavit admissible in evidence without other proof of such genuineness and such authority; it does not purport to be the only or an exclusive method. Nor does it follow that, if the oath was in fact lawfully administered, if the affidavit was in fact duly made, it shall be of no effect because the officer has neglected to avail himself of the most convenient method of making it admissible in evidence without other proof. Consequently, parol evidence might be introduced at the hearing both as to the genuineness of the signature of the clerk (or the assistant clerk), and of his authority to administer the oath.' . . . Such contention rests, I think, upon a misconception of the purpose of authentication, the persons it is intended to satisfy, and the reason of the selection of the method which requires it to appear written upon the face of the claim authorized to be made a lien on being admitted to record. It is intended as a notice of a lien — a creature of the statute — to all whom it may concern. . . . Where the statute prescribes no method of verification of the signature of the officer before whom the affidavit is made, or if, when a method is mentioned, it does not appear to be restrictive or exclusive, the common-law method must be, in the one case, may be, in the other, resorted to. . . . [But here] the party whom it may concern, to whom the statute requires the notice to be given, wishes to know now the present actual fact of lien or no lien, as already accomplished; and the lawmaker . . . prescribed a method of authentication which he was to look for, and must find admitted to record if it exist at all; and he is required to look there, and nowhere else, for all the essential, determining factors of ascertainment. . . . Here the statute prescribes a method of giving notice to all whom it may concern, by requiring it to be in writing and made matter of record, so that the lien created may not be secret;

⁴ 1836, *Bennet v. Paine*, 7 Watts 224; 1839, *Van Ness v. Bank of U. S.*, 13 Pet. 17, 21; see also precedents in § 1681, *post*, about prov-

ing a foreign judge's seal, and in § 2165, concerning authentication of a notary's seal.

⁵ Compare what is said *ante*, § 1649, note.

and the inherent nature of the transaction necessarily implies that such method is intended to be exclusive."⁶

(3) So far as the question is involved of the presumed genuineness of a certified copy *not purporting to be authenticated by another certificate*, or of the other modes of proving its genuineness — for example, whether a clerk's certified copy not signed by him may be authenticated by proving his handwriting in the certificate —, the rules are considered under the general principle of Authentication (*post*, §§ 2161-2168).

§ 1680. *Certified Copies of Miscellaneous Public Documents.* The application of the foregoing principles to certified copies of the various kinds of documents is to-day a composite matter of common-law precedent and of statute. Any more detailed generalizations are impossible. The authorities may however be grouped under three heads, — miscellaneous administrative documents, judicial records, and registered deeds.

In dealing with the first group, *miscellaneous documents*,¹ it is to be kept

⁶ The precedents on this subject are so involved with doctrines of substantive law that it is impossible to give them here.

¹ In the following list both statutes and common-law precedents are collected; where a ruling appears to have been made under a statute, it is so noted; but statutory changes have outlawed many of the earlier rulings; a detailed analysis of the statutory history is here impossible. The statutes affecting the use of documents of the government land-offices have been given *ante*, § 1239, for the reason stated there and in § 1659, but they are noted here, together with such rulings as seem to involve the present principle; the table of cross-references in § 1659 should also be consulted for authorities on special kinds of land-office documents; for *notarial copies* of deeds under the continental system, see *ante*, § 1681, notes; for *judicial records*, the authorities are given in the next section, § 1681; for *registered deeds*, they have been given *ante*, § 1651, with which should be compared those cited in § 1225 (concerning the rule for producing the original); for *telegraphic copies*, see *post*, § 2154; for *quasi-official copies*, see *post*, § 1683; for copies of other kinds of documents, the preceding sections of this Chapter may be found to contain material, though the effort has been made to place here all that properly involves the present principle; for the use of copies as *secondary to the originals*, see *ante*, §§ 1192-1230, and as affected by other principles, see in general, *ante*, §§ 1231-1241, 1244-1250; for *authentication by seal and signature*, see *post*, §§ 2161-2168; no attempt is made in the following list to collect fully the rulings interpreting the local statutes:

ENGLAND: 1799, *Moises v. Thornton*, 8 T. R. 303 (a diploma of medicine at a foreign university; if treated as a copy of the corporation records, the legal authority in the Faculty to certify copies must be shown); 1822, St. 1 & 2 Vict. c. 94 (certified copy of records in custody of the master of the rolls, by one of his officers under seal of the office, admissible); 1851, St. 14 & 15

Vict. c. 99, § 7, Lord Brougham's Act (acts of State in a foreign State or a British colony, provable by copy under seal of the State or colony); § 14 ("Whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents provable by means of a copy, any copy thereof or extract therefrom shall be admissible in evidence in any court of justice . . . , provided it be proved to be an examined copy or extract, or provided it purport to be signed or certified as a true copy or extract by the officer to whose custody the original is intrusted"); 1865, St. 28 & 29 Vict. c. 63, § 6 (certified copy of a colonial law, by the clerk or other proper officer of the legislative body, admissible); 1865, St. 31 & 32 Vict. c. 37, § 2, Documentary Evidence Act ("any proclamation, order, or regulation" issued by Her Majesty or the Privy Council, or by authority of any Government department or officer as specified in the schedule, is provable by certified copy by the clerk of the Privy Council or one of its members, or by the departmental officers specified in the schedule, without proof of the handwriting or official position of the person certifying); British N. Amer. Act, 1867, § 143 (records of the old province of Canada, delivered to Ontario or Quebec, provable by the custodian's certified copy); there are also scores of minor acts affecting various classes of public documents.

CANADA: *Dominion*: Rev. St. 1886, c. 73, § 21 (certain certified copies of certificates of shipmasters, etc., to be admissible and to be presumed genuine); c. 82, § 156 (certified copies of official customs papers, under seal of "any of the principal officers in the United Kingdom" or a colonial collector or a British consul or vice-consul, admissible); c. 113, §§ 23-25 (certified copies of naturalization documents, provided for); St. 1893, c. 31, § 8, Evidence Act (proclamations, etc., of the Governor-General or Governor in council or a minister or head of department of the government of

in mind (according to the foregoing principles) that the American common-law rule recognizes the official custodian of documents as having an implied

Canada are provable by certified copy as in Ont. R. S. c. 73, § 23; § 9 (proclamations, etc., of a Lieutenant-Governor or Lieutenant-Governor in Council or head of department of a Provincial government are provable by certified copy by the clerk or assistant clerk of the Council or head of department or his deputy or acting clerk or deputy); § 11 (Imperial records, documents, etc., are provable as in England); § 12 ("any official or public document of Canada or of any province" is provable by certified copy by the custodian; and any document or book-entry of a corporation in Canada or a province is provable by certified copy of the presiding officer or clerk under corporate seal, without proof of seal or signature or official character); § 13 (like Ont. R. S. c. 73, § 29, where no other statute "renders its contents provable by means of a copy"); § 14 (no proof of handwriting or official position of any person certifying a copy under this statute shall be required, and the copy may be written or printed); § 17 (any entry in a book kept in a department of the government of Canada is provable by copy under oath or affidavit of an officer of the department); § 19 (reasonable notice, not less than 10 days, required for copies under §§ 12, 13, 14, 17).

British Columbia: Rev. St. 1897, c. 71, § 9 (like Can. St. 1893, c. 31, § 8); § 10 (like ib. § 9); § 12 (like ib. § 11); § 13 (like ib. § 12); § 14 (like ib. § 13); § 15 (like ib. § 14); § 16 (like ib. § 17); § 20 (like ib. § 19); c. 33, § 25 (register of births, etc., provable by certified copy); c. 129, § 21 (same for marriage-certificates by a clergyman or registrar); St. 1899, c. 39, § 73 (liquor licenses; analogous to Ont. Rev. St. c. 245, § 106).

Manitoba: Rev. St. 1902, c. 57, § 8 (substantially like Can. St. 1893, c. 31, § 8, but omitting departmental documents); § 9 (like ib. § 9, but limited to the province of Manitoba); § 10 (substantially like ib. § 9, but applying to other provinces than Manitoba); § 11 (proclamations, orders, regulations, or appointments, by a minister or head of department of Canada or Manitoba or any other province are provable by certified copy of the minister or deputy or acting deputy or chief clerk); § 13 (like Can. St. 1893, c. 31, § 11); § 14 (substantially like ib. § 12); § 15 (documents, etc., belonging to or deposited in any department of the government of Canada or Manitoba, are provable by attested copy of the head or deputy head or chief clerk of the department; and documents, etc., in any Dominion lands or surveys office in Manitoba, by attested copy of the agent, inspector, or other officer in charge); § 16 (like Can. St. 1893, c. 31, § 17, applying also to any province of Canada); § 18 (like ib. § 13); § 19 (like ib. § 14); § 21 (like ib. § 19, applying to §§ 14, 16, 18, 19, *supra*); c. 40, *Malles* 403, 499 (depositions provable by certified copy of the proper officer); c. 116, § 371 (municipal by-law, provable by certified copy, under corporate seal, of the clerk or acting clerk or secretary-treasurer, without

proof of seal or signature, unless forgery of the seal or signature is specially pleaded); c. 141, § 35 (park board by-law, provable by the secretary's certified copy, without proof of signature, unless forgery of the signature to the original is specially pleaded); c. 63, § 7 (farmers' benefit association declaration, provable by county clerk's certified copy); c. 23, § 18 (provincial Secretary's certificate of issuance of licenses of foreign corporation, admissible); c. 76, § 2 (certain survey-plans of Hudson's Bay Co.; certified copy under Lieutenant-Governor's signature and Manitoba Great seal, admissible); § 6 (so for a copy of the register-book of surveys, with the addition of the affidavit of the clerk or other person examining the original); c. 104, § 12 (magistrate's oath, provable by provincial Secretary's attested copy); c. 101, § 204 (like Ont. R. S. 1897, c. 246, § 106); § 205 (liquor commissioners' regulation, provable by certified copy by one of them, without proof of signature, unless forgery of the signature to the original is specially pleaded); c. 111, § 58 (official medical register, provable by registrar's certified copy); c. 131, § 38 (same for pharmaceutical register); c. 123, §§ 12, 14 (certified copy of newspaper publisher's affidavit of ownership, admissible); c. 147, § 61 (certain railway plans, provable by certified copy of commissioner or registrar); c. 135, § 56 (documents belonging to or deposited in the lands department, provable by the commissioner's attested copy); c. 136, § 4 (any copy, signed by the provincial Secretary, "of any document, shall be equivalent to the original instrument itself," without proof of signature); c. 140, § 13 (public officer's bond, provable by certified copy); c. 144, § 29 (documents, etc., in the public works department, provable by certified copy of the minister); c. 168, § 10 (in part repeats c. 57, § 9); c. 173, §§ 31, 35 (official records of births, marriages, and deaths, provable by certified copy of the inspector or the Minister of Agriculture); § 34 (same for certain religious bodies' records deposited in the department).

New Brunswick: Consol. St. 1877, c. 46, § 7 (any record or document recorded or deposited "in any public office in this Province" is provable by examined copy, or by certified copy of the custodian "without proof of the official character or handwriting of such officer or deputy"); § 12 ("All proclamations, treaties, and acts or statutes of any legislature or other governing body of any foreign State, Canadian province, or British colony, and all written enactments or laws of the same, and all other acts of state" of the same, are provable by examined copy, or by copy under seal of State, province, or colony, without any proof of the seal, signature, or truth of the attestation); § 15 (British ship register and appurtenant documents are provable by custodian's certified copy); § 16 (British bankruptcy proceedings are provable by office copies purporting to be by the commissioners and registrar under court seal); c. 97, § 24

authority to certify copies (so that the decision depends chiefly on the administrative law as to the proper custody of the original); that the

(county registrar's certified copy of the registry of a certificate of partnership, admissible); c. 98, § 86 (secretary-treasurer's certified copy of an extract of the books of the county council, admissible); § 101 (secretary-treasurer's certified copy of a county council's by-law or regulation, admissible without proof of signature or official character); c. 115, § 14 (county secretary's certified copy under official seal of a certificate of return of election of sewer commissioners, admissible); St. 1881, c. 15, § 1 (proclamations, etc., of the Province; like Ont. L. S. 1897, c. 73, § 23); § 2 (proclamations, etc., of the Dominion; like ib. § 22); § 3 ("no proof shall be required of the handwriting or official position of any person" thus certifying; and the copy may be printed or written; compare Cons. St. c. 46, § 12, *supra*); St. 1887, c. 5, § 18 (register of marriages, etc., provable by the registrar's certified copy); St. 1889, c. 11, § 6 (registered marriage-certificate, provable by certified copy of the clerk of the peace or the registrar); St. 1897, c. 10 (foregoing acts repealed); St. 1901, c. 6 (repeal suspended until proclamation by Lieut.-Governor); St. 1898, c. 24, § 2, as amended by St. 1894, c. 11, and by St. 1895, c. 17 (letters patent, certificate of incorporation, or other document "purporting to incorporate any joint-stock company under any law" of the United Kingdom or a British colony or the Dominion or a province of Canada, or a State of the United States, is provable by a certified copy by a notary public under official seal, certifying to a comparison with the original, verified by affidavit, provided a copy of the certified copy and affidavit is served on the opponent six days before offering; the notary to certify, for a certificate of incorporation, that the copy is of a certificate duly filed or of a certificate "purporting to be that of the Secretary of State" "under what purports to be the seal of office").

Newfoundland: Consol. St. 1892, c. 13, § 3 (documents belonging to or deposited in the surveyor-general's office are provable by certified copy under his signature); c. 57, § 6 ("all proclamations, treaties, and other acts of State of any foreign State or British colony" are provable as in N. Br. Consol. St. 1877, c. 46, § 12); § 8 (like ib. § 15); § 9 (like Can. St. 1893, c. 31, § 13); c. 96, § 20 (filed certificate of incorporation, provable by colonial secretary's certified copy); c. 3, § 128 (similar, for lists of voters, etc., except counterfoils, in election inquiries); c. 108, § 11 (certain documents concerning newspaper publication, provable by the colonial secretary's certified copy); c. 110, § 24 (similar, for copyright documents); c. 123, § 9, (marriage registers, provable by the colonial secretary's certified copy of entry, "the handwriting of the said secretary being duly proved").

Northwest Territory: Consol. Ord. 1898, c. 9, § 23 (documents belonging to or deposited in the department of public works are provable by attested copy of the commissioner or his deputy); c. 23, § 25 (Territorial secretary's cer-

tified copy of sheriff's bond, admissible); c. 14, § 20 (registry of births, etc., provable by the registrar's certified copy); c. 70, § 100 (municipal by-law, provable by certified copy of the secretary-treasurer and any member of the council under corporate seal); c. 74, § 11 (recorder's certificate of record of stock-brand shall be evidence of ownership of the brand).

Nova Scotia: Rev. St. 1900, c. 19, § 51 (inspector's certified copy of mining rules to be admissible); c. 73, § 63 (clerk's certified copy of assessment roll of municipal corporation, under corporate seal, admissible, without proof of seal or signature); c. 89, § 127 (registrar of deeds' certified copy of railway plans, etc., filed, to be admissible); c. 100, § 155 (council resolution concerning intoxicating liquors is provable by clerk's certified copy, without proof of signature's authenticity, unless the original is expressly denied as a forgery); c. 163, § 4 (like Can. St. 1893, c. 31, § 11); § 5 (like ib. § 8); § 6 (like ib. § 9, specially mentioning the province of Nova Scotia, and including also any territory of Canada); § 9 ("proclamations, treaties, and other acts of State of any foreign State, or of any British colony," are provable by copy under the seal of the State or colony); § 11 (like Can. St. 1893, c. 31, § 12, applying the first portion to any "grant, map, plan, report, letter, or official or public document belonging to or deposited in any department," etc.); § 13 (like ib. § 17, including also the books of a department of Nova Scotia); § 14 (like ib. § 13); § 17 (substantially like N. Br. Consol. St. 1877, c. 46, § 15); § 19 (certain filed or registered township plans and allotments, provable by certified copy, after notice in certain cases); § 31 (like Can. St. 1893, c. 31, § 14).

Ontario: Rev. St. 1897, c. 23, § 47 (records and documents in the public lands department are provable by copy attested by the commissioner or assistant commissioner; copies of licenses and other documents issued under certain statutes are provable by attested copy of the same officers under the department seal); c. 73, § 22 (proclamations, orders, regulations, or appointments by any chief executive officer or head of department of the Government of Canada are provable by copy purporting to be certified by a clerk of the Privy Council or by the minister or deputy or secretary of the department, or by such acting officer); § 23 (similar, for copies of such documents, from an Executive Council or department of a province or territory of Canada, by the clerk of the Council or the minister or deputy of the department); § 26 (whenever the original record is admissible, "any official or public document in this province" is provable by a copy "purporting to be certified under the hand of the proper officer, or person in whose custody such official or public document is placed," without further proof); § 28 (entry in a regular book kept in a government department is provable by copy under oath or affidavit of an officer of the department); § 29 ("whenever a

certified copy is itself authenticable, for many or most domestic officers, by the seal of his office, and for foreign officers by the seal of State ap-

book or other document is of so public a nature as to be admissible in evidence on its mere production from the proper custody," a copy "purporting to be signed and certified as a true copy or extract by the officer to whose custody the original has been entrusted" is admissible; c. 223, § 334 (municipal by-law may be proved by certified copy by the clerk and any member of the council, under corporate seal, "without proof of the seal or signatures," unless the forgery of seal or signature is specially alleged); § 485 (by-laws of board of police commissioners may be proved by copy certified by any member, "without proof of such signature," unless it is specially alleged that the signature to the original is forged); § 710 (in certain cases, proof of the foregoing by-laws by affidavit is permissible); c. 245, § 107 (resolution of board of liquor-licence commissioners; similar to c. 223, § 485, *supra*); § 106 (inspector's certificate of a liquor licence to be evidence of the facts stated and of the authority of the inspector "without proof of his appointment or signature"); c. 324, § 12 (letters patent under the Great Seal of the United Kingdom or any other of the British Dominions are provable "by exemplification thereof, or of the enrolment thereof," under the Great Seal under which the same may have issued"); St. 1900, c. 26, § 7 (documents in the office of the registrar of loan corporations, or issued by him, are provable by his certified copy under official seal); St. 1902, c. 33, § 187 (in proceedings under the liquor act, the chief inspector's certificate suffices to prove the existence, etc., of a licence; and no proof of his appointment or signature is necessary; replaces Rev. St. c. 245, § 106); St. 1903, c. 18, § 71 (R. S. c. 223, § 334, repealed, and the following substituted; an original by-law of a municipal corporation, when produced by the clerk or any officer, shall be received "without proof of the seal or signatures" unless one or more of them is specially alleged to be forged); St. 1903, c. 19 (replaces c. 223, §§ 334, 485, 710, *supra*, with corresponding numbers).

Prince Edward Island: St. 1889, c. 9, § 21 (like Newf. Consol. St. 1892, c. 57, § 6, but including acts in Great Britain, Ireland, the Dominion and the provinces of Canada); § 22 (register of marriages, etc., out of the Province is provable by the legal custodian's certified copy); § 27 (like Can. St. 1893, c. 31, § 13; public documents in general); § 26 (like N. Br. Consol. St. 1877, c. 46, § 15; ship's registers); § 28 (record of a vote, etc., of the Executive Council concerning land titles is provable by certified copy purporting to be by the clerk of the Council); § 30 (proclamations, etc.; like Can. St. 1893, c. 31, § 8); § 31 (like *ib.* § 14; limited to the foregoing P. E. I. § 30); St. 1893, c. 3, § 1 (Provincial treasurer's certificate of a commercial traveller's licence, admissible).

UNITED STATES: *Alabama*: Code 1897, § 1811 (custodian's certificate of register of marriage, etc., kept by law or church rule, received as

"presumptive evidence" of the law or rule for keeping and of the authority to certify); §§ 1813-14 (certified copies, by the register of a land-office in the State, of "any official book, official entry, or other document pertaining to" such an office, admissible; also of a deed or written instrument of conveyance in such land-office, either by register's copy or by copy of transcript in probate office); § 1815 (U. S. surveyor-general for the State; certified copies, by the Secretary of State, of his books, maps, and field-notes deposited in the Secretary's office, receivable); § 1816 (books or papers "required by law to be kept in the office of any public officer," including a book which is a copy of U. S. office-books, provable by certified copy by "the proper custodian thereof"); § 1817 (field-notes of original government-surveys, furnished by Secretary of State to a judge of probate, provable by the latter's certified copy); § 1818 (certificate of "the head of any bureau or department of the general government is sufficient authentication of any paper or document appertaining to his office"); § 1819 ("official bonds or other instruments or papers required to be kept by any officer of this State," and "books and proceedings required to be kept by any sworn officer of this State," provable in civil causes by certified copy or transcript by the custodian, with the "same effect as if the original were produced"; except that production of the original may be required, "if practicable, when necessary to promote the ends of justice"); § 1821 (Federal, State, or Territorial statute; transcript certified by the Secretary of this State as deposited in his office or the Supreme Court library, receivable); § 1822 (certified book of ordinances, etc., or copy of a specific ordinance, of a municipal corporation in the State, by the clerk or recording officer, receivable as evidence of "due adoption and continued existence" of the ordinances, etc.); § 3029 (certified copy of deceased notary's acts by probate judge or other notary, the depositary of the registers, receivable); §§ 2846, 2847 (certified copies of the probate judge's record of marriage licenses and certificates, admissible); § 4088 (books and records of tax-collector or probate judge, in an issue of sale of realty for taxes, provable by certified copy); §§ 1206, 1243 (Secretary of State's certified copy of turnpike company's articles of association, admissible); § 1974 (Secretary of State's certified copy of books, etc., of late U. S. surveyor-general, admissible); § 3265 (recorded certificate of medical examiners as to "person's authority to practice, provable by certified copy of record, if original certificate is lost); § 1449 (same for dental examiners); § 330 (certified copy of commissioner's record of fertilizer-licences, admissible); § 273 (recorded refunding bonds, provable by certified copy); § 395 (official analysis of fertilizer or chemical, provable by copy under seal of department of agriculture); § 3507 (certified copy of books of auditor or of superintendent of education, admissible in action for

pendent to the copy; and that in both of these respects numerous statutes in every jurisdiction now provide specially for certain classes of documents.

default against county superintendent); § 79 (recorded bond of executor or administrator, provable by certified transcript); § 3860 (clerk of Supreme Court's certified copy of its opinion, to be "legal evidence"); 1836, *Hamner v. Edlina*, 3 Stew. 192, 197 (certified copies of field-notes in the surveyor-general's office, excluded, as not authorized); 1840, *Johnson v. McGhee*, 1 Ala. 186, 192 (certified copy of assignment of Indian land, the original being kept in the War Department, admissible); 1851, *Phillips v. Poindexter*, 18 id. 579, 582 (notary's certified copy of his entry of protest, receivable); 1854, *Stephens v. Westwood*, 25 id. 716, 719 (certified copy of land-patents, etc., from the U. S. land-office and U. S. Indian bureau, certified by an "acting commissioner," sufficient); 1862, *Martin v. Hall*, 72 id. 587 (certified copy of the record of an official bond, required to be filed but not to be recorded, excluded); 1888, *Woodstock Iron Co. v. Roberts*, 87 id. 436, 437 (same, for copy of U. S. land-patent); 1889, *Hawes v. State*, 88 id. 97, 100, 7 So. 302 (the statute as to marriage registers applies to registers kept out of the State; certificate of such a custodian is evidence of his authority to certify copies); 1890, *Robinson v. Cahalan*, 91 id. 479, 481, 8 So. 415 (U. S. "patent," admitted "without proof of its execution").

Alaska: C. C. P. 1900, § 1039 (like Or. Annot. C. 1892, § 718); § 1040 ("a judicial, legislative, or executive record of said district [of Alaska], or of any State or Territory of the United States, or of any foreign country, or of any political subdivision of either, may be proved by the production of the original, or by a copy thereof, certified by the clerk or other person having the legal custody thereof, with the seal of the court or the official seal of such person affixed thereto, if it or he have a seal, or otherwise authenticated as required by §§ 905, 906, and 907 of the Revised Statutes of the United States").

Arizona: Rev. St. 1857, § 1968 (Secretary of the Territory's certified copy, under seal, of an act in "any of such printed statute books deposited in his office, or of any law or bill, public or private, deposited in his office in accordance with law," admissible); § 1869 (records of "all public officers" of the Territory, provable by certified copy, under seal, by the "lawful possessor of such records"; so also § 1870); § 1871 (certified copies of "records and official papers" of notaries public, admissible); § 1872 (in suits by the Territory against a delinquent officer or agent, a transcript under official seal of the lawful possessor's books, etc., containing statements of accounts, and certified copies annexed thereto, under official seal of the lawful possessor, of "bonds, contracts, or other papers relating to" the account and filed in the office, are admissible; but in such suit on a bond or other written instrument, whose execution is denied by sworn plea, production of the original shall be required); § 1875 (certified copy by a

territorial officer under official seal of "all notes, bonds, mortgages, bills, accounts or other documents, properly on file with such officers," admissible); St. 1890, March 21, No. 52 (certified copy of a duly recorded domestic marriage certificate, receivable).

Arkansas: State. 1894, § 2376 (Secretary of State's certified copy under seal of an act, etc., in a printed statute book of a U. S. State or Territory, purporting to be printed by authority and deposited and required by law to be kept in his office, admissible); § 2380 (Secretary of State's certified copy under official seal of an act, etc., of the General Assembly, official acts of Governor, and "of all rolls, records, documents, papers, bonds, and recognizances" deposited and required by law to be kept in his office, admissible); § 2381 (certified copy under official seal by the State treasurer or auditor of documents legally deposited in his office, admissible); § 2382 (public auditing officer's certified copy of a balance of debt due to the State, admissible); § 2383 (superintendent of public instruction's certified copy under official seal of a document deposited or filed in his office, admissible); § 2386 (records of auditor and of commissioner of State lands, provable by certified transcript); § 2388 (city or incorporated town ordinance, etc., provable by certified copy of "the proper officer" under corporate seal); § 2389 (official bonds of all State, county, and township officers, provable by the legal custodian's certified copy); § 2391 (official bond of an executor, administrator, guardian, or commissioner, or of principal and security as required in a judicial proceeding, provable by the legal custodian's certified copy under official seal); § 2390 (contracts with the State or an officer or with a county or for a county's benefit, made under legal authority, and kept in official custody, provable by the custodian's certified copy under official seal, or, if he has no seal, by affidavit-copy); § 2392 (production may be required, in cases of the three preceding sections, if defendant in an action on such a bond, etc., denies under oath the execution).

California: C. C. P. 1872, § 1893 (certified copy by "every public officer having custody of a public writing which a citizen has a right to inspect," admissible "with like effect as the original writing"); § 1901 (certified copy of a "written law or other public writing of any State or country," by "the officer having charge of the original," under the public seal of the State or country, receivable); § 1918 ("Other official documents may be proved as follows: 1. Acts of the Executive of this State, by the records of the State department of the State; and of the United States, by the records of the State department of the United States, certified by the heads of those departments respectively. . . . 2. The proceedings of the Legislature of this State, or of Congress, by the journals of those bodies respectively, or either House thereof, or by published statutes or resolutions, or by copies certified by the clerk. . . .

These statutes, with their tedious multiplicity of repetition, are for the most part vain and harmful, — a printed monument to the folly of excessive and

3, The acts of the Executive, or the proceedings of the Legislature of a sister State, in the same manner; 4, The acts of the Executive, or the proceedings of the Legislature of a foreign country, . . . by a copy certified under the seal of the country or sovereign, or by a recognition thereof in some public act of the Executive of the United States; 5, Acts of a municipal corporation of this State, or of a board or department thereof, by a copy, certified by the legal keeper thereof. . . . 6, Documents of any other class in this State, by the original, or by a copy, certified by the legal keeper thereof; 7, Documents of any other class in a sister State, by the original, or by a copy certified by the legal keeper thereof, together with a certificate of the Secretary of state, judge of the supreme, superior, or county court, or mayor of a city of such State, that the copy is duly certified by the officer having the legal custody of the original; 8, Documents of any other class in a foreign country, by the original, or by a copy certified by the legal keeper thereof, with a certificate, under seal of the country or sovereign, that the document is a valid and subsisting document of such country, and that the copy is duly certified by the officer having the legal custody; 9, Documents in the departments of the United States government, by the certificate of the legal custodian thereof; subdiv. 8 amended by the Commissioners in 1901, by substituting, after "legal keeper thereof," the following: "under his seal, if he has one, with a certificate of the minister or ambassador or a consul, vice-consul, or consular agent of the United States in such foreign country, to the effect that the document is a valid and subsisting document of such country, and that the copy is duly certified by the officer having the custody of the original"; for the validity of this amendment, see *ante*, § 488; § 1919 ("A public record of a private writing may be proved by the original record, or by a copy thereof, certified by the legal keeper of the record"); § 1923 (certificate with a copy must state "that the copy is a correct copy of the original, or of a specified part thereof, as the case may be. The certificate must be under the official seal of the certifying officer, if there be any, or if he be the clerk of a court having a seal, under the seal of such court"); Civ. C. 1872, § 297 (Secretary of State's certified copy of articles of incorporation, admissible); § 2471 (county clerk's certified copies of entries of a partnership register, admissible); Pol. C. 1872, § 1117 (entry in the great register of elections, provable by certified copy); § 3789 (same for assessment books and delinquent list); 1857, *McFarland v. Pico*, 8 Cal. 624, 635 (notary's certified copy of his record, receivable); 1866, *Doherty v. Thayer*, 31 id. 140, 143 (certified copy of official survey, excluded as not conformable to statute); 1872, *Himmelman v. Hoadley*, 44 id. 218, 225 (municipal officer's record, authenticated by certificate of the officer having the duty to make it); 1886, *Alameda M. Co. v. Williams*, 70 id.

534, 538 (same, under statute; applied to a city assessment-book); 1896, *Galvin v. Palmer*, 113 id. 46, 45 Pac. 173 (certificate of correctness of a copy of a map by a colonel of engineers, the legal custodian, admitted).

Colorado: Annot. State. 1891, § 1749 (Secretary of State's exemplification of "the laws of the several States and Territories which may be transmitted by order of the Executives or Legislatures of such States to the Governor of this State and by him deposited" in the Secretary's office, admissible); § 1752 (papers, etc., "appertaining to transactions in their corporate capacity of any town or city" incorporated, provable by the clerk's or keeper's certified copy under corporate seal, or, if no public seal, under the certifier's private seal, the certifier also stating that he is intrusted with the original's safe keeping); § 4807 (bond of an executor or administrator, provable by certified copy under seal of the county court); § 284 (State census reports, provable by the Secretary of State's certified copy); § 3297 (district court clerk's bond, provable by the Secretary of State's certified copy under State seal); § 2796 (bond of a justice of the peace and of a constable, provable by the county clerk's copy under official seal); § 2306 (superintendent of insurance's certified copy of papers under official seal, admissible); § 3003 (recorder's certified copy under official seal of an entry in a register of marriages, admissible); § 2147 (county clerk's certified copy of recorded records, proceedings, etc., of a mining district, admissible); § 2161 (recorder's certified copy of a returned affidavit of improvements on a mining claim, admissible); § 502 (charter, etc., of a foreign corporation filed in the office of the Secretary of State, provable by his certified copy under official seal); § 504 (articles of incorporation, provable by certified copy under great seal of State); § 838 (recorder of deeds' certified copy of "all papers filed" and of records, admissible); § 922 (all papers duly filed or deposited with a county clerk or treasurer, and all record-books there kept, provable by certified copy under official seal); § 2546 (certified copy of recorded sheriff's certificate of sale, admissible); § 3972 (superintendent of public instruction's certified copies of "all papers filed in his office and his official acts," admissible); § 4251 (county clerk's certified copy under official seal of a recorded stock-brand, admissible); § 4316 (county clerk's certified copy of recorded field-notes, etc., of the general government survey, admissible); § 3920 (assessment-rolls, etc., provable by certified copy); § 4397 (recorded municipal plats, provable by certified copy by county recorder); § 4442 (municipal ordinances, etc., "may be proven by the seal of the corporation"); § 2985, and St. 1891, p. 397, § 2 (Secretary of State's certified copy of a recorded trademark, admissible); § 2404 (recorded certificate of irrigation-decree, provable by certified copy); C. C. P. § 356 (a copy is allowable, "when the original is a record or other document

thoughtless legislation. They are vain, because either they merely state what would by the American common law have been conceded or might

in the custody of a public officer"); § 482 ("any record, or document, or paper, in the custody of a public officer of this State, or of the United States, within this State," is provable by officer's copy certified under official seal or verified by his oath); St. 1894, p. 74, § 8 (certified copy of the register of elections, admissible).

Columbia (District of): Comp. St. 1894, c. 20, §§ 18 ff. (like U. S. Rev. St. §§ 882, 883, 884, 885, 886, 906, 907); § 83 (any "instrument of writing" lawfully "lodged for safekeeping in any office or court," provable by the keeper's certified copy under official seal); c. 20, § 18 (marriage license and certificate, provable by the Supreme Court clerk's certified copy of record under court seal); c. 15, § 77 (recorder of deeds' certified copy of certificate of incorporation, admissible); Code 1901, § 1070 ("An exemplification of the record under the hand of the keeper of the same, and the seal of the court or office where such record may be made, shall be good and sufficient evidence to prove any record made or entered in any of the States or Territories of the United States; and the certificate of the party purporting to be the keeper of such record, accompanied by such seal, shall be *prima facie* evidence of that fact").

Connecticut: Gen. St. 1897, § 318 (Secretary of State's certified copies, under seal of State, of records, etc., in his custody, admissible); § 1086 (Secretary of State's exemplified copy of a law of another of the United States officially deposited with the Secretary or in the State library, admissible); § 1039 ("entries or records of all public offices and corporations," "made of their acts, votes, and proceedings, by some officer appointed for that purpose," provable by certified copy under hand and official seal); § 1090 (Secretary of State's certified copy under seal of a stock corporation's certificate of organization, admissible); § 1091 (recording officer's certified copy of a memorandum of revenue stamps affixed to a recorded document, admissible); § 1092 (clerk's certified copy of records of proceedings of town boards of health, common proprietors, ecclesiastical society, or religious corporation, admissible); § 3436 (Secretary of State's certified copy of articles of a railroad corporation's organization, admissible); § 3445 (same, under seal, for a consolidated railroad corporation, admissible); § 2270 (town-clerk's certified copy of filed factory-inspector's notice, admissible); § 2983 (town-clerk's certified copies of common proprietors' records, admissible); § 3960 (Secretary of State's certified copy, under seal of State, of a recorded certificate of trademark, admissible); § 3117 (State chemist's certified copies of his official analyses, admissible); § 3120 (same, for pharmacy commissioners' certified copies of proceedings); St. 1897, June 9, c. 224 (certified copy of a lost bond of the treasurer of a savings bank, recorded with the Secretary of State, admissible); 1876, *Wilson v. School District*, 44 Conn. 160 (rejecting a town-clerk's certified copy of a vote passed at a meeting the legality of which

was in question); 1901, *Harber v. International Co.*, 73 Md. 587, 48 Atl. 788 (cited *ante*, § 1676).

Delaware: Rev. St. 1893, c. 89, § 50, St. 1897, c. 159, § 6 (probate register's certified copies of recorded executors', etc., accounts, receipts, etc., admissible); u. 107, § 9 ("all records, surveys, patents, deeds, or other instruments of writing" kept in a Maryland public office and affecting lands in Delaware, provable by attested copies of custodian under seal; also by the record of the same or a certified copy when recorded in any Delaware county); § 14 ("any record or paper belonging to a public officer or legally in the custody of a public officer," provable by custodian's certified copy under seal); c. 35, § 10 (county recorder's record, or a certified copy, of any instrument "authorized by law to be recorded," admissible); St. 1903, c. 394, §§ 6, 74, 128, 132 (certified copies of certain documents of incorporation, admissible).

Florida: Rev. St. 1892, § 1111 (any instrument of writing, lawfully filed or recorded in a public office of this State or a county, is provable by the custodian's certified copy, under seal of office, but if none exists, under private seal; but this shall not prevent the Court from requiring the original to be produced or accounted for, "if the same shall be deemed necessary or proper for the administration of justice"); § 1867 (county judge's certified copy under court seal of a bond of an executor or administrator, admissible); § 2126 (letters patent of a corporation, provable by the Secretary of State's certified copy under the great seal; a charter, by his certified copy of record); St. 1897, c. 4552 (certified copy, by the clerk of a circuit court, of county commissioners' election returns, admissible to prove a legal election in prosecutions for illegal sale of liquor); 1896, *Ropes v. Kempe*, 38 Fla. 233, 20 So. 992 (exemplification of a patent-record by the land-commissioner under seal, admissible); 1902, *Florida C. & P. R. Co. v. Seymour*, — id. —, 33 So. 424 (a municipal ordinance is provable by the clerk's certified copy, apart from statute).

Georgia: Code 1895, § 5211 (certificate of any public officer of the State or county "shall give sufficient validity or authenticity to any copy or transcript of any record, document, paper of file, or other matter or thing in the respective offices, or pertaining thereto, to admit the same in evidence"); § 5212 (this certificate is to be "primary evidence" of documents, etc., required by law to remain in the office, but "secondary evidence" of those which by law properly remain in the party's possession); § 5216 (municipal corporation's records, provable by the keeper's certified copy under seal, like judicial records); § 5232 ("foreign laws and judgments must be authenticated under the great seal" of State); § 5237 (laws of State, etc., of the U. S. are proved by copy under seal of State, etc.); § 5238 (records in a public office of a State, etc., of the U. S. are provable by the keeper's attested copy under official seal, certi-

have been made certain by a general clause, or they profusely repeat in scores of acts, with culpable forgetfulness, what is already the law by express

fed by the presiding justice, Governor, Secretary of State, Chancellor, or keeper of the great seal; if by the first named, then to be authenticated by the clerk under official seal; if by one of the last four, then to be under the great seal; Acts 1897, p. 107, Van Epps' Suppl. § 6527 (transcript of recorded Confederate soldiers' roster, declared receivable); 1899, *Brakehill v. Leonard*, 40 Ga. 60, 62 (Confederate military orders, proved by certified copy); 1881, *Jackson v. Johnson*, 67 Md. 167, 180 (certified copy of a bond filed in the Probate Court of Alabama, admitted, under Ala. Code, § 2695, giving a certified copy the same force "as if proved," and though execution is specially denied); 1900, *Central of G. R. Co. v. Bond*, 111 Md. 13, 36 S. E. 299 (certified copy, not under municipal seal, of town records, excluded); 1903, *McLanahan v. Blackwell*, — Md. —, 45 S. E. 785 (U. S. bankruptcy referee's certified copy of proceedings, admissible).

Hawaii: Civil Laws 1897, § 1398 ("All proclamations, treaties, and other acts of state of this Republic or of any foreign State, and all judgments, decrees, orders, and other judicial proceedings of any court of justice in any part of this Republic, or in any foreign State, and all affidavits, pleadings, and other legal documents, wills, and codicils filed or deposited in any such court, may be proved, . . . either by examined copies or by copies authenticated as hereinafter mentioned (that is to say), if the document sought to be proved be a proclamation, treaty, or other act of State, the authenticated copy to be admissible in evidence must purport to be sealed with the great seal of this Republic, or of the foreign State to which the original document belongs; and if the document sought to be proved be a judgment, decree, order, or other judicial proceeding of any court in this Republic, or in any foreign State, or an affidavit, pleading, or other legal document, will, or codicil filed or deposited in any such court, the authenticated copy to be admissible in evidence must purport either to be sealed with the seal of such court or (in the event of such court having no seal) to be signed by the judge or (if there be more than one judge) by any one of the judges of the said court, and such judge shall attach to his signature a statement in writing on the said copy that the court whereof he is judge has no seal. But if any of the aforesaid authenticated copies shall purport to be signed or sealed as hereinbefore respectively directed, the same shall respectively be admitted in evidence in every case in which the original document could have been received in evidence without any proof of the seal, where a seal is necessary, or of the signature, or of the truth of the statement attached thereto, where such signature and statement are necessary, or of the judicial character of the person appearing to have made such signature and statement; and every such copy shall be *prima facie* evidence of the original thereof, in like manner as if such original were produced and proved in due course of law"); § 1400 (ship's

register of Hawaiian vessels, provable by "a copy thereof purporting to be certified under the hand of the person having charge of the original"); § 1408 ("Whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no law exists which renders its contents provable by means of a copy, any copy thereof or extract therefrom shall be admissible in any court, . . . provided it be proved to be an examined copy or extract, or provided it purport to be . . . and certified as a true copy or extract by the officer to whose custody the original is intrusted"); St. 1896, no. 50, § 19 (certified copy of records of birth, etc., kept by Board of Health, furnished by its secretary, admissible).

Idaho: Rev. St. 1897, § 5968 (certified copy by "every public officer having the custody of a public writing, which a citizen has the right to inspect," admissible like the original); § 5970 (like Cal. C. C. P. § 1901, inserting "Territory"); § 5977 (like id., § 1918, substituting "a State or other Territory" for "a sister State," and inserting "District (Court)" in cl. 7); § 5978 (like Cal. C. C. P. § 1919); § 5982 (like id., § 1923); § 5999 (the writing itself must be produced, except "when the original is a record or other document in the custody of a public officer," or when it is recorded and a certified copy is made evidence); § 2585 (certified copy of articles of incorporation by the Secretary of the Territory or a county recorder, admissible); St. 1899, Feb. 16, § 7 (county surveyor's certified copy of recorded plats and field-notes of the U. S. surveyor-general, admissible); St. 1899, Feb. 14, § 9 (certified copy, under the county recorder's official seal, of county books of marriages, admissible).

Illinois: Rev. St. 1874, c. 51, § 11 (Secretary of State's exemplification of laws of other States and Territories, transmitted to the Governor by order of their Executive or Legislature, and deposited in Secretary's office, admissible); § 14 (papers, ordinances, etc., of "any city, village, town, or county," are provable by the clerk's or keeper's certified copy, under corporate seal, or, if none, under the certifier's private seal); c. 24, § 65 (municipal ordinances, provable by the clerk's certificate under corporate seal); c. 79, § 15 (county clerk's certified copy of a record of swearing, etc., of justices and constables, admissible); c. 130, § 5 (State treasurer's certified copy under official seal of records, documents, etc., legally in his keeping, admissible); c. 133, § 7 (county recorder's or surveyor's certified copy of a survey-record, admissible); § 10 (State auditor's certified copy under official seal of the U. S. surveyor-general's field-notes, admissible); c. 99, § 14 (notary's record, provable by certified copy under official seal of the notary or of a county clerk having custody); c. 139, § 112 (town-clerk's certified copies of papers duly filed in his office and of town records, admissible); c. 125, § 5 (county clerk's certified copy of sheriff's bond, and

general statute. They are harmful, because they not only add to the impedimenta of the profession and make necessary the mastery of multifarious

county court clerk's certified copy of its record, admissible); c. 31, § 5 (same for coroner's bond); c. 89, § 12 (county clerk's certified copy under county seal of a marriage certificate or register, admissible); c. 19, § 11 (books, etc., of sale of land by trustees of Illinois and Michigan canal, or canal commissioners, provable by the secretary's certified copy under official seal); c. 121, § 172 (district clerk's certified copy of papers duly filed in his office and of district records, admissible); c. 22, § 122 (certified copy of articles of incorporation and changes thereof, under the great seal of Illinois, admissible); c. 124, § 7 (documents legally deposited in the office of the Governor or Secretary of State, provable by the Secretary's certified copy under official seal); c. 15, § 6 (records and documents legally in the keeping of the State auditor, provable by his certified copy under official seal); 1843, *Morrison v. Hinton*, 5 Ill. 457, 459 (a certificate to official character must assert it as of the time of the official act); 1844, *Frazier v. Laughlin*, 6 id. 247, 259 (certified copy of an illegally recorded school commissioner's bond, excluded); 1864, *Waterman v. Raymond*, 34 id. 42 (certified copy of an official survey, admitted under statute); 1870, *Senly v. Wells*, 53 id. 120 (certified copies of records of the U. S. land-office, admitted); 1885, *Lindsay v. Chicago*, 115 id. 120, 123, 3 N. E. 443 (certified copy of a city ordinance is evidence not only of contents but of passage and publication, under statute); 1894, *Chicago B. & Q. R. Co. v. Jones*, 149 id. 361, 373, 37 N. E. 247 (railroad commissioners' schedule of rates, certified by the commissioners, admissible as genuine).

Indiana: Rev. St. 1897, § 463 (legislative acts of any State, etc., of the U. S., to be "authenticated by having the seals" thereof affixed); § 464 (records and books, not judicial, "in any public office" of any State, etc., of the U. S., are provable by the keeper's attestation under official seal, if there be one, with a certificate of due attestation by the presiding justice of the court of the county, or of the Governor, Secretary of State, Chancellor, or keeper of the great seal; if certified by a presiding justice, the clerk of the court shall also certify under official seal that the justice is qualified; if certified by one of the others, the great seal shall be annexed); § 465 (copy of a statute certified under the State seal by the Secretary of State to be taken from a statute-book deposited in his office or the State library and "by him believed to have been received under the authority" of another State or Territory, admissible); § 471 (local records, office books, and official bonds kept in a public office, provable by the keeper's attestation under official seal, and, if no seal exists, certified by the clerk of court of the county under official seal); §§ 475, 477, 481, 8037 (records of the U. S. land-office and office for sale of canal or Michigan road lands, provable by the keeper's or State auditor's or Secretary's certified copies); § 480 (legislative act of a U. S. State or Territory, provable by the Secretary of State's certified copy

under seal); § 489 (record of a land-patent, certificate, etc., provable by certified copy); § 5016 (street-railway corporation's articles of association, provable by certified copy by the Secretary of State or deputy); § 5737 (same for water-works company); §§ 5216, 5220 (recoiled trademark, etc., provable by certified copy); § 5385 (railroad corporation's articles of association, provable by Secretary of State's certified copy); see also id. § 5361); § 7616 (affidavit of lien of a mechanic, etc., provable by the county clerk's attested copy under seal); § 5978 (banking corporation's articles of association, provable by the Secretary of State's certified copy under seal); § 7980 (official bond, provable by certified copy); § 4355 (recorded plat of city, provable by certified copy); § 3570 (municipal records, provable by city clerk's certified copy under corporate seal); § 7811 (official mine-map, provable by the mine-inspector's certified copy under seal); § 8196 (county commissioners' records, provable by the auditor's certified copies under seal); § 8000 (records, papers, etc., lawfully in the office of the Secretary of State, provable by his certified copy under State seal); § 4623 (detective association's articles, provable by the county recorder's certified copy); § 3371 (same for an express company); § 4971 (same for consolidated hydraulic companies); § 5078 (insurance company's papers lawfully filed with the State auditor, provable by his certified copy); § 7649 (recorded marriage certificate, provable by the county clerk's certified copy); § 4133 (municipal ordinance, provable by certified copy); § 9129 (tax-payment entry on the book of a treasurer, receivable when the treasurer's receipt is lost or destroyed); 1876, *Nelson v. Blakey*, 54 Ind. 28, 36 (certified copy, by the Secretary of State, of articles of association, excluded on the facts); 1881, *Analey v. Meikle*, 81 id. 260, 262 (the statutory proof by certified copy of a printed statute book is not exclusive; a certified copy from the original here admitted).

Iowa: Code 1897, § 4635 ("duly certified copies of all records and entries or papers belonging to any public office or by authority of law required to be filed therein," admissible); § 4639 ("maps, official letters, and other documents" in the office of the U. S. surveyor-general, provable by his certified copy); § 4650 (legislative journals, provable by an "officially certified" copy by the clerk of the appropriate House); § 4652 (like *Nebr. Comp. St.* § 5994); § 4653 (ordinances, acts, etc., of a municipal corporation, provable by the clerk's certified copy); § 75 (Secretary of State's certified copy, under official seal, of land-office documents and records, admissible); § 558 (survey field-notes and plat, provable by certified copy of the surveyor or of the county auditor under seal); § 1451 (certified copies of records in the office of the auditor and treasurer, admissible); § 3007 (certified copy of a recorded notice and return of service as to terminating an easement, admissible); § 4624 (notary's certified copy of protest-record, admissible).

petty learning, but they also provide, in many instances, inconsistent formalities of authentication for evidence which could equally well be subjected to

Kansas: Gen. St. 1887, c. 97, § 2 (record of "any instrument authorized to be recorded," admissible if "the original is not in the possession or under the control of the party desiring to use the same"); § 3 (papers lawfully filed or recorded in "any public office," or a record lawfully kept there, provable by certified copy of the legal custodian under seal, "when such original," etc., as in § 2); § 10 (books or filed papers in "any of the departments of the government of the United States," provable by attested exemplification of official custodian); § 14 (Indian census-roll and allotment-roll, provable by certified copy); § 19 (Secretary of State's certified copy under official seal of the statute-book of a U. S. State or Territory purporting to be printed by authority and lawfully deposited in his office, admissible); § 23 (ordinances, etc., of a city or town, provable by certified copy under corporate seal by the "proper officer").

Kentucky: Stats. 1892, § 1637 (record or paper properly in the office of the Secretary of State, treasurer, register or auditor, county surveyor, or assessor, provable by the custodian's attested copy, "upon proof of the execution of the original"); § 1639 (official book or ordinance of a mayor, town, or religious society, provable by the custodian's attested copy); § 1636 (books of "any public office of the U. S. or of a sister State," provable by the keeper's attested copy under official seal); § 1637 (books or papers of an executive department of U. S., provable by the President's or department-chief's attested copy; or "any State or Territory," by the Governor's or Secretary of State's attested copy under official seal); § 1638 (a law or ordinance of any State, nation, province, colony, city, or town out of the U. S., a register of births and marriages, or a duly registered instrument, is provable by the keeper's attested copy certified under official seal by a U. S. consular, chargé, or minister); § 1642 (a law of the U. S. or a State or Territory thereof is provable by the Secretary of State's certified copy of an authoritative printed volume received by him); § 2588 (official register of births, marriages, and deaths, provable by the custodian's certified copy); § 3723 (notary's protest-book, provable by his certified copy under seal, or, after his decease, by the custodian's certified copy); 1827, *Dudley v. Grayson*, 6 T. R. Monr. 359, 362 (clerk of town trustees, not authorized to give copies of minutes).

Louisiana: (for the statutes, see under this State the remark in note 5, § 1651, ante); 1836, *Montreuil v. Pierre*, 9 La. 356, 371 (notary's certified copy of Spanish public "acts," admitted); 1843, *Rosine v. Bonnabel*, 5 Rob. 163 (certified copy, dealt with under statute); 1841, *Millaudon v. McDonough*, 13 La. 102, 115 (certified copy by the register of the land-office of plats there filed, excluded); 1842, *Bontner v. Scott*, 1 Rob. La. 546, 552 (survey-copy certified by the register of the land-office, admitted); 1857, *Lawrence v. Grout*, 12 La. An.

334, 336 (same, excluded); 1847, *White v. Kearney*, 3 Bl. 630 (certified copy of a ship's clearance by the deputy-collector under custom-house seal, admitted); 1879, *Board v. Hernandez*, 31 Bl. 158, 159 (school-board treasurer's certified copy of their records, admitted).

Maine: Pub. St. 1888, c. 49, § 40 (Secretary of State's certified copy of an insurance company's certificate of organization, admissible); c. 80, § 112 (certified copies under seal of documents or books of a consular officer or custom house, admissible); St. 1887, c. 47 (town-clerk's certified copy of a record of birth, etc., admissible).

Maryland: Pub. Gen. L. 1888, Art. 36 (any instrument "lodged for safe keeping in any office or court" by the law of the country, provable by certified copy of the copy under seal of the court or office); § 60 (clerk of Court of Appeals' certified copy of extracts from proceedings of conventions and the General Assembly in his custody, admissible); § 64 (Secretary of State's copy under seal of books, papers, etc., in his custody or office, admissible); § 65 (treasurer's attested copy of books, papers, entries, and proceedings, admissible); § 66 (same for comptroller); § 67 (tobacco inspector's sworn copy of manifest or entry in his possession, and certified to be complete, admissible); Art. 18, § 6 (Governor's certificate under seal of State of a record of appointment of a commissioner to take acknowledgments, admissible); § 46 (court clerk's certified copy under official seal of a recorded certificate of corporate organization, admissible); Art. 33, § 24 (custodian's certified copy of entries in a registry of voters or a poll-book, admissible); Art. 93, § 39 (certified copy under seal of an administrator's bond, admissible); St. 1898, c. 478 (incorporation of a foreign corporation, provable by a copy, certified in a specified manner, of its record or register recorded agreeably to law).

Massachusetts: Pub. St. 1882, c. 2, § 28, Rev. L. 1902, c. 2, § 15 (certified copies of legislative journals and papers, by the clerk of the Senate or House or the secretary of the Commonwealth, admissible); P. S. c. 15, § 12, R. L. c. 5, § 4 (Secretary of the Commonwealth's certified copy under State seal of records and papers in his office, admissible); P. S. c. 25, § 11, R. L. c. 23, § 9 (sheriff's bond, provable by the treasurer's certified copy "in a case relating to the bond," unless the Court requires production of the original, when execution is disputed); P. S. c. 72, § 3, R. L. c. 70, § 3 (Secretary of the Commonwealth's certified copy of a power of attorney of a foreign express carrier, admissible); P. S. c. 106, § 22, R. L. c. 110, § 21 (Secretary of the Commonwealth's certified copy of a record of an incorporation certificate, admissible); P. S. c. 112, § 44, R. L. c. 111, § 46 (same for a railroad corporation); P. S. c. 118, § 4, R. L. c. 115, § 4 (certified copy of a bank-incorporation certificate, by the register of deeds or the Secretary of the Commonwealth, admissible); P. S. c. 159, § 170, R. L. c. 176,

a uniform simple rule. Add to this that the tendency of so many and so varying statutory peculiarities of detail is to impress the profession (both on

§ 74 (books, papers, documents, and records in "the executive and other departments of the Commonwealth," or of any city or town, provable by attested copy of the officer in charge, attested by the secretary of the Commonwealth under its seal or by the clerk of the city or town); Stat. 1894, c. 330, § 2, R. L. c. 126, § 4 (certified copy of a foreign corporation's appointment of an attorney for service, filed with the corporation commissioner, admissible); St. 1897, c. 214, § 78, R. L. c. 126, § 4 (same for a foreign insurance corporation, filing an appointment with the insurance commissioner); St. 1898, c. 429, § 13, R. L. c. 119, § 13 (same for a foreign fraternal beneficiary association, filing with the insurance commissioner); St. 1899, c. 387, § 1, R. L. c. 175, § 73 (clerk's attested copy of ordinances of a city, by-laws of a town, or regulations of a board of aldermen, admissible); St. 1897, c. 444, § 21, R. L. c. 29, § 20 (certificate signed by a town or city clerk or assistant clerk for the time being, admissible to prove the record of marriages, etc.); St. 1903, c. 437, §§ 13, 30, 59 (certified copies of certain documents of incorporation, admissible); 1850, Com. v. Chase, 6 Cush. 248 (clerk of a city or town may certify copies of votes, ordinances, or by-laws); 1895, Com. v. Hayden, 163 Mass. 453, 40 N. E. 816 (certified copy of a town-clerk's marriage-record, admitted under statute); 1900, Com. v. Corkery, 175 id. 460, 56 N. E. 711 (corporation commissioner's certified copy of a copy of foreign articles of incorporation filed with commissioner, admitted under statutes).

Michigan; the statutes in this jurisdiction reach the culmination of crude superfluity: Comp. L. 1897, § 10166 (certified copies must be attested by the custodian's official seal, and if a clerk of the county, by the court seal, except for use in the same court, or for use in a circuit court of the Supreme Court's order); § 10164 (affidavit of newspaper notice, provable by the custodian's certified copy); § 10169 (papers, records, etc., lawfully filed or recorded in a public office, provable by the custodian's certified copy); § 10193 (municipal ordinances, provable by the clerk's or recorder's certified copy); § 10198 (documents filed or recorded with the board of control of St. Mary's Falls ship canal, provable by the auditor-general's certified copy); § 10201 (U. S. signal-service record of weather conditions, provable by the custodian's certified copy, in civil causes); § 1305 (certified copies of State land-office field-notes, surveys, etc., by the commissioner under seal or by the register of deeds, admissible); § 63 (records, etc., in the office of the Secretary of State, provable, etc., by his certified copy under the great seal of State); § 441 (register of deed's certified copy of a recorded bill affecting realty, admissible); § 1708 (soldier's discharge, provable by certified copy under seal of the circuit court of county); § 2333 (township supervisor's records, provable by certified copy or abstract); § 2365 (constable's bond provable by certified copy by the town-

ship clerk); § 2871 (same for the county clerk's certified copy, under official seal, of a justice's bond); § 2511 (county supervisors' record of boundaries perpetuated, provable by the county surveyor's record); § 2638 (county clerk's certified copy, under seal, of a notary's records deposited with him, admissible); § 2692 (order of village incorporation, provable by a certified copy of the county clerk or Secretary of State); § 2759 (village ordinance, provable by the clerk's certified copy under village seal; see also id. § 2913); § 3088 (same for city ordinance); § 2925 (same for a clerk's certified copy of a judgment in village condemnation proceedings); § 3240 (same for a city); § 2968 (city declaration of incorporation, provable by certified copy of the county clerk or Secretary of State); § 3372 (municipal survey-plat, provable by certified copy of the register of deeds or auditor-general); §§ 3386, 3387 (county supervisors' resurvey of a municipal plat, provable by the register of deeds' certified copy); § 3394 (public-improvement resolution of a municipal council, etc., provable by certified copy); § 3427 (water-introduction proceedings, provable by certified copy); § 3879 (tax-roll, provable by certified copy); § 4239 (separation of grades of highway and railroad; resolution of a board, etc., provable by certified copy); §§ 4234, 4279 (affidavit of notice of election for a county road system, or of laying out of road, provable by the county clerk's certified copy); § 4277 (court certificate of road-proceedings, provable by the register of deeds' certified copy); § 4541 (record of a pauper-settlement decision, provable by certified copy); § 4617 (record or certificate of death, provable by certified copy); § 4772 (township board's resolution of removal of an officer, provable by certified copy); § 5103 (papers, etc., in the office of the insurance commissioner, provable by his certified copy under official seal); § 6140 (insurance documents deposited in the office of the Secretary of State, provable by his certified copy); § 5230 (railroad commissioner's records, provable by his certified copy); § 5273 (certificate of business of a banker, broker, or exchange dealer, provable by the county clerk's certified copy under circuit court's seal); § 5304 (pharmacy board's records, provable by the secretary's certified copy under seal of the board); § 5331 (township clerk's certified copy of a township resolution licensing peddlers, etc., and of affidavit of notice, admissible); §§ 5425, 5428 (board of supervisors' prohibition, etc., of liquor traffic, provable by certified copy); §§ 6140, 6181 (records, etc., in the office of the banking commissioner, provable by certified copy under official seal); § 6234 (railroad company's bond filed with the judge of probate, provable by certified copy); § 6468 (street railway and electric light companies' consolidation agreement, provable by the Secretary of State's certified copy); § 7000 (mining company's record of alienation of land, etc., provable by the register of deeds' certified copy); § 7008 (recorded decree of sale of prop-

the bench and at the bar) with the false notion that obedience to the precise statutory formalities is the sole means of evidential salvation; and to ob-

erty of a mining and manufacturing company, provable by the register of deeds' certified copy); § 7637 (plat, etc., of a summer-resort association, provable by the register of deeds' certified copy); § 7745 (foreign fraternal beneficiary association's power of attorney to accept service, provable by the insurance commissioner's certified copy); §§ 8001, 8011 (county clerk's record of marriage or of license, provable by his certified copy); § 9178 (sheriff's certificate of sale, provable by the register of deeds' certified copy); § 9459 (name for decree of partition, *semble*); § 9476 (name for decree of sale by executor, etc.); § 10019 (foreign insurance company's power of attorney to accept service, provable by certified copy of the insurance commissioner or his deputy); § 11685 (Secretary of State's certificate of recording of a trademark, etc., admissible); in the following sections, a certified copy by the custodian, usually the Secretary of State, is made admissible to prove recorded articles of association of corporations of the following sorts: §§ 5997, 5998 (mint growers); §§ 6006, 6007 (grange); § 6026 (brood animals); § 6092 (banking); § 6159 (trust, deposit, and security); § 6203 (receiving, loaning, and investing money); §§ 6224, 6225, 6227, 6254 (railroad); § 6397 (train railway); § 6437 (street railway); §§ 6481, 6510 (pipe line); §§ 6516, 6524 (booming); § 6631 (bridge); § 6654 (ferry); §§ 6669, 6687 (telegraph); § 6690 (canal or harbor); § 6768 (water power); § 6913 (business men); § 6925 (hotel); § 6949 (exposition buildings); § 6961 (store buildings); §§ 6982, 6997, 7031, 7034, 7035 (mining); §§ 7045, 7053, 7069, 7071 (manufacturing); § 7130 (gaslight); §§ 7135, 7145 (electric light); §§ 7159, 7165, 7186, 7188 (printing and publishing); §§ 7195, 7282 (life insurance); §§ 7233, 7264 (fire and marine insurance); § 7364 (log and timber insurance); § 7379 (farm-stock insurance); § 7418 (bicycle insurance); § 7436 (labor); § 7446 (arbeiter bund); § 7501 (cooperative and mutual benefit); § 7536 (cooperative savings); § 7621 (summer resort); § 7656 (suburban homestead); § 7673 (yachting, etc.); § 7698 (gymnastic); § 7736 (social); § 7755 (fraternal beneficiary); §§ 8141, 8152 (institutions of learning); § 8163 (university scholarships); § 8173 (literary and scientific); §§ 8185, 8186 (polytechnic); § 8259 (benevolent); § 8398 (burying-ground); §§ 8429, 8435 (treatment of disease); § 8458 (military); § 8466 (firemen); § 8471 (apprehending horse thieves); § 8480 (detective); § 8493 (equal suffrage); § 8523 (commercial agencies); in various sections, from § 7617 to § 8139, the same is provided in private acts for specifically named associations; 1869, *Gilman v. Rippelle*, 18 Mich. 145, 153 (certification of U. S. land-office documents depends on U. S. laws, not local laws); 1869, *Clark v. Hall*, 19 id. 356 (assignment of a land-office certificate, customarily filed, but not by law, may be proved by certified copy); 1879, *Doyle v. Mixer*, 42 id. 332, 338, 3 N.W. 968 (certified copy of defectively acknowledged arti-

cles of incorporation, excluded); 1884, *Wilson v. Hoffman*, 54 id. 246, 247, 20 N.W. 37 (certificate of the land-office, excluded on the facts).

Minnesota: Gen. St. 1894, § 5717 (State librarian's certified copy under official seal of any judicial decision or proceeding in any law or equity reports in his office or under his charge, or of "any other document or paper in his custody," admissible); § 5722 (certified copy by the official custodian of an affidavit of publication by printer, etc., admissible); § 5725 (certified copy made evidence is to be certified by the official custodian to have been compared and to be correct, and the official seal if any shall be annexed; but this is not to apply to documents in offices of the U. S. government); § 5726 (preceding section not to require seal of court for a rule or order or filed paper proved by copy before the same court or an officer thereof); § 5733 ("copies of all papers, documents, or writings required by law to be filed or left in any public office in this State, and transcripts of any public records kept therein," certified by the officer having the custody, under official seal if any, admissible); § 5734 (copies of records or documents "belonging to, and being in any of the governmental departments of the U. S., authenticated as such, and in accordance with the laws of the U. S. to entitle" them to admission in U. S. courts, admissible); § 5760 (clerk of a district court's record, or certified copy, of certificates and records of marriage, admissible); § 6048 (certified copies of recorded affidavits of foreclosure sales, admissible); § 1703 (copies of papers or records in the office of the adjutant-general, "duly certified and authenticated" under his official seal, admissible); §§ 1751, 1752 (commandant's attested copy of militia regulations, admissible); § 1065 (city recorder's certified copy under corporate seal of papers filed in his office and common council records, admissible); § 881 (Secretary of State's certified copy, under official seal, of an official bond, admissible); § 671 (copies of county commissioners' proceedings, "when signed, sealed, and attested, as provided by law," admissible); § 1820 (town-clerk's certified copy of a highway order, admissible); §§ 7823, 7839, 7844 (certified copy of certain orders laying out county or town drains, admissible); §§ 2397, 2400 (record or a certified copy of the record of the surveyor-general's scale-bills of logs, etc., admissible); § 2403 (certified copy by the surveyor-general or deputy of a record in his office, admissible); §§ 2416, 2418 (certified transcripts of the surveyor-general's record of log-marks, admissible); § 2274 (certified copy of a notary's register, admissible); § 3268 (certified copy of the register of deeds' record of certificate of incorporation of a farmers' mutual insurance company, admissible); § 3394 (Secretary of State's certified copy of a record of certificate of incorporation, admissible); § 3296 (insurance commissioner's certified copy of certain documents of an insurance company's organization, admissible); § 2492

secure the simple general principles which once sufficed and will always remain inherent in the use of this class of evidence. In a few juria-

(bank's certificate of organization, provable by duly certified copy by the register of deeds or State auditor); § 3394 (Secretary of State's certified copy of a recorded certificate of incorporation, admissible); § 3153 (insurance commissioner's certified copy under official seal of papers in his office, admissible); §§ 3038, 3057 (register of deeds' certified copy of certain recorded proceedings of a religious society, admissible); §§ 2319-2329 (certified copies of certain survey-documents, admissible); §§ 1207, 1215 (register of deeds' record of village papers of incorporation or annexation, admissible); § 1338 (village recorder's certified transcript of certain village proceedings, etc., admissible); § 1115 (city clerk's certified copy of the record of certain street proceedings, admissible); § 1360 (village recorder's certified copy of an assessment-roll, etc., admissible); § 3803 (clerk's certified copy of a board of education's records and papers, admissible); § 1107 (13) (city clerk's certified transcript of an assessment of damages for street-taking, admissible); St. 1895, c. 145, § 2 (certified copy of banking articles of incorporation, by the register of deeds or superintendent of banks, admissible); 1863, *Walsh v. Kattenburgh*, 8 Minn. 127, 132 (certified copy of township plats by the register of a U. S. land-office, not receivable without express statutory authority); 1873, *First Nat'l Bank v. Kidd*, 20 id. 234, 237 (U. S. comptroller's certified copy of an organization certificate of a bank, admitted).

Mississippi: Annot. Code 1892, § 1777 ("foreign registers of births, marriages, and deaths," provable by certified copy under official seal "of the officer having custody of the record, and authenticated by the certificate of any public minister, secretary of legation, or consul of the U. S.," but if its execution is disputed under oath, the original must be "produced or its absence accounted for"); § 1783 (copies of "records, books, and files belonging to the offices of the U. S.," (certified by the officer having charge, admissible); § 1785 (copies of field-notes of surveys and of certain maps, deposited in the office of the Secretary of State, land-commissioner, "or other public office," certified by the officer having the custody, admissible); § 1786 (copy, under official seal of the clerk having custody, of a certificate of marriage transmitted to a circuit clerk, or of the record thereof, admissible); § 1791 ("all public officers in this State having the charge or custody of any public books, records, papers, or writings, are authorized to certify copies of the same," to be admissible "in all cases where the original or a sworn copy would be evidence"); § 1793 (in an action on bond given under law by an officer, collector, administrator, executor, or guardian, a certified copy by the officer in whose office it is recorded or filed is admissible; but the original must be produced by the custodian if issue is joined on a plea denying execution); § 1802 (copy of record of an officer protesting a bill or note, verified by his oath, admissible); 1848, *Way v.*

Doe, 10 Sm. & M. 452, 460 (certified copy of a land-office location, admitted); 1854, *Hardin v. Ho-yo-po-nubby*, 27 Miss. 567, 580 (same); 1856, *Davis v. Freeland*, 32 id. 645, 649 (land-officer's letter filed; certified copy admitted); 1900, *State v. Oliver*, 78 id. 5, 27 So. 958 (board of supervisors' book of entries of duplicate receipts of convict-contractor, admitted under C. § 1791).

Missouri: this State vies with Michigan in cumbering the statute-book: Rev. St. 1899, § 3086 (the law of a U. S. State or Territory is provable by "any printed statute-book" certified as correct under official seal by the Secretary of that State or Territory or of this State, the certificate setting out "in full the title-page of such printed book"); § 3083 (Secretary of State's certified copy under official seal of a law, etc., contained in a book, deposited in his office, and purporting to contain acts of the U. S. Congress and to be published by authority of Congress or the U. S.; admissible); § 3093 (certified copies under official seal of papers on file or matters recorded in the office of the State secretary, treasurer, auditor, and register of lands, admissible); § 3094 (entries, etc., in books of a register or receiver, of "any U. S. land-office," provable by his certified copy); § 3095 (so also for any letter received by him by any superior in the U. S. land department); § 3096 (documents lawfully deposited in the office of the State Treasurer or auditor, provable by his certified copy under official seal); § 3098 ("all records and exemplifications of office books, kept in any public office of the U. S., or of a sister State, not appertaining to a court," admissible if attested by the keeper under official seal if any); § 3099 ("exemplifications from the books of the executive department of the U. S., or any papers filed therein, admissible when attested by the President, or a department chief, and "from any State or Territory, of like books or papers," when attested by the Governor or Secretary of State under official seal); § 3100 (ordinances, etc., of a city or incorporated town in this State, provable by the lawful custodian's certified copy under corporate seal); § 3111 (all papers lawfully kept by a surveyor of U. S. lands in this State, provable by his certified copy); § 3124 (official bond of all State officers required by law to give a bond, provable by certified copy by lawful custodian under official seal); § 3125 (contracts with the State or any officer or with any county or for its benefit, by authority of law or court order, lawfully kept in the officer's custody, provable by custodian's certified copy under official seal, or, if no seal exists, verified by affidavit); § 3126 (bond required by law of executors, administrators, guardians, curators, and commissioners, or taken of principal and surety in judicial proceedings, provable by the lawful custodian's certified copy under official seal); § 3. "In a suit brought upon a bond or contract or the three preceding sorts, or defendant's sworn denial of execution, the Court may require production of the origi-

dictions this evil has been avoided; but in most jurisdictions the law has still to be sought in a confused mass of statute and precedent. It is diffi-

mal "if necessary to the attainment of justice"; § 3140 (recorder's certified copy under official seal of a marriage register, admissible); § 3143 (steamboat enrolment in the office of a custom-house or surveyor and inspector of customs, provable by certified copy "by the proper officer"); § 4557 (certified copies of recorded surveys in *perpetuum memoriam*, admissible); § 4564 (certified copy of recorded marriage-affidavit, admissible); § 290 (public administrator's bond, etc., provable by certified copy under probate court seal); §§ 1290, 1437 (certified copy of the Secretary of State's certificate of increase of corporate stock, admissible); § 8660 (certified copy of a guardian's bond, by the clerk of the appointing court, admissible); § 1059 (certified copy of corporate articles of consolidation filed with the Secretary of State, admissible); § 1413 (superintendent of insurance's certified copy of a foreign fraternal beneficiary association's power of attorney to accept service, admissible); § 1247 (certified copy under seal of State, by the Secretary of State or deputy, of articles of association of a telegraph or telephone company, admissible); § 1087 (Secretary of State's certified copy of articles of association of a railroad company, admissible); § 1206 (duly certified copy of proceedings or documents on file in the office of the railroad commissioner, admissible); § 6682 (bond of a commissioner of county seat, provable by certified copy by the clerk of the county court under court seal); § 7600 (tobacco inspector's bond, recorded in the office of the Secretary of State, provable by certified copy); § 10255 (township clerk's certified copy of a constable's bond, admissible); § 5887 (city clerk's certified copy of a city work-book, admissible); § 10026 (Secretary of State's certified copy under official seal of the General Assembly's acts, Governor's acts, and documents lawfully deposited in his office, admissible); § 6789 (certain county accounts, provable by certified copy under seal by the clerk of the county court); § 5870 (city clerk's certified copy under city seal of a record of special assessment proceedings, admissible); § 10271 (township clerk's certified copies of papers duly filed in his office, admissible); § 5540 (city clerk's certified copy under corporate seal of papers filed in his office and common-council proceedings, admissible); § 5458 (city health-commissioner's records, etc., provable by his clerk's authenticated copy); § 5521 (city ordinances provable "by the seal of the corporation"); §§ 5694, 6364 (provable by the same, "attested by the officer having charge thereof"); § 6074 (city park-commissioners' proceedings, etc., provable by the secretary's certified copy under corporate seal); § 10348 (township clerk's certified copy of highway plats, etc., admissible); § 82-0 (Secretary of State's certified copy of plats, etc., of certain school lands, admissible); § 8531 (certified copy of the State dental board's certificate recorded with the clerk of the county court, admissible); § 8556 (tax-collector's certified copy under official seal of a merchant's

statement filed, admissible); 1823, Rector v. Welch, 1 Mo. 334 (State surveyor-general's certified copy of a land-warrant, inadmissible apart from statute); 1835, Bryan v. Wear, 4 id. 106, 110 (land-certificate in a U. S. surveyor's office, proved by certified copy); 1875, Phillips v. Robins, 59 id. 107 (auditor's copy of a collector's bond filed, admitted); 1893, Eichenlaub v. St. Joseph, 113 id. 395, 21 S. W. 8 (the city seal on an ordinance raises a presumption of the latter's genuineness, by statute); 1897, Banking House v. Darr, 139 id. 660, 41 S. W. 227 (sworn tax list; custodian's certified copy, admitted).

Montana: C. C. P. 1895, § 2169 (like Cal. C. C. P. § 1901); § 3206 (like Cal. C. C. P. § 1918, substituting "District" for "Superior" in par. 7); § 3332 (like Cal. C. C. P. § 2011); Civ. C. § 407 (Secretary of State's certified copy of filed articles of incorporation, admissible); § 3284 (county clerk's certified copies of entries of partnership names, etc., admissible).

Nebraska: Comp. St. 1899, § 5982 ("duly certified copies of all records or entries belonging to any public office or by authority of law filed to be kept therein," admissible); § 5991 (legislative journals, provable by certified copy by the appropriate clerk); § 5994 ("public seal of the State or county affixed to a copy of a written law or other public writing," makes it admissible); § 3632 (stock-bond provable by certified copy of record by the register of deeds or Secretary of State under official seal); § 4386 (collector's entry of tax-payment, admissible when the receipt is lost or destroyed); § 1721 (cemetery association's record of organization, provable by the county clerk's certified copy); § 3657 (probate judge's marriage record, provable by certified copy); §§ 758, 970, 1373, 1416, 1601, 1603 (municipal ordinance, provable by the clerk's certified copy under city or village seal); § 1903 (foreign surety-company's power of attorney to accept service, provable by certified copy by the auditor of public accounts); § 2353 (papers filed in a town-clerk's office, and books of record, provable by certified copy); § 5017 (same for State treasurer's copies of papers lawfully filed; St. 1908, c. 17, § 111 (ordinances of cities of the first class are provable by certificate of the clerk under city seal)).

Nevada: Gen. St. 1885, § 3449 (original need not be produced when it is "a record or other document in the custody of a public officer"); § 3618 ("any record, document, or paper in the custody of a public officer of this State, or of the United States," is provable by copy certified under official seal, or "verified by the oath of such officer"); § 758 (certified copy by recorder under official seal, of recorded mark and brand, admissible); §§ 304, 311 (certified copies of mining records deposited with a county recorder, admissible); §§ 322, 342 (copy of a paper, plat, etc., "emanating from" the State land-office under its seal, admissible); § 483 (county recorder's certified copy of a record of a marriage certificate, admissible); § 604 (certified copy, by

cult to say which is the more to be lamented,—the unpractical narrowness of the English common-law rule which led to this legislation, or the cum-

the county clerk or deputy or the Secretary of State, of a filed certificate of incorporation, admissible); § 950 (same for certificates of incorporation for a savings-investment); § 1110 (county auditor's certified copy of a delinquent tax-list, admissible); § 1816 (State comptroller's certified copy of his account, admissible in an action for a debt due to the State); § 2346 (notary's certificate "drawn from his record," admissible).

New Hampshire: Pub. Sta. 1891, c. 173, § 10 (town-clerk's certified copy of his records of birth, marriage, and death, or of the officiating person's certificate of marriage, admissible); c. 224, § 23 (certified copy by the proper officer of any document required to be filed in a public office, and the adjutant-general's certified copy of documents in his office, admissible"); c. 15, § 5 (Secretary of State's certified copies, under seal of State, of records and papers in his office, admissible); c. 28, § 8 (Supreme Court clerk's certified copy of a sheriff's bond, to be evidence in actions thereon); c. 143, § 4 (copy of fence-viewers' division, recorded in town records, admissible); c. 151, § 23 (Secretary of State's or town-clerk's certified copies of records of common proprietors, admissible); c. 61, § 7 (town-clerk's certified copy of proceedings of sale for taxes, admissible); c. 61, § 7 (same for a copy by the local clerk of the Supreme Court in certain cases); St. 1899, c. 57 (a certified copy under oath of a town-clerk or of the secretary of the State board of health, admissible to prove the existence of the regulations of that board); 1831, State v. Carr, 5 N. H. 367, 369 (the seal of another State suffices for a copy of a statute, just as the English great seal does); 1843, Woods v. Banks, 14 id. 101, 109 (the copyist must have "the right to the custody of the records" and be "the person who had the authority to furnish authenticated copies"); 1852, Bowman v. Sanborn, 25 id. 112 (notary's copy of his records, admissible when made under a duty).

New Jersey: Gen. St. 1896, Evidence § 58 (a public record in a foreign State, there admissible, is provable by a copy exemplified according to the laws of the U. S.); § 61 (board of health clerk's certified copy of a recorded return of birth, etc., admissible); § 69 (register of an ex-notary in the United States, legally deposited there in a public office, provable by copy); Promissory Notes § 12 (same for a county clerk's copy of the register of a domestic notary dead, removed from State, or not found); Banking and Insurance Dept. § 6 (certified copies under seal of official papers in the commissioner's office, admissible); Corporations § 12 (county clerk's certified copy of a certificate of corporate organization, admissible); Banking § 3 (county clerk's or Secretary of State's certified copy of a bank's certificate of association, admissible); Bar Assoc. § 5 (Secretary of State's certified copy of an organization certificate, admissible); Benef. Soc. § 55 (banking and insurance commissioners' certified copies

of a foreign fraternal society's power to accept service, admissible); Cities § 1484 (city or city board ordinances, provable by the city clerk's certified copy under seal); Clerks of Courts, etc. (clerk's certified copy of a sheriff's bond, admissible); Munic. Corpor. § 6 (county clerk's certified copy under seal of the recorded bond of a municipal officer, admissible); Marriage, B. & D. § 23 (medical superintendent's certified copy of a record of marriage, birth, or death, admissible); Secretary of State § 8 (his certified copies, under seal, of a law, admissible); St. 1900, c. 150, § 27 (re-enacts Gen. St. Evid. § 58, adding "territory or province," and substituting at the end "acts of Congress of the United States" for "laws of the United States of America"); in this State the failure to accept the American doctrine as to custodian's authority (*ante*, § 1677, where New Jersey rulings are given) explains the following rulings: 1854, State v. Calk, 24 N. J. L. 516 (clerk's copies of surveyors' oaths filed with him, excluded); 1871, Hawthorne v. Hoboken, 35 id. 247, 251 (certified copy of an enlistment record in U. S. War Department, admitted); 1894, West Jersey Traction Co. v. Board, 57 id. 313, 314, 30 Atl. 581 (Secretary of State's certified copy of a railroad route-map lawfully deposited with him, excluded); 1896, State v. Mayor, 58 id. 522, 33 Atl. 553 (an adjutant-general said not to have authority to issue copies of military records).

New Mexico: Comp. L. 1897, §§ 3027, 3028 (records, maps, plats, etc., in the office of the surveyor-general or Territorial secretary, provable by copy or tracing certified by the secretary under official seal or by the surveyor-general and attested by the secretary under official seal; but the Court for good cause may require production of the original); § 3029 (records, plats, or other writings on file in the U. S. surveyor-general's office in N. M., provable in civil causes by his certified copy); § 3191 (certified copy of an officer's bond, in an action at law against the officer, admissible when the bond cannot be produced); § 3115 (certified copy of cattle sanitary board's records by the secretary under his seal, admissible); § 1688 (certified copies of an election certificate, admissible); § 1422 (probate clerk's certified copy of a record of marriage certificate, admissible); § 4160 (certified copy of records, lists, etc., of a revenue assessor, clerk, or collector, admissible); § 792 (certified copy of a county surveyor's survey, etc., admissible); § 416 (Secretary of the Territory's certified copy of a certificate of incorporation, admissible); § 447 (Secretary of the Territory's certified copy, under official seal, of a foreign corporation's charter, etc., admissible); § 449 ("certified copy of any articles of incorporation and changes thereof, together with all indentments thereon, under the great seal of the Territory of N. M., admissible"); § 1523 (superintendent of public instruction's certified copies of his "official acts," admissible).

New York: C. C. P. 1897, § 408 (Secretary

brous crudeness of the enactments which attempted to remedy the common-law shortcomings.

of State's exemplified copy of a filed power of attorney of a foreign corporation to accept service, admissible); § 922 (official certificate or affidavit filed, provable by exemplified copy); § 928 (marriage certificate or entry, provable by certified copy); § 933 (papers or records legally in a public office having a seal, or the Legislature, or "any other public body or public board" having a seal, are provable by copy certified by the official custodian or the board's presiding officer or secretary under official seal; but the seal is not necessary in the case of the Legislature); § 934 (paper or record legally in a town-clerk's office, provable by certified copy); § 941 (proceedings, etc., of a local city council, village trustees, board of health or of supervisors, provable by the clerk's certified copy; see also L. 1878, c. 219, § 1); § 944 (record or paper in a Federal government office, provable by certified copy of the head of the office or of the legal custodian or of the officer federally authorized to certify); § 956 (document in a public office of a foreign country, provable by certified copy under seal of a deeds-commissioner appointed for that country, authenticated by the Secretary of State under official seal); § 957 (where no form is otherwise prescribed, the certifier of a copy must state "that it has been compared by him with the original, and that it is a correct transcript therefrom, and of the whole of the original"); Laws 1848, c. 162, § 5 (canal-board auditor's certified copy of official documents, admissible); Laws 1854, c. 400, § 3 (county clerk's certified copy of a partnership registry, admissible); Laws 1857, c. 405, § 4 (port wardens' certified copy of official records, admissible); Laws 1858, c. 247, § 5 (auditor's certified copy of a canal-vessel lien-claim filed in his office, admissible); Laws 1870, c. 291, §§ 2, 3, 5 (clerk's certified copy under seal of a village election-inspectors' certificate or a collector's return of unpaid tax, or an award of street commissioner, admissible); Laws 1877, c. 311, § 1 (exemplified copy of a certificate of organization of a corporation in another State, etc., made evidence by that State's laws, admissible); Laws 1881, c. 145, § 3 (county clerk's and treasurer's certified copies under seal of certain filed documents, admissible); Laws 1883, c. 205, § 6 (clerk of the board of claims' certified copy under seal of official papers, admissible; see also Laws 1885, c. 135, § 2; Laws 1887, c. 36, § 4); Laws 1884, c. 336, § 1 (county clerk's certified copy of a notice of a public-works appropriation of land, etc., admissible); Laws 1885, c. 342, § 8 (certified copy of a recorded mechanic's lien, admissible); Laws 1890, c. 565, § 167 (railroad commissioners' certified copy under seal of official papers, admissible); Laws 1892, c. 683, § 83 (commissioner of deeds in another State or country; his certified copy under seal of a document there officially filed or recorded, admissible when authenticated by the Secretary of State's certificate); Laws 1892, c. 680, § 4 (bank-superintendent's lawfully certi-

fied copies under seal, admissible); Laws 1892, c. 690, § 4 (same for insurance superintendent); Laws 1893, c. 661, § 5 (certified copies of records of the State board of health, admissible); Laws 1894, c. 338, § 5 (custodian's certified copy of a filed canal-survey map or field-notes, admissible); Laws 1894, c. 556, T. 1, § 5 (State superintendent of school's certified copies under seal of official papers, admissible; see also T. 14, § 3); Laws 1895, c. 927, § 6 (Secretary of State's certified copy under seal of naturalization returns, admissible); 1816, *Mauri v. Heffernan*, 13 John. 73 (foreign notary's copies admissible where a duty exists to certify; see the same case *ante*, § 1676, par. 2); 1817, *Coolidge v. Ins. Co.*, 14 id. 308, 314 (certified copy of a ship's register, made by a collector of the port of registry, excluded because the collector is authorized to furnish only a copy to go with the vessel, "not to grant copies generally"); 1828, *Catlett v. Ins. Co.*, 1 Wend. 561, 578 (certified copy of a ship's register by the register of the U. S. Treasury, where after condemnation the register is filed, received); 1897, *People v. Tobey*, 153 N. Y. 381, 47 N. E. 800 (certificate by a clerk of a commission, failing to state as required by C. C. P. § 957 that the copier has compared the original, admissible under id. § 933, authorizing clerks of public boards generally to certify to copies of records).

North Carolina: Code 1883, § 1335 (Secretary of State's certified copy of a law of another State, Territory, or foreign country, from a printed volume filed in his or the Governor's office or the State library, admissible); § 1340 (Secretary of State's certified copy of a General Assembly's act, admissible); § 1341 (Secretary of State's certified copy of plots, surveys, and abstracts of grant, admissible); § 1342 (keeper's certified copy under official seal of official bonds or writings recorded or filed in any "public office" or in the office of the Governor, treasurer, auditor, Secretary of State, attorney-general, or adjutant-general, admissible, unless the Court orders the original produced); § 715 (county board clerk's certified copies under county seal of the records, admissible); § 662 (register's certified copy of a coroner's bond, admissible); 1796, *Ellmore v. Mills*, 1 Hayw. 359 (proving a statute of Virginia; the secretary of the Commonwealth, not the clerk of the House of Delegates, is the proper officer to certify a statute); 1817, *Denton v. Fonta*, 4 id. 72 (custodian's copy of enlistment contract kept at the adjutant-general's or treasury, not receivable); 1896, *Stata v. Baird*, 118 N. C. 854, 24 S. E. 649 (certified copy by a registrar authorized to preserve a clerk's bond, admitted); 1896, *Barcello v. Hapgood*, 118 id. 712, 24 S. E. 124 (certified copy of a corporate certificate of organization, by the Secretary of State of Maine asserting his custody of the original as a record, admitted).

North Dakota: Rev. C. 1895, § 5700 (like Cal. C. C. P. § 1923); § 5699 (substantially like

The *Federal statute* of 1804 (Rev. St. § 906) is of special importance, because it provides a uniform mode which may be availed of in the court

Cal. C. C. P. § 1918, omitting par. 8); §§ 400, 470 (certified copy of a notary's record by the notary under seal or by the clerk of the district court having custody, admissible); § 1538 (Secretary of State's certificate of a recorded stock-brand, admissible); § 2168 (city auditor's certified copy under corporate seal of papers filed in his office and of city council records, admissible); § 2278 (city auditor's certified copy of a record of street-proceedings, admissible); § 2870 (articles of incorporation, provable by the Secretary of State's certified copy); § 3233 (so also for banking articles); § 3090 (insurance commissioner's certified copy of an insurance company's articles, etc., admissible); § 294 (certified copy of the records of the State board of dental examiners, by the secretary under the board's seal, admissible); § 5862 (certified copy of a publication-affidavit recorded with the register of deeds, admissible); § 3417 (village ordinances, provable by "the ordinance-book or the certificate of the clerk of the village under the seal of the village"); § 2730 (county judge's marriage record-book, provable by his certified copy under court seal); § 1978 (county auditor's certified copy under seal of vouchers, etc., filed in his office, admissible); § 4415 (certified copies by the clerk of the district court of a register of partnerships, admissible).

Ohio: Rev. St. 1898, § 5245 (papers, books, and records lawfully in the office of the Governor or Secretary of State, provable by certified copy of the Secretary under the great seal; in the office of the board of public works, by the board's president; in the auditor's office, by auditor under seal; in office of the surveyor of lands of the Virginia military district, by the surveyor's sworn copy; in the office of the county-recorder and being entries, etc., of above lands, by the recorder's certified copy; in office of the Union County auditor, being such entries, etc., by the auditor's copy (*nomine*); in the office of any Federal executive department, by copy under the department seal); § 3716 (Secretary of State's certified copy of the record of organization of an anti-cruelty society, admissible); § 4143 (b) (recorder's certified copies of land-entries, etc., of the Virginia military district, admissible); § 3238 (Secretary of State's certified copy of articles of incorporation, admissible); § 3447 (same for union-depot corporation); § 6399 (certified copy under probate court seal of an entry of birth or death, admissible); § 2309 (records of a board of city affairs, provable by the clerk's certified copy); §§ 1176, 1196 (certified copy of a county surveyor's book of plats, etc., admissible); § 2304 (same for a filed affidavit of notice of municipal improvement); § 1699 (same for the clerk's certified copy of a municipal ordinance); § 2624 (same for the county recorder's certified copy of a re-survey); § 1506 (same for a township clerk's certified copy of a township-officer's bond); § 108 (same for a certified copy under State seal, by the Governor's private secretary,

executive clerk, or commission clerk, of the records of the Governor's office as to pardons, extraditions, etc.); § 371 (same for the insurance superintendent's certified copy under seal of official papers); § 5 (certified copy of a recorded official bond, admissible); § 89 (pardon-documents, provable by copy certified by the warden and attested by the clerk of the penitentiary); § 2668 (port-warden's surveys, etc., provable by his certified copy under seal).

Oklahoma: Stats. 1893, § 4202 (copies of "all papers authorized or required by law to be filed or recorded in any public office, or of any record required by law to be made or kept in any such office," duly certified by the legal custodian, under official seal if any, are admissible "when such original is not in the possession or under the control of the party desiring to use the same"); § 4204 (Secretary of Territory's certified copy under official seal of a law, etc., contained in "printed statute books of the States and Territories of the U. S., purporting to be printed by authority," and deposited and required by law to be kept in Secretary's office, admissible); § 4269 (certified copy by "the proper officer," under corporate seal, of ordinances, etc., of a city or incorporated town in the Territory, admissible); § 4275 (official custodian's exemplification of books or papers in any department of the U. S. government, admissible); § 1169 (certified copy, by the Secretary of State or a county register of deeds, of a foreign corporation's appointment of agent to accept service, admissible); § 245 (recorded brand of stock, provable by the county clerk's certified copy under official seal); § 1776 (county clerk's certified copy under seal of the proceedings of a board of county commissioners, admissible); § 927 (Secretary of Territory's certified copy of filed articles of incorporation, admissible); § 3076 (insurance commissioner's certified copy of a foreign life insurance company's appointment of attorney to accept service, admissible); § 3034 (same officer's certified copy of the charter and capital-certificates of a domestic insurance corporation, admissible); § 3244 (duly certified copy of a recorded marriage certificate or declaration of entry, filed with the county clerk or register of deeds, admissible); § 705 (town ordinances, provable by the town-clerk's certificate under town seal or by "the ordinance book of the town"); § 3543 (certified copies, by the clerk of the district court, of an entry of partnership names, admissible); § 1671 (duly certified copies of a county clerk's road record, admissible).

Oregon: C. C. P. 1892, § 718 ("every public officer having the custody of a public writing which a citizen has a right to inspect" must give a certified copy on demand, which "is primary evidence of the original writing"); § 736 (a law of one of the U. S. or a foreign country, provable by copy under the public seal); § 748 (like Cal. C. C. P. § 1918; but

of any State or Territory for using certified copies of public documents (not being judicial records) existing in another State or Territory. The

par. 2 adds "or other legal keeper of the originals"; par. 6 inserts "or the U. S."; par. 7 substitutes "judge of a court of record"; par. 9 is omitted; § 744 (like Cal. C. C. P. § 1919); § 811 (like Cal. C. C. P. § 2011, substituting "duly certified"); § 2321 (State treasurer's certified copies of deeds, papers, etc., filed and records kept in his office, admissible).
Pennsylvania: St. 1823, Pepper & Lewis' Dig., Evidence 29 (documents in the offices of the secretaries of the Commonwealth and of the land-office, of the surveyor-general, auditor-general, and State treasurer; certified copies receivable); St. 1823, ib. 31 (treasurers' bonds duly recorded, provable by exemplification); St. 1837, ib. 45 (certified copy of an extract from a burial-register of a religious society or corporate town out of the U. S., receivable; the certificate to be authenticated by the U. S. consul); St. 1840, ib. 11 (certified copy of the recorded bond of a justice, receivable); St. 1840, ib. 12 (same for the commission of a justice or alderman); St. 1843, ib. 35 (certified extracts from assessment books, receivable); St. 1847, id., Deeds 84 (record or certified copy of a duly recorded tax-receipt, receivable); St. 1857, id., Attorney-General 3 (Secretary of Commonwealth's certified copy under seal of an attorney-general's bond, admissible); St. 1859, id., Evidence 36 (certified copies of papers on file and books in the canal commissioners' office, receivable); St. 1860, ib. 49 (certified copy by the health officer of a register-entry of birth, marriage, or death, receivable); St. 1866, ib. 37 (certified copies of ordinances, etc., of the Philadelphia Council, receivable); St. 1867, ib. 33 (certified copies of provost-marshal's documents at certain places, receivable); St. 1868, id., Court Records 16 (certified copies of official bonds recorded with the Secretary of the Commonwealth, receivable); St. 1869, id., Just. Peace 34 (certified copy by the recorder of the bond of a justice or alderman, receivable); St. 1870, id., Evidence 21-24 (powers of attorney from U. S. residents to obtain payment of money at a government office in Great Britain, receipts there given for money so paid, reports awarding the money; provable by certified copy under seal); St. 1876, id., Medicine 39 (custodian's certified copy, under seal, of the dentistry board's certificate, admissible); St. 1876, id., Banking Corp. 2 (auditor-general's certified copy under seal of a banking company's certificate of incorporation, admissible); St. 1876, id., Evidence 50 (acts of foreign notaries, to be verified by the appropriate U. S. consul under seal, the consular seal and signature to be presumed genuine, etc.); St. 1885, ib. 26 (duly recorded inventories, etc., of a decedent's estate, provable by certified copy under seal); St. 1889, ib. 42 (certified copies of documents in the office of the insurance department, receivable); 1811, Young v. Com., 4 Binn. 113 (certified copy by the Secretary of the Commonwealth of a coroner's bond not duly recorded, excluded);

1811, Garwood v. Dennis, ib. 314, 325 (certified copy of a land-office entry by one not the proper custodian, excluded); 1832, Oliphant v. Ferrant, 1 Watts 57 (St. 1823 applied to admit copies of land-office blotters); 1852, Strimpfer v. Roberts, 18 Pa. 283, 297 (same); 1841, Hockenbury v. Carlisle, 1 W. & S. 232 ("exemplified copy from the proper office" is the correct mode; here, for tax-books); 1845, Farr v. Swan, 3 Pa. St. 245, 255 (maps filed in the land-office, provable by certified copy).

Rhode Island: Gen. L. 1896, c. 100, § 15 (municipal clerk's record of a birth, etc., provable by certified copy); c. 102, § 3 (clerk's certified copy of a record of a liquor-license commission or town council, admissible); c. 176, § 15 (Secretary of State's certified copy of documents of organization of corporation, admissible); c. 253, § 38 (same for a foreign corporation's power of attorney to accept service).

South Carolina: St. 1731, Rev. St. 1893, §§ 2362-3 (exemplifications of records attested under the seal of a mayor, Governor, or notary of a domestic or foreign State, receivable conditionally); St. 1856, R. S. § 2357 (copy of any entry in the official books of a sheriff, certified by him under oath before a clerk of court, receivable conditionally, on ten days' notice); St. 1866, R. S. § 2355 (certified copy, "by the officer having the custody," of certain kinds of bonds, and "all other instruments in writing which by law are required or permitted to be in writing, and kept in a public office," receivable, on thirty days' notice); St. 1868, § 2352 (attested copy of an act of General Assembly, by the Secretary of State, receivable; so of "all records, signed by the keeper of such records respectively"); St. 1871, § 2356 (certified copies of "all papers filed in the office of the State Superintendent of Education, and his official acts," receivable); § 513 (custodian's certified copy of a public officer's bond, admissible in an action thereon); § 629 (Treasurer's certified copy of an entry from his books, admissible); St. 1901, No. 365 (certified copy of an ordinance, resolution, or records of a town or city of the State, by the custodian under corporate seal, admissible on ten days' notice to the opponent); No. 437 (certified copy of a county dispenser's bonds, by the officer with whom they are filed or recorded, admissible).

South Dakota: Stats. 1899, § 6542 (like Cal. C. C. P. § 1923); § 634 (county clerk's certified copy under seal of the proceedings of county commissioners, admissible); § 1569 (attested copy of county commissioners' entry of town extension, admissible); § 1593 (town ordinances; like N. D. Rev. C. § 2417); § 967 (county clerk's certified copy under seal of accounts, etc., filed in his office, admissible); § 3072 (registered stock-brand, provable for the former registration-system, by certified copy by the register of deeds under official seal, and for the present system, by a certified copy by the Secretary of State under official seal); §§ 3452, 3455 (certified

principle of a custodian's authority to certify copies is sanctioned, and the authentication of his custody, incumbency, and signature or seal is made

copy by the clerk of a circuit court of a marriage register and return, admissible); § 3463 (certified copy of a marriage certificate or declaration recorded with a city or town clerk or county register of deeds, admissible); § 3819 (Secretary of State's certified copy of articles of incorporation filed, admissible); § 5257 (certified copies by the clerk of a circuit court of a partnership register, admissible); §§ 770, 771 (certified copy of a notary's record by the notary under seal or by the clerk of a circuit court having the custody, admissible); St. 1908, c. 79, § 10 (certified copy of banking articles of incorporation, admissible).

Tennessee: Code 1896, § 5573 (papers "belonging to any public office" or lawfully "filed to be kept therein," provable by certified copies); § 5574 (records, books, and papers of a "county entry-taker's office," provable by certified copies); § 5584 (copy of a legislative journal, domestic or foreign, provable by the legal custodian's certified copy); §§ 5587-88 (written law or "any public writing" of any State, provable by a copy under the great seal; document belonging in the office of a department of the general government, provable by certified copy by the head of the department); § 5590 (certified copy by the Secretary of State from statute-books, etc., described in *id.* §§ 5584-88, in the State library, receivable); § 265 (documents in the comptroller's office, provable by his certified copy under seal); § 1045 (delinquent tax-collector's bond, provable by copy from the comptroller's office, unless the Court requires the original); § 2065 (incorporation-articles, provable by the register's certified copy); § 7357 (existence of a corporation in a criminal case, provable by the charter's "legally authenticated copy"); 1879, *Amis v. Marks*, 3 Lee 568, 570 (certified copy of a filed constable's bond, received); 1899, *State v. Cooper*, — Tenn. Ch. —, 53 S. W. 391 (entry-taker of Carter Co., authorized to certify a copy of the survey).

Texas: Rev. Civ. Stat. 1895, § 2305 (Secretary of State's certified copy under seal of an act in printed statute-book as described *post*, § 1684, deposited in his office, or of a law or bill there lawfully deposited, admissible); § 2306 ("copies of the records of all public officers and courts of this State, certified to under the hand and seal, if there be one, of the lawful possessor of such records," admissible; "translated copies of all records in the land-office, certified to under the hand of the translator, and the commissioner of the general land-office, attested with the seal of said office," admissible); § 2307 (certified copies, under a county surveyor's "official signature," of his records of surveys and plats, admissible); § 2308 ("any paper, document, or record" in the office of the "Secretary of State, attorney-general, commissioner of general land-office, comptroller, treasurer, adjutant-general, and commissioner of agriculture, insurance, statistics, and history," provable by their certified copies); § 2309 (certified copies

of notaries' "records and official papers," admissible); § 2310 (in State suits for official money default, the records of the comptroller of public accounts are provable by his transcript under official seal; and bonds, contracts, etc., connected with the account, are provable similarly when annexed to such a transcript, except that when the suit is on the bond, etc., and execution is denied on oath, the Court "shall require the production and proof thereof"); § 2315 ("Certified copies, under the hands and official seals of the heads of departments, of all notes, bonds, mortgages, bills, accounts, or other documents, properly on file in any of the departments of this State," admissible); § 645 (Secretary of State's certified copy, under the great seal of State, of a corporate charter, admissible); 1847, *Bryant v. Kelton*, 1 Tex. 436, *semble* (certified copy of a record of a bill of sale, excluded because the certifier was not shown to be required by law to keep the records); 1862, *Patrick v. Vance*, 26 Id. 298, 301 (certified copy of field-notes, not properly returned to the survey-office, excluded); 1887, *Harvey v. Cummings*, 68 Id. 599, 603, 5 S. W. 513 (certified copy by the Alabama Secretary of State, from the printed statute-book in his office, admitted).

United States: Rev. St. 1878, § 882 (books, papers, etc., "in any of the executive departments," provable by copy under seal of department); § 883 (books, papers, etc., in the office of the solicitor of the treasury, provable by certified copy under official seal by himself or the acting solicitor); § 884 (papers in the office of the comptroller of the currency, provable by his certified copy under official seal); § 885 (organization certificate of a national banking association, provable by the comptroller of currency's certified copy under official seal); § 886 (in suits for delinquency of money officials, transcripts of books, etc., of the treasury department, certified by the register under department seal, or if accounts of war or navy departments are involved, certified by the proper auditor under the treasury department seal, are admissible; bonds, etc., relating to an account between the U. S. and an individual, provable by certified copy by such register or auditor under department seal; if execution is denied by verified plea or motion, the Court, "if it appears to be necessary for the attainment of justice," may require the production of the original); § 886 (contract returned to returns-office of the interior department, provable by clerk's certified copy under department seal, in a prosecution for false swearing to a return); § 889 (copies of quarterly returns of postmasters and of account-papers in the sixth auditor's office, and of money-order account-books of the post-office department, admissible, when certified by the sixth auditor under official seal); § 890 (certified copy, under the sixth auditor's seal, of a certificate of demand upon a delinquent postmaster, admissible); § 891 (books, papers, etc., in the general land-office, provable by certified copies by the commis-

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by either a judge or an officer representing the supreme Executive, — the former alternative being a practical measure relieving from the inconvenience

done under official seal; see also §§ 3466, 3470); § 892 ("written or printed copies of any records, books, papers, or drawings belonging to the patent-office, and of letters-patent authenticated by the seal and certified by the commissioner or acting commissioner," admissible); § 893 (such certified copies of "the specifications and drawings of foreign letters-patent," to be evidence of their granting, date, and contents); § 894 (printed copies of specifications and drawings, distributed by the patent-commissioner by law and deposited in State capitals, etc., admissible when certified by him under official seal); § 895 (House Journal and Senate Journal and executive Journal, provable by copies certified by the House clerk or Senate secretary); § 896 (official documents and records in the office of a U. S. consul, vice-consul, or commercial agent, provable by his certified copy under seal); § 905 (St. 1790, May 20; "The acts of the Legislature of any State or Territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seal of such State, Territory, or country affixed thereto"); § 906 (St. March 27, 1804; "All records and exemplifications of books which may be kept in any public office of any State or Territory or of any country subject to the jurisdiction of the United States, not appertaining to a court, shall be proved or admitted in any court or office in any other State or Territory or in any such country, by the attestation of the keeper of the said records or books, and the seal of his office annexed, if there be a seal, together with a certificate of the presiding justice of the court of the county, parish, or district in which such office may be kept, or of the Governor, Secretary of State, the Chancellor or keeper of the great seal, of the State or Territory or country, that the said attestation is in due form and by the proper officers. If the said certificate is given by the presiding justice of a court, it shall be further authenticated by the clerk or prothonotary of the said court, who shall certify, under his hand and the seal of his office, that the said presiding justice is duly commissioned and qualified; or, if given by such governor, secretary, chancellor, or keeper of the great seal, it shall be under the great seal of the State, Territory, or country aforesaid in which it is made"; compare the Federal statute post, § 1601, and see the citations in the next note of this section); § 907 ("It shall be lawful for any keeper or person having the custody of laws, judgments, orders, decrees, journals, correspondence, or other public documents of any foreign government or its agent, relating to the title to lands claimed by or under the U. S., on the application of the head of one of the departments, the solicitor of the treasury, or the commissioner of the land-office, to authenticate copies thereof under his hand and seal"; then, on being certified under official seal, by an American minister or consul, shall be sent to the solicitor of the treasury and recorded by him; "a copy" of this record is ad-

missible "equally with the originals"); § 2325 (copy of plat or records of the surveyor-general of Louisiana certified by him, admissible); § 2329 (books, documents, seals, dies, etc., lawfully deposited with the surveyor-general of California, provable by his certified copy under official seal); §§ 4114, 4115 (U. S. marshal's bond in consular courts, provable by certified copy by the secretary of the treasury or the minister; unless the judge, on sworn denial of execution or for other good cause, requires production of original); 1795, *Talbot v. Janzen*, 3 Dall. 133, 137 (collector of the port cannot certify copies of his book-entries); 1804, *Church v. Hubbart*, 2 Cr. 186, 226 (quoted ante, § 1677); 1806, *U. S. v. Johns*, 4 Dall. 412, 415 (certified and sworn copy of a custom-house record of a ship's manifest, admitted without other evidence of the shipmaster's signature); 1833, *U. S. v. Percheman*, 7 Pet. 51, 85 (quoted ante, § 1677); 1840, *U. S. v. Wiggins*, 14 id. 324, 346 (certified copy of a Spanish land-grant, by the custodian, received); 1896, *Smith v. U. S.*, — Ariz. —, 45 Pac. 341 (Treasurer's transcript, admitted under Rev. St. § 886); 1873, *First Nat'l Bank v. Kidd*, 20 Minn. 234, 237 (comptroller's certified copy under seal of a bank's organization certificate, admitted under Rev. St. § 885).

For the rulings interpreting Rev. St. § 906, see note 2, *infra*.

Utah: Rev. St. 1896, § 3380 ("A copy of the written law or other public writing of any other State, or of a Territory, or a foreign country, attested by the certificate of the officer having charge of the original under the public seal of the State, Territory, or country, or attested by the certificate of the keeper thereof and the seal of his office annexed, if there be a seal, together with the certificate of the presiding justice of the county, parish, or district, in which such office may be kept, or of the Governor, Secretary of State, or chancellor, or, if of a foreign country, the certificate of the minister or ambassador, or a consul, vice-consul, or consular agent of the U. S. in such foreign country," is admissible); § 3387 (like Cal. C. C. P. § 1913, except as follows: in par. 1, omitting the first "of the State department" and changing the second to "the departments"; in par. 3 and 7, reading "of another State or of a Territory"; in par. 7, inserting "circuit, district"; in par. 8, inserting "or with the certificate of the minister or ambassador, or a consul, vice-consul, or consular agent of the U. S. in such foreign country"); § 3388 (like Cal. C. C. P. § 1919); § 3393 (like id. § 1923); § 2410 (like id. § 1855, par. 3); § 2444 (certified copy, by the official custodian, of an affidavit of publication of notice, admissible); §§ 1800-1804 (certified copy of an affidavit of mining improvements, mining regulations and records, and mining location-notices, admissible); § 39 (State auditor's certified copy of a recorded stock-brand, admissible); § 319 (certified copy of the Secretary of State's certificate of incorporation, admissible); § 320 (certi-

of resorting to the headquarters of government. The double certificate (of judge and of clerk), required for this form of authentication, seems intended

And copy of corporation papers recorded or filed with a county clerk or the Secretary of State, admissible; § 2435 (State auditor's account of money due to the State, provable by copy); St. 1899, c. 14, § 12 (county recorder's certified copy of district mining regulations, admissible); c. 16 (city recorder's certified copy, under city seal, of record of city ordinance, admissible).

Vermons: State, 1894, § 218 (Secretary of State's certified copies, under seal, of his records, admissible); § 265 (Secretary of State's certified copy of the State treasurer's bond, admissible); § 247 (State treasurer's certified copy of documents in his office, "belonging to his department" or "judged there by law," admissible in civil suits); § 400 (certified copy, by the county clerk or Secretary of State, of a banking corporation's certificate of organization, admissible); § 1250 (copy of the U. S. weather record, certified under oath by the officer in charge, receivable); § 2640 (certified copy of a marriage record, by the legal custodian, admissible); § 2898 (county clerk's certified copy of a sheriff's bond, admissible); § 2929 (county clerk's certified copy of a lost or destroyed sheriff's commission or an accused's recognizance, admissible); § 2935 (county clerk's certified copy of a treasurer's bond, admissible); § 3025 (town-clerk's certified copy of the record of a constable's appointment, etc., admissible); § 3008 (town-clerk's certified copies of documents legally filed or recorded in his office, admissible); § 3094 (Secretary of State's certified copies of township charters, admissible); § 3107 (Secretary of State's or town-clerk's certified copy of a town's vote of aid to a railroad, admissible); § 3765 (Secretary of State's or county clerk's certified copy of a railroad's articles of association, admissible); § 3937 (same for a reorganized corporation); § 4166 (Secretary of State's certified copy of a foreign corporation's appointment of an attorney for service of process, admissible); § 4136 (Inspector of finance's certified copy of the same, admissible); § 4219 (Secretary of State's certified copy of filed documents of an insurance corporation, admissible); § 4387 (adjutant-general's and inspector-general's certified copies of official papers, admissible); St. 1898, No. 61 (town-clerk's certified copy of the recorded bond of town officer, admissible); St. 1903, No. 162 (surveyor-general's books, papers, and records, in possession of the Secretary of State, provable by his certified copy); 1867, *Barnet v. Woodbury*, 40 Vt. 266, 268 (town-clerk's copy of a grand list of assessment, excluded, because his duty is to certify copies of instruments recorded only, and not merely deposited with him).

Virginia: Code 1867, § 207 (House clerk's certified copy of the General Assembly's acts and the House's record and proceedings, admissible); § 3331 (certified copy of an ordinance, etc., of a municipal corporation in the State, receivable); §§ 3334, 3335 (attested copy of "any record or paper in" the office of the Secretary

of the Commonwealth, treasurer, register, either auditor, railroad com'r, agriculture com'r, State assayer and chemist, board of education or of public works, county supervisors, or county surveyor, receivable "in lieu of the original"; but "for good cause shown" the original records of a county surveyor "may be required to be produced"; attested copy of "any record or paper in" the office of the Secretary of State, treasurer, auditor, or a county surveyor, of West Virginia, receivable); § 3343 (records and office-books, not of a court, "kept in any public office" of the U. S. or a State, provable by exemplification by the keeper, under seal of office, if there is one, certified by a judge of an appropriate court of record or by the Governor, Secretary of State, Chancellor, or keeper of the great seal; if by a judge, certified also by the clerk of the court under seal; if otherwise, given under the seal of State); § 3344 (birth-and-marriage register "in any place out of the U. S."; attested copy by a notary under seal of office, certified by a court of record or mayor or under seal of State of the kingdom, province, etc., receivable); 1817, *Warner v. Com.*, 2 Va. Cas. 95, 96 (certificates of the Secretary of State, attested by the Governor of the State, received to show the statute of a domestic State).

Washington: Codes and State, 1897, § 6043 ("Copies of all records and documents on record or on file in the offices of the various departments of the United States and of this State, when duly certified by the respective officers having by law the custody thereof, under their respective seals, where such officers have seals," admissible); § 3111 (certified copy, by the State log-sealer or his deputy, of records in his office, admissible); § 153 (State auditor's certified copy under official seal of documents lawfully deposited in his office, admissible); § 3439 (county auditor's certified copy under official seal of a recorded stock-brand, admissible); § 160 (copies, authenticated by the State Treasurer's official seal, of documents lawfully deposited in his office, admissible); § 421 (county auditor's certified copy, under official seal, of instruments, etc., lawfully filed or recorded in his office, and of records of a board of county commissioners, admissible); § 363 (copies of records of county commissioners, signed and sealed by them and attested by their clerk, admissible); § 180 (certified copy of the State geologist's notice of the dangerous condition of a mine, admissible); § 250 (certified copy of a notary's record, by the notary under seal, or by a county clerk having the custody, admissible); § 3155 (certified copies of records of the mining-district recorder, to have the same effect as "similar papers certified by other officers of this State"); § 7232 (certified copy of a recorded marriage-certificate, on a trial for adultery, etc., admissible); St. 1899, c. 45, § 7 (certified copy of a recorded affidavit of labor on mining claim, admissible); St. 1899, c. 142, § 4, par. 13 (certified copy of all papers filed and

merely to give that additional security which would come from the danger of forging a signature more familiar to the bar.²

official acts of the superintendent of public instruction, attested by his official seal, admissible).

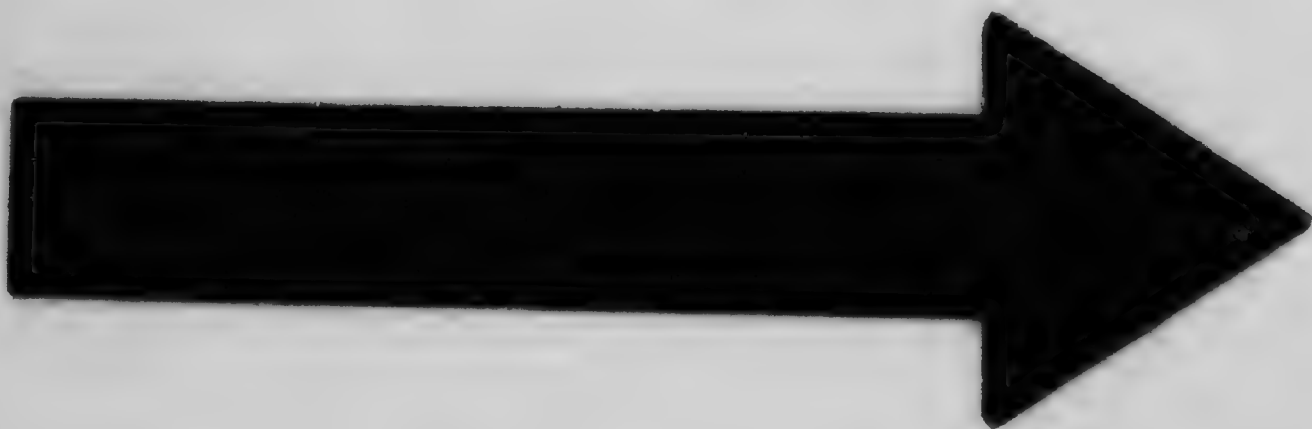
Fla. Florida: Code 1891, c. 63, § 27 (county court clerk's register of marriages, etc., provable by copy "certified by said clerk lawfully having the custody thereof"); c. 180, § 8 (custodian's attested copy of documents in the office of the Secretary of State, treasurer, auditor, or county surveyor, admissible); § 7 (same for the above officers and the land-register and surveyor of Virginia); § 20 (office books kept in a public office of the U. S. or a State, provable by the custodian's attested copy under official seal, certified by the presiding justice of the county or the judge of a court of record of the county or the Governor or Secretary of State or Chancellor or keeper of the great seal: this to be authenticated by the clerk of court under official seal, in case of a presiding justice, or by the great seal of State, if by one of the last four); § 21 (register of births and marriages out of the U. S., provable by a notary's certified copy under seal, authenticated by a court of record, or chief magistrate of a county or city, or by the great seal of State); St. 1903, c. 8, amending Code, c. 84, § 19 (secretary of State's certified copy of a certificate of incorporation, etc., and a printed copy as provided, to be "as evidence, equivalent to the original").

Ill. Illinois: Stats. 1893, § 4148 (any document "filed, deposited, entered, kept, or recorded," or any lawful record, "in any public office or with any public officer of the U. S. or of this State or of any town, school district, county or municipality herein, or any public body or board created under any statute of the State," provable by certified copy); § 4149 (certified copy must be under the custodian's "official seal, or under the official seal of the court, public body, or board, in his custody," when required by law to have a seal; "any certificate purporting to be signed, or signed and sealed as authorized by law, shall be presumptive evidence that it was signed by the proper officer, and, if sealed, that it has the proper seal affixed, except when the law requires an additional certificate of genuineness"); § 4151 a (copy of any record, document, etc., lawfully kept in the office of the public lands commissioners of this State, and certified as in *id.* § 186, admissible); § 186 (commissioners of public lands, preserving all records, books, and other papers pertaining to public lands; a certified copy, by the chief clerk under official seal, of injured or lost documents, shall have the same effect as the original; and a certified copy from any record required to be kept in the office, by the Secretary of State under the great or lesser seal, is admissible with the same effect as the original); § 4176 (certified copy of a recorded affidavit of publication, admissible); § 4181 (corporate charter, certificate of organization, articles of association, and amendments thereof, provable by certified copy); § 4202 ("In every action upon any official bond,

the original bond, or a certified copy," is evidence of execution); § 160 a (records of the board of deposit, provable by the secretary's certified copy); § 4474 (certified copy of books, etc., made by court order, usable on a trial for perjury); § 1008 (certified copy of a tax-stub-book, admissible); § 830 (town treasurer's certified copy of a town-clerk's bond, admissible); § 926 (14) (certified copy of the record of patent of a municipal incorporation, admissible); § 1298 (certified copy of the record of a highway order, admissible); § 1338 (certified copy of the record of a drain order, admissible); St. 1899, c. 258, § 1 (amends Stats. 1898, § 186, by substituting the Secretary of State for the chief clerk of the land-office, as the officer to certify copies); St. 1899, c. 251, § 47 (amends Stats. 1898, § 4196, quoted here post, § 1684, by adding that the State librarian's certified copy of any judicial opinion or any statute of a State or Territory or foreign country, "contained in any book in the State library," shall be receivable); St. 1903, c. 347 (articles of consolidation, etc., of certain corporations, provable by the Secretary of State's certified copy under seal of State); 1893, Lally v. Rossman, 82 Wis. 147, 150, 51 N. W. 1132 (certified copy of a government plat, etc., by the chief clerk of the land-office, admitted under statute).

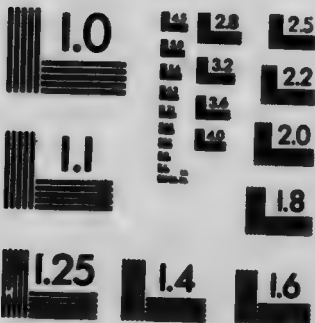
Mont. Montana: Rev. St. 1887, § 40 (certified copies of recorded foreclosure-affidavits, admissible); §§ 502, 511 (certificate of incorporation, provable by territorial secretary's certified copy under great seal); § 525 (running company's road survey, filed with the Territorial Secretary, provable by certified copy under Territorial seal); § 603 (foreign corporation's charter, etc., provable by certified copy by the register of deeds under official seal); § 853 (contents of the bond of a district court clerk, provable by certified copy by the Territorial auditor under official seal); § 1556 (certified copy of a marriage record, admissible); § 1617 (copy of mining-district records, filed with the register of deeds, "shall be taken as evidence"; such records heretofore filed, and transcripts thereof, "shall have the like effect in evidence"); § 1984 (documents duly filed in the office of a county clerk or treasurer, and records kept by him, provable by certified copy under seal of office); § 2593 (like Oh. Rev. § 5245, omitting all between "great seal" and "shall be"); § 3834 (certified copy of the records of a clerk of a board of county commissioners and county treasurer, admissible); St. 1891, c. 95, § 9 (certified copies under official seal, by the Secretary of State, of all records, documents, etc., deposited in his office by law, admissible).

² As to the rulings interpreting this statute, the remarks prefacing note 12, § 1681, post, are here also applicable. The following are some of the rulings in State courts: 1828, Huff v. Campbell, 1 Stew. 543; 1834, Tatum v. Young, 1 Port. 298, 310; 1849, Geron v. Felder, 15 Ala. 304; 1851, Smith v. Redden, 5 Harringt. 321;



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This Federal statute is not exclusive of other rules for certifying copies of public documents in another State or Territory;¹ i. e., the offering party may follow either a common-law mode, or the Federal mode, or the local statutory mode, and a certified copy fulfilling the provisions of the one is not excluded for failure to answer the more onerous requirements of another.

§ 1681. *Certified Copies of Judicial Records (including Probated Wills).* Upon the general principle of the common law as recognized in England (*ante*, § 1677) the custodian of records had, as custodian, *no implied authority to certify copies*. Thus the certified copies of a clerk or other custodian of judicial records were not admissible apart from an express authority appearing. The application of this principle may be considered, first, as to domestic records, next, as to foreign records, and, finally, under the American doctrine and statutes.

(1) A clerk's certified copy — or office-copy¹ — of a domestic judicial record was not admissible, without an express order shown. Such an order could be either a general one or a special one for each instance. A *special order* was implied in the affixing of the great (or broad) seal, kept in Chancery, or of the court seal in any other court; because the judicial affixing of the seal was in effect a sanctioning of the specific copy to which it was affixed. Of *general orders*, there seem to have been three, — by the Chancery court, authorizing office copies of depositions for use in Chancery; by the other courts, authorizing office-copies of documents in the same court and the same cause;² and to the clerk of the rules, in general to certify rules (i. e. orders, judgments, and the like) to inferior courts. The result of these rules, summarized, was practically this: an office-copy (i. e. certified merely by the clerk-custodian) was not admissible, except in an inferior court³ or in the same superior court in the same cause;⁴ while an exemplified copy (representing a special court-order) was admissible without limitation. This rule, and the theory upon which it was founded, was simple enough in essence and was unquestioned. In the following passages its various aspects are

1833, *King v. Dale*, 2 Ill. 513; 1836, *Hudson v. Green H. & S. Co.*, 113 Ill. 618, 630; 1832, *Henthorn v. Doe*, 1 Blackf. 157, 159; 1833, *Johnson v. Rannels*, 6 Mart. N. A. 631; 1860, *Rice's Succession*, 21 La. An. 614; 1849, *Routh v. Bank*, 12 Sm. & M. 161, 186; 1854, *Kidd v. Manly*, 28 Minn. 156, 159; 1855, *James v. Kirk*, 29 id. 206, 210; 1836, *Paca v. Dutton*, 4 Mo. 371; 1841, *Bennick v. Obloo*, 7 id. 197, 203; 1805, *Richards v. Hicks*, 1 Overt. 207.

² 1857, *Parke v. Williams*, 7 Cal. 247, 249; 1839, *Hawes v. State*, 58 Ala. 37, 69, 7 So. 302; 1859, *Karr v. Jackson*, 23 Mr. 316, 318; and the more numerous rulings cited in note 12, § 1681, *post*, dealing with the statute about judicial records. *Contra*: 1833, *Pennel v. Weyant*, 2 Harringt. 501, 505; 1851, *Brown v. Edson*, 23 Vt. 435, 447 (repudiating *Ingersoll v. Van Oilder*, D. Chipm. 59). Compare the rule for Federal and State jurisdiction (*ante*, § 6).

³ "Office-copy" is the original English term for what is with us termed usually "certified

copy"; see the definitions *ante*, § 1644; an "exemplification" is a copy under the court seal or great seal.

⁴ There probably was no express order; the thing was allowed as a matter of convenience, and explained on the theory of a general authority.

⁵ 1699, *Selby v. Harris*, 1 Ld. Raym. 745 (at nisi prius, a rule of the C. P. or K. B. signed "by the proper officer," admissible; because, says Peake, *Evidence*, 33, "the clerk of the Rules is appointed to make out the rules of the court and authenticate them").

⁶ 1838, *Barron v. Daniel*, *Crawf. & D. Abr.* 283 (office-copy from another court, excluded); 1840, *Jack v. Klernas*, 2 Jebb & S. 231, 237 (office-copy in the same cause and the same court, received); 1844, *Pitcher v. King*, 1 C. & K. 655 (action for a sheriff's false return, in the same court as the original suit; office-copy excluded). The limitation as to the same cause did not obtain in Chancery.

expounded; the passage from Chief Baron Gilbert's book was the earliest systematic exposition of the theory, and for a century it served as the foundation for the text of every English writer on evidence:

1611, *Sir Edward Coke*, Note to *Dr. Leyfield's Case*, 10 Rep. 93 a: "A copy of a record, being testified to be true, is permitted to be given in evidence; but the sure way is to exemplify it under the great seal, or at least under the seal of the court."

Ante 1726, *Gilbert*, C. B., Evidence, 11: "The next thing is the copies of all other records [than statutes] and they are twofold: under seal, and not under seal. First, under seal; and these are called by a particular name, Exemplifications, and are of better credence than any sworn copy; for the courts of justice that put their seals to the copy are supposed more capable to examine and more critical and exact in their examinations than any other person is or can be; and besides there is more credit to be given to their seal than to the testimony of any private person. . . . Exemplifications are twofold: under the broad seal, or under the seal of the court. . . . When a record is exemplified under the great seal, it must either be a record of the court of Chancery, or be sent for by a *certiorari* into the Chancery (which is the centre of all courts), and from thence the subjects receive a copy under the attestation of the great seal; for in the first distribution of the Courts, the Chancery held the broad seal, from whence the authority issued to all proceedings, and those proceedings cannot be copied under the great seal unless they come into the court where that seal is lodged. . . . The second sort of copies under seal are the exemplifications under the seal of the court, and these are of higher credit than a sworn copy. . . . Seals of public credit are the seals of the King and of the public courts of justice, time out of mind. . . . But the seals of private courts or of private persons are not full evidence by themselves without an oath concurring to their credibility. . . . The second sort of copies are those that are not under seal, and these are of two sorts, sworn copies, and office-copies. . . . A copy given out by the officer of the court that is not trusted to the purpose . . . is not evidence without proving it actually examined."

1761, *Mansfield*, L. C. J., in *Denn v. Fulford*, 2 Burr. 1177, 1179 (admitting an examined copy of a Chancery bill, and interpreting the stamp law): "How does it appear that it is necessary that a copy of a proceeding in Chancery, given in evidence, must be an office-copy? . . . An office-copy is, in the same court and in the same cause, equivalent to a record; but in another court or in another cause in the same court the copy must be proved."

1767, *Buller*, J., *Trials at Nisi Prius*, 229: "Here a difference is to be taken between a copy authenticated by a person trusted for that purpose, for there that copy is evidence without proof, and a copy given out by an officer of the court, who is not trusted for that purpose, which is not evidence without proving it actually examined. . . . Therefore it is not enough to give in evidence a copy of a judgment, though it be examined by the clerk of the treasury, because it is no part of the necessary office of clerk; for he is only intrusted to keep the records for all men's perusal, and not to make out copies of them."

1801, *Mr. T. Peake*, Evidence, 31: "Something similar to exemplifications under the seal of a court are what are denominated office-copies of its proceedings granted out and authenticated by an officer appointed by the law for that purpose. There are, however, but few instances in which an officer is so entrusted, and though, in cases where he is, the law on account of the confidence reposed in him receives his copy without further evidence, yet where that trust does not form part of the duty of his office, his certificate is no more than that of any other private person, and gives the copy certified no credit whatsoever. Thus, though in every instance where any copy of a proceeding is granted out by an officer of the court, as copies of proceedings in chancery, in the crown-office, etc., it is popularly called an office-copy, and though such copy is for the sake of convenience permitted to be read in any part of the same cause, it is not legally evidence before another court."

1816, *Holroyd, J.*, in *Appleton v. Brough*, 2 Stark. 8, 6 M. & S. 37: "An exemplification is under the seal of the court; which shows it to be the act of the Court, and it is equivalent when the act is done by an officer who has a duty cast on him for the express purpose."

In the *United States*, the more liberal principle that a lawful custodian had implied authority to certify documents was widely accepted (*ante*, § 1677) for public documents in general; and a logical application of it would have sufficed to admit a clerk's certified copy of a domestic judicial record. But this application seems to have been rarely made.⁵ Probably some difficulty was felt about taking judicial notice of the clerk's office and presuming his signature genuine (*ante*, § 1679) for the purpose of authenticating the copy; at any rate, the English rule, requiring the affixing of the court seal, seems to have been generally kept up, apart from statutory modification.⁶

(2) Where the copy was of a *foreign* judicial record, the common-law theory and rule in England was no different from that for a domestic record. There must be an express order of court, and this was indicated by the judicial affixing of the court seal, making an exemplification. It is true that the question might be raised as to the possibility of presuming or judicially noticing the genuineness of the foreign court's seal, and a doubt and uncertainty of practice did exist on this point. But the proper course, if this doubt was sanctioned, was to call a witness and prove the seal genuine, and such was the practice (*post*, § 2164). The inability to notice the seal without proof did not alter the general theory and rule that the seal must be there as embodying an express judicial authority to the clerk to make the copy. This rule and the practice, then, were simple enough (though decidedly inconvenient), and probably would never have suffered confusion, had not Mr. Peake, in the second edition of his treatise on Evidence, in 1804, made the inappropriate suggestion that the copy should bear the broad or great seal of State:

1804, Mr. T. Peake, *Evidence*, 2d ed., 72: "The proof of these proceedings [of a foreign court] has generally been by copies under the seal of the court where they were. There seems no objection to the seal of a court acting on the law of nations [*i. e.* a court of admiralty] being received as evidence of itself. But in my first edition [of 1801] I hazarded an opinion that to prove the seal of a mere municipal court [*i. e.* not of admiralty], some evidence should be given of its authenticity; and a case [*Henry v. Adey, infra*] which has since been determined in the King's Bench [in 1803] has confirmed that opinion. . . . It may be observed that the public seal of one State is matter of notoriety, and may be taken notice of by another, as part of the law of nations acknowledged by all; but when only the seal of a foreign court is put to the copy, it should seem that some evidence should be given of that seal being what it purports to be, for the courts of England cannot judicially take notice of the laws of other countries."

If it was here meant that the great seal should be substituted for the court seal, this might leave the copy unauthorized by court order, and still inad-

⁵ Massachusetts furnishes an instance; but here it was a matter of old tradition.

⁶ See the citations in note 12, *infra*.

missible; if it was meant that the great seal should be added to the court seal, merely to authenticate the latter, this would be theoretically correct, though practically a cumbering of formalities.⁷ The suggestion of Mr. Peake seems not to have been in harmony with the English practice before his time; and it is perfectly clear that thereafter also an exemplification under the foreign court seal was treated as the orthodox form of copy, even though occasionally the seal of some obscure court was required to be specially evidenced as genuine.⁸

But Mr. Peake's suggestion, however fruitless in England, is for us noteworthy; for it seems to have had some influence in establishing for the United States a common-law rule differing widely from the English one. Three years after the first publication of Mr. Peake's book, Chief Justice Marshall enunciated the proposition that a copy of a foreign judicial record must properly bear the foreign great seal of State, not the court seal:⁹

⁷ As in *Spaulding v. Vincent*, 24 Vt. 501, cited *supra*, note 12; see the cases cited *post*, § 2164. In a foreign State not having the peculiar English custom of keeping judicial records in the custody of the holder of the seal of State, or of sending them there to be copied, that seal could hardly of itself import an authority to make a copy.

⁸ 1688, *Olive v. Gwin*, 2 Sid. 145, *semble* (copy of a record exemplified by a Welsh Court of Sessions, received); 1713, *Stennil v. Brown*, 10 Mod. 108 ("A copy of a rule [order] of court, signed by the officer of the court, is no evidence in any other court, unless the judge of the court set his hand to it himself"; requiring an exemplification of a French decree under the court seal); 1724, *Anon.*, 9 id. 66 (exemplification of a decree in Holland, under the seal of the States, received); 1803, *Henry v. Adey*, 3 East 221 (copy of a judgment in the Island of Grenada, certified by the judge under a seal; excluded, because the Court could not judicially notice that the seal was that of the Island, "which was necessary to be shown in order to prove the judgment which it purported to authenticate"); 1807, *Buchanan v. Rucker*, 1 Camp. 63 (copy of a judgment from the court of common pleas in the Island of Tobago, under the chief justice's hand and a seal; the copy authenticated by a witness sworn to the handwriting and to the seal as that of the Island; *Ellenborough, L. C. J.*); 1811, *Flint v. Atkins*, 3 id. 215 (copy of a sentence of condemnation in a foreign court of admiralty; *Ellenborough, L. C. J.*: "If you would prove the sentence, you must produce it under the seal of the court in the usual way"); 1814, *Alves v. Bunbury*, 4 id. 23 (copy of a judgment in the K. B. and C. P. of the Island of St. Vincent, signed by the chief justice and certified under the governor's private seal; *Ellenborough, L. C. J.*, said "it ought either to be proved under the seal of the court, or distinct evidence should be given that the court had no seal and verified its judgments by the signature of the chief justice"; if it were a judgment in a foreign State, he should "require

the same evidence"); 1816, *Cavan v. Stewart*, 1 Stark. 525 (if there is a seal of the court, the authentication must be under it, and not by mere certificate with signature and private seal; here the seal of the court of Jamaica had become so worn that it was seldom used, but its absence was held fatal); 1816, *Appleton v. Lord Braybrook*, Black v. Lord Braybrook, 2 Stark. 6; 6 M. & S. 34 (copies of a judgment in the supreme court of the Island of Jamaica, the first by the chief clerk, with a certificate of the Island secretary to the clerk's office, and another of the governor under the Island seal to the secretary's office; the second by the clerk of the court under private seal, with similar certificates; both excluded; *Ellenborough, L. C. J.*, said that "an exemplification under the seal of the court is certainly admissible," but he held that the court's lack of such a seal did not justify the use of this paper; *Holroyd, J.*: "There is nothing equivalent to the seal of the court, and consequently the evidence is inadmissible"; *Rayley, J.*, pointed out that the Island seal would probably have sufficed, had it been appended directly to the copy); 1824, *Starkie, Evidence*, l. 190 ("If a foreign court has an official seal, it ought to be used for the purpose of authenticating its judgments"); 1850, *Warener v. Kingmill*, 7 U. C. Q. B. 409 (exemplification of a New York judgment, under court seal, received; *Robinson, C. J.*: "The mere exemplification, without any evidence of examination, would of course be sufficient, if properly proved to be under the seal of the court; that is the common practice given of foreign judgments"; here the witness testified to seeing the seal affixed).

The general question of proving the genuineness of a foreign court seal is examined *post*, § 2163; some of these cases are there again considered from that point of view.

⁹ In the argument of the successful counsel, Peake's *Evidence* was cited; moreover there was no English authority which clearly supported that argument; this seems significant.

1804 (February), *Marshall, C. J.*, in *Church v. Hubbard*, 2 Cr. 186, 228 (rejecting a copy of a Portuguese judgment of sequestration, "certified under the seal of his arms by D. Jono de Almeida de Mello de Castro, who states himself to be the secretary of State for foreign affairs"): "Foreign judgments are authenticated, [either] 1, by an exemplification under the great seal, [or] 2, by a copy proved to be a true copy, [or] 3, by the certificate of an officer authorized by law, which certificate must itself be properly authenticated. These are the usual, and appear to be the most proper, if not the only, modes of verifying foreign judgments. . . . If it be true that the decrees of the colonies are transmitted to the seat of government and registered in the department of State, a certificate of that fact under the great seal, with a copy of the decrees authenticated in the same manner, would be sufficient evidence of the verity of what was so certified, but the certificate offered to the Court is under the private seal of the person giving it, which cannot be known to this Court, and of consequence can authenticate nothing. The paper, therefore, purporting to be a sequestration of the Aurora and her cargo in Para ought not to have been laid before the jury."

This rule of the great Chief Justice, repeated within the same year by the Court of New York,¹⁰ was widely copied, and served as a model for many of our Courts. Its employment in practice has now been superseded in most jurisdictions by statutory provisions, which in many instances return to the English rule of requiring only the court seal and in some instances are satisfied with even less; but the rule of Chief Justice Marshall may be regarded as distinctively the common-law rule in the United States. Yet it must be noted that the rule as laid down by him for this country was a perfectly logical one, free from Mr. Peake's error; for, by the theory maintained for this country by Chief Justice Marshall (*ante*, § 1677), the custodian of documents had an implied authority of office to certify copies, and thus no express order of court (by court seal) was needed; the only necessity was to authenticate the custodian's authority, incumbency, and signature, and for this purpose the affixing of the great seal of State was the sole appropriate means.¹¹ The rule of the Chief Justice was therefore a logically correct one under the common-law doctrine of certified copies as maintained by him.

(3) The statutes which have since dealt with this subject in almost every jurisdiction present a great variety of provisions. In general, for domestic records, they accept a clerk's certified copy under his seal; for foreign records, they proceed upon the theory that the custodian of the judicial records is the proper officer to certify copies, and that his certificate must be authenticated by another certificate (stating the authority, incumbency, and signature-genuineness) given by some appropriate superior officer sufficiently high to allow the presumption that his seal is genuine. Other States of the United States are treated as foreign States; yet a distinction is usually introduced, as to modes of authentication, between those States and foreign nations. The

¹⁰ 1804 (August), *Vandervoort v. Thompson*, 2 Cal. 155, 163 (copy of a judgment of a ship's condemnation at Para; Thompson, J.: "This document cannot be considered an exemplification of a judgment; that should be under the great seal; this is only under the seal of arms of the Secretary of State").

The passage on this subject by Chief Justice

Swift of Connecticut, written in 1810 (*Evidence*, 7), shows the two rules, the old and the new one, stated somewhat confusedly as equally valid, and indicates the then novelty of the Federal rule.

¹¹ As already explained *ante*, § 1679; the rule and the authorities are considered in detail *post*, § 2163.

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great seal of State is in general not required, and the court seal (usually required) serves merely as a mode of authentication and not (by the English rule) as an order of court. The practical difference in the latter respect is that a certified copy by the lawful custodian, but lacking a court seal, could upon the American theory be sufficiently authenticated by calling witnesses to the signature, but by the English rule would be incurably defective.¹² The theory of these various modes of authentication has already been examined (*ante*, § 1679).

¹² In the following list are included both *statutes and judicial rulings*, but only a few of the latter are given, the earlier ones being for the most part now of no force and the others dealing chiefly with the verbal interpretation of local statutes; unless otherwise noted, the ruling concerns a domestic record, and where the terms of a decision are not given, it interprets a local statute. The statute list includes provisions as to copies of *probated wills and letters testamentary*, but the judicial rulings on that subject are placed *ante*, § 1658, under Records of Wills; compare also § 1236, for the rule as to producing the original. The statute-list also includes provisions as to copies of documents filed in a court and of depositions filed anywhere; but statutes dealing with ordinary registered deeds, wherever filed, are placed *ante*, § 1651, under Registers of Deeds; the statutes under Miscellaneous Public Documents, *ante*, § 1681, should also be consulted. Provisions dealing with the rule about producing the original as a condition of using a certified copy have already been given *ante*, §§ 1215-1217. Provisions concerning judicial notice of officers in general will be found *post*, § 2578, and concerned the presumed genuineness of seals in general, *post*, §§ 2163, 2164. Distinguish the principles as to what constitutes a record (minute-book, judgment-roll, original writ, justice's docket, etc.), briefly noticed *post*, § 2450. Note also that in a few jurisdictions (as in England and Delaware) judicial records may be provable without special statute under the general terms of the public-document statute given *ante*, § 1680.

ENGLAND: 1838, St. 1 & 2 Vict. c. 94 (cited *ante*, § 1680); 1851, St. 14 & 15 Vict. c. 99, § 7 (judicial records of a foreign State or a British colony are provable by copy purporting to bear the seal of the court, or if none, to be signed by any judge of the court with a recital that no seal exists; no proof being necessary of the genuineness of seal or signature or the truth of the recital or of official character); § 14 (cited *ante*, § 1680).

CANADA: *Dominion*: St. 1893, c. 31, § 10 (records of any court in the United Kingdom or of Canada, or any court or justice of the peace or coroner of a province of Canada, or any court in a British colony or possession or in the United States or a State thereof or any other foreign country, are provable by exemplification or certified copy under seal of the court or of the justice or coroner, without proof of seal or signature "or other proof whatever"; and if the Court "has no seal or seal certifies," then under

signature of a judge without proof thereof "or other proof whatsoever"); § 19 (reasonable notice, not less than ten days, required for using such copies).

British Columbia: Rev. St. 1897, c. 71, § 11 (like Can. St. 1893, c. 31, § 10); § 20 (like *ib.*, § 19); § 34 (depositions provable by certified copy of the officer taking, without proof of his signature); c. 161, § 26 (judicial declaration quieting title, provable by registrar's certified copy "without accounting for the non-production of the original"); c. 71, § 35 (will of real estate is provable by the probate or letters, or a copy thereof, under seal of the court, on at least ten days' notice to the opponent; the same to suffice unless the opponent within four days after receipt gives notice of intention to dispute the will's validity); § 37 (for wills of persons dying in British possessions out of British Columbia, but affecting real estate within it, the probate or a judge's or clerk's certificate of the execution and of the filing of the original in a court of such possessions, suffices, on similar notice; but the probate or certificate "shall not be used" if the Court doubts as to the sufficiency of execution); § 38 (the certificate need not be proved as to the officer's appointment, authority, or signature); c. 73, § 31 (like c. 71, § 13, *supra*, substituting a certification by the registrar of the court).

Manitoba: Rev. St. 1902, c. 57, § 12 (substantially like Can. St. 1893, c. 31, § 10); § 21 (like *ib.*, § 19); c. 40, Rule 480 (like Ont. Rule 480); c. 128, § 25 (office-copy of a judgment of partition, admissible); c. 41, § 79 (official administrator's bond, provable by the provincial Secretary's certified copy under the Great Seal of Manitoba, without proof of seal or signature); c. 57, § 22 (on ten days' notice, the probate or letters *a. d. a.* under seal of the Surrogate Court may be admitted, and shall be sufficient evidence "of such will [of real estate] and of its validity and contents," even though not granted in solemn form, unless within four days after receipt of notice the opponent gives notice of intention to dispute its validity); § 24 (the will of a person dying in British possessions without Manitoba and leaving real estate within it is provable, without the original, on one month's notice, by the probate, or a certificate of the judge, registrar, or clerk, that the original is there filed and purports to be executed before two witnesses; this to be "*prima facie* evidence of the will and the contents thereof and of the same having been executed so as to pass real estate"; but the probate or certificate shall not

be used if the judge "made reason to doubt" the sufficiency of execution and so orders; § 26 (for the above certificate no proof of the official's appointment, authority, or signature is needed).

New Brunswick: Consol. St. 1877, c. 46, § 12 (all judicial proceedings of "any court" in the United Kingdom or any foreign State or Canadian province or British colony, and all "legal documents filed or deposited in any such court," are provable by copy under seal of Court, or if there is no seal, under signature of a judge, with a statement of the lack of a seal; and no proof of the seal or signature or the truth of the statement is necessary); St. 1892, c. 11, § 2 ("any will duly proved either within or without the province" as provided in Consol. St. c. 74, § 6, may be registered in the county of the land concerned "without the said will being previously admitted to probate"); St. 1889, c. 5, and St. 1894, c. 20, § 81 (substituting the following for Consol. St. c. 74, § 25; the probate or administration letters of a will deposited in a court out of the province, but affecting lands within it, when purporting to be under the hand of the custodian and the seal of the court, or an exemplification similarly authenticated, when proved before a person authorized to take acknowledgments and authenticated like deeds, shall be evidence "of the said original will being deposited" as above, and may be registered with like effect as the original); *ib.* § 32 (will affecting land in the province but probated in British dominions out of the province; a copy by any court officer and under court seal, with a certificate of a judge of the court, shall be evidence of the original having been "proved and registered" there, and may be registered here like an original, and a certified copy will be evidence); § 61 (registrar's certified copy of a registered will is evidence of its contents and execution, on six days' notice with a copy of the copy); 1890, *Dec v. Savoy*, 30 N. Br. 227, 232 (admissibility of a certified copy of an unprobated will from the registry of deeds, considered); Consol. St. 1877, c. 77, §§ 14, 15, and St. 1892, c. 11, § 2, construed; 1895, *Murray v. Duff*, 33 id. 361, 362 (St. 1892, applied).

Newfoundland: Consol. St. 1892, c. 5, § 6 (all "judicial proceedings of any court of justice in Great Britain or Ireland or in any foreign State or in any British colony" and all "legal documents filed or deposited in any such court" are provable as in N. Br. Consol. St. 1877, c. 46, § 12; nor need the judicial character of the signer be proved); c. 80, § 23 (certified copy of a registered probated will, admissible "in the event of the loss of any original will or the probate thereof"); c. 50, Rules of Court 33, par. 3 (documents filed in the Supreme Court are provable by office-copies).

Nova Scotia: Rev. St. 1900, c. 163, § 15 (certified copy, under seal of court or the proper officer's hand, of any document "filed in any court in this Province" is admissible; certified copy of any order or entry of judgment suffices, without producing the record or other proceeding); § 16 (like Can. St. 1892, c. 81, § 10); § 21 (the probate or the registrar's certified copy of a will, or an examined copy of the original will,

"when such will has been recorded," is admissible; but the Court may order production of the original, or direct such other proof of it "as under the circumstances appears necessary or reasonable for testing the authenticity of the alleged will and its unaltered condition, and the correctness of the prepared copy"; this section to apply to wills proved "elsewhere than in this Province," provided the original has been deposited and probate granted in a court having jurisdiction); § 23 (for such copies, ten days' notice and a schedule of documents must be given, unless the Court dispenses); Rules of Court 1900, Ord. 35, R. 3 ("certified copies of all writs, records, pleadings, and documents filed in the Supreme Court" are admissible like the originals).

Ontario: Rev. St. 1897, c. 73, § 31 (exemplification under seal of court is admissible for any judicial proceeding in the Supreme Court of Judicature in England or Ireland or the Superior Courts in Scotland or any court of record in a province of Canada or any British possession or "of the United States or of any State of the United States of America," "without any proof of the authenticity of such seal or other proof whatever," in the same manner as a proceeding of the High Court of Ontario may be proved by exemplification in that court); § 41 (will may be proved by probate or letters of administration *c. t. a.*, or a copy, under seal of the Surrogate Court or the former Court of Chancery, if ten days' notice before trial is given; unless the opponent within four days after receipt of notice gives notice of intent to dispute the validity); § 42 (for wills of real estate probated and filed in any court of the British possessions out of Ontario, of a person there dying, one month's notice is to be given, and the probate or a certificate of prescribed tenor may be used; but the Court, if doubting the probate or certificate); Rules of Court 1897, § 496 (custodian's certified copy of a writ, etc., filed "in any office of the Court," admissible); 1889, *Barber v. McKay*, 17 Ont. 563 (certified probate copy from the registry office, excluded, no notice having been given).

Prince Edward Island: St. 1889, c. 9, § 21 (like Newf. Consol. St. 1892, c. 57, § 6, including the Dominion and provinces of Canada); § 23 (execution and contents of a will are provable by exemplification under seal of court where recorded, or of the judge or registrar thereof, or of "the custodian of such will," whether in this province or elsewhere in British dominions or in any foreign country; also its probate under seal of "any court of competent jurisdiction"; the seal, signature, and authority of the officer need not be proved); §§ 55, 56 (certified copies of depositions, without proof of the officer's signature, admissible).

UNITED STATES: Alabama: Code 1897, § 4231 (will duly probated and recorded, receivable "without further proof thereof," or a certified copy); § 4232 (admitting a certified copy of a will probated in another State, by the clerk of court, with certificate of a judge, or by the judge only, if no separate clerk; out of the

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U. S., by the clerk of court, with certificate of a judge, or by the judge only, if no separate clerk, with attestation of a judge of a court of record, mayor, or U. S. consular, etc., officer); § 2679 (justice's judgment, provable by certified copy by him or by his successor in possession of docket); § 79 (letters testamentary and of administration, provable by certified copy); 1831, *Torbert v. Wilson*, 1 Stew. & P. 200, 204 (certified copy by a clerk under private seal, there being no official court seal, sufficient); 1874, *Powell v. Young*, 51 Ala. 518, 520; 1890, *Hully v. Bass*, 68 id. 206, 208 (affidavit-certificates of a judge of a Florida court, not properly authenticated); 1892, *Barnes v. Campbell*, 71 id. 371, 394 (justice's record, not provable by certified copy, but by sworn copy); 1897, *Stevenson v. Moody*, 85 id. 33, 4 So. 586 (affidavit of exemption, and a record of it in probate court, provable by the certified copy without more; explaining the contrary intimation in *a. c.*, 83 id. 4, 418, 3 So. 695).

Alaska: Civ. C. 1900, § 151 (like Or. Annot. C. 1892, § 2038).

Arizona: Rev. St. 1887, § 1869 (records of all "courts of this Territory," provable by certified copy under seal of "the lawful possessor of such records"; so also id. § 1870); § 3251 (probated will, provable by certified copy); § 1874 (in a suit on any instrument in writing filed in a suit in another court of the Territory, a certified copy by the clerk of court under seal is admissible; but the clerk of court shall be subpoenaed to bring it, if the opponent denies execution in a plea and affidavit); § 1875 (certified copy under official seal, by territorial officers, of all notes, bonds, etc., "or other documents, properly on file with such officers," admissible); § 3184 (claim of title by a third person to personalty levied upon; copy of the writ of levy, admissible in trial in another county).

Arkansas: Stats. 1894, § 2677 (justice's certified copy of proceedings before him, admissible); § 2678 (clerk of the circuit court's certified copy of justice's records delivered to him by law, admissible); § 3023 (certified copy of a deposition *in perpetuum*, admissible on a trial elsewhere than in the circuit court of the county where filed); § 7427 (probated will, provable by exemplification of record by the clerk having custody).

California: C. C. P. 1872, § 1905 ("A judicial record of this State or of the United States, may be proved by the production of the original, or by a copy thereof, certified by the clerk or other person having the legal custody thereof. That of a sister State may be approved by the attestation of the clerk and the seal of the court annexed, if there be a clerk and seal, together with a certificate of the chief judge or presiding magistrate that the attestation is in due form"); § 1906 ("A judicial record of a foreign country may be proved by the attestation of the clerk, with the seal of the court annexed, if there be a clerk and a seal, or of the legal keeper of the record, with the seal of his office annexed, if there be a seal, together with a certificate of the chief judge or presiding magistrate that the per-

son making the attestation is the clerk of the court or the legal keeper of the record, and in either case, that the signature of such person is genuine, and that the attestation is in due form. The signature of the chief judge or presiding magistrate must be authenticated by the certificate of the minister or ambassador, or a consul, vice-consul, or consular agent of the United States in such foreign country"; amended by the Commissioners in 1901, by substituting, in the first sentence, after "certificate," the following, "of the minister or ambassador or a consul, vice-consul, or consular agent of the U. S. in such foreign country, to the effect that the signature of such person is the genuine signature of the clerk or other legal keeper of the record, that the same is a valid subsisting record of such country, and that the attestation is in due form"; for the validity of the Commissioners' amendments, see *ante*, § 488); § 1921 (justice's record in a sister State, provable by the justice's certified transcript; amended by the Commissioners in 1901 by substituting "the docket or other book of proceedings of a court not of record"); § 1922 (such transcript may be authenticated by a certificate of the clerk or prothonotary of the county of justice's residence under seal of the county or of the common pleas or county court); § 1923 ("duly authenticated" copy of foreign probated will, receivable for probate); § 1923 (see the quotation *ante*, § 1680).

Colorado: C. C. P. 1887, § 358 ("A judicial record of this State or of the United States may be proved by the production of the original, or a copy thereof, certified by the clerk or other person having the legal custody thereof under the seal of the court to be a true copy of such record"); § 359 (from any other U. S. State or Territory, "by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with a certificate of the judge, or presiding magistrate, as the case may be, that the said attestation is in due form"); § 360 (from a foreign country, "certified by the clerk, with the seal of the court annexed if there be a clerk and seal, or by the legal keeper of the record," with official seal, if any; and with a certificate by a judge of the court attesting the clerk's certificate; and also a certificate of the U. S. minister or ambassador or consul as to the court's jurisdiction and official signatures); § 370 (certified copy of deposition *in perpetuum*, admissible); § 922 (all papers duly filed or deposited with a county judge, and all record-books there kept, provable by certified copy under official seal); § 1102 (records of a county judge, provable by certified copy by the county judge or clerk); Annot. Stats. 1891, § 1747 (justice's proceedings, etc., provable by the justice's certified copy under seal; if offered in another county, then also attested by the county clerk's certificate); § 4679 (exemplified copy of a record of a probated will, admissible); § 467 (copy of a will, etc., recorded with the county recorder of deeds, admissible); § 2931 (judgment of insanity by a foreign court, provable by certified copy by the court or a judge under court seal, attested by the U. S. minister, ambassador, consul, or vice-consul); 1889, Thal-

Boimer v. Crow, 12 Colo. 267, 405, 22 Pac. 779 (clerk of U. S. circuit court's certified copy of tax-bill admitted).

Columbia (District): Comp. St. 1894, c. 20, §§ 23 ff. (like U. S. Rev. St. §§ 899, 906, 907); § 23 (debt of record in another of the U. S. or any foreign country, provable by the keeper's exemplification under official seal); § 23 (any "instrument of writing" lawfully "lodged for safekeeping in any office or court," provable by the keeper's certified copy under official seal); c. 70, § 18 (probated will in the District, provable by record or by record of transcript); Code 1901, § 1070 (quoted ante, § 1680); § 1071 (certified copy of a will and decree of probate, admissible to prove execution).

Connecticut: Gen. St. 1897, § 440 (Judge or clerk's certified copies, with or without court seal, of probate records, admissible); § 460 (same for a lost bond filed in probate court); § 707 (ex-justice's certified copies of his records, admissible); § 2073 (superior court clerk's certificate as to the fact of a liquor license, admissible); 1798, *Spangill v. Perkins*, 2 Root 374 (certificate of a clerk of court in another country, excluded); 1857, *Dibble v. Morris*, 26 Conn. 416, 424 (clerk of probate alone, and not the judge, is authorized to certify copies of records).

Delaware: Rev. St. 1893, c. 84, §§ 6-8 (provisions for proof by copy of a foreign probated will); c. 107, § 14 ("any record or paper belonging to a public officer or legally in the custody of a public officer," provable by the custodian's certified copy under seal).

Florida: Rev. St. 1892, § 1106 (judicial records of this State, or the U. S., or a State or Territory thereof, provable by copy attested by the officer having charge, under court seal; a recital by the attester that he has such charge, to be *prima facie* evidence); § 1110 (wills and administration letters recorded in a public office of this State, provable by the keeper's certified copy; probated wills in a U. S. State or Territory or foreign State, provable if certified according to the law of the place of probate granted); § 1141 (certified copy of a recorded deposition *in perpetuum*, admissible).

Georgia: Code 1895, § 5211 (record in a public office, provable by certified copy); § 5213 (same for letters testamentary, of administration, and of guardianship); § 5214 (justice's records, provable by certified transcript, authenticated when out of the county by the county ordinary); § 5290 (probated will, provable by certified copy); §§ 5291, 5301-5303 (foreign probated will, provable according to the Federal statute); § 5167 (judicial records and probated wills, provable by copy); § 5237 (judicial records of a State, etc., of the U. S., provable by the clerk's attested copy under court seal, certified by the judge, chief justice, or presiding magistrate); § 5232 (a "foreign judgment" must be authenticated by copy under great seal of State); 1879, *Back v. Grimes*, 62 Ga. 605; 1899, *Bell v. Bowdoin*, 109 id. 209, 34 S. E. 339 (certified copies of copies of lost justice's papers established under C. §§ 5213, 5214, admissible without proving loss of original); 1900, *Sloan v. Wolfstahl*, 110 id. 70, 35 S. E. 344 (copy of

a record in another U. S. State must bear the great seal).

Massachusetts: Civil Laws 1897, § 1396 ("all judgments, orders, and other judicial proceedings of any court of justice in any part of this Republic or in any foreign State, and all affidavits, pleadings, and other legal documents, wills, and codicils filed or deposited in any such court," are provable by examined or certified copy); § 1406 (probate of a will, or letters of administration *a. t. a.*, "shall be *prima facie* evidence of the original will or codicil"); § 1409 (record of a court of record or a judge thereof at chambers is provable by transcript "authenticated by the attestation of the clerk of such court with the seal of such court annexed," or of the judge at chambers with the court seal); § 1410 (docket of any circuit judge at chambers or any district magistrate; transcript of the judgment, execution, and return, "when subscribed by said judge or magistrate," shall be admissible).

Idaho: Rev. St. 1897, § 5974 (like Cal. C. C. P. § 1905, substituting "a State or other Territory" in the second sentence); § 5975 (like Cal. C. C. P. § 1906); §§ 5980, 5981 (like Cal. C. C. P. §§ 1921, 1922, substituting "a State or other Territory"); § 5992 (like Cal. C. C. P. § 1923); § 5999 (writing itself must be produced, except "when the original is a record or other document in the hands of a public officer"); § 4760 (justice's docket, provable by certified copy of clerk or justice or his successor); St. 1891, Feb. 3, § 24 (certified copy of the sentence of a convict, delivered by the officer to the warden, to be "evidence of the fact therein contained").

Illinois: Rev. St. 1874, c. 3, § 56 (authenticated copy of an inventory or bill of appraisement of a decedent's estate, admissible); c. 30, § 33 (certified copies of deed-registry's record of probated wills and exemplified foreign wills, admissible); c. 33, § 474, St. 1893, June 23 ("duly authenticated copy of the record of a former conviction," admissible in proving a prior conviction of habitual criminals); c. 51, § 18 ("The papers, entries, and records of courts may be proved by a copy thereof certified under the hand of the clerk of the court having the custody thereof, and the seal of the court, or by the judge of the court if there be no clerk"); § 17 (justice's proceedings provable by certified copy by the justice under private seal or his successor having custody, and, if offered out of the county of justice's residence, attested by the county clerk's certificate); § 46 (certified copy of a recorded deposition *in perpetuum*, admissible); c. 148, § 2 ("authenticated copies," with a certificate of probate by "the proper officer or officers," of a will of land in this State proved according to the laws of "any of the U. S., or the Territories thereof, or of any country out of the limits of the U. S.," may be recorded and be "as good and available in law" as wills executed here); § 10 ("all original wills, or copies thereof, duly certified according to law, or exemplifications from the records in pursuance of the law of Congress in relation to records in foreign States," may be recorded and be good and available in law); § 11 (certified copies of a record of wills in the county court, by the clerk under court seal,

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admissible); 1672, *Breckett v. People*, 64 Ill. 170 (certified copy of a record of naturalization in Missouri, by the clerk under court seal, excluded); 1895, *Garden City S. Co. v. Miller*, 157 Id. 225, 41 N. E. 783 (Rev. St. c. 51, § 12, making judicial records provable by the clerk's certified copy under court seal, includes records out of the State, because such a copy was already admissible at common law for records within the State; the act of 1872, Rev. St. c. 51, § 12, simply repeats that rule for domestic records, and extends it to foreign records); 1902, *People v. Miller*, 195 Id. 621, 63 N. E. 604 (approving the preceding case).

Indiana: Rev. St. 1897, § 463 (judicial records of a State, etc., of the U. S., provable "by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form"); § 467 (records of a justice of the peace in the U. S., provable by certified copy under seal of the justice or his successor or the justice having legal custody, with the certificate of the clerk of a court of record of the county or district); § 468 (records of a local justice, provable by certified copy under seal by him or by the justice having legal custody); § 484 (records of a U. S. State or Territorial court, provable by the clerk's attestation under court seal, with the seal of the chief justice or other judge or presiding magistrate certifying due attestation); § 484 (recorded depositions in *perpetuum memoriam*, provable by certified copy); § 2446 (letters testamentary and of administration, provable by certified transcript); § 2504 (name for foreign representative's appointment); § 1024 (decree of court changing a name, provable by the clerk's certified copy under court seal); § 1765 (indictment "lost, mislaid, stolen, or destroyed," provable by court clerk's certified copy of the record); § 2810 (probated will, provable by the court clerk's certified copy under official seal); 1857, *Dragoon v. Graham*, 9 Ind. 212 (foreign judgment of justice of the peace); 1861, *Vaughn v. Griffith*, 16 Id. 353 (same); 1861, *Phelps v. Tilton*, 17 Id. 423, 426 (same); 1871, *Ault v. Zehring*, 23 Id. 429, 431 (same); 1881, *Bradford v. Russell*, 79 Id. 64, 70 (foreign judgment).

Iowa: Code 1897, §§ 4644-4647 (like Nebr. Comp. St. §§ 5867-5869); § 3286 (record, or properly authenticated transcript, of a probated will, admissible); 1855, *Lattourette v. Cook*, 1 Ia. 15; 1860, *Guendorf v. Gleason*, 10 Id. 436; 1871, *Railroad Bank v. Evans*, 32 Id. 202, 205; 1872, *Darrah v. Watson*, 36 Id. 117, 118; 1897, *Rowe v. Barnes*, 101 Id. 302, 70 N. W. 197 (excluding a certificate of a foreign record in the name of the judge instead of the clerk).

Kansas: Gen. St. 1897, c. 97, § 3 (record lawfully kept in "any public office," or a paper lawfully filed or recorded there, provable by the custodian's certified copy under official seal); § 4 (ex-justice's records, provable by certified copy of the justice in possession); § 20 (foreign country's judicial records, provable by the legal custodian's "official attestation," with a certificate of one of the judges or magistrates of such court as to due attestation, and the "offi-

cial certificate" of the custodian of the "principal seal of the government," under that seal, "stating that such court is duly constituted, specifying the general nature of its jurisdiction, and verifying the seal of the court"); c. 110, § 17 (recorded probated will, provable by the probate judge's certified copy under court seal); § 24 (will probated in a State or Territory of U. S., recorded in a local probate court, provable "like a local will"); § 37 (same for a foreign probated will, after local hearing and reprobate); 1900, *Drumm v. Cassum*, 61 Kan. 467, 59 Pac. 1078 (c. 97, § 4, applied).

Kentucky: Stats. 1865, § 1627 (record of paper properly in the clerk's office of any court, provable by the custodian's attested copy, "upon proof of the execution of the original"); § 1630 (entry of date of execution, etc., from a clerk's or justice's book, admissible in a proceeding against the officer and sureties); § 1635 (records of a court of "any State," provable with the same effect as in such State by the clerk's attested copy under seal of court, certified by the judge, chief justice, or presiding magistrate; records of any court of U. S., provable with the same effect as in U. S. courts by the clerk's attested copy under court seal); § 1636 (records of any court out of the U. S. provable by the keeper's attested copy certified under official seal by a U. S. consul, chargé, or minister); 1827, *Thomas v. Tanner*, 6 T. R. Jour. 52, 53, (authority of a clerk of another State court to give copies, presumed).

Louisiana: Code Pr. 1894, § 752 (judgments in "the different courts of the U. S., provable by certified copy of the clerk under his seal, attested by the judge, chief justice, or magistrate who presides in the court"); § 753 (judgments in foreign countries, provable by copy "clothed with all the forms required to prove their authenticity in the countries" where rendered); Rev. Laws 1897, § 1430 (certified copy by the recorder or justice, of testimony at a fire inquest, admissible); St. 1883, No. 140 ("only certified copies of inventories of a succession" in New Orleans, when returned into court, admissible); St. 1870, No. 43 (in any trial in a district or parish court, "any record, paper, or document belonging to the files or records of either the district or parish court of the parish in which the trial is proceeding" is provable by the document itself produced by the clerk of the district court, without making a copy, unless the case is appealed to the Supreme Court); 1822, *Hanna v. His Creditors*, 12 Mart. 32, 52 (mortgage register's certificate of copy of a judgment, excluded).

Maine: Pub. St. 1883, c. 82, § 107 (records of a Federal or other State court, provable by the clerk's attested copy under court seal); c. 70, § 5 (register's certified copies of the insolvency court's records, admissible).

Maryland: Pub. Gen. L. 1883, Art. 25, § 36 (debt of record in another of the U. S., provable by exemplification of the keeper under seal of the court or office); § 58 (court of chancery; keeper's certified copy under official seal of books, papers, etc., in his custody, admissible); § 60 (certified copy under official seal by the

clerk of any court or register of wills, of any record in his custody, admissible, including any paper required to be recorded; § 60 (same for judicial proceedings, not required to be recorded, copied from papers, docket, and minutes); Art. 54, § 4 (land-office commissioner's transcript of a docket of proceedings, admissible); Art. 98, §§ 54, 56 (to prove a named executor to be infamous or insane, a transcript of a court-record of adjudication is admissible); § 112 (register of wills' certified copy of a record-certificate of an administrator's notice to creditors, admissible); §§ 285, 286 (custodian's certified copy under seal of court or office of a foreign will required to be recorded or lawfully lodged for safekeeping or authorized to be recorded, admissible); § 286 (authenticated copy of a foreign probated will recorded by a domestic wills-register; register's certified copy under official seal, admissible); § 289 (will probated in a domestic court may be required by the Court to be produced for proof, in custody of the register or deputy).

Massachusetts: Pub. St. 1882, c. 155, § 42, Rev. L. 1902, c. 155, § 37 (justice's certified copy of a judgment transcribed by himself, admissible); P. S. c. 157, § 6, R. L. c. 163, § 10 (register's certified copies of insolvency courts' proceedings, admissible); P. S. c. 168, § 67, R. L. c. 175, § 71 (judicial records of other States, provable by copy under attestation of the officer having charge of the records, with the court seal); St. 1882, c. 211, R. L. c. 165, § 24 (certified copies of records of former trial-justices deposited with a clerk of courts, admissible); 1881, Com. v. Phillips, 10 Pick. 28, 30 (record of a court in the State, provable by certificate of the clerk, under the court seal); 1860, Chamberlin v. Ball, 15 Gray 352 (for a record of a court in the State, "it is not necessary that it should be an exemplified copy under the seal of the court; . . . in Massachusetts it is sufficient if the copy is attested by the clerk; this rule of evidence is founded on immemorial usage"); 1901, Willock v. Wilson, 176 Mass. 68, 50 N. E. 757 (deputy clerk's certified copy from another State, held defective in not stating that the certifier was custodian of the records).

Michigan: Comp. L. 1897, § 10145 (records of a court in a U. S. State or Territory or foreign country, provable by attestation of the clerk under court seal, or of the legal custodian under official seal); § 10147 (any common-law mode, to be still proper); § 10171 (records of a justice of the peace in another State of the U. S., provable by the justice's certified copy, attested by the clerk of a court of record in the county or district under official seal); § 9042 (recorded letters testamentary or of administration or guardianship, provable by certified copy of the registry of deeds); §§ 9046, 9047 (judgments recorded in a deed-registry, provable by certified copy); § 646 (records of a probate court, certified under court seal, admissible); § 959 (justice's record, provable by his certified copy); § 1256 (record of condemnation proceedings, provable by certified copy of the clerk or the register of deeds; see also id. §§ 2928, 3240); § 2129 (certified copy of a convict's sentence, admissible); § 9207 (re-

corded probated will, provable by the probate judge's certified copy under seal); § 9471 (probate court's adjudication of heirs, provable by certified copy); § 10019 (decrees of sale of water-craft, provable by the clerk's certified copy); § 10046 (same for proceedings under a creditor's bill); 1868, *Facey v. Fuller*, 18 Mich. 527 (justice's transcript); 1871, *Shotwell v. Harrison*, 22 Id. 410 (same); 1871, *Goodsell v. Leonard*, 28 Id. 274 (same); 1876, *Willer v. Goodrich*, 34 Id. 84 (same); 1881, *Campbell v. Wallace*, 45 Id. 320, 9 N. W. 492 (same); 1882, *Winnor v. Wirth*, 48 Id. 201, 13 N. W. 194 (assignment in bankruptcy); 1886, *Holcomb v. Tift*, 54 Id. 647, 20 N. W. 627 (justice's transcript); 1892, *Howard v. Coon*, 68 Id. 442, 444, 25 N. W. 515 (same).

Minnesota: Gen. St. 1894, § 5706 (records of "any court of any State or Territory or of the U. S.," admissible "when authenticated by the attestation of the clerk, prothonotary, or other officer having charge," under court seal); § 5743 (clerk's certified copy under official seal of minutes of conviction and judgment, with a copy of the indictment, sufficient without producing the judgment-roll); §§ 5744, 5745 (justice of the peace's certified copy of his docket, admissible in any court in the county); § 5746 (the same when read in another county must be authenticated by certificate of the clerk of the district court of the county of the justice's residence under court seal); § 5747 (minutes of a justice, when equivalent to his record, provable, if he is dead or absent, by sworn copy); § 5748 (certified copy of a justice's certificate of conviction, admissible); § 5749 (judgment of a justice "in any State or Territory of the U. S.," provable by an "officially certified" copy by him or his successor, with a certificate of magistracy authenticated by the clerk of a court of record in that county under court seal); § 3006 (taking land for a cemetery; the clerk's certified copy of the judgment when recorded, admissible); § 4452 (probated will, or its record, or a transcript of the record certified by the probate judge under court seal, admissible "without further proof"); § 4715 (certified transcript of a locally recorded copy of letters testamentary or of administration or guardianship, in or out of the State, admissible); § 4739 (certified copy of a defectively probated will, admissible on certain conditions); § 4616 (certified copy of probate papers concerning sale of land by an executor, etc., by the probate court under official seal or by the register of deeds when recorded, admissible); § 4701 (probate court's certified copy of the official bond of an executor, administrator, or guardian, admissible); § 5697 (certified copy of a recorded deposition *in perpetuum*, admissible); § 7476 (clerk's certified copy of a sentence, etc., furnished to prison officers, admissible on *habeas corpus* application); 1872, *Bryan v. Farnsworth*, 19 Minn. 289; 1884, *Horrick v. Ammerman*, 32 Id. 544, 21 N. W. 826; 1886, *Gunn v. Peakes*, 36 Id. 177, 179, 30 N. W. 466 (certified copy by a clerk of court, authenticated by the great seal of Nova Scotia appended to a certificate of the keeper of the seal, admitted).

Mississippi: Annot. Code 1892, § 1775 (certi-

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and copy of a recorded deposition in perpetuum, admissible); § 1777 ("copies of all judgments, decrees, and specialties of record in any foreign country," admissible if certified under official seal by the "officer having custody of the record, and authenticated by the certificate of any public minister, secretary of legation, or consul of the U. S."; but if execution is disputed under oath, the original "shall be produced or its absence accounted for"); § 1780 (copies of the record of a land-conveyance under a justice's judgment and of the record of a certified transcript of proceedings and of the record of an execution and return, certified by the clerk under official seal, admissible); § 1781 (certified copy, under official seal, by the clerk, of wills and of their record when lawfully recorded, admissible); § 1783 (copies of "records, books, and files belonging to the offices of the U. S.," certified by the officer having charge, admissible); § 1787 (duly certified copy of a record of appointment and qualification of an executor, administrator, or guardian, in other States, Territories, or the District of Columbia, or foreign countries, and a certificate that he is liable to account by the office to whom he is accountable, admissible); also a certified copy thereof by the clerk of the chancery court where filed); § 1790 (duly certified copy of a taxed bill of costs, admissible); § 1792 (copy of an entry on the judgment-roll, with the caption at the top of the page of entry, certified by the clerk under seal of court, to be "competent evidence of such enrollment"); § 1794 (in a suit on a writing filed in a suit brought thereon in another court, a copy attested by the clerk of the latter court is admissible); 1837, *Strong v. Runnels*, 2 How. 667 (copy of a Tennessee record, admitted on the facts).

Missouri: Rev. St. 1899, § 3125 (Judicial records of the U. S. or any State, attested by the clerk under court seal if any, and certified by the judge, chief justice, or presiding magistrate, "shall have such faith and credit" as in their own jurisdiction; records in this State are provable by copy attested by the clerk under court seal, or, if no seal, under his private seal); § 3137 (proceedings of a justice of the peace, provable by certified copy by the justice or the lawful custodian); § 3138 (justice's records lawfully in custody of the clerk of a county court, provable by the clerk's certified copy); § 3139 (justice's proceedings, provable by certified copy by his successor in possession, or by the lawful custodian); § 4540 (certified copies of depositions in perpetuum, admissible); § 2851 (clerk's certified copy of a fee-bill, admissible); § 25 (letters testamentary and of administration, provable by certified copy under court seal); § 2495 (certified copy, under probate court seal, of the appointment of a guardian or curator, admissible); § 4557 (certified copies of recorded depositions to establish land-corners, admissible); § 4569 (certified copy of a recorded land-title decree, admissible); §§ 4692, 4695 (probate clerk's exemplification of the record of a probated will, admissible); 1838, *Wineand v. Conner*, 5 Mo. 296; 1850, *Halet v. Rice*, 13 id. 171 (certified transcript of a justice's record must be by

one legally possessed of his papers); 1853, *McDermott v. Barnum*, 19 id. 304.

Montana: U. C. P. 1894, §§ 3196, 3194 (like Cal. C. C. P. §§ 1905, 1904); §§ 3200, 3210 (like Cal. C. C. P. §§ 1921, 1922).

Nebraska: Comp. St. 1899, § 5907 (Judicial record of this State or a Federal court, provable by certified copy of the clerk or legal custodian under seal of office); § 5908 (of a sister State, by attestation of the clerk under court seal, certified by the "judge, chief justice, or presiding magistrate" to be in due form); § 5909 (proceedings before a justice of peace in any of the U. S., by the justice's certificate, "supported by the official certificate" of the clerk of any court of record in the county); § 5990 (Judicial records, provable as in Kan. Gen. St. c. 97, § 20); § 4114 (will established after contest, and recorded, provable like a recorded deed); § 4115 (recorded exemplification of a chancery decree affecting realty, provable by the record or an exemplification thereof); 1901, *Linton v. Baker*, — *Nebr.* —, 96 N. W. 261 (statute applied to admit a copy of a judgment of the Queen's Bench Division of the English High Court of Justice).

Nevada: Gen. St. 1885, §§ 2443-2444 (certified copies of depositions in perpetuum, admissible); § 2451 (Judicial record of this State, or of the U. S., or any Territory, provable by certified copy by the clerk or other legal custodian under court seal); § 2452 (Judicial record of any other State of U. S. or any Territory, provable by the clerk's certified copy, under court seal, if any, with a certificate of attestation by the judge, chief justice, or presiding magistrate); § 2453 (Judicial record of a foreign country, provable by certified copy of the clerk under court seal, if there be a clerk and seal, or by the legal keeper under official seal if any, with a certificate of attestation by a judge of the court, and a certificate of signatures and jurisdiction by a U. S. minister or ambassador or consul); § 2692 (record of a probated will, and the clerk's exemplification, admissible); § 2739 (certified copies of letters testamentary and of administration, admissible); § 682 (copy of a court-martial record, certified by the officer authorized to approve it, admissible in suit to collect the fine imposed).

New Hampshire: 1834, Mahurin v. Bickford, 6 N. H. 567 (certified copy of a Vermont justice's judgment, by the county clerk, excluded).

New Jersey: Gen. St. 1896, Evidence § 58 (record in a foreign State, there admissible, provable by copy exemplified according to U. S. law); Conveyances §§ 114-116; Orphans' Courts §§ 24, 236, 247, 248, 253 (provides for admission of copies of a foreign probated will); Courts § 77 (same for the register's certified copy of a local probated will); Orphans' Courts §§ 6, 21, 22 (similar, for a county surrogate's copies and register's copies); Partition § 10 (orphans' court clerk's certified copy under court seal of the commissioner's appointment and report, admissible); Poor § 27 (court clerk's certified copy under seal of a pauper-support award, admissible); Practice § 302 (certified transcript of a sheriff's return, by the

sheriff or court clerk, admissible); Orphans' Courts § 140 (receipts to an executor, etc., recorded with the surrogate on proof or acknowledgment like a deed, provable by the record or a certified copy under seal, if the original is lost or not in the power of the offeror to produce).

New Mexico: Comp. L. 1897, § 3064 (duly certified copies of recorded depositions in *perpetuum*, admissible); § 1089 (probated will, certified by the clerk under court seal, or a duly authenticated transcript of record, admissible).

New York: C. C. P. 1877, § 883 (judicial records in the State, provable by the clerk of court's certified copy under seal of court); § 938 (local justice's docket, provable by his certified transcript); § 939 (justice's transcript of a docket-book, authenticated by the county clerk's certificate under seal, admissible); § 940 (deceased or absent justice's minutes, provable by an examined copy); § 943 (record of a court of the United States, provable by certified copy of the clerk or custodian); §§ 948, 949 (judgment, proceedings, etc., in the docket-book of a justice in an "adjoining State," provable by the justice's certified transcript, authenticated by the clerk of the county under the county court seal); § 953 (foreign country's judicial record, provable by copy attested by the clerk of court under court seal or by the custodian under official seal, certified by the chief judge or presiding magistrate of the Court, and certified also by the custodian of the great or principal seal of government under that seal); §§ 2629-2632 (mode of proving a probated will by copy, prescribed); §§ 2703, 2704 (foreign probated will; mode of proof prescribed); Rev. St. 11, 738, § 8 (Secretary of State's exemplification of a transcript of judgment of conviction, admissible on a trial for a subsequent offence); St. 1897, c. 403, 605 (provisions for authenticating foreign probated wills, revised); St. 1900, c. 633 (similar); St. 1903, c. 472 (similar); 1902, *Lazier v. Westcott*, 28 N. Y. 146, 148 (copy of a record of a Canadian court, held duly authenticated).

North Carolina: Code 1883, § 1343 (writings "recorded or filed as records in any court," provable by the keeper's certified copy under official seal, unless the Court orders production of the original); § 1343 (letters testamentary, inventory, etc., in another State, provable by certified copy according to Federal law or by "the proper officer of the said State or Territory"); § 1344 (will by an inhabitant of another State or Territory, of property in this State, provable, if the original cannot be obtained, by copy certified under Federal law or by the proper officer, etc.; see also *id.* §§ 2156, 2157); §§ 2175, 2181, 2182 (certified copies of locally probated wills, admissible; details prescribed).

North Dakota: Rev. C. 1895, § 5691 (judicial records of a court of the U. S. or any U. S. State or Territory, provable by the clerk's certificate of "the judge, chief justice, or presiding magistrate"); § 5692 (judicial records of a foreign country; like Cal. C. O. P. § 1906); §§ 5694, 5695 (justice's docket record, provable in the same county or subdivision by certified

copy by himself or his successor; in another county or subdivision, the certificate of the clerk of the district court must be added); § 5700 (like Cal. C. O. P. § 1923); § 5711 (certified copies of depositions in *perpetuum*, admissible).
Ohio: Rev. St. 1898, § 5931 (certified copy of a recorded will with probate, admissible).

Oklahoma: Stat. 1893, § 4261 (judicial records in a foreign country, provable by copy officially attested by the clerk or other lawful custodian, with certificate of attestation by "one of the judges or magistrate[s] of such court," and the official certificate, as to the court's jurisdiction and seal, of the officer having custody of the principal seal of government); §§ 4267, 4268 (justice's certified copy of proceedings before him, admissible); §§ 4268, 4269 (proceedings before a former justice, provable by certified copy by the justice in possession of the records); § 4284 (certified copies of depositions in *perpetuum*, admissible); § 5357 (same for deposition taken for the accused); § 1277 (letters testamentary or of administration, provable by transcript of the minutes of court, with the judge's certificate under court seal of his qualification and the non-revocation of letters); § 1283 (letters issued in any of the U. S. or Territories, provable by certified copy "under seal of the authority granting the same"); § 1587 (clerk of a district court's certified copy of indictments, informations, and bonds filed, admissible when the original is "lost, destroyed, or stolen, or for any other reason cannot be produced at the trial"); § 5456 (sheriff's certified copy of process of commitment and returns thereon, admissible); § 1633 (county clerk's or recorder's record of a recorded certified copy of a probated will, admissible like a record of a deed to real estate).

Oregon: C. C. P. 1892, § 730 (like Cal. C. C. P. § 1905, without requiring court seal for local or U. S. records); § 731 (substantially like Cal. C. C. P. § 1906, but substituting, for the U. S. officer's attestation, the certificate of the foreign officer having the custody of "the great or principal seal of the government," verifying the signatures of the clerk and magistrate and certifying the jurisdiction); §§ 746, 747 (like Cal. C. C. P. §§ 1921, 1923, substituting "under the seal of his office" in § 747); §§ 862, 863 (certified copy of proceedings and deposition in *perpetuum*, admissible); St. 1891, Feb. 5, § 3 (record, or duly certified copy, of a probated will recorded in a deed-registry, admissible "in all controversies relating to real property situate in the county" of record); Code 1892, § 2063 (foreign probated will, recorded like a domestic probated will, provable in the same manner).

Pennsylvania: St. 1832, St. 1839, P. & L. Dig., Decedents' Estates 57, 60 (copies of recorded probated wills and of the probate, receivable; also copies of wills, after probate is conclusive, recorded in another county where the land is); St. 1844, *id.*, Evidence 53 (certificate of a court prothonotary in this State, not under seal of office, of an acknowledgment of a sheriff's deed, receivable conditionally, though not recorded); St. 1845, *id.*, Just. Pence 47

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(certified copy of a justice's proceedings, verified under seal of the appropriate clerk, receivable; St. 1860, id., Evidence 20 (record of proceedings before a justice or alderman in any other State; certified copy by the justice, etc., verified by certificate of the clerk of the appropriate Court of record under seal, receivable); 1859, *Magee v. Scott*, 32 Pa. 539 (a justice's docket is not a record; hence, his certificate of a copy is inadmissible, except by statute).

Rhode Island: Gen. L. 1896, c. 312, § 33 (certified copies of executor's or guardian's discharge, etc., recorded in a probate court, admissible); c. 320, § 19 (moneys for lost bond filed in probate court); c. 323, § 33 (district court clerk's or judge's certified copies under seal of a justice's transferred records, admissible).

South Carolina: St. 1800, Code 1902, § 2392 (certified transcript of minute-books of a domestic Court of record, by the clerk or lawful custodian, receivable); St. 1865, St. 1901, Code 1902, § 2494 (exemplification of a probated will, under hand and seal of the probate judge and court seal, or the hand and seal of any other officer having legal possession, receivable after ten days' notice); § 2495 (exemplification and certificate, by the judge, of a foreign probated will, receivable).

South Dakota: Stats. 1899, § 6534 (like N. D. Rev. C. § 5691, but omitting to provide for U. S. courts); §§ 6536, 6537 (justice's docket, provable by his certified copy; but in any other county or subdivision, a certificate of the clerk of the circuit court under court seal must be added); § 6542 (like Cal. C. C. P. § 1923); § 6552 (certified copies of depositions in *perpetuum*, admissible).

Tennessee: Code 1894, §§ 5570-82 (certified copy of a judicial record in (1) this State, (2) a U. S. State, or (3) a foreign country, receivable; to be authenticated (1) by the clerk or legal custodian under seal of office; (2) by the clerk under seal of office, with the judge's certificate of due attestation, or by a justice of the peace for his own record, with the certificate of a clerk of a court of record in the county; (3) by the clerk or a legal custodian, with certificate of the judge of court, and certificate of the custodian of the great seal of government under that seal; §§ 3913, 3915, 3920, 3927, 3929-32 (certified copies of probated wills, a. s. etic and foreign, receivable; but the original of a will of real estate may be required to be produced, upon a suggestion of "fraud committed in the drawing or obtaining" or "any irregularity in the executing or attestation"; further details prescribed); 1871, *Coffey v. Neely*, 2 Heisk. 304, 307 (foreign clerk's certificate under Code § 5530, formerly § 3795; seal of office, without seal of court, sufficient).

Texas: Rev. Civ. Stats. 1895, § 2306 (copies of all records of "courts of this State, certified to under the hand and seal, if there be one, of the lawful possessor," admissible); § 2314 (in a suit on an instrument filed in another court of this State, the clerk's certified copy under court seal is admissible, but upon affidavit denying execution, the clerk shall attend with the original); § 1908 (certified copy of testimony at a will-probate, admissible).

United States: Constitution 1789, Art. IV, § 1 ("Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof"); Rev. St. 1878, § 905 (St. 1790, May 26: "The records and judicial proceedings of the courts of any State or Territory, or of any such country [subject to the jurisdiction of the U. S.], shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form"; for rulings under this statute, see *infra*, notes 13-16; compare Rev. St. § 906, in note 1, § 1680, *ante*); 1804, *Church v. Hubbard*, 2 Cr. 237 (quoted *supra* in the text); 1809, *Yeaston v. Fry*, 5 id. 235, 243 (proceedings in the vice-admiralty court of Jamaica, under certain seals, received); 1826, *Catlett v. Ins. Co.*, 1 Paine C. C. 594, 613 (consular certificate of an officer attesting a foreign judgment, excluded); 1899, *Wagner v. County Com'rs*, 34 C. C. A. 147, 91 Fed. 969 (Maryland secretary of State or court clerk, not authorized to certify to the genuineness of a justice's signature to a judgment).

Utah: Rev. St. 1898, § 33-2 (for a record of this State or of the United States, like Cal. C. C. P. § 1905, first part; for a record of another State or a Territory, like the same section, second part); § 3385 (for a record of a foreign country, like Cal. C. C. P. § 1906, except that only one certificate is needed, and that from any one of the seven officers named); § 3390 (like Cal. C. C. P. § 1921, reading "of another State or of a Territory"); § 3391 (like Cal. C. C. P. § 1922, inserting "or court of general jurisdiction").

Vermont: Stats. 1894, § 1053 (county clerk's certified copy of records of a former justice deposited with him, admissible); § 1279 (certified copies by the county clerk of recorded depositions in *perpetuum*, receivable); § 2353 (attested copies of probate decrees, receivable, and certificates of probate, administration, and guardianship, receivable like the probate, etc.); § 2367 (so for a copy of a foreign will and probate thereof); 1852, *Spaulding v. Vincent*, 24 Vt. 501 (copy of a foreign record must be "certified by the clerk and the presiding judge and the seal of the court, with the broad seal of the province or kingdom to the appointment of the judge, with the proper certificate from the office of appointment"); 1855, *Parish v. Pearsons*, 27 id. 621 (copy of a domestic judgment must be authenticated by court seal).

Virginia: Code 1887, §§ 3334, 3335 (attested copy of "any record or paper in the clerk's office of any court" in the State or in West Virginia, receivable); § 3342 (attested copy of the records of a U. S. or State court, by the clerk of court under court seal, if there is one, certified by the judge, chief justice, or presiding magistrate as attested in due form, receivable); § 3344 (notarial copy of record "in any foreign court," re-

(4) The *Federal statute* (Rev. St. § 905), passed in 1790, has been of particular importance, not only as furnishing a model for State legislation, but also as providing under the Constitution a rule which is available in any State or Territorial court, for using certified copies of judicial records from another State or Territory.¹² It has been generally conceded that this Federal

copy, if under seal of office and certified by a court of record or mayor or seal of State of kingdom, province, etc.); § 2596 (authenticated copy of a foreign probated will and probate certificate of property in the State, admissible); 1811, *Hadfield v. Jameson*, 3 Munf. 53, 71, 77 (certified copy of a judgment from the British governor of Hispaniola, under the Governor's seal, not the colonial seal, received); 1817, *Gibson v. Com.*, 2 Va. Cas. 111, 120 (a copy of the General Court's judgment, certified by its clerk, is evidence in the Superior Court); 1826, *Dickinson v. M'Graw*, 4 Rand. 153, 160 (statute applied).

Washington: Codes and Stats. 1897, § 6040 (records of any court of the United States, or any State or Territory, admissible "when duly authenticated by the attestation of the clerk, prothonotary, or other officer having charge of the records of such court, with the seal of such court annexed"); § 6083 (certified copy of a deposition *in perpetuum*, admissible); § 6107 (a duly probated and recorded will, "certified by the judge of the superior court and attested by the seal of said court, may be read as evidence without any further proof"); § 6108 (record of the foregoing, and exemplification thereof by the clerk having custody, admissible); § 6130 (foreign probated wills; copy to be authenticated by attestation of the clerk of court, or if no clerk, of the judge, and "by the seal of office of such officers, if they have a seal"); § 6135 (copy of letters testamentary or of administration, or of the record thereof, certified by the clerk under seal of the superior court, admissible).

West Virginia: Code 1891, c. 120, § 5 (clerk of court's attested copy of a document in his office, admissible); § 7 (same for a Virginia clerk); § 19 (records of a court of the U. S. or of any State, Territory, or District, provable by the clerk's attested copy under court seal, certified by the judge, chief justice, or presiding magistrate to be attested in due form); § 21 (record of a foreign court, provable by a notary's certified copy under seal, authenticated by a court of record or the chief magistrate of a county or city or the great seal of State); c. 50, § 181 (justice's docket entry, provable by a transcript by him or his successor or its lawful custodian).

Wisconsin: Stats. 1898, § 4140 (domestic courts; record provable by certified copy by "the clerk, judge, or justice having legal custody of the original," under seal "of the court or of such officer"); §§ 4121, 4124 (certified copy of a recorded deposition *in perpetuum*, admissible); § 4142 (justice of the peace's certified transcript of his proceedings, admissible before him); § 4143 (justice of the peace's proceedings, provable in any court in the same county by a

copy certified by him or his successor or other legal custodian; in any other county, by the same, with a certificate of the clerk of the circuit court of the county under court seal); § 4144 (record of an absent or deceased justice, authenticated by proving his handwriting to the produced record, or by proving a sworn copy and the handwriting of the original entries); § 4145 (record of any court of the U. S. or of any State or Territory or District thereof, provable "when authenticated in the manner directed in § 4140, by the attestation of the clerk, prothonotary, or other officer having charge of the records of such court, with the seal of the court annexed"); § 4146 (records of a justice or other court not of record in any U. S. State or Territory, provable by certified copy by the justice or his successor, with a certificate by the clerk of a court of record in the county under court seal); § 4147 (records in a foreign country, admissible "when authenticated in the manner required in the two preceding sections"; proof of genuineness of signatures of the authenticating officers and of seal of court of record is "not to be required in the first instance"); § 4149 (certified copy, when made admissible must have the official seal of the custodian or of the court; the signature and seal will be presumed genuine, except when an additional certificate is required); § 4150 (but the seal of court is not necessary for a copy to be used before the same court); § 2295 (certified copy of a recorded foreign probated will, admissible).

Wyoming: Rev. St. 1897, § 2243 (probated will, certified by the probate judge under court seal, or the record thereof or a transcript duly authenticated, admissible "without further proof"); § 2004 (certified copies, under seal of the probate court, of letters testamentary and of administration, and the record thereof, admissible); § 3071 (certified copy of a deposition *in perpetuum*, admissible); § 1904 (copies under seal of office of records or writings duly filed in the office of the probate judge, admissible).

¹² As between the Federal courts themselves, the statute lays down no rule; consequently (ante, § 6), the ordinary rule for courts within the same jurisdiction is applicable, namely, a clerk's copy under court seal suffices, without the statutory certificate of the judge; 1877, *Turnbull v. Payson*, 95 U. S. 418, 424 (even where the record is from another circuit or district); 1899, *National Acad. Soc'y v. Spiro*, 37 C. C. 288, 94 Fed. 750 (and a deputy clerk's certificate will be presumed to have been made during the clerk's absence).

The same is true of a Federal record-copy offered in a State court: 1903, *Allison v. Robinson*, 135 Ala. 434, 34 So. 966 (a Federal record need not be certified by the judge when offered

provision is not exclusive of other rules, but is merely additional to them.¹⁴ Thus there are now usually three sets of rules, by any of which such a certified copy may be prepared and admitted,—the common-law rule, the local statutory rule, and the Federal rule; one of them being often more liberal or simple than the others. It is worth noting that, although another of the rule adopted in the Federal statute is not the one prescribed by Chief Justice Marshall for foreign records, but corresponds in form to the orthodox English rule, with the addition of a formal certificate of the clerk's authority by the judge. The fact that this statute was passed fourteen years before the decision in *Church v. Hubbard*¹⁵ suggests that it represented the traditional rule as then familiar to the profession; and yet it foreshadows, with its judge's certificate, the American theory of custodian's authority.

The interpretation of this statute, simple as it has given rise to many rulings, concerned chiefly with the literal application of its words to copies of various sorts.¹⁶ The number of these rulings, when compared with the

within the State in which the Federal court is); 1800, *Pepon v. Jenkins*, 2 John. Cas. 119 (a copy under the court seal certified by the clerk, sufficient); 1850, *Williams v. Wilkes*, 14 Pa. St. 226, 290 (U. S. Circuit Court is not within the statute, but is to be treated as a domestic court of the State); 1877, *Turnbull v. Payson*, 95 U. S. 418, 424 (even where the record is from a Federal court sitting without the State).
¹⁴ 1897, *Droop v. Hidenhour*, 11 D. C. App. 224, 244; 1900, *Sloan v. Wolfsfeld*, 110 Ga. 70, 35 S. E. 344; 1895, *Garden City S. Co. v. Miller*, 157 Ill. 225, 41 N. E. 753; 1855, *Latourette v. Cook*, 1 La. 1; 1828, *Taylor v. Bank*, 7 T. R. Moar. 576, 585; 1853, *Landry v. Klopman*, 13 La. An. 345; 1869, *Kingman v. Cowles*, 103 Mass. 263; 1901, *Willock v. Wilson*, 178 id. 68, 59 N. E. 757; 1871, *Dean v. Chapin*, 22 Mich. 275; 1893, *Ellis Appeal*, 55 Minn. 401, 408, 56 N. W. 1056; 1893, *Ellis v. Ellis*, 55 N. W. 1056; 1796, *Ellmore v. Mills*, 1 Hayw. 359; 1800, *Olden v. Field*, 2 Yeates 592; 1824, *Kean v. Nico*, 12 S. & R. 208, 207; 1856, *Ohio v. Hinchman*, 27 Pa. 479, 485; 1871, *Coffee v. Neely*, 2 Heisk. 304, 307; 1883, *Pickett v. Boyd*, 11 Lea 498, 501; 1881, *Ex parte Povall*, 2 Leigh 816, 817; 1869, *Thraasher v. Ballard*, 23 W. Va. 265, 267, 10 S. E. 411.
Contra: 1892, *Tharpe v. Pearce*, 59 Ga. 194, 15 S. E. 46 (since the Code, a judgment in a sister State must be authenticated under the Federal statute if applicable, or if not, under the Code section applicable; but compare the later decision *supra*); 1903, *Lehmann v. Rivera*, 110 La. 1079, 35 So. 296, *semble* (for a Federal judgment in bankruptcy); 1891, *Hope v. Hart*, 59 Miss. 174, 178 (where no domestic statute provides for authentication of judicial records in other States, the Federal statutory mode must be followed). Compare the analogous rulings as to Rev. St. § 906, cited *ante*, § 1680, notes 2 and 3.

Conversely, the Federal mode suffices, even

though the local statute requires more: 1903, *Dusenberry v. Abbott*, — *Sebr.* —, 25 N. W. 466.

¹⁵ Quoted *supra*.

¹⁶ These rulings in the Federal courts are already carefully collected and fully stated by Messrs. Gould and Tucker, in their Annotations to the Revised Statutes, and it seems unnecessary to repeat them here. But in the following list will be found (not in completeness) rulings of the State courts on the same statute; they are also important (though more so before local statutes had become so numerous), but they are not elsewhere collected; space does not suffice to set forth the tenor of each, for much citation of reasoning would be needed for accuracy: *Ala.*: 1848, *Hudson v. Dally*, 13 Ala. 722, 727; 1850, *Elliott v. McClelland*, 17 id. 206, 208; 1858, *Thraasher v. Ingram*, 22 id. 645, 657; *Ark.*: 1847, *Butler v. Owen*, 7 Ark. 369; 1854, *Central Bank v. Veasey*, 14 id. 671, 674; 1854, *Blackwell v. Glass*, 43 id. 209, 211; *Cal.*: 1859, *Low v. Burrows*, 12 Cal. 181, 183; *Conn.*: 1812, *Russell v. Edwards*, 5 Day 263; 1860, *Adams v. Way*, 23 Conn. 419, 429; 1897, *Smith v. Brockett*, 69 id. 492, 23 Atl. 57; *Del.*: 1845, *Regan v. McCormick*, 4 Harringt. 436; *Ga.*: 1850, *Settle v. Allison*, 3 Ga. 201, 205; 1853, *Goodwyn v. Goodwyn*, 25 id. 203; 1874, *Cox v. Jones*, 52 id. 438; 1880, *McAllister v. Mfg. Co.*, 64 id. 622, 624; 1903, *Taylor v. McKee*, — id. —, 45 S. E. 672; *Ill.*: 1839, *Trader v. McKee*, 2 Ill. 556; 1853, *Ducommun v. Hysinger*, 14 id. 249; 1859, *Spencer v. Langdon*, 21 id. 192; 1869, *Newman v. Willetta*, 52 id. 98; 1872, *Brackets v. People*, 64 id. 170; 1875, *Horne v. Spelman*, 78 id. 206; *Ind.*: 1853, *Adams v. Lisher*, 3 Blackf. 241, 243; 1845, *Redman v. Gould*, 7 id. 261; 1857, *Dragg v. Graham*, 9 Ind. 212; 1861, *Vaughn v. Griffith*, 16 id. 353; 1881, *Bradford v. Russell*, 79 id. 64, 70; 1881, *Analey v. Meikle*, 81 id. 290, 292; *Ia.*: 1847, *Gay v. Lloyd*, 1 Greens 78;

scanty English rulings on the same subject, is a suggestive illustration of the inherent obstinacy with which our system of litigation refuses to suffer the final settlement of a principle by any concise codified statement, however skillful and correct.

§ 1682. *Same: Copies of Registered Deeds: Judicially established Copies of Lost Documents.* (1) The use of certified copies of registered deeds involves no special variation from the general principle already considered for copies of official documents in general (*ante*, §§ 1677, 1680).

(a) So far as concerns the *implied authority to certify copies*, we find in England the general principle here also negating this authority; for although the register (or "inrolment") was there apparently regarded as receivable to prove the deed's contents and execution,¹ yet the clerk of inrolments could not certify copies.² In the United States, on the other hand, no doubt seems ever to have been entertained that the registrar as custodian, even where statute did not expressly make his copies admissible, was impliedly authorized to give them. (b) The *authentication* of the registrar's copy would, on general principles, have been sufficiently made, for domestic officers, by his seal of office, and, for foreign officers, by the great seal of State

1847, *Young v. Thayer*, 1b. 196; 1849, *Lewis v. Hill*, 2 id. 186; 1854, *Roop v. Clark*, 4 id. 264; 1855, *Lattourett v. Cook*, 1 la. 1; 1859, *James v. Davis*, 9 id. 219, 224; 1870, *Simons v. Cook*, 29 id. 324; Ky.: 1814, *Stephenson v. Hannister*, 3 Bibb 369; 1823, *Strode v. Churchill*, 2 Litt. 75, 76; 1831, *Helm v. Shackleford*, 5 J. J. M. 390, 398; 1847, *Waller v. Orallo*, 8 B. Monr. 11, 15; 1848, *Moore v. Ann*, 9 id. 36; 1852, *Young v. Chandler*, 13 id. 252; La.: 1824, *Kirkland v. Smith*, 2 Mart. n. s. 497; 1827, *Balfour v. Chew*, 5 id. 517; 1829, *Scott v. Blanchard*, 8 id. 303, 306; 1842, *Jordan v. Black*, 1 Rob. La. 575, 578; 1842, *Goodman v. James*, 2 id. 297; 1842, *Bowles' Succession*, 3 id. 33; 1845, U. S. v. *Bank of U. S.*, 11 id. 418, 429; 1855, *Fitzpatrick v. Williams*, 10 La. An. 517; 1879, *State v. Barrow*, 31 id. 691; Md.: 1855, *Cass v. McGee*, 8 Md. 9, 14; Mass.: 1824, *Warren v. Flagg*, 2 Pick. 443, 450; 1901, *Willock v. Wilson*, 178 Mass. 68, 59 N. E. 787; Mich.: 1878, *Wilt v. Cutler*, 38 Mich. 189, 196; Minn.: 1848, *Malvin v. Lyons*, 10 Sm. & M. 78; 1849, *Stuart v. Swanzy*, 12 id. 684, 689; 1852, *Stewart v. Swanzy*, 23 Minn. 502, 505; 1854, *Rates McCully*, 27 id. 534; 1856, *Jordan v. Thomas*, 31 id. 557; 1866, *Sherwood v. Houston*, 41 id. 59, 64; Mo.: 1823, *Hays v. Honthaller*, 1 Mo. 346; 1831, *Hutchinson v. Partick*, 3 id. 65; 1834, *Posey v. Buckner*, 1b. 604; 1834, *Blair v. Caldwell*, 1b. 353; 1836, *McQueen v. Farrow*, 4 id. 212; 1844, *Bright v. White*, 8 id. 421, 426; 1850, *Duval v. Ellis*, 13 id. 308; 1852, *Wilburn v. Hall*, 16 id. 426, 430; 1852, *McLain v. Winchester*, 17 id. 49, 54; 1856, *Manning v. Hogan*, 26 id. 570; 1860, *Grover v. Grover*, 30 id. 400, 403; Nebr.: 1898, *Comstock v. Kerwin*, 57 Nebr. 1, 77 N. W. 387; N. H.: 1828, *Robinson v. Prescott*, 4 N. H.

450, 454; 1834, *Mahurin v. Bickford*, 6 id. 567; N. J.: 1901, *Steele v. Queen*, 67 N. J. L. 99, 50 Atl. 668; N. Y.: 1800, *Smith v. Blagge*, 1 Johns. Cas. 233; 1846, *Coit v. Millikin*, 1 Den. 376; 1858, *Hatcher v. Rocheleau*, 18 N. Y. 57, 39; 1862, *Morris v. Patchin*, 24 id. 394 (general commentary on the statute); 1879, *Burnell v. Wild*, 78 id. 103; Ok.: 1832, *Silver Lake Bank v. Harding*, 5 Oh. 545; Or.: 1852, *Pratt v. King*, 1 Oreg. 49; 1866, *Keyes v. Mooney*, 13 id. 179, 181, 9 Pac. 400; Pa.: 1846, *Lothrop v. Blaka*, 3 Pa. 493, 495; 1848, *Snyder v. Wise*, 10 id. 157; Tex.: 1856, *Houss v. Houss*, 16 Tex. 596; 1856, *Patrick v. Gibbs*, 17 id. 275, 277; Vt.: 1834, *Blodget v. Jordan*, 6 Vt. 580, 585; Wis.: 1855, *Ordway v. Conroe*, 4 Wis. 45, 48; 1860, *Arschener v. State*, 9 id. 140, 145; 1862, *Hackett v. Bonnell*, 16 id. 471, 477.

It is worth noting that the peculiar double certificate prescribed by R. S. § 906 (a judge certifying the copyist's office, and then his clerk certifying the judge's office) concerns only documents "not appertaining to a court," so that there are ordinarily three distinct officers involved (copyist-custodian, judge, and judge's clerk). If it did apply to judicial records, the meaningless and ineffectual formality would be prescribed for the clerk to certify the judge, and then the judge to certify the clerk; and yet that form is sometimes employed by attorneys in proving judicial records, under the belief that the statute countenances such a singularity. But when this error is committed, the clerk's superfluous certificate may be disregarded, and the copy used under the present R. S. § 906: 1850, *Gavit v. Snowhill*, 26 N. J. L. 76.

¹ See the cases cited in § 1650, *ante*.
² See the quotation from Buller's *Nisi Prius*, *ante*, § 1677.

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with a certificate of due attestation (*ante*, § 1679). But the local statutes providing for registration and for the use of certified copies now almost universally contain express provisions for authentication; where these are lacking,² the Federal statute (Rev. St. § 906; quoted *ante*, § 1680) is available for the purpose. (c) But the certified copy merely furnished the contents of the register, and thus brought up ultimately the fundamental question of the admissibility of the register to prove the contents and execution of the deed. This question, as already noticed (*ante*, §§ 1648-1656), involves its own peculiar principles.⁴

(2) Statute has in many jurisdictions provided for the establishment, by judicial process, of copies of lost documents, — records, deeds, and the like. These copies become official copies, and are usually by statute expressly made admissible; they become parts of an official register, however, and thus come under the general principle.⁵

§ 1683. *Quasi-Official Copies Certified by Private Persons.* No person not an official can upon any principle have an authority to certify copies which shall be admissible,¹ unless at least a duty is expressly cast upon him by statute. Even then it is doubtful whether this statutory duty upon a private person would suffice to render his copies admissible.³ But in a few jurisdictions, on grounds of public convenience, statutes have expressly declared admissible, without calling the copyist, certified copies made by sundry kinds of custodians of private documents having frequent use for evidential purposes; the chief instances are the registers of churches and the records of corporations.⁶

¹ The authorities on all the points concerning certified copies of registered conveyances have been placed *ante*, §§ 1648-1656.

² In Connecticut and Massachusetts.

³ The authorities are placed *ante*, § 1680. For the rule against a copy of a copy, see *ante*, § 1275; for the conclusiveness of such a copy, see *ante*, § 1247.

⁴ 1814, *Stoover v. Whitman*, 6 Binn. 418 (copy of church register certified under corporate seal, excluded; Tilghman, C. J.: "It might be convenient if such certificates were received in evidence; but that alone will not authorize courts of justice to receive them. The party against whom a fact is to be proved has a right to call for the oath of a witness, except in those cases where it is otherwise ordered by Act of Assembly").

⁵ The general principle has already been examined *ante*, § 1633, par. 10, § 1674, *sub fin.*

⁶ Compare the statutes and cases cited *ante*, § 1223, exempting the rule for production of the original; the two series of statutes do not always coincide; compare also the statutes permitting proof by affidavit (*post*, § 1710); CANADA: Dom. Rev. St. 1884, c. 118, § 14 (certified copy of a company by-law, under the company's seal and officer's signature, to be evidence); c. 119, § 66 (same, as against a shareholder); St. 1893, c. 31, § 12 (corporation documents and book-entries; cited *ante*, § 1680);

B. C. Rev. St. 1897, c. 71, § 13 (like Dom. St. 1893, c. 31, § 12); *Mont.* Rev. St. 1902, c. 15, § 35 (building-society's by-laws, etc., provable by the certified copy of the secretary or manager, without proof of the society's seal); c. 30, 77 (joint-stock company's by-law, provable by its officer's certified copy under company seal); c. 145, § 100 (railway corporation's proceedings, provable by the secretary's certified copy); c. 67, § 14 (like Can. St. 1893, c. 31, § 12); § 21 (like *ib.* § 19); c. 124, § 52 (land-surveyors' association's by-laws, etc., provable by certified copy of the secretary-treasurer, countersigned by the president, under the common seal); c. 145, § 98 (by-laws, etc., of railway companies, provable by certified copy of the president or secretary); *Nev.* St. 1897, c. 21, §§ 3, 4 (affidavit-copy of bankers' books, admissible); *N. Sc.* Rev. St. 1900, c. 163, § 11 (like Can. St. 1893, c. 31, § 12); c. 128, § 79 (certified copy of a corporate resolution, by an officer under corporate seal or by a registrar under his seal, admissible); c. 99, § 204 (secretary's certified copy of a railway corporation's minutes of meeting, admissible); § 214 (no for by-laws, etc., certified by president or secretary); *Ont.* Rev. St. 1897, c. 73, § 26 (any "document, by-law, rule, regulation, or proceeding," and any "entry in any register or other book of any corporation created by charter or statute in this province" is provable by copy "purporting to be certified under the seal of the

§ 1634. *Officially Printed Copies (of Decisions, Statutes, and Miscellaneous Documents).* There is no reason why an officer may not be authorized to give printed copies as well as to give written copies; nor has there been any doubt that such authorized copies were admissible. Yet it cannot be said that such an authority has ever been implied from the nature of an office (*ante*, § 1674). An official printer's copies have been usually regarded as admissible; but the official printer's authority, though a general one, is express rather than implied. The objections that have been made in connection with the use of printed copies have chiefly had their source, not so much in a doubt of any of these principles, as in the difficulty of presuming the authenticity (*post*, § 2151) of a printed copy purporting to be an official one. The doctrine of presuming the genuineness of an official seal has served to furnish a mode of authenticating certified copies (*ante*, § 1679, *post*, § 2163); but there has naturally been a hesitation about extending this doctrine to impressions of type purporting to represent an official seal or certificate.

corporation and the hand of the presiding officer or secretary thereof," without further proof); § 51 (commercial documents provable by copy; cited *ante*, § 1228); c. 191, § 66 (corporate by-law, provable by a certified copy under corporate seal, purporting to be signed by any officer); c. 207, § 40 (railroad by-laws, provable by certified copy by the president or secretary; minutes of proceedings, provable by certified copy of the secretary).

UNITED STATES: *Ala.* Code 1897, § 1811 (registers of marriages, births, and deaths, kept by law or church rule; custodian's certification admits them); 1899, *Hawes v. State*, 88 *Ala.* 37, 69, 7 *So.* 302 (the statute applies to registers kept out of the State; certificate of a purporting custodian sufficiently authenticates a copy of the register); *Del.* Rev. St. 1893, c. 39, § 7 (religious society's register of a birth, death, marriage, or burial, provable by the chairman's copy under corporate seal); *Ga.* Code 1895, § 5236 (domestic corporation's books, provable by copy certified by the chief officer in charge); *Ill.* Rev. St. 1874, c. 51, § 15 (papers and records of "any corporation or incorporated association," provable by certified copy by the "secretary, clerk, cashier, or other keeper," under corporate seal, if any); *Ind.* Rev. St. 1897, §§ 5686, 5706 (records of telegraph and telephone companies, provable by the secretary's attested copy, "when the interests of said corporation are concerned"); 1873, *King v. Ins. Co.*, 45 *Ind.* 43, 60 (copies not in terms of the statute, excluded); *Kan.* Gen. St. 1897, c. 97, § 24 (religious society's register of marriages, etc., provable by affidavit-copy); *Ky.* Stats. 1899, § 1629 (official books or ordinances of a religious society, provable by the custodian's certified copy); *La.* Rev. L. 1897, § 694 (secretary of a railroad company's certified copy under corporate seal of the company's books, admissible); *Md.* Pub. Gen. L. 1883, Art. 23, § 4 (certified copy of a corporation by-law under corporate seal, by the president, secretary, or

treasurer, admissible); *Miss.* St. 1895, c. 39 (certified copy of a record of deeds, etc., of cemetery lots, by the secretary of a cemetery association, admissible); *Mo.* Rev. St. 1899, § 3101 (domestic corporation's records and papers on file, provable by certified copy of the secretary or president under corporate seal); § 3102 (church register of marriages, etc., kept in the State, provable by affidavit copy); 1902, *Hancock v. Supreme Council*, 87 *Id.* 614, 62 *Atl.* 301 (whether a certified copy of a foreign parish-register, by a priest or clerk, is admissible, not decided); *Okla.* Stats. 1893, § 4371 (religious society's register of marriages, etc., in this Territory, provable by certified copy by the pastor "or other head of any such society or congregation, or by the clerk or other keeper of such register"); *St.* 1897, c. 2, § 25 (instruments affecting real estate but not requiring record may be proved by copy "duly verified by oath or affidavit of any person knowing the same to be a true copy"); *Pa.* St. 1837, P. & L. Dig. Evid. 45 (church registers; cited *ante*, § 1680); *St.* 1897, May 25, Pub. L. 82, § 1 (employee's sworn copy of books of account of a common carrier, etc., "or other public corporation," admissible; cited *ante*, §§ 1223, 1519); *St.* 1901, May 29, Pub. L. 349, § 4 (certified copy of the certificate of corporate merger, admissible); *R. I.* Gen. L. 1896, c. 244, § 45 (custodian's certified copy of a newspaper deposited with the Rhode Island Historical Society, admissible); *Rts.* Stats. 1898, § 4181a (corporate clerk's certified copy of an affidavit of notice, admissible); § 4183 (certificate of notice and notice, by the secretary of a mutual insurance company, admissible); § 4182a ("verified copies" of the books of a life or mutual benefit association "doing business on the level premium or assessment plan," admissible, when served on the opponent six days before term, with an opportunity given for inspection of books).

Thus, it is with the authentication of the copy rather than the authority to furnish it that the difficulties have arisen.

In general, then, where an *official printer* is appointed, his printed copies of official documents are admissible. It is not necessary that the printer should be an officer in the strictest sense, nor that he should be exclusively concerned with official work; it is enough that he is appointed by the Executive to print official documents. As for authentication of his copies, it is enough that the copy offered purports to be printed by authority of the government; its genuineness is assumed without further evidence. Such seem to be the general principles of the common law, to be drawn from a variety of passages:

Ante 1726, *Gilbert, C. B.*, Evidence, 11: "My Lord Chief Justice Parker allowed the printed statute to be evidence, in the case of the College of Physicians and Dr. West, of the truth of a private act of Parliament touching the institution of the College of Physicians, because the printed statute-book is printed by the Queen's authority, and therefore, though it be not so good evidence as an exemplification under seal, yet it must be supposed as good an evidence of the truth of a copy as a copy compared with the rolls and sworn to by the testimony of any witness, which is allowed daily as a good proof of the copy of a record; for a copy printed by the public authority derives more credit from that authority than it would from the testimony of any living witness that had compared it."

Ante 1767, *Buller, J.*, Trials at Nisi Prius, 225: "Not that the printed statutes are perfect and authentic copies of the records themselves; but every person is supposed to know the law, and therefore the printed statutes are allowed to be evidence, because they are the hints of what is supposed to be lodged in every man's mind already. But in private acts of Parliament the printed statute-book is not evidence, . . . for they are not considered as already lodged in the minds of the people. However, a private act of Parliament in print that concerns a whole country, as the act of Bedford Levels, for rebuilding Tiverton, etc., may be given in evidence without comparing it with the record. And these things are the rather admitted because they gain some authority from being printed by the King's printer, and besides from the notoriety of the subject of them they are supposed not to be wholly unknown."

1814, *Tugman, C. J.*, in *Biddis v. James*, 6 Bin. 536: "Confidential persons have been selected to compare the copies with the original rolls and superintend the printing. The object of this provision was to furnish the people with authentic copies; and from their nature, printed copies of this kind, either of public or private laws, are as much to be depended on as the exemplification verified by an officer who is the keeper of the record. . . . I am for admitting the printed copies authorized by the Legislature, either of this or any other State, whether the laws be public or private."

1820, *Duncan, J.*, in *Jones v. Maffet*, 5 S. & R. 552: "Such authorized authentic publication would be more satisfactory evidence than a sworn copy; less danger of mistake or corruption or fabrication. . . . It is not the being in a statute book which gives them authenticity, but the publication by the King's printer."

1854, *Eastman, J.*, in *Emery v. Berry*, 28 N. H. 473, 487 (admitting a printed copy of the Maine Statutes, purporting to be official): "Such a course seems called for by the great convenience and saving of expense that it will afford to all parties, and by that confidential relation which exists between the States. The rule, too, would seem to be almost entirely free from any danger of abuse, and error or imposition could easily be detected."

1878, *Marston, J.*, in *Will v. Cutler*, 38 Mich. 196: "The distinct authority for printing and publishing the laws need not appear in any case where they purport to be published under the authority of the government."

(1) This principle has been broadly applied to admit printed copies of *miscellaneous public documents*.¹

(2) Upon this principle, also, a copy purporting to be officially printed, of a *decision of a court* is admissible.² The few instances of exclusion rest on other grounds,—for example, the failure to account for the original of a document,³ or the preference for a certified copy over a printed copy.⁴ There is little authority on the precise point, for the reason that, by another Exception to the Hearsay rule, all printed copies of judicial decisions, whether by official authority or by private enterprise, are generally treated as admissible.⁵ But there can be no doubt of the general principle. Statutes sometimes expressly declare printed volumes of reports admissible.⁶

¹ *England*: 1693, *Dupays v. Shepherd*, 12 Mod. 216 (printed proclamation of peace; "such things as these in print as are of a public nature, as a public act of parliament, . . . may be given in evidence without comparing it with the record"); 1704, *Captain Quelch's Trial*, 14 How. St. Tr. 1084 (Boston; piracy upon Portuguese vessels; to prove the treaty of alliance of 1703 between Portugal and England, the London Gazette of May 24 and July 14, 1703, were received, reciting the signing of the treaty; Newton, answering the objection made to them: "The Gazette is published by authority, and has been often allowed as good evidence"); 1733, *R. v. Holt*, 6 T. R. 436 (Ashurst, J.: "The Gazette is an authoritative means of proving all acts relating to the King and the State"; Buller, J.: "The Gazette, which is published by royal authority," is admissible to prove "anything done by his Majesty in his character of King or which has passed through his Majesty's hands"; here received to show certain addresses presented to the King and the fact of their presentation; Kenyon, L. C. J.: "That the Gazette is evidence of many acts of State is not doubted. . . . These documents are addresses of different bodies of subjects . . . received by the King in his public capacity. They then become acts of State, and of such acts, announced to the public in the Gazette, it is admitted that the Gazette is evidence"); 1805, *Kirwan v. Cockburn*, 5 Esp. 234 (official gazette received to prove an army appointment; compare §§ 1228, 1242, *ante*, which are involved in this ruling); 1809, *Van Omerson v. Dowick*, 3 Camp. 44 (official gazette, admitted); 1811, *R. v. Gardner*, ib. 513 (*contra* to *Kirwan v. Cockburn*, *supra*); 1820, *Att'y-Gen'l v. Theakstone*, 8 Price 92 (official gazette, admitted); 1825, *Bradley v. Arthur*, 4 B. & C. 304 (official printed copy of army regulations, excluded); for the learning about the privileges of the King's printer, see *Basket v. Univ. of Cambridge*, 1 W. Bl. 106; *Universities v. Richardson*, 6 Ves. Jr. 689. *United States*: 1844, *Houston v. Spruance*, 4 Harringt. 117, 119 (printed official pamphlet showing mail routes, admitted); 1870, *Doe v. Roe*, 13 Fla. 602 ("American State Papers" admitted); 1839, *Lorton v. Gilliam*, 2 Ill. 577, 579 (State Register, received to prove the Governor's proclamation); 1889, *Marka v. Orth*,

131 Ind. 10, 12, 23 N. E. 608 (printed document purporting to be congressional, excluded on the facts); 1850, *Dutillet v. Blanchard*, 14 La. An. 97 ("American State Papers" received); 1871, *Whitton v. Ins. Co.*, 109 Mass. 30 (official volume of the U. S. "Foreign Relations" admitted); 1884, *Cushing v. E. Co.*, 143 id. 77, 78, 9 N. E. 23 (printed copy of a purporting U. S. Senate document; not decided); 1858, *Nixon v. Porter*, 24 Miss. 697, 707 ("American State Papers," admitted); 1872, *Callaway v. Fash*, 50 Mo. 420, 423 ("Patent-Book of the State of Illinois," excluded on the facts); 1844, *Brundred v. Del Hoyo*, 20 N. J. L. 234 (government gazette, not received to show a patent-application published); 1810, *Radcliff v. Ins. Co.*, 7 John. 50 (officially printed diplomatic correspondence, admitted); 1837, *Root v. King*, 7 Cow. 636 (officially printed edition of legislative journals received); 1842, *Watkins v. Holman*, 16 Pet. 55 ("American State Papers" admitted); 1854, *Bryan v. Forsyth*, 19 How. 234, 235 (report printed in "American State Papers," admitted); 1860, *Grogg v. Forsyth*, 24 id. 170, 180 (similar); 1881, *Post v. Supervisors*, 105 U. S. 667 (printed copies of legislative journals, published by law, are evidence of the contents, in Illinois); 1885, *Fulham v. Howe*, 60 Vt. 351, 357 (official printed copy of the Federal Compendium, received).

For statutes covering this part of the subject, see *infra*, note 15.

² 1877, *Kiy v. James*, 122 Mass. 44. In *R. v. Randnits* (1869), 11 Cox Cr. 260, a copy of bankruptcy adjudication in a journal purporting to be the London Gazette was admitted under special statute.

³ 1873, *Hoyt v. Shipboard*, 70 Ill. 309, 310 (report of a contract in an official volume of local decisions, excluded, because the original was not accounted for).

⁴ 1877, *Donellan v. Hardy*, 57 Ind. 203, 402 (official printed report of an opinion of the Supreme Court, not received to prove the contents of a judgment, a certified copy being available). For this general subject of the preference of one kind of copy over another kind, see *ante*, § 1273.

⁵ See *post*, § 1703.

⁶ For the statutes dealing expressly with official reports, see *infra*, note 15; for the stat-

(3) The most frequent application of the principle, however, is to the evidencing of the *statute law*, domestic and foreign. Upon the theory of judicial notice, no evidence of a domestic law need be offered (*post*, § 2572). Nevertheless, it may be offered; and the present Exception is employed whenever an officially printed copy of a statute is received.

(a) For *domestic general statutes*, no doubt seems to have existed,—at least since the middle of the 1700s;⁷ copies purporting to be the officially printed ones are unquestionably admissible.

(b) For *domestic private acts*, there was at one time⁸ apparently no recognition of copies purporting to be officially printed. Yet there was no real ground, either in principle or in policy, for the distinction. It came to be the custom in England to insert in private acts a clause providing expressly that they should be printed by the King's printer and that a copy so printed should be admissible.⁹ But in the United States the same result was generally reached on common-law principles;¹⁰ and legislation has now almost everywhere sanctioned this rule.¹¹

(c) For *foreign statutes*, no difficulty seems ever to have been felt as to the admissibility of a copy proved actually to have been printed by official authority. But there was with some Courts a hesitation about assuming the genuineness of a copy purporting to have been thus printed. In New York and New Jersey, it was perhaps once the law that no officially printed copy, however proven, could be received.¹² In England, and in a few of our own courts, some sort of authentication, by testimony on the stand, was additionally required; testimony that the copy or edition offered was "commonly accepted" in the foreign court being usually the form of this authentication.¹³ In still other courts (represented by the last two quotations above), the mere purporting to be officially printed was taken as sufficient;¹⁴ precisely in the same way that the purporting impression of the foreign great seal of State was taken to be genuine (*post*, § 2163). But before any full and detailed development of principle had taken place in the courts, statutes intervened, in almost every jurisdiction, to provide a definite and liberal rule.

These statutes commonly state, in the alternative, two conditions of admissibility: the volume must either *purport* to be printed by authority of the

utes dealing with all other printed reports, see *post*, § 1708.

⁷ 1649, *Lilburne's Trial*, 4 How. St. Tr. 1909, 1947 (a printed statute, on objection, was proved as an examined copy); 1700, *Anon.*, 2 Salk. 586 (on a plea of *non tunc record*, the official printed copy of a statute will not suffice; an exemplification under the great seal is necessary; because this is equivalent to the original; see *ante*, § 1216); 1735, *Edwards v. Vasey*, cited 1 W. Bl. 110 (king's printer's copy of a statute, admissible). Whether the authority must be that of the central government, or whether that of a municipality would equally suffice, seems not to have been settled; but statutes (*infra*, note 15) have almost everywhere covered the subject; on the general principle, a municipal

authority would suffice: 1900, *Boston v. Coon*, 175 Mass. 323, 56 N. E. 287 (Revised Ordinances of Boston, admitted on the facts).

⁸ As indicated in the quotations *supra*.

⁹ Park, J., cited in *Phillips on Evidence*, II, 342; 1841, *Groswold v. Kemp*, Car. & M. 127; 1843, *R. v. Milton*, 1 C. & K. 53, note.

¹⁰ 1833, *Owen v. Boyle*, 15 Me. 149 (here the foreign government was accustomed to use the edition); 1814, *Biddis v. James*, 6 Binn. 326 (quoted *supra*); 1824, *Kean v. Rice*, 12 S. & R. 207; 1808, *Young v. Bank*, 4 Cr. 387; for Missouri, see the singular ruling cited in note 15, *infra*.

¹¹ See them *infra*, note 15.

¹² For the rulings in the different jurisdictions, see *infra*, note 15.

foreign government, or it must be proved to be commonly admitted in the courts of that country as evidence of the law. (1) The first alternative properly sanctions the liberal rule of authentication which had already been accepted by some Courts. But the source of the authority by which the printing must purport to have been sanctioned is seldom specifically named in these enabling statutes; owing to this, and to lack of foresight on the part of the editors, statutory collections have often been excluded because the title-page or printed certificate does not convey the proper purport of authority. To satisfy, by a single formula, the demands of all the jurisdictions would perhaps be impossible. A uniform provision on this subject is greatly desirable.²⁰ (2) The second alternative practically allows the use of a volume "commonly admitted" in the courts of the foreign country, even though it was not, and does not purport to have been, printed by official sanction. The curious result here is that the resort to testimony of such common acceptance in foreign courts seems to have been originally intended merely to authenticate the official character of a volume whose purporting official character would not be assumed without other evidence;²¹ while under these statutes (as commonly phrased) the operation of this expedient has now become much wider, and serves to admit even private compilations provided they are "commonly admitted" in the foreign courts.²² (3) It may be added that, by many statutes, still a third method is provided, namely, the *Secretary of State's certified copy* of the printed statute-book officially sent to him by the foreign government and kept in his office. This, however, being in form at least a certified and not a printed copy, comes within the general principle of certified copies (*ante*, § 1680).

²⁰ A Federal rule would presumably be constitutional; compare the Federal clause cited *ante*, § 1681, note 12.

²¹ See *Lacoe v. Higgins, Eng., 4 Ex.*

²² Before setting out the authorities, certain other principles affecting the mode of evidencing foreign law may here be discriminated. (1) Whether an expert witnesses to the foreign law may state its terms, if it lies in statute, without producing a copy either printed, certified, or examined; this involves the question of a rule of preference for copy-testimony over recollection testimony, and is discussed *ante*, § 1271. (2) Whether a witness to foreign common law is sufficiently an expert, is dealt with *ante*, § 564; and, similarly, whether a witness, sufficiently expert, has had adequate sources of observation of the law, is considered *ante*, § 690. (3) The use of ordinary private compilations of foreign law, whether in treatises or in reports of decisions, forms the subject of special and different Exceptions to the Hearsay rule, treated *post*, §§ 1697, 1708. (4) Whether the terms of a foreign law may be judicially noticed, or may be the subject of a presumption, falls under those respective heads, *post*, §§ 2536, 2573. (5) Whether the opinion rule affects testimony to foreign law is examined *post*, § 1953.

The statutes and rulings under the present principle are as follows:

ENGLAND: Besides the following, there are also a few minor special statutes: 1645, St. 3 & 4 Vict. c. 112, § 3 (copies of non-public acts of Parliament, "if purporting to be printed by the Queen's printers," and of parliamentary journals and royal proclamations, "purporting to be printed by the printers to the Crown or by the printers to either House of Parliament, or by any or either of them," are admissible "without any proof being given that such copies were so printed"); 1865, St. 28 & 29 Vict. c. 63, § 6 (Governor's proclamation of royal assent or veto to a colonial law, provable by a copy purporting to be published by authority of the Governor in any newspaper in the colony); 1868, St. 31 & 32 Vict. c. 37 (Documentary Evidence Act), § 2 (any proclamation, etc., as cited *supra*, § 1680, is provable by a copy of "the Gazette purporting to contain such proclamation," etc., or by production "of a copy purporting to be printed by the Government printer, or, where the question arises in a court in any British colony or possession, of a copy purporting to be printed under the authority of the legislature of such British colony or possession"); 1882, St. 45 Vict. c. 9, § 2 (preceding statutes extended to copies purporting to be printed under superintendence or authority of Her Majesty's Stationery Office); 1905, *Richardson v. Anderson*, 1 Camp. 66, note (printed collection of U. S. treaties,

proved by the U. S. minister to be authorized, excluded; *Hilkenborough*, L. C. J., required an examined copy, and "would not have admitted a book of treaties with Spain, proved to have been printed by the king's printer there"; 1832, *Lacoe v. Higgins*, 3 Stark. 178 (copy of a French Order, purporting to be printed at the royal printing-office, and proved to be commonly accepted in French courts, received); 1868, *R. v. Wallace*, 10 Cox Cr. 500 (copy of a proclamation in a journal entitled "Dufala Gazette, published by authority," not admitted under St. 26 & 27 Vict.).

CANADA: Dominion: Rev. St. 1898, c. 58, § 111 (ordinances, etc., concerning Northwest Territories, to be provable by printed copy of the Canada Gazette, or the official printer for Canada, Manitoba, or the Northwest Territories); St. 1898, c. 51 (Evidence Act), § 8 (proclamations, etc., of the Governor-General or Governor in Council or of any minister or head of department of the government of Canada are provable by printed copy, as in Ont. R. S. c. 78, § 23); § 9 (proclamations, etc., of a Lieutenant-Governor or Lieutenant-Governor in Council of any Canadian province, or head of department of a provincial government, are provable by printed copy as in Ont. R. S. c. 78, § 23); § 11 (imperial "official records, acts, or documents" are provable as in England, or by the Canada Gazette or a volume of the Canadian Acts of Parliament, or by copy purporting to be by the Queen's printer for Canada); § 16 (all official documents printed in the Canada Gazette are provable thereby).

British Columbia: Rev. St. 1897, c. 71, § 9 (like Can. St. 1893, c. 31, § 8); § 10 (like ib. § 9); § 12 (like ib. § 11); § 17 (like ib. § 16).

Manitoba: Rev. St. 1892, c. 57, § 8 (substantially like Can. St. 1893, c. 31, § 7, but omitting departmental documents); § 9 (like ib. § 8, but limited to the province of Manitoba and the Manitoba Gazette); § 10 (like ib. § 9, but applying to other provinces than Manitoba); § 13 (like ib. § 11); § 20 (like ib. § 16, applying also to any province of Canada and its official gazette); § 22 (for ascertaining foreign or domestic law, the judge may refer to "any books of statutes, reports of cases"); c. 96, § 22 (in libel, etc., the legislative journals are provable by a copy purporting to be printed by legislative authority); c. 111, § 57 (official medical register, admissible); c. 116, § 372 (municipal by-laws, provable by printed copy purporting to be by authority); c. 131, § 26 (official pharmaceutical register, admissible); c. 142, § 11 ("publications in the Manitoba Gazette, and all copies of the statutes of this Province, the journals of the House, occasional papers, and all other documents," purporting to be by "any King's printer or Queen's printer," shall be admissible); § 12 (where the Lieutenant-Governor under a former statute authorized "any person" to print any of the foregoing documents, a copy purporting to be by a person so authorized is admissible); c. 146, § 49 (railway commissioners' rules, etc., provable by the Manitoba Gazette or any book, etc., purporting to be by a King's or Queen's printer); c. 166, § 10 (in part repeats

c. 66, § 9); St. 1902, c. 41, § 72 (Revised Statutes, 1902, are provable by copies purporting to be printed by the King's printer from the official roll as deposited).

New Brunswick: Council St. 1877, c. 46, § 31 (British bankruptcy proceedings, provable by the London Gazette, purporting to be published by Royal authority); c. 12, § 8 (acts or rules and regulations made under them, provable by the Royal Gazette or by copy purporting to be by the Queen's Printer for the Province); St. 1881, c. 18, § 1 (proclamations, etc., of the Province; like Ont. R. S. 1897, c. 78, § 23; compare Council St. 1877, c. 46, § 13); § 2 (proclamations, etc., of the Dominion; like ib. § 22); St. 1886, c. 24, § 1 (a law of any province of Canada may be proved by a purporting copy of the Official Gazette or a purporting copy by the official or Queen's printer).

Newfoundland: Council St. 1892, c. 2, § 5 (purporting printed copy of House Journals, admissible in inquiries touching privilege, etc.).

Nova Scotia: Rev. St. 1900, c. 2, § 23 (copy of the Council or House Journals purporting to be printed by its order, admissible in inquiries of privilege, etc.); c. 162, § 9 (any statute of the Parliament of the Empire or Canada or this Province or a Canadian province, colony, or territory, or any ordinance of such territory, is provable by copy purporting to be by the Queen's printer or the respective government printer); § 4 (like Can. St. 1893, c. 31, § 11, adding the Queen's printer for Nova Scotia); § 5 (like ib. § 8); § 6 (like ib. § 9, specially mentioning the Province of Nova Scotia and the Queen's printer thereof, and including also any territory of Canada); § 10 (like Can. St. 1893, c. 31, § 16, adding the Royal Gazette).

Ontario: Rev. St. 1897, c. 12, § 63 (in proceedings against a person for printing a report, etc., of legislative proceedings, a printed copy of the journals, purporting to be by authority, is admissible); c. 78, § 21 (statutes or ordinances of the Dominion, or a Territory or Province in British North America, are provable by printed copy purporting to be by the respective Queen's or Government printer); § 22 (proclamations, orders, regulations, or appointments by any chief executive officer or head of department of the Government of Canada are provable by printed copy in the Canada Gazette, or a volume of the Acts of the Parliament of Canada, or purporting to be by the Queen's printer for Canada); § 23 (proclamations, etc., by any chief executive officer or head of department of any province or territory of Canada are provable by printed copy in the respective Official Gazette or purporting to be by the respective Queen's or Government printer); § 25 (copies of notices and documents printed in the Canada Gazette and the Ontario Gazette are "prima facie evidence of the originals"); St. 1900, c. 27, § 14 (loan corporations; certain lists, reports, etc., provable by printed copy in the Ontario Gazette or by an official printer).

Prince Edward Island: St. 1880, § 20 (proclamations, etc.; like Can. St. 1893, c. 31, § 8); § 23 (like ib. § 10); § 24 (statutes of any province of Canada are provable by copy "purport-

ing to be printed and published by the printer authorized to print and publish the same).

UNITED STATES: Alabama: Code 1887, § 1881 (public or private statutes or proceedings of any legislative body, "purporting on the face of the book to be printed by authority" of the government, State, or Territory, receivable); § 1882 (ordinances, etc., of a municipal corporation of this State; a copy "purporting on the face of the book to be printed by authority or to be a code of ordinances," etc., is to be evidence of the "due adoption and continued existence" of the ordinance, etc.); § 380 (printed report of a commissioner, admissible to show the issuance of a fertilizer license); 1882, *Con v. Robinson*, 2 St. & P. 91, 94 (printed copy of statute procured by the Secretary of State as required by law, received; also, when purporting to be published by State authority); 1880, *Herrick v. Andrews*, 9 Port. 9, 87 (New York statute, appearing to be published by public authority, received); 1880, *Smoot v. Pittsburgh*, 15 72, 75 (same; Virginia statutes); 1849, *Geron v. Felder*, 15 11, 304 (printed copy of statutes must be published by authority of law); 1873, *Clanton v. Jones*, 50 11, 290, 292 ("Revised Code of Mississippi," received); 1877, *Bradley v. Bank*, 60 11, 222, 229 (statutes of Louisiana, received); 1880, *Johnson v. State*, 73 11, 483, 486 (volume purporting merely to be "published by authority," rejected); 1885, *Edmunds v. State*, 79 11, 48 (preceding ones approved); 1886, *Hawes v. State*, 80 11, 37, 48, 71, 7 So. 302 (purporting official printed copy of Mississippi Code, received); 1892, *Falls v. Building Co.*, 97 11, 417, 18 So. 25 (publication by a private person under State authority sufficient).

Arizona: Rev. St. 1887, § 1887 ("printed statute-books" of this Territory, or the District of Columbia, or any U. S. State or Territory, or any foreign government, "purporting to have been printed under the authority thereof," admissible).

Arkansas: State, 1884, § 2674 ("the printed statute-books of this State," admissible to prove private acts); § 2875 ("the printed statute-books of the several States and Territories" of the U. S., "purporting to have been printed under the authority thereof," admissible); § 2896 (city or incorporated town ordinances, etc., provable by "printed copies" "published by the authority of" the city or town); § 2906, 2907 (banking company's charter, in a criminal cause, provable by "the printed statute-book" of the creating State); 1850, *Clarke v. Bank*, 10 Ark. 516, 527 (printed statute-book, purporting to be published by authority, received); 1850, *Barkman v. Hopkins*, 11 11, 187, 168 (same); 1850, *May v. Jameson*, 11 11, 263, 277 (same); 1853, *Dixon v. Thatcher*, 14 11, 141, 146 (same; certain Louisiana volumes rejected); 1859, *Yarbrough v. Arnold*, 20 11, 592, 596 (same; book not so purporting, excluded); 1892, *Arkadelphia Lumber Co. v. Arkadelphia*, 56 11, 370, 372, 19 E. W. 1057 (printed copy of a municipal ordinance published by authority, received); 1901, *Lanigan v. North*, 69 11, 62, 68 S. W. 63 (Deering's edition of California Codes, rejected as not purporting to be official).

California: C. C. P. 1872, § 1880 ("books printed under the authority of a sister State or foreign country, and purporting to contain the statutes, code, or other written law of such State or country, or proved to be commonly admitted in the tribunals of such State or country as evidence of the written law thereof," receivable); the thirteenth word *supra*, "and," should be omitted, and this improvement is made in some of the codes founded on the California Code; the letter in these sections is confusing in failing to make clear that a "purporting" authority suffices; id. § 1882, *infra*, attempts to cure this; § 1918 ("public documents printed by the order of the Legislature or Congress or either House thereof," receivable to prove acts of the Executive of this State, a sister State, or the United States; legislative proceedings of the same, provable "by published statutes or resolutions" or by copies "printed by their order," and for a foreign country, by "journals published by their authority or commonly received in that country as such"; acts of a municipal corporation, or its board or department, in the State, "by a printed book published by the authority of such corporation"); § 1943 (there is a presumption "that a printed and published book purporting to be printed or published by public authority was so printed or published"; and that a similar book purporting to contain reports of cases, etc., is authentic).

Colorado: C. C. P. 1891, § 361 ("printed copies in volumes, of statutes, codes, or other written law, of any Territory or any other State or foreign government, purporting or proven to have been published by the authority thereof, or proved to be commonly admitted as evidence of the existing law in the courts and judicial tribunals" thereof, admissible); § 4442 (municipal ordinances, etc., provable by copy "printed in book form or pamphlet form, and purporting to be printed and published by authority of the corporation"); Annot. Stat. 1891, § 1746 ("printed statute-books of the U. S. and of the several States and Territories, printed under the authority" thereof, and "books of reports of decisions of the Supreme Courts of the U. S. and of the several States and Territories, published by authority of such Courts," admissible); St. 1891, p. 267, § 1 (Mills' Annotated Statutes to be evidence of Colorado statutes); 1884, *Bruckman v. Tausig*, 7 Colo. 561, 5 Pac. 152 (statute applied to a volume of Missouri statutes).

Columbia (District): 1898, *Main v. Aukam*, 19 D. C. App. 375, 392 (Georgia Code, admitted; "the impress of the [public] authority by which it is published" sufficient).

Connecticut: Gen. St. 1887, § 1087 (U. S. State and Territorial statutes, "printed by authority," admissible).

Delaware: Rev. St. 1898, c. 107, §§ 5, 6 (printed copies of domestic laws, "published by authority of the State," admissible; also, of laws of another of the U. S., "if purporting to be published under the authority of their respective governments or if commonly admitted and read as evidence in their courts"); § 7 ("reports of cases" in courts of another of

U. S., "published by authority," admissible); 1835, *Bailey v. M'Dowell*, 2 Ha. ingt. 24 (printed statutes of Virginia, etc., in the Secretary of State's office, and purporting to be published by authority, excluded); 1839, *Kinney v. House*, 3 Id. 77 (more private publication of statutes, excluded); 1890, *Bank of Wilmington and R. v. Wollaston*, 1b. 90, 98 (official printed domestic volume containing a bank charter, admitted).

Florida: Rev. St. 1892, § 1106 ("printed copies" of domestic legislative acts, public and private, "which shall be published under authority of the government," admissible; see also id. § 1041); § 1106 ("printed copies of the statute laws" of the U. S. or a State or Territory thereof, "if purporting to be published under the authority of the respective governments, or if commonly admitted and read as evidence in their courts," admissible); 1894, *Rogers v. Zippel*, 23 Fla. 625, 15 So. 326 (*Throop v. N. Y. Statutes*, held not to be a publication purporting to be under authority, though certified as correct by the Secretary of State; under the statute, the fact of being "commonly admitted" must be evidenced).

Georgia: Code 1895, §§ 5210, 5201 (laws of this State, the U. S., and other States of U. S., "as published by authority," to be recognized without proof); 1850, *Stanford v. Frost*, 37 Ga. 243, 246 (a certain printed volume, excluded).

Hawaii: Civil Laws 1897, § 1404 (where the President or a Minister is authorized to act, or to certify anything and publish it in any newspaper, "proof of the said newspaper purporting to contain a copy or notification" thereof shall be evidence of the act or certificate "having been duly done or given" and of the "purport and due making" of such law, etc.; and "the mere production of a newspaper purporting to contain public notices published by authority shall be prima facie evidence of the publication thereof on the day on which the same bears date"); § 1405 (legislative proceedings, and proclamations; copies "purporting to be printed by authority" are admissible "without any proof being given that such copies were so printed").

Idaho: Rev. St. 1897, § 5000 (like Cal. C. C. P. § 1900); § 5077 (like Cal. C. C. P. § 191a, substituting "a State or other Territory" for "a sister State").

Illinois: Rev. St. 1874, c. 51, § 10 ("The printed statute-books of the U. S., and of this State, and of the several States, Territories, and late Territories of the U. S., purporting to be printed under the authority of the U. S., etc., admissible"); § 12 ("books of reports of decisions of the Supreme Court and other courts of the U. S. of this State, and of the several States and Territories thereof, purporting to be published by authority," admissible); c. 24, § 65 (municipal ordinances, "when printed in book or pamphlet form, and purporting to be published by authority of the board of trustees or the city council," admissible); c. 124, § 3 (laws and legislative resolutions and journals, provable by a volume containing a "published" certificate of Secretary of State); 1854, *Charleworth v. Williams*, 16 Ill. 239 (book purporting to be an

statute, read); 1864, *Ewhanks v. Ashley*, 36 Id. 177, 181 (printed copy of town by-laws, admitted under statute); 1865, *Block v. Jacksonville*, 1b. 301, 305 (municipal ordinance printed in a newspaper, received under special town charter); 1872, *Hensoldt v. Petersburg*, 63 Id. 111, 115 (printed town ordinance, admitted under one of the town ordinances); 1875, *Byars v. Mt. Vernon*, 77 Id. 467, 469 (printed city ordinance, received under statute); 1883, *Egan v. Connolly*, 107 Id. 453, 463 (Ohio statute-book, admitted under statute); 1885, *Hudson v. Green H. S. Co.*, 113 Id. 613, 629 (Indiana statute-book, admitted under statute); 1897, *Louisville M. A. & C. R. Co. v. Patchen*, 167 Id. 304, 47 N. E. 368 (city ordinance; must purport to be printed by authority); 1899, *Grand Pass & C. v. Crosby*, 181 Id. 266, 54 N. E. 913 (Indiana statute-book, admitted under the statute).

Indiana: Rev. St. 1897, § 465 (printed statute-books of Indiana State, Northwest Territory, and Indiana and Illinois Territories, "purporting to be printed under the authority of said State or Territories," admissible; see also of books of U. S. States and Territories, "purporting to be printed under the authority thereof"); §§ 5002, 4181 (municipal ordinances "in book or pamphlet form, if the same shall purport to be printed under the authority of the common council," admissible); § 485 (domestic Supreme Court's decision, provable by reports published "as provided by the laws of this State"); 1858, *Mages v. Henderson*, 10 Ind. 261, 263 (statute-book purporting to be printed by authority; purporting certificate of correctness by the Secretary of State, not sufficient); 1860, *Line v. Mack*, 14 Id. 330 (similar); 1861, *Vaughn v. Griffith*, 16 Id. 353 (similar); 1862, *Crake v. Crake*, 18 Id. 154, 160 (similar); 1868, *Paine v. R. Co.*, 31 Id. 263, 215, 253 (similar); 1874, *Rothrock v. Perkinsen*, 61 Id. 39, 43 (printed volume "published by authority," received).

Iowa: Code 1897, § 4649 (acts of the Executive, provable by "public documents purporting to have been printed by order of the Legislature of those governments, respectively, or by either branch thereof"); § 4650 (legislative journals, provable by copy "purporting to have been printed" by order of the appropriate House); § 4651 (statutes provable as in Nebr. Comp. St. § 5003); § 4653 (ordinance of a municipal corporation, provable by "printed copies . . . published by its authority"); 1874, *Grensons v. Davis*, 9 Ia. 223 (private edition of statutes of another State, proved to be there current, admissible); 1867, *Webster v. Rees*, 23 Id. 269 (statute applied); 1896, *Goodwin v. Ass. Soc.*, 97 Id. 230, 68 N. W. 157 (a copy certified in print by the Secretary of State, not sufficient under a clause "published by authority of the Legislature").

Kansas: Gen. St. 1897, c. 97, § 1 ("printed statute-books of this State or of the Territory of Kansas, printed under authority," admissible to prove private acts); § 6 ("printed books containing the acts of the Congress of the United States, purporting to be published by authority of Congress or by authority of the United States," ad-

missible; see also *Id.* c. 102, § 222; § 7 ("public documents purporting to be edited and printed by authority of Congress or either House thereof," admissible); § 17 ("printed copies in volumes of statutes, codes, or other written law enacted by any other State or Territory, or foreign government, purporting or proved to have been published by the authority thereof, or proved to be commonly admitted as evidence of the existing law in the courts" of such State, etc., admissible); § 23 ("printed copies" of ordinances, etc., of any city or town in the State, "published by authority of" such city, etc., admissible).

Kentucky: *Stats.* 1890, §§ 1626, 2419 (copies of Assembly journals, printed by the State, and certain specified editions of the laws, admissible); § 1642 (law of the U. S. or a State or Territory thereof, provable by copy "printed under authority" thereof and received in the Secretary of State's office); § 1644 (law of "any State or Territory," provable by a printed volume or pamphlet "showing on its face that it was published by authority thereof"); 1828, *Taylor v. Bank*, 7 T. B. Monr. 576, 585 (printed copy of statutes, admitted under statute); 1871, *Boots v. Merriweather*, 8 Bush 400 (statutes purporting to be officially printed, admissible).

Louisiana: *Rev. L.* 1897, § 1440 ("The published statutes and digests of other States," admissible to prove "the statute laws of the States from which they purport to emanate").

Maine: *Pub. St.* 1883, c. 82, § 108 (printed copies, "purporting to be published under authority of government," of a law of the United States or a State or Territory thereof, admissible); 1833, *Owen v. Boyle*, 3 Shopl. 147, 150 (book purporting to be an authorized copy of the laws of a British province, received).

Maryland: *Pub. Gen. L.* 1888, Art. 35, §§ 47, 48, 49 (private laws "published by the authority of this State" may be read "from the printed statute-book"; laws of the U. S. or a State or Territory of the U. S., from "any printed volume purporting to contain" them; Baltimore city ordinances, from "the printed volume thereof published by the authority" thereof); *St.* 1896, c. 342 (statutes of the U. S. or a State or Territory or of the United Kingdom are provable from "any printed volume purporting to contain" them, without further authentication or proof).

Massachusetts: *Pub. St.* 1882, c. 169, § 71, *Rev. L.* 1902, c. 175, § 75 (printed copies of this Commonwealth's statutes, "published under the authority of the government," and of the statutes of the United States, and of any other State or Territory, "if purporting to be published under the authority of their respective governments, or if commonly admitted and read as evidence in their courts," admissible); 1825, *Raynham v. Canton*, 3 Pick. 298, 296 (statutes of another State, in "a volume purporting on the face of it to contain the laws," admissible); 1857, *Merrifield v. Robbins*, 8 Gray 180 (the phrase "By Authority" on the title-page, held sufficient); 1862, *Ashley v. Root*, 4 All. 504 (statute applied); 1894, *Bride v. Clark*, 161 Mass. 180, 86 N. E. 745 (statute applied).

Michigan: *Comp. L.* 1897, § 10173 (local statutes, private and public, provable by "printed copies" "published under the authority of the government"); § 10173 (statutes of another State or Territory of the U. S. or of a foreign State, provable by "printed copies," "if purporting to be published under the authority of the respective governments, or if commonly admitted and used as evidence in their courts"); § 10198 (ordinances of a city or village council, etc., provable by printed copy "purporting to have been published by authority" of the council, etc.; see also *Id.* §§ 2758, 3088); 1878, *Wilt v. Cutler*, 38 Mich. 189, 195 (statutes purporting to be "printed by order of the Governor," admitted); 1891, *People v. McQuaid*, 85 *id.* 123, 124, 48 N. W. 161 (an unofficial compilation of statutes, "commonly admitted in all courts" in Pennsylvania, received to show that law); 1896, *Dawson v. Peterson*, 110 *id.* 431, 68 N. W. 246 (printed copy of foreign—here Canadian—statutes, receivable, if proved by a competent witness—here a Toronto barrister—to be commonly accepted by the foreign court).

Minnesota: *Gen. St.* 1894, § 5707 ("the printed copies of all statutes, acts, and resolves of this State, whether of a public or private nature, which are published under the authority of the State," admissible); § 5708 (Bissell's edition of Statutes at Large of 1873, published by Callaghan & Co., admissible, provided the publisher file an agreement as to price); § 5709 (Young's edition of 1878, admissible); § 5711 (Supplement of 1881, admissible); § 5713 (Kelly's edition of 1891, admissible, provided an agreement as to price is filed); § 5715 ("Printed copies of the statute laws of any State or Territory of the U. S., if purporting to be published under the authority of their respective governments, or if commonly admitted and read as evidence in their courts," admissible); § 5719 (ordinances, etc., of any incorporated city of this State, if "printed and published by authority of the corporation," admissible); 1891, *Holly v. Bennett*, 46 Minn. 384, 49 N. W. 189 (printed book purporting to contain municipal ordinances published by the city's authority, received under its charter).

Mississippi: *Annot. Code* 1892, § 9 ("This Annotated Code, when published by authority of the Legislature," to be evidence of the statute law); § 1809 ("printed acts of the Legislature, published by authority thereof," admissible); 1835, *Baughan v. Graham*, 1 How. 220, 224 (foreign book must be shown to be published by authority of the State); 1852, *Stewart v. Swanzy*, 23 Miss. 502, 504 (a foreign book purporting to be printed by authority is presumed to have been so printed).

Missouri: *Rev. St.* 1899, § 2634 (in criminal causes, the powers, etc., of "any banking company or corporation" are provable by "the printed statute-book of the State, government, country" creating it); § 3084 ("the printed statute-books of this State, printed under its authority," to be evidence of private acts); § 3085 ("the printed statute-books of sister States and the several Territories of the U. S., purporting to

be printed by the authority of such States or Territories," admissible); § 3087 ("the printed books containing the acts of the Congress of the U. S., purporting to be published by authority of Congress or by authority of the U. S.," admissible); § 3088 ("the printed volumes, purporting to contain the laws of a sister State or Territory," admissible); § 3090 ("public documents, purporting to be edited or printed by authority of Congress, or either house thereof," admissible); § 3091 ("the printed journal of the Senate and House of Representatives of this State, and all public documents or reports therein contained, and all reports or documents printed by order of this State or by either House of the General Assembly, or purporting to be printed by authority thereof," admissible); § 3097 (Duray's edition of early Maryland laws, and Caruthers and Nicholson's edition of Tennessee statutes, admissible); § 3100 ("printed copies" of ordinances, etc., of a city or incorporated town in this State, "purporting to be published by authority of such city," etc., "and any printed pamphlet or volume, purporting to be published by authority of any such town or city and to contain the ordinances," etc., admissible); § 3143 (copy of a certain act of Congress dealing with lands, printed with Missouri session laws 1873, to be evidence); §§ 5621, 5694, 6364 (city ordinances, "when printed and published by authority of the corporation," admissible); § 4196 (copy of Revised Statutes of 1899 in the office of the Secretary of State, containing a certificate by such Secretary and chairman of the revising committee, admissible; each copy containing such printed certificate, admissible); 1844, *Bright v. White*, 8 Mo. 421, 425 (certain volumes not purporting to be printed, etc., excluded); 1848, *Bailey v. Trustees*, 12 id. 174, 177 (private statute must be produced, even where the law has made the printed statute-book evidence; an enigmatic ruling); 1850, *Halle v. Hill*, 13 id. 612, 616 (certain volumes allowed to be read); 1861, *Cummings v. Brown*, 31 id. 309 (under the statute, the volume need purport only to contain the laws, and not to be printed by authority); 1874, *State v. Williamson*, 57 id. 192, 200 (volume published "pur-suant to law," admitted); 1893, *Tarkio v. Cook*, 70 id. 1, 12, 25 & W. 202 (ordinances admitted under the statute); 1893, *Glenn v. Hunt*, ib. 330, 337, 25 S. W. 181 (the statute sanctioning copies certified by the Secretary of State does not prevent the use of a printed book otherwise admissible; under Rev. St. § 4832 the printed copy need not purport to be by authority).

Montana: C. C. P. §§ 3163, 3206 (like Cal. C. C. P. §§ 1900, 1918); P. C. § 2086 (printed statutes, admissible in a criminal case to prove incorporation).

Nebraska: Comp. St. 1896, § 5970 ("printed copies in volumes of statutes, code, or other written law, enacted by any other Territory, or State, or foreign government, purporting or proved to have been published by the authority thereof, or proved to be commonly admitted as evidence of the existing law" in the courts thereof, admissible); § 5991 (acts of the Executive, domestic or foreign, provable by "public

documents purporting to have been printed by order" of the Legislature or either branch); § 5992 (legislative journals, provable by copy "purporting to have been printed by order of" the respective Houses); § 5993 ("printed copies of the statute laws of this State, or any of the United States, or of Congress, or of any foreign government," purporting, etc., as in id. § 5970, admissible); § 5590 (Brown's compilation of Nebraska statutes, "and subsequent editions founded thereon," to be admissible); §§ 758, 970, 1373, 1416, 1601, 1603 (municipal ordinances, provable "in book or pamphlet form, and purporting to be published or printed by authority of the city council," or "city," or "trustees"); St. 1903, c. 17, § 111 (ordinances of cities of the first class are provable by book or pamphlet "purporting to be printed and published by authority of the city council"); 1902, *Hewitt v. Bank*, — Nebr. —, 92 N. W. 741 (certain Oklahoma statute-books, not admitted on the facts).

Nebraska: Gen. St. 1886, § 3455 ("Printed copies in volumes of statutes, code, or other written law, enacted by any other State, or Territory, or foreign government, purporting or proved to have been published by the authority thereof, or proved to be commonly admitted as evidence of the existing law in the courts and judicial tribunals" of such State, etc., are admissible); § 5012 (*Baily and Hammond's* "compilation, as printed," to be evidence of "the law therein contained"); § 705 (town ordinances, "when printed in a newspaper or published in a book or pamphlet form and purporting to be published or printed by the authority of the town," admissible).

New Hampshire: 1854, *Emery v. Barry*, 23 N. H. 473, 485 (volume of statutes of another State, "purporting on its face to have been printed by authority," admissible; quoted *supra*).

New Jersey: Gen. St. 1896, Evidence § 22 (statute-book and pamphlet session-law of one of the United States, "printed and published by the direction or authority of such State," admissible; the Court to determine whether it was so printed, etc.); § 65 (same for the law of a foreign country or province or subdivision); Cities § 1371 (municipal laws, provable by a volume "printed and published by authority of the common council"); § 1434 (provable by any compilation "duly authorized and recognized"; applicable also to a public board); Statutes § 38 (law "printed by the authority of this State," admissible); St. 1900, c. 150, § 24 (re-enacts Gen. St., Evidence § 22, inserting "or Territory" wherever a State is mentioned); § 25 (re-enacts id. § 65); 1811, *Hale v. Ross*, 3 N. J. L. 590, 591 (printed volume "universally received in the State of New York as the statutes of that State," received); 1840, *Van Buskirk v. Mulock*, 18 id. 184, 188 (*Hale v. Ross* repudiated; exemplified or sworn copies of a New York statute required).

New York: C. C. P. 1877, § 932 (official newspaper copy of a law of this State, admissible till six months after the end of the session; volume "printed under the direction of the Secretary of State," with his certificate, admis-

able); § 941 (proceedings, etc., of a local city council, village trustees, board of health or of supervisors, provable by a volume "printed by authority" of the council, etc.); see also L. 1870, c. 291, T. 3, § 18; L. 1878, c. 219, § 1); § 942 (foreign statute, or executive proclamation, etc., provable by a publication "purporting or proved to have been published by the authority thereof, or proved to be commonly admitted as evidence of the existing law in the judicial tribunals thereof"); 1829, *Peckard v. Hill*, 2 Wend. 411 (printed copy of laws of a foreign State, never receivable; of a U. S. State, receivable if printed by authority); s. o. 5 id. 375, 384, *semble* (same); 1829, *Chanoine v. Fowler*, 3 id. 177 (printed unofficial edition of a French criminal code, excluded); 1880, *Hynes v. McDermott*, 82 N. Y. 41, 54 (printed book purporting to contain French codes, but not purporting or shown to be official, and authenticated only by an expert who had not read them, excluded on the facts); 1899, *Hecla P. Co. v. Sigma I. Co.*, 157 Ill. 437, 53 N. E. 650 (copy of a Spanish ordinance, admitted on the facts).

North Carolina: Code 1833, § 1338 (statute or edict of another State or Territory or a foreign country, provable by a "book or publication purporting or proved to have been published by the authority thereof, or proved to be commonly admitted as evidence of the existing law in the judicial tribunals thereof"); § 1339 (General Assembly's acts, provable by "the printed statute-book"); § 1340 (private act, provable by Martin's collection); 1823, *State v. Twitty*, 2 Hawks 441 (printed copy of statutes of another State, inadmissible without the State seal); 1898, *Copeland v. Collins*, 122 N. C. 619, 30 S. L. 315 (volume purporting to be laws of S. C., admitted).

North Dakota: Rev. C. 1895, § 5090 ("books purporting to be printed under the authority of any other State, Territory, or foreign country, and purporting to contain the statutes, codes, or other written law of such State, Territory, or country, or proved to be commonly admitted in the tribunals of such State," etc., are admissible); § 5099 (substantially like Cal. C. O. P., § 1918); § 70 ("all laws, journals, and documents printed and published by any contractor under the provisions of this article, and duly certified by the Secretary of State as provided herein, shall be deemed to be officially printed and published," and full faith is to be given them); § 2417 (village ordinances, "when printed in a newspaper or published in book or pamphlet form and purporting to be published or printed by authority of the village," admissible); St. 1897, c. 110, para. 25, 26 (it is presumed that "a printed and published book and [= of] statutes purporting to be printed or published by public authority was so printed or published"; that "a printed and published book purporting to contain reports of cases adjudged in the tribunals of the State or country where the book is published contains correct reports of such cases").

Ohio: Rev. St. 1898, § 5244 (printed copy of a law of another State, Territory, or foreign government, "purporting or proved to have

been published by the authority thereof, or proved to be commonly admitted as evidence of the existing law," receivable); § 1699 (municipal ordinance, etc., provable by "printed copies," published under authority of the corporation); § 4263 ("the printed statute-books of this Territory, printed under authority," admissible to prove private acts); § 4265 ("the printed books containing the acts of the Congress of the U. S., purporting to be published by authority of Congress or by authority of the U. S.," admissible to prove all laws therein); § 4266 ("public documents, purporting to be edited or printed by authority of Congress or either House thereof," admissible); § 4269 ("printed copies" of ordinances, etc., of a city or incorporated town "Territory," published by authority of "city, etc., admissible).

Oklahoma: Stats. 1893, § 4260 (like S. D. Stats. § 6533, without the added clause).

Oregon: C. C. P. 1892, § 725 (like Cal. C. C. P. § 1900); § 745 (like Cal. C. C. P. § 1918; but par. 2 reads, "or by statutes or resolutions published by their order"; par. 1 reads, "prepared or printed"; par. 5 reads, "copy" for "book," and adds "or department thereof"); 1900, *State v. Savage*, 35 Or. 191, 60 Pac. 610 (Compiled Statutes of Nebraska, admitted under the statute).

Pennsylvania: St. 1866, P. & L. Dig. Evidence 37 (authorized printed copy of ordinances, etc., of the Philadelphia Council, receivable); 1814, *Biddle v. James*, 6 Binn. 321, 326 (Tighman, C. J.: "I am for admitting the printed copies authorized by the Legislature either of this or any other State, whether the laws be public or private"); 1824, *Kenn v. Rice*, 12 S. & R. 203, 205 (same; applied to a U. S. State); 1820, *Jones v. Maffet*, 5 S. & R. 523 (quoted *supra*); 1845, *Mullen v. Morris*, 2 Pa. St. 85, 87 ("printed volumes" purporting to contain the laws, receivable for U. S. States).

Rhode Island: Gen. L. 1896, c. 244, § 46 (statutes of the U. S., or a State, Territory, or country, "purporting to be published by authority of such State, etc., admissible; so also municipal ordinances in this State); 1870, *Barrows v. Downs*, 9 R. I. 453 (admitting a Spanish Code, authenticated by an expert and used by him to refer to).

South Carolina: Rev. St. 1893, § 2353, Code 1893, § 2890 ("printed copies, in volumes, of statutes, code, or other written law, enacted by any other sovereignty, State, Territory, or foreign government, purporting or proved to have been published by the authority thereof, or proved to be commonly admitted as evidence of the existing law" in the courts of that State, etc., receivable); 1834, *Allen v. Watson*, 2 Hill 319 (printed book of the laws of Georgia, bearing the Governor's certificate, and commonly there accepted as authority, received).

South Dakota: Stats. 1899, § 6533 (like Nev. Gen. St. § 2455; adding: "The term 'public document' is defined to be all the publications and maps printed by order of the Legislative Assembly, or Congress, or either House thereof; and all such documents are admissible in evi-

dence"); § 1588 (town ordinance; like *N. D. Rev. C. § 2417*); *St. 1899*, Feb. 21 (Grant-ham's edition of statutes of South Dakota, "and all revisions thereof," made admissible as evidence).

Tennessee: Code 1894, § 5585 (statutes of this or another U. S. State or a foreign State, provable by printed copies "purporting or proved" to be published by authority, or "proved to be commonly admitted as evidence" in that State, receivable); § 5584 (legislative journals, provable by copy purporting to have been printed by authority of the respective body); § 7357 (existence of a corporation in criminal cases, provable by "book purporting to be the public statute-book" of the U. S. or a State).

Texas: *Rev. Civ. Stats. 1896*, § 2304 ("The printed statute-books of this State, of the United States, of the District of Columbia, or of any State or Territory of the U. S., or of any foreign government, purporting to have been printed under the authority thereof," admissible); 1846, *Barton v. Anderson*, 1 *Tex. 96* (admitting a book purporting to be published under State authority, with expert testimony identifying it); 1854, *Martin v. Payne*, 11 *id.* 292 (copy of Tennessee laws, excluded under the statute).

United States: *Rev. St. 1876*, § 906 (Little & Brown's edition of the laws and treaties of the U. S., admissible); *St. 1874*, June 20, c. 323, § 2 (same); § 3 (pamphlet edition of congressional and session laws, printed by direction of the Secretary of State, admissible); *St. 1877*, March 2, c. 82, § 4 (second edition of the Revised Statutes, for 1876, printed under the same direction, admissible); 1801, *Talbot v. Seeman*, 1 *Cr. 1*, 13, 38 (pamphlet printed by congressional order, containing communications from U. S. diplomatic agents abroad giving copies of French admiralty ordinances, admitted); 1806, *U. S. v. Johns*, 4 *Dall.* 412, 415 (Maryland statute-book, "published by authority," admitted); 1816, *Craig v. Brown*, 1 *Fet. C. C.* 355 (printed foreign statutes must bear the State seal); 1823, *Commercial & F. Bank v. Patterson*, 2 *Cr. C. C.* 346 (Pennsylvania statute-book, purporting to be published by legislative authority and deposited in the State Department, admitted); 1831, *Hinde v. Vattier*, 5 *Fet. 398* ("Land Laws of Ohio," received under Ohio law); 1841, *U. S. v. Glasware*, 4 *Law Reporter* 36 (printed copy of an English statute, bought of the royal printer, admitted); 1852, *Ennis v. Smith*, 14 *How.* 400, 429 (printed copy of the code of France, purporting to be official and received by the Federal Supreme Court in exchange for U. S. statutes, admitted); 1869, *O'Keefe v. U. S.*, 5 *Ct. Cl.* 674, 682 (volume of English statutes, purporting to be officially printed, and testified to by an English lawyer as an authorized book, admitted); 1870, *Armstrong v. U. S.*, 6 *id.* 225 (printed volume of laws sent by a foreign government to the Federal Supreme Court, admitted); 1872, *The Pawashick*, 2 *Low.* 142, 147 (officially printed book of foreign statutes, admissible when "shown to the reasonable satisfaction of the Court" to be genuine; here, a purporting printed copy of the

English Merchant Shipping Act was admitted without any proof by witnesses); 1903, *Nashua Savings Bank v. Anglo-American L. M. & A. Co.*, 159 *U. S.* 231, 23 *Sup.* 517 (printed copies of a purporting act of the British Parliament, testified by an English attorney to have been "issued by authority, being printed by Her Majesty's printer," and to be there receivable without further evidence, admitted, under the law of New Hampshire).

Utah: *Rev. St. 1898*, § 5379 ("Books purporting to be printed or published under the authority of another State or a Territory or foreign country, and to contain the statutes, code, or other written law of said State, Territory, or country, or proved to be commonly admitted in the tribunals of such State, Territory, or country, as evidence of the written law thereof," admissible); § 4859 (corporate charter; like *Mont. P. C. § 2086*); *St. 1899*, c. 16 (city ordinances as "printed in book or pamphlet form by authority of the city council," admissible).

Vermont: 1814, *State v. Stude*, D. Chip. 303 (copy of a law of a U. S. State, printed under authority, receivable); 1827, *Danforth v. Reynolds*, 1 *Vt.* 259, 265 (statute-book of a U. S. State, "printed by the authority of such State and used in her courts," receivable); 1847, *Territt v. Woodruff*, 19 *id.* 182, 183 (printed statutes of a U. S. State "published by the authority of such State," receivable); 1852, *Spaulding v. Vincent*, 24 *id.* 501, 504 ("some copy of the law which the witness could swear was recognized in the Province as authoritative" is necessary; here for Canadian law); 1855, *Smith v. Potter*, 37 *id.* 304, 309 ("authorized statute-book" of a U. S. State, "ordinarily sufficient"); 1856, *State v. Abbey*, 29 *id.* 60, 65 (volume "purporting to be published under the authority of the State," sufficient, for a U. S. State).

Virginia: Code 1887, §§ 3327-3331 (domestic statutes, etc., "published by the public printer for the time being," receivable; also such printed copies of domestic legislative journals; also Henning's publication of early Virginia statutes; also copies of statutes of the United States or of any U. S. State or Territory, "printed by authority," of such State, etc.; also, copies of ordinances, etc., of a municipal corporation in this State, "which purports to have been printed by the authority of the corporation"); 1834, *Taylor v. Bank*, 5 *Leigh* 471, 476 (Federal statutes, "printed under the orders of Congress by the public printer," received).

Washington: Codes and Stats. 1897, § 6045 ("Printed copies of the statute laws of any State, Territory, or foreign government, if purporting to have been published under the authority of the respective governments, or if commonly admitted and read as evidence in their courts," receivable); § 864 ("A printed copy of any ordinance or by-law [of a city of the second class], or a compilation thereof printed by authority of the city council and attested by the clerk," admissible); § 1299 ("When the ordinances of any city or town are printed by authority of such municipal corporation, the printed copies thereof" are admissible).

West Florida: Code 1891, c. 126, § 2 (copies of legislative journals of this State, "printed by authority of the Legislature," admissible); c. 12, § 2 (laws of Virginia, provable by "printed copies"; acts of the Legislature of this State, provable by printed copies "published by authority thereof"); § 4 (law of another State or country or of the U. S.; the judge may consult "any printed book purporting to contain" it).

Wisconsin: Stats. 1898, § 4125 ("The printed copies of all statutes, acts, and resolves of this State, whether of a public or private nature, which shall be published under the authority of the State," admissible; journals of the Legislature kept by clerks and deposited with the Secretary of State, "including the printed journals of previous Legislatures there deposited," admissible; "and the printed journals of said House, respectively, published by authority of law," are admissible); § 4126

("Printed copies" of the statutes of the United States or a U. S. State or Territory, "if purporting to be published under the authority of their respective governments, or if commonly admitted and read as evidence in their courts," admissible); § 4127 ("Copies of the ordinances, by-laws, resolutions, and regulations of any city or village in this State, printed in any newspaper, book, pamphlet, or other form, and purporting to be published by authority of the proper common council or village board," admissible); 1900, Quint v. Merrill, 105 Wis. 406, 81 N. W. 684 (printed copy of a city charter insufficient on the facts); 1901, Hollister v. McCord, 111 Md. 538, 87 N. W. 475 (Wenzell's edition of the Minnesota General Statutes 1894, admitted under § 4126).

Wyoming: Rev. St. 1907, § 2602 (like Oh. Rev. St. § 5244).

SUB-TITLE II (continued): EXCEPTIONS TO THE HEARSAY RULE.

Topics IX, X, XI, XII: SUNDRY EXCEPTIONS.

CHAPTER IV.

Topic IX: LEARNED TREATISES.

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Topic IX: LEARNED TREATISES.

§ 1690. Scope of the Objections to the Exception. This Exception is usually spoken of as involving the use of "scientific books" or "medical books" or "books of science and art"; but the term "learned treatises" seems more accurate in indicating the scope of the doctrine. As an exception to the Hearsay rule, it has obtained complete recognition in only one or two jurisdictions; but it deserves a fuller acceptance, and the precise bearings of the reasons for and against recognizing it deserve careful consideration.

(1) More than one reason has been advanced for prohibiting the use of learned treatises in evidence; but the only legitimate one, and the one generally pointed out and relied upon in judicial opinion, is that such an offer of evidence purports to employ testimonially a statement made out of court by a person not subjected to cross-examination; i. e. purports to violate the fundamental doctrine (*ante*, § 1862) of the Hearsay rule. That this is the main objection is indicated in the following passages:

1831, *Mellen, C. J.*, in *Ware v. Ware*, 8 Me. 59: "These books do not come into court, as all other evidence must, either by consent or under the sanction of an oath. Without such consent or oath, their contents are mere declarations and hearsay. . . . The benefit of cross-examination would be lost by allowing books of such a character to be evidence."

1853, *Shaw, C. J.*, in *Ashworth v. Kittredge*, 12 Cush. 194: "The substantial objection is that they are statements wanting the sanction of an oath, and the statement thus proposed is made by one not present and not liable to cross-examination."

1854, *Battle, J.*, in *Melvin v. Early*, 1 Jones L. 388: "The reason of the rule is obvious, that if the authors were present they could not be examined without being sworn and exposed to cross-examination."

1856, *Burns, J.*, in *Brown v. Sheppard*, 18 U. C. Q. B. 179: "The opinions which are to be received, upon which the jury is to deduce a certain fact, must be so given as to be subject to examination and cross-examination before the court and jury. Now it is obvious, if books upon skill and science are to be made evidence of themselves, the protection a person has of showing by an examination of the person advancing an opinion that it is improperly arrived at is quite destroyed."

1860, *Johnston, J.*, in *State v. Baldwin*, 36 Kan. 17, 12 Pac. 318: "The great weight of authority is that they cannot be admitted . . . , this upon the theory that the authors did not write under oath, and that their grounds of belief and processes of reasoning cannot be tested by cross-examination."¹

Other reasons, however, which have occasionally been suggested, usually in connection with the preceding one, must be briefly noticed.

(2) We are told that science is shifting; that experiment and discovery are continually altering scientific theories and rendering them valueless; so that "a medical book which was a standard last year becomes obsolete this year"; that there is no general agreement among scientists, and that testimony characterized by such instability and uncertainty is untrustworthy.² Leaving aside for the moment the ignorant exaggeration in these charges, which attribute to the entire body of scientific knowledge the instability due to recent rapid progress in certain departments of the sciences, and ignore even in those departments the small proportion which the field of possible change bears to the large area of established truth, we find that the objection is in itself inconsistent with accepted legal practices, and would if consistently applied exclude all testimony even on the stand from scientific witnesses. For if these works are rejected because they may not embody the latest results of science, what shall be said of specialist witnesses in general? Out of the hundreds of scientific experts who are this month testifying in courts of justice, how many are speaking from a thorough acquaintance with the latest researches in their subjects? For how many of them is it possible to maintain steady pace with the daily progress of science? How many are not testifying from information obtained at a medical or other technical school a decade or more ago, from the standard books of their day? It is true,

¹ *Accord*: 1832, *People v. Wheeler*, 60 Cal. 584; 1835, *Gallagher v. E. Co.*, 67 *id.* 17, 6 Pac. 469; 1832, *People v. Hall*, 48 Mich. 490, 12 N. W. 665; 1834, *People v. Millard*, 53 *id.* 76, 18 N. W. 562; 1867, *Payson v. Everett*, 12 Minn. 219; 1882, *Tucker v. McDonald*, 60 Miss. 470; 1862, *State v. O'Brien*, 7 R. I. 388; 1860, *Fowler v. Lewis*, 25 Tex. (Suppl.) 321.

² This suggestion is found in the following opinions: 1835, *Gallagher v. E. Co.*, 67 Cal. 16, 6 Pac. 369; 1831, *Ware v. Ware*, 8 Me. 57; 1853, *Ashworth v. Kittredge*, 12 Cush. 195; 1832, *People v. Hall*, 48 Mich. 490, 12 N. W. 665; 1877, *Huffman v. Click*, 77 N. C. 57.

where conflicting views are advanced and an expert cannot state his views to be founded on the most recent investigations, that his views are naturally entitled to inferior weight; but could it seriously occur to any one to exclude all experts from the stand, not because this or that one has in fact no acquaintance with the recent literature of his profession, but because many among the whole body may not possess such acquaintance? Yet after all, going back to the exaggeration involved, is the objection one of appreciable magnitude? "I will not sit here," once said Chief Justice Dallas, "and hear science reviled and the recorded researches of the medical world misrepresented as leading only to uncertainty." Is there in fact such a conflict of beliefs and theories as courts must take notice of, to the exclusion of these works? It is safe to say that for practical purposes, in legal controversy, the uncertain topics are the exception and not the rule. If we can imagine a proposition to exclude a given witness to an event because possibly some other person was present, who possibly would relate a different version, which possibly would be more correct, we shall have some analogy to the true force of this objection. In short, if witnesses had never contradicted each other and experts on the stand had never differed, it might be urged with some show of reason that writers of treatises are often not agreed. It is not to be wondered at under the circumstances that a guilty feeling of inconsistency sometimes arises, and, in the words of a learned editor of Professor Greenleaf's work,³ "Courts manifest a consciousness of the want of principle upon which the rule excluding such testimony rests."

(3) Another objection sometimes raised is the danger of *confusing the jury* by technical passages without oral comment and simplification.⁴ A number of answers to this will suggest themselves; it is enough to point out that, so far as it is an appreciable danger, the counsel may be trusted to protect themselves, where necessary, against this danger by employing also an expert to take the stand.

(4) Another objection, once made, is that the treatises may be used unfairly by taking passages which are explained away or contradicted in other books or in other parts of the book.⁵ Here, again, so far as the possibility is appreciable, the opposing counsel may be trusted to protect his client's interests, exactly as he does by bringing to the stand one expert to oppose another, and with much less difficulty and expense.

All these objections, appearing in the beginning as the casual thoughts of individual judges in past and less liberal generations, have been elevated to the rank of accepted reasons and given vogue by one or two writers on Evidence,⁶ and have thence found their way into many judicial opinions of the present generation. But for this, it is probable that the true reason for the rule of exclusion would, in this country at least, not have been obscured in the minds of a generation naturally so hostile to such illiberal notions.

³ Crosswell's Greenleaf, 15th ed., I, § 497, note 4.

⁴ 1853, Ashworth v. Kittredge, 12 Oash. 195.

⁵ 1885, Gallagher v. R. Co., 67 Cal. 15, 6 Pac. 869.

⁶ Particularly by Dr. Wharton, Evidence, § 665.

(5) There is also to be noticed, moreover, the original reason offered for exclusion by Chief Justice Tindal, in *Collier v. Simpson*,⁷ the starting-point of the English decisions.⁸ "Physic," he said, when asked by counsel why he could not read to the jury a medical book as well as a law book, "depends more upon practice than law does"; meaning apparently that though the principles of law are chiefly obtained from books, the truths of medicine are to be sought chiefly in the personal experience of physicians. It is almost needless to say that medical treatises cannot in these days be put on the shelf with the simple statement that medicine depends more on practice than the law does. The great storehouses of medical experience are the books and journals of the profession. "Medical evidence," it has been truly said,⁹ "altogether is little else than a reference to authority." The argument of Chief Justice Tindal has not reappeared.

1. The Exception as Recognized.

The grounds for recognizing the Exception, and its proper limitations if recognized, may be taken up in the light of the general considerations already mentioned for the other Hearsay Exceptions (*ante*, §§ 1421-1424).

§ 1691. *General Principle*: (1) *Necessity*. The necessity (*ante*, § 1421) seems palpable enough, if we examine carefully the results of the strict enforcement of the Hearsay rule. The ordinary expert witness, in perhaps the larger proportion of the topics upon which he may be questioned, has not a knowledge derived from personal observation. He virtually reproduces, literally or in substance, conclusions of others which he accepts on the authority of the eminent names responsible for them. If, whenever this is discovered, we are to reject the evidence absolutely,¹ then on all such matters the only resource is to search for a qualified expert, who may or may not be available within the jurisdiction.² Even where such a person is legally procurable (all the chances being against it except in a few centres of population), the expense is frequently disproportionata. Costly litigation is the parasite of justice; and we pay too high a price when we refuse to accept our information from a competent source ready at hand. Moreover, there are

⁷ 5 C. & P. 73.

⁸ There seems to have been no general rule before this time; though we meet with such incidents as the tilt in Cowper's Trial between Baron Hattell and Dr. Crell (quoted *post*, § 1697), and the refusal of Abbott, C. J., in the Donnell poisoning trial, to listen to citations from Thénard's works, on the ground that "we cannot take the fact from a publication as related by a stranger." But even in Cowper's Trial, medical works were allowed to be quoted: 1699, Spencer Cowper's Trial, 13 How. St. Tr. 1163 (Dr. Crell was allowed to cite Parry on Renunciations, an eminent surgeon's work, on the indicia of drowning).

⁹ Edinburgh Med. & Surg. Journal, XIX, 420.

¹ 1875, *R. v. Taylor*, 18 Cox Cr. 77, 78, Brett, J. ("a mere statement by a medical man

of hearsay facts of cases at which he was in all probability not present"); 1888, *Soquet v. State*, 73 Wis. 666, 40 N. W. 391; see the principle *ante*, § 687, as applied to radical witnesses on the stand.

² 1857, *Stone, J.*, in *Stoudenmeyer v. Wil-Hamson*, 29 Ala. 567: "If we lay down a rule which will exclude from the jury all evidence on questions of science and art, except to the extent that the witness has himself discovered or demonstrated the correctness of what he testifies to, we certainly restrict the inquiry to very narrow limits. . . . It is the boast of this age of advancing civilization that, aided and facilitated by the printer's art, the collected learning of past ages has been transmitted to us. Shall we withhold the benefits of this heritage from the contests of the court-room? We think not."

certain matters upon which the conclusions of two or three leaders in the scientific world are always preëminently desirable; and it is highly unsatisfactory that, except in the region where they may happen to live, the opinions of world-famous investigators should have no standing of their own.⁶ Whether such persons are legally unavailable, or whether it is merely a question of relative expense, the principle of necessity (*ante*, § 1421) is equally satisfied; and we should be permitted to avail ourselves of their testimony in the printed form in which it is most convenient.

The proper rule would be for the Court to allow the use of a printed treatise, unless in its discretion, considering all the circumstances, the author if available should be summoned. In practice, the Courts which allow the use of learned treatises apparently do not impose any such condition.

§ 1092. *Same*: (2) *Trustworthiness*. Under the second general consideration for Hearsay exceptions (*ante*, § 1422), the question here is whether there are any circumstances attending the publication of a learned treatise which give a fair guarantee of trustworthiness. If we consider the circumstances that have been regarded as sufficient in the foregoing and the following Exceptions to the Hearsay rule, it must be concluded that the guarantee here is at least as satisfactory. (a) There is no need of assuming a higher degree of sincerity for learned writers as a class than for other persons; but we may at least say that in the usual instance their state of mind fulfils the ordinary requirement for the Hearsay exceptions, namely, that the declarant should have "no motive to misrepresent." They may have a bias in favor of a theory, but it is a bias in favor of the truth as they see it; it is not a bias in favor of a cause or of an individual. Their statement is made with no view to a litigation or to the interests of a litigable affair. When an expert employed by an electric company using the alternating or the single current writes an essay to show that the alternating current is or is not more dangerous to human life than a single current, the probability of his bias is plain; but this is the exceptional case, and such an essay could be excluded, just as any Hearsay statement would be if such a powerful counter-motive were shown to exist. (b) The writer of a learned treatise publishes primarily for his profession. He knows that every conclusion will be subjected to careful professional criticism, and is open ultimately to certain refutation if not well-founded; that his reputation depends on the correctness of his data and the validity of his conclusions; and that he might better not have written than put forth statements in which may be detected a lack of sincerity of method and of accuracy of results. The motive, in other words, precisely the same in character and is more certain in its influence than that which is accepted as sufficient in some of the other Hearsay exceptions, namely, the unwelcome probability of a detection and exposure of errors (*ante*, § 1422). (c) Finally, the guarantees of accuracy, such as they are, at

⁶ This thought was given expression in judicial language by Foster, J., in *Dole v. Johnson*, 80 N. H. 454 (1870): "We may have little doubt that a page from Youatt or Merrell [in this case] would be a safer guide for the jury than the opinion of such a witness as Mr. W."

least are greater than those which accompany the testimony of so many expert witnesses on the stand. The abuses of expert testimony, arising from the fact that such witnesses are too often in effect paid to take a partisan view and are practically untrustworthy, are too well-known to repeat (*ante*, § 562). It must be admitted that those who write with no view to litigation are at least as trustworthy, though unsworn and unexamined, as perhaps the greater portion of those who take the stand for a fee from one of the litigants.¹ It may be concluded, then, that there is in these cases a sufficient circumstantial guarantee of trustworthiness. The Court in each instance should in its discretion exclude writings which for one reason or another do not seem to be sufficiently worthy of trust.

§ 1693. *Jurisdictions in which the Exception is Recognized.* (1) On the foregoing grounds, the Exception has received a general and complete recognition in at least two jurisdictions as a deduction from common-law principles.² Furthermore, in several jurisdictions (including one of the above two) a statute has established an Exception of similar import.³ But, unfortunately, the legislators, in the original enactment of Iowa (copied in California and else-

¹ Mr. Nathaniel Monk, the writer on Evidence, has emphasized this (1891; 24 Albany Law Journal 366).

² *Iowa*: 1848, *Bowman v. Woods*, 1 G. Greene 445; *Alabama*: 1857, *Stendenmeier v. Wilson*, 29 Ala. 567; 1861, *Merkle v. State*, 57 Id. 41; 1879, *Bales v. State*, 63 Id. 38; the latest case vacillates; 1901, *Timothy v. State*, 130 Id. 68, 30 So. 239 (medical-jurisprudence book, not admitted to prove experiments as to powder marks). In *Wisconsin*, the exception seemed once to be established; 1849, *Laning v. State*, 1 Chand. 185; 1872, *Ripon v. Bittel*, 50 Wis. 619 (admitted "as evidence, but only as having that force and authority which the opinion of learned and scientific men may give"). But by later decisions (*post*, § 1696) the Exception was overthrown. In *Laning v. State*, 2 Fina. 286 (1849; second trial), a medical witness' answer was excluded because it appeared that it would have been based on reading and hearsay, not on personal knowledge; there was no ruling, as has sometimes been thought, excluding medical books.

In the *Federal Courts*, a disposition to recognize it has been shown: 1897, *Western Assur. Co. v. Mohlman Co.*, 28 C. C. A. 157, 83 Fed. 811 (Lacombe, J., allowing a civil engineer, called as an expert in construction, to read excerpts from scientific books in his testimony: "The rule [of exclusion] is not of universal application. It would be a reproach to the administration of the law if it were so. Records of observations are undoubtedly secondary evidence, but, if all such records were excluded from the sources of knowledge available to a court of justice, it would frequently find itself unable to obtain information which was open to every individual in the community. It has been held repeatedly that standard life and annuity tables, showing at any age the probable duration of life, are competent evidence. . . .

Under the rule contended for, that valuable information would be available for the use of a court of justice so long as the men who made the tests and prepared the tabulations were living and producible, but after their death or disappearance the information they had gathered would be lost to the court, although available for every one else in the community, and relied upon by engineers and builders whenever a new structure is in process of erection. Upon the precise point here presented the diligence of counsel has not succeeded in discovering a single authority. We feel, therefore, no hesitancy in so modifying the general rule as to hold that, where the scientific work containing them is concededly recognized as a standard authority by the profession, statistics of mechanical experiments and tabulations of the results thereof may be read in evidence by an expert witness in support of his professional opinion, when such statistics and tabulations are generally relied upon by experts in the particular field of the mechanic arts with which such statistics and tabulations are concerned").

³ *Cal.* C. C. P. 1872, as amended 1874, § 1944 ("Historical works, books of science or art, and published maps or charts, when made by persons indifferent between the parties, are *prima facie* evidence of facts of general notoriety and interest"); the following statutes are identical with this: *Ida.* Rev. St. 1887, § 5990; *La.* Code 1897, § 4618; *Mont.* C. C. P. 1835, § 2227; *Nebr.* Comp. St. 1899, § 5916; *Or.* C. C. P. 1892, § 758; *Utah* Rev. St. 1898, § 2400. The following statute is more limited: *S. C.* St. 1891, c. 20, Code 1902, § 2902 (where a question of sanity or the administration of poison or other article destructive to life is involved and expert testimony is admissible, "the medical or scientific works" shall be admissible "in addition to such expert testimony").

where), used language partially appropriate to the Exception for Reputation on Matters of General Interest (*ante*, §§ 1596, 1598, 1599); and by more recent judicial construction, in some of these States, the legislative intent to establish an Exception of the present tenor has been defeated, and the use of learned treatises in those jurisdictions is now allowable no further than as recognized at common law under the General Interest (Reputation) Exception (*ante*, § 1598) or under the partial concessions of the common law later to be noted (*post*, §§ 1697-1700).²

(2) A partial recognition of the principle of the Exception, at common law, is found in the admission in all jurisdictions of a few specific kinds of treatises or tables (noted *post*, §§ 1697-1700).

§ 1694. *Testimonial Qualifications; Production of Original.* (1) The treatise-writer must, like every other witness, be shown beforehand to be properly qualified to make statements upon the subject in hand.¹ This will require as in other Hearsay exceptions (*ante*, § 1424), another witness who will testify to these qualifications,— which means here the summoning of any one in the profession, art, or trade of the writer and ascertaining from him the writer's standing as an authority. This removes the danger of an ignorant use of statements by writers of no standing; but it is merely the application of the general principle as to testimonial qualifications. It is done even in those jurisdictions (*post*, § 1637) where the Exception is recognised only in a fragmentary form.³ Practically, also, it guards against the supposed danger, already adverted to, of allowing the jury to be confused by book-passages offered without explanation; for the expert who induces the book can also be used to make explanations where desirable. It also forbids, of necessity, the loose and unsafe practice (*post*, § 1700), followed in some jurisdictions, of permitting counsel to read indiscriminately to the jury, as a

¹ *California*: 1882, *People v. Wheeler*, 60 Cal. 542 (Code § 1941 applies to matters of general interest only, and does not admit scientific books as such); 1885, *Gallagher v. R. Co.*, 67 id. 16, 6 Pac. 869 (similar); *Iowa*: the decisions applied the statute as intended, for more than a generation: 1872, *Brodhead v. Wilton*, 35 Ia. 429; 1878, *Crawford v. Williams*, 48 id. 249; 1887, *Quackenbush v. R. Co.*, 73 id. 458, 461, 35 N. W. 523, *concord*; 1888, *Warden v. R. Co.*, 76 id. 310, 314, 41 N. W. 36; 1892, *Pock v. Hutchinson*, 88 id. 320, 325 (*Welsh' Treatise on the Eye*, admitted); then the *California* heresy was adopted: 1894, *Burg v. R. Co.*, 90 id. 106, 114, 57 N. W. 680 (*American Mechanical Dictionary*, not admitted on the facts; *Railway Age*, not admitted to show tests of brakes); 1897, *Union P. R. Co. v. Yates*, 25 C. C. A. 103, 79 Fed. 584 (*Iowa* Code held to apply strictly to matters of "general notoriety or interest"; a medical book treating of nervous shock, excluded); 1898, *Bixby v. Bridge Co.*, 105 Ia. 293, 75 N. W. 182 (declining to allow the use of medical treatises; limiting the Code words "books of science" by the later clause "facts of general notoriety and interest"; distinguishing *Bowman v. Woods*, and repudiating the later

cases; approving *Gallagher v. R. Co.*, Cal.; 1900, *Stewart v. Equit. M. L. Ass'n*, 110 id. 528, 81 N. W. 782 (preceding case followed); 1900, *State v. Petersen*, ib. 647, 82 N. W. 325 (same); *Nebraska*: The same history here ensued: 1884, *Sioux City & P. R. Co. v. Finlayson*, 16 Nebr. 587, 20 N. W. 860 (*Forney's "Catechism of a Locomotive"*, admitted); 1897, *Van Shike v. Potter*, 53 id. 28, 73 N. W. 295 ("books of science or art" does not admit books of surgery, save under the exception of "general interest").² 1887, *Stoudenmeier v. Williamson*, 29 Ala. 567 (Stone, J.: "books admitted or proven to be standard works with that profession"). *Accord*: 1861, *Merkle v. State*, 37 id. 141; 1878, *Crawford v. Williams*, 48 Ia. 249 (proof required that a herd-book was recognized by cattle-breeders as correct).

² 1873, *Rowley v. R. Co.*, L. R. 8 Ex. 227; 1845, *Spalding v. Hedges*, 2 Pa. St. 243 (gazetteer); 1886, *Railroad Co. v. Ayres*, 84 Tenn. 729 (mortality tables).

In the use of legal treatises and statute-books to prove foreign law a requirement that the book shall appear to be commonly accepted in the foreign jurisdiction as evidence of the law is usually made (*post*, § 1697).

part of his argument, extracts from scientific treatises, and furnishes the real reason why this is to be condemned.

(3) The rule of production of the book itself (*ante*, § 1170) also applies, where it is desired to employ a specific book; but this does not forbid asking the witness a general question as to the opinion of the profession.³

2. The Exception nominally Rejected, though in part Recognized.

§ 1096. Jurisdictions rejecting a General Exception. The Exception as already noted, is explicitly accepted in one or two jurisdictions only. In the others, the Exception, so far as it has been ruled upon, has been repudiated in general terms.⁴ But even in these jurisdictions there are several forms in which it has been recognized partially; that is, a consistent application of principle would have resulted in the exclusion of certain things that are in fact received; and their reception is an implied recognition of the principle of the Exception in those classes of cases. These may now be examined.

§ 1097. Partial recognition; (1) Legal Treatises. (a) The statements of domestic law made by writers of legal treatises have always been consulted as sources of information. In theory, to be sure, the real nature of the process has been blinked at. As the judges are supposed to know the law, the doctrines of judicial notice (*post*, § 2572) and of refreshing the judicial memory (*post*, § 2569) have served to obscure the real effect of a practice which one would hardly think of disputing.⁵ The constant references, particularly in

³ The principle was applied improperly in *State v. Winter*, 1887, 73 Ia. 627, 632, 34 N. W. 476, where the witness was not allowed to state the general consensus of medical authors. In *Broadhead v. Wilton*, 1872, 25 Ia. 420, it was said that a physician might testify to the contents of a scientific book without producing it.

⁴ Besides the cases cited *ante*, §§ 1090 and 1093, the following rulings repudiate it: *England*: 1844, *R. v. Crouch*, 1 Cox Cr. 24; *Alderson*, B.; 1854, *Darby v. Ouseley*, 1 H. & N. 8, 12 (rejecting histories reciting the excommunication by Popes of heretical Sovereigns, and other books of ecclesiastical affairs); 1874, *R. v. Taylor*, 13 Cox Cr. 78; *Brett*, J.; *United States*: 1895, *Johnston v. R. Co.*, 25 Ga. 636, 637, 22 S. E. 604; 1882, *North Chicago R. M. Co. v. Monks*, 107 Ill. 341; 1884, *Bloomington v. Schreck*, 110 Id. 221; 1885, *Eppe v. State*, 109 Ind. 540, 1 N. E. 491; 1848, *Coolidge's Trial* (Waterville), Me., *Boston Daily Times Rep.* 22 (medical books not allowed to be read, "on the ground that the authors of these works were not under oath when they were written"; by *Whitman*, C. J., and *Shipley* and *Wells*, JJ.); 1873, *Com. v. Startivant*, 117 Mass. 139; 1876, *Com. v. Brown*, 121 Id. 81; 1889, *Com. v. Marzynski*, 149 Id. 72, 21 N. E. 228; 1883, *People v. Vanderhoof*, 71 Mich. 179, 20 N. W. 28; 1870, *Dole v. Johnson*, 50 N. H. 458; 1896, *New Jersey E. & I. Co. v. L. E. & I. Co.*, 20 N. J. L. 189, 35 Atl. 915; 1897, *State v. Sexton*, 10 S. D. 127, 72 N. W. 54; 1901,

Brady v. Shirley, 14 Id. 447, 35 N. W. 1000 (works on veterinary surgery, excluded); 1881, *Davis v. U. S.*, 105 U. S. 372, 17 Sup. 200 ("what does medical science teach us in that?") excluded, at least in the trial Court's discretion); 1897, *Union P. R. Co. v. Yates*, 25 C. C. A. 103, 79 Fed. 534; 1882, *Stilling v. Thorp*, 54 Wis. 584, 11 N. W. 906; 1883, *Kronzinger v. R. Co.*, 73 Id. 100, 40 N. W. 657.

⁵ It was disputed, but immediate rebuke was given, by *Lowell*, J., in *The Pawashick*, 1872, 2 Low. 148 ("I believe it to be the true doctrine that the unwritten law of England may be proved in this court, not by experts only, but by text-writers of authority and by printed reports of adjudged cases; and written law may be proved by the printed copies and be construed with the aid of text-books as well as of experts. . . . Evidence is competent which consists only of books of acknowledged or ascertained authority. . . . The proposition that *Abbott on Shipping* and the regular reports of decisions of the courts and the various books cited as authority for the law in England cannot be read for this purpose here appears to me little less than absurd").

Whether counsel may read legal treatises in argument to the jury is a question of the propriety of interfering with the proper functions of the Court, and of the duty of the jury to accept the Court's statement of the law, and does not concern the present question; see *State v. Fitzgerald*, 120 Mo. 407, 32 S. W. 1112.

more recent times, to the statements of treatises and compilations of more or less authority indicate the inveteracy of the practice.

(b) But when it has come to the use of treatises by writers upon foreign law, these subterfuges fail, and the judicial conscience has been obliged to acknowledge the true nature of the process as involving the reception of evidence. The propriety of accepting such evidence, after it is shown by testimony on the stand that the authors of the treatises are recognized in the foreign jurisdiction as competent authorities, has been frequently justified in judicial opinion:

1806, *Ellenborough*, L. C. J., in *Piston's Trial*, 30 How. St. Tr. 468: "The text-writers furnish us with their statement of the [foreign] law, and that would certainly be good evidence upon the same principle which renders histories admissible. . . . I shall therefore receive any book that purports to be a history of the common law of Spain."

1811, Sir William Scott (Lord Stowell), in *Dabrymple v. Dabrymple*, 2 Hagg. Cons. 81: "The authorities to which I shall have occasion to refer [for the law of Scotland] are of three classes: first, the opinions of learned professors given in the present or similar cases; secondly, the opinions of eminent writers as delivered in books of great legal credit and weight; and, thirdly, the certified tribunals of Scotland upon these subjects. I need not say that the last class stands highest in point of authority."

1844, Lord Denman, in *The Sussex Peerage Case*, 11 Cl. & F. 118: "We have both the materials of knowledge offered to us. We have the witness, and he states the law, which he says is correctly laid down in these books. The books are produced, but the witness describes them as authoritative. . . . Proof of the law itself, in a case of foreign law, could not be taken from the book of the law, but from the witness who described the law. If the witness says: 'I know the law, and this book truly states the law,' then you have the authority of the witness and of the book."

Accordingly, the propriety of receiving treatises thus shown competent may be said to be established.² It is true that in some opinions this requirement of presentation through an expert on the stand is taken as signifying that the foreign writer's statements merely become a part of the former's testimony, and the theory is kept up that the foreign writer is as such not accepted.³ Yet in effect the book is taken, and the rule merely

² Eng.: 1806, *Ellenborough*, L. C. J., in *Piston's Trial*, 30 How. St. Tr. 468, 492, 511; 1822, *Lacoe v. Higgins*, 3 Stark. 178, Dowl. & R. N. P. 42, Abbott, C. J., *conside*; 1836, *Bredalbane v. Chandoe*, 2 Myl. & Cr. 727, 741; 1844, *Baron de Bode's Case*, 8 Q. B. 354, Lord Denman, C. J.; 1845, *Nelson v. Bridport*, 8 Bv. 529, Lord Langdale, M. R. (Sicilian and Roman compilations of codes and statutes and Sicilian law-treatises, certified as in use among the profession in Sicily); 1857, *Bremer v. Freeman*, 10 Moore P. C. 306, 323; Can.: 1884, *Rice v. Gunn*, 4 Ont. 589; U. S.: 1908, *De Somora v. Bankers' M. C. Co.*, — 1a. —, 95 N. W. 252 (Bouvier's Law Dictionary, admitted as evidence of the age of majority by the law of Mexico); 1926, *Devenbogh v. Devenbogh*, 5 Paige Ch. 554, 556, Walworth, C.; 1895, *Hilton v. Gayot*, 159 U. S. 113, 16 Sup. 139, 162 (the Court, mentioning treatises on foreign law, refers to their works "for evidence of authorita-

tive declarations, legislative or judicial, of what the law is"); 1899, *The Paquete Habana*, 175 id. 677, 20 Sup. 290 (whether by international law coasting fishing-vessels were exempt from capture as prize; "the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat," admissible, "not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is"; then consulting *Ordolan*, *Calvo*, and others). *Contra*: 1844, *Alderson, B.*, in *R. v. Crouch*, 1 Cox Cr. 94; 1846, *Perth Peerage Case*, 2 H. L. C. 874.

³ Lord Campbell, in *Sussex Peerage Case*, *supra* ("You ask the witness what the law is. He may from his recollection, or on producing and referring to books, say what it is, or that it is found correctly stated in such a book").

requires (and very properly) that the qualifications of the writer (*ante*, § 1694) shall first be shown in the ordinary way. But the fiction may well be abandoned. The daily use by judges of the foreign law-books in our libraries exposes its untruth. Goldsmith's Chinese traveller would smile to see the judge refuse to listen to a foreign treatise while on the bench and then retire to his chambers and take down the same book from the shelves to refresh his judicial memory. Certainly, the practice which allows the use of legal treatises, even domestic only, confesses the principle which admits learned treatises generally:

1699, *Spencer Cusper's Trial*, 13 How. St. Tr. 1163. Dr. Crett: "Now, my lord, I will give you the opinion of several ancient authors." Baron Haisell: "Pray, doctor, tell us your own observations"; Dr. Crett: "My lord, it must be reading, as well as a man's own experience, that will make any one a physician, for without the reading of books of that art, the art itself cannot be attained to. Besides, my lord, I conceive that in such a difficult case as this we ought to have a great deference for the reports and opinions of learned men. Neither do I see why I should not quote the fathers of my profession in this case as well as you gentlemen of the long robe quote Coke upon Littleton in others."

1857, *Stone, J.*, in *Stoudenmeier v. Williamson*, 29 Ala. 567: "We think that medical authors whose books are admitted or proved to be standard works with that profession ought to be received in evidence. . . . Are opinions derived from the perusal of books, and deposited to by witnesses, safer guides for the jury than the books themselves are? . . . We prove the existence of our law and its principles by reported cases and elementary writers. . . . Can that be a sound rule which in the determination of a question involved in one science allows to the trying body the light shed upon it by the writings of its standard authors and withholds such lights from controversies respecting all other sciences? We think not."

(c) The use of printed *books of foreign statutes or decisions* commonly accepted in the foreign jurisdiction as evidence of the statutes is referable not to the present principle, but to another (*post*, § 1703), because they are not learned treatises but merely copies of decisions or statutes. These are also and usually admitted under the principle of Official Statements (*ante*, § 1684), as being copies authorized by law to be made and given out.⁴

§ 1698. Same: (2) *Life Tables, Almanacs, Sundry Scientific Tables*. It has long been unquestioned that standard *tables of mortality*¹ (used in com-

⁴ The question whether a legal expert witness may testify to the terms of a *foreign statute* without producing a copy of it involves the rule of Preference for a Copy over Recollection-testimony, and has been already dealt with (*ante*, § 1271). The question whether a particular witness has sufficient knowledge and experience to testify to foreign unwritten law has been examined under the head of Testimonial Qualifications (*ante*, §§ 564, 690).

¹ 1872, *Kowley v. R. Co.*, 1. R. & Exch. 226; 1893, *Birmingham M. R. Co. v. Wilmer*, 97 Ala. 165, 170, 11 So. 896 (American tables); 1897, *Arkansas M. R. Co. v. Griffith*, 68 Ark. 491, 39 S. W. 550; 1898, *Townsend v. Briggs*, 99 Cal. 481, 494, 34 Pac. 116 (standard tables); 1902, *Keast v. Santa Ysabel G. M. Co.*, 123 id. 236, 68 Pac. 771 ("McCarty's Statistician and Economist," containing Farr's table, ad-

mitted; "the Court may or may not require such preliminary proof" of standard acceptances, according to its judgment of the need thereof); Colo. St. 1893, p. 261, § 1 (mortality table given in the statute, made admissible); 1879, *Central R. Co. v. Richards*, 62 Ga. 307; 1892, *Richmond & D. R. Co. v. Garner*, 91 id. 27, 16 S. E. 110 (mortality and annuity tables); 1894, *Columbus v. Sims*, 94 id. 483, 20 S. E. 332; 1896, *Macon, D. & S. R. Co. v. Moore*, 99 id. 229, 25 S. E. 440 (admissible, but here improperly used); 1902, *Western & A. R. Co. v. Cox*, 115 id. 715, 41 S. E. 74 (Carlisle tables are admissible without prior testimony to their recognition as standard tables); 1895, *Joliet v. Blower*, 15 Ill. 414, 40 N. E. 619; 1895, *Donaldson v. R. Co.*, 18 Ia. 391; 1898, *McDonald v. R. Co.*, 28 id. 140; 1893, *Coates v. R. Co.*, 63 id. 491, 17 N. W. 760; 1893, *Worden v. R. Co.*, 76 id. 314,

putting annuities, life-insurance sums, dower, and damages for the loss of life), and *almanacs*³ are admissible in evidence. It is doubtful whether a general rule in favor of standard tables of *scientific calculations* of all sorts can be regarded as established; but rulings tending in that direction are found.⁴

These almanacs and mortality tables have been explained to be admissible because they are founded on "certain and constant data" and deal with the "exact sciences."⁴ But the notion that every collection of figures savors of the exact sciences is sufficiently discredited at the present day. In fact, these particular tables are among the least trustworthy of scientific efforts. The first mortality table appeared about 1690,⁵ and was crude in comparison with those of to-day. The errors in tables even of the last century have been numerous and radical.⁶ The simple fact is that the admission of a certain class of statistics was demanded by custom and practical convenience,

41 N. W. 26; 1839, *Gorman v. R. Co.*, 78 id. 509, 43 N. W. 303 (tables in a cyclopedia, admitted); 1891, *Seagel v. R. Co.*, 53 id. 380, 40 N. W. 990 (same); 1897, *Krueger v. Sylvester*, 100 id. 647, 69 N. W. 1059; 1902, *Pearl v. R. Co.*, 115 id. 535, 83 N. W. 1078 (tables "generally accepted as standard authority," receivable); 1901, *Atchison T. & S. F. R. Co. v. Ryan*, 62 Kan. 532, 64 Pac. 603; 1879, *Lancaster v. Lancaster's Trustees*, 78 Ky. 200 (dower tables); 1897, *Louisville & N. R. Co. v. Kelly*, 100 id. 421, 38 S. W. 552; 1895, *Nelson v. R. Co.*, 104 Mich. 582, 62 N. W. 993, *semble*; 1892, *O'Mellia v. R. Co.*, 115 Mo. 205, 223; 1894, *Friend v. Ingemoll*, 39 Nebr. 717, 724, 58 N. W. 261 (*Carlisle* tables); 1898, *Camden & A. R. Co. v. Williams*, 61 N. J. L. 646, 40 Atl. 634 (*Carlisle* or other approved table admissible, when properly authenticated); 1874, *Schell v. Plumb*, 55 N. Y. 598; 1876, *Sauter v. R. Co.*, 66 id. 54; 1879, *People v. Life Ins. Co.*, 78 id. 129; N. C. Code 1883, § 1352 (specific mortuary table adopted by statute and made admissible); N. D. Rev. C. 1895, § 5702 (*Carlisle* tables of mortality, admissible to prove duration of life); 1892, *Steinbrunner v. R. Co.*, 146 Pa. 504, 515, 23 Atl. 239 (*Carlisle* tables); 1896, *Campbell v. York*, 172 id. 205, 33 Atl. 879; 1901, *McKenna v. Gas Co.*, 196 id. 31, 47 Atl. 900 (testimony from a table based on unspecified conditions, excluded); S. O. St. 1903, No. 61 (mortuary table adopted by law and made admissible); 1886, *Railroad Co. v. Ayres*, 84 Tenn. 729; 1886, *Vicksburg R. Co. v. Putnam*, 118 U. S. 554, 7 Sup. 1; 1849, *Mills v. Catlin*, 22 Vt. 107; 1887, *McKeighe v. Janesville*, 68 Wis. 53, 31 N. W. 298; 1899, *Crouse v. R. Co.*, 102 id. 190, 78 N. W. 446.

Distinguish the exclusion of such tables on grounds of substantive law, — as where the expectation of life is immaterial on the issue, or where a contract of insurance has embodied a specific reckoning; the following cases illustrate this: 1880, *Mutual Life Ins. Co. v. Bratt*, 55 Md. 200, 212; 1899, *Kerrigan v. R. Co.*, 124 Pa. 98, 44 Atl. 1069; 1882, *Berg v. R. Co.*, 50 Wis. 427, 7 N. W. 247; 1896, *Mulcairne v. Janesville*, 67 id. 37, 20 N. W. 555.

³ *Eng.*: 1703, *R. v. Dyer*, 6 Mod. 41; *Brough v. Perkins*, ib. 81; 1739, *Theory of Evidence*, c. II, pl. 104 ("The almanack is a sufficient evidence to prove a day Sunday"); 1860, *Tutton v. Darke*, 5 H. & N. 649, per Pollock, C. B.; the history of the English usage is fully examined in *Thayer, Preliminary Treatise on Evidence*, 292; *U. S.*: 1857, *Allman v. Owen*, 31 Ala. 141; 1882, *People v. Chee Kee*, 61 Cal. 404; 1879, *State v. Morris*, 47 Conn. 180; Ga. Code 1895, § 5169 (*Stern's U. S. Calendar*, admissible to prove dates); Acts 1897, p. 87, *Van Epps' Suppl.* § 6641 (*Stafford's Office Calendar*, to be "legal evidence, covering all dates between the years 1490 and 2000, both old and new style"); 1880, *Munshaw v. State*, 55 Md. 24; 1887, *Case v. Perew*, 46 Hun 62; 1889, *Wilson v. Van Leer*, 127 Pa. 278, 17 Atl. 1097.

Distinguish the judicial notice of a date, etc., (*post*, § 2582).

⁴ 1885, *Gallagher v. R. Co.*, 67 Cal. 16, 6 Pac. 869, *semble* (tables of weights, currency, interest, etc., admissible); 1896, *Hatcher v. Dunn*, — Ia. —, 66 N. W. 905 (not put upon this ground; a thermometer used in gauging oils, admitted); 1867, *Payson v. Everett*, 12 Minn. 219 ("bank-note detectors," excluded); 1887, *Garwood v. R. Co.*, 45 Hun 129 (millwrights' tables, admissible); 1897, *Western Assur. Co. v. Mohlmanna Co.*, 26 O. C. A. 157, 83 Fed. 811 (engineering tables; quoted *ante*, § 1693); 1901, *Cherry Point Fish Co. v. Nelson*, 25 Wash. 558, 66 Pac. 55 (*U. S. government tide-tables*, prepared for Puget Sound, admitted).

For commercial tables, price-lists, horse-pedigree, etc., see *post*, §§ 1704, 1706.

For official tables of interest, etc., see *ante*, § 1672.

For scientific instruments used by witnesses, see *ante*, § 665.

⁵ *Wharton, Evidence*, § 667.

⁶ *Bland's Ch.* 237; *Scratchley, Life Assurance*, 2.

⁷ *Scratchley, id.*, 3-6; *Blayney, Life Assurance*, 96, 98. See a notable one described in *Porter's Progress of the Nation* (English annuities), and others in *Jevons' Philosophy of Science*, I, 344.

and the judicial mind relented. Thus, a system of mere probabilities and working averages is not found wanting in qualities entitling it to be placed before the jury; yet the substance of other collections of data, possessing at least equal inductive value, made with equal or greater thoroughness, sifted, arranged, and stated by trained observers, is by the same discriminating authority relegated to the limbo of hearsay and other judicial abominations. The error has lain, not in looking too leniently upon mortality tables, but in a misconception of the true qualities of other scientific work.

§ 1699. *Same: (3) Dictionaries and Histories.* Within narrow but undefined limits the use is allowable of dictionaries and works of general literature, to evidence literary usage and definitions, and of historical works, to prove facts of general history:

1886, *Pollock, C. B., in Darby v. Ouseley*, 1 H. & N. 1, 8: "Standard authors may be referred to for such a purpose [to show the literary significance of parodies] or as showing the opinions of eminent men on particular subjects, but not to prove facts. . . . In this case the defendant's counsel proposed to read certain specific [church] canons, not as matters of speculative opinion, . . . but as matters of fact."

(a) As to *dictionaries* and the like, a counsel's citation of passages to indicate word-usage will sometimes not involve a hearsay question, i. e. the passage is not taken for its assertive value; the usage of authors is itself the fact in issue (*post*, § 1770).¹ But there may well be a hearsay question, for example, if Dr. Johnson were quoted as stating the incorrectness of an etymology or the meaning of a word in his time. It cannot be said what limits Courts would draw in such cases; but it is certain that they resort freely to dictionaries for definitions of the meaning of words, even where the scope of that meaning is one of the disputed issues of the case, and clearly they thus take testimony from the learned compilers of these treatises.²

(b) As to *historical* and *encyclopedic works*, most questions are disposed of usually from the point of view of Judicial Notice (*post*, § 2565), i. e. the Court will or will not dispense with evidence of certain notorious facts;

¹ The following instance illustrates the difficulty of drawing the line: 1875, *Tilton v. Beecher*, N. Y., Official Report, III, 993 (Mr. Beach quoted from Newman and others, in arguing for the plaintiff that a sincere belief in the righteousness of a lie on some occasions is a possible thing in professors of religion).

For quotations by counsel to show *literary usage*, see *post*, § 1807. For quotation of other people's utterances to show *moral or political standards of action*, see *ante*, § 461.

² The following cases will suffice to illustrate the practice: 1789, *Answer of the Judges to the House of Lords*, 22 How. St. Tr. 302 ("Judges can collect the intrinsic sense and meaning of a paper in the same manner as other readers do; and they can resort to grammars and glossaries, if they want such assistance"); 1892, *Dantzier v. D. C. & I. Co.*, 101 Ala. 309, 314, 14 So. 10 (various dictionaries quoted); 1896, *Cook v. State*, 110 id. 40, 20 So. 360 (definitions taken from Webster's International Dictionary and

Century Dictionary); 1885, *Gallagher v. R. Co.*, 67 Cal. 16, 6 Pac. 869 (meaning of words and allusions in ordinary dictionaries and authenticated books of general literary history, allowable); 1897, *State v. Main*, 69 Conn. 123, 37 Atl. 80 (definitions taken from Century Dictionary and Webster's International Dictionary); 1895, *Parker v. Orr*, 158 Ill. 609, 41 N. E. 1003 (Webster's Dictionary, for a definition); 1893, *Nix v. Hedden*, 149 U. S. 304, 13 Sup. 381 (dictionaries resorted to for defining "fruit" and "vegetables"); 1893, *Mutual Ben. L. Ins. Co. v. Robison*, 19 U. S. App. 266, 372, 7 C. C. A. 444, 58 Fed. 723 (to determine what "spitting of blood" was, Quain's Dictionary of Medicine and the Century Dictionary were cited); 1893, *Koschl v. U. S.*, 23 C. C. A. 453, 84 Fed. 443 (dictionaries used to define "vaccine"); 1897, *Kimball v. Carter*, 95 Va. 77, 27 S. E. 333 (Webster and Worcester referred to).

while the Exception in favor of Ancient Reputation on Matters of General Interest (*ante*, §§ 1586, 1598) will admit many treatises. Apart from these two principles, it is doubtful where there is any general exception in favor of works of history.³

§ 1700. Same: (4) Sundry Instances; Quotation of Books by an Expert; Counsel's Use in Cross-examination or in Contradiction; Counsel Reading to the Jury; Judicial Reference to Authorities. There are also to be noted sundry instances in which a few Courts have seen fit to allow further infringements of the principle.

(a) The expert witness is by a few Courts allowed to *cite the writers* of his profession, either specifically by quotation, or generally by referring to professional opinion as corroborating his views.¹

(b) It has been in some Courts held that counsel on cross-examination, may, for discrediting purposes, read a professional treatise as opposing the statement of an expert on the stand, or ask whether a contradictory opinion has been laid down by others.² But this is generally repudiated.³ There is here, however, a legitimate use, i. e. where a witness has been allowed to refer to a treatise as corroborating him, the treatise may be read to show that it does not contain such corroboration, on the principle (*ante*, § 1000) of discrediting a witness by showing misstatements on a material point. This orthodox purpose, as expressly distinguished from the indirect introduction of the books on their own credit (as above noted), is fully recognized:

1882, *Graves, C. J.*, in *Pinney v. Cahill*, 48 Mich. 587, 12 N. W. 862: "It was not improper to resort to the book, not to prove the facts it contained, but to disprove the statement of the witness and enable the jury to see that the book did not contain what he had ascribed to it."⁴

¹ 1856, *Darby v. Owsley*, 1 H. & N. 12 (the fact that Popes have excommunicated sovereigns; histories resorted to); 1862, *Charlotte v. Chouteau*, 33 Mo. 194, 301 (*Garner's History of Canada* read); 1882, *Steinbrunner v. R. Co.*, 146 Pa. 504, 515, 23 Atl. 239 (*Encyclopædia Britannica* quoted to show the mode of preparing life-tables); 1902, *Hilton v. Roylance*, 25 Utah 129, 69 Pac. 660 ("works of history and church records and journals," held admissible, under Rev. St. § 2400, cited *ante*, § 1693, to show the meaning of "sealing" in the Mormon church).

² 1851, *Carter v. State*, 2 Ind. 619; 1886, *State v. Baldwin*, 36 Kan. 17, 12 Pac. 316; 1892, *Pinney v. Cahill*, 48 Mich. 584, 12 N. W. 862, *semble*; 1903, *Scott v. R. Co.*, — Or. —, 73 Pac. 594 (an engineer allowed to name the authors on whom he relied; whether he could read excerpts, not decided); 1896, *Earle's Trial*, Pa., 36 (reading or quotation by a medical witness, allowed). Yet in Michigan direct quotation seems to be not allowed in later cases: 1884, *People v. Millard*, 53 Mich. 76, 18 N. W. 563; 1891, *Fox v. Peninsular Works*, 84 id. 681, 48 N. W. 203.

But this must be distinguished from the question of the sufficiency of the witness' qualifications.

cautions as based on books only (*ante*, § 687), for in theory we may refuse to let him state the effect of professional opinion, and yet may admit his own opinion though it is based solely on the reading of professional books. So, too, must be distinguished the reading of a book as authority and the use of its expressions or its diagrams, by way of illustration merely: 1870, *Ordway v. Haynes*, 50 N. H. 164. Compare § 790, *ante*.

³ 1825, *Gardner Peerage Case*, *Le Marchant's Rep.* 22 ("Do you not know it was the opinion of Dr. Hunter that, etc.?" allowed on cross-examination); 1890, *Brownell v. Black*, 31 N. Br. 594 (good opinion by Tuck, J.); 1885, *Hess v. Lowery*, 122 Ind. 233, 23 N. E. 156; 1896, *Louisville N. A. & C. R. Co. v. Howell*, 147 id. 266, 45 N. E. 534; 1898, *Williams v. Nally*, — Ky. —, 46 S. W. 874; 1873, *State v. Wood*, 53 N. H. 495; 1895, *Byers v. R. Co.*, 94 Tenn. 599, 29 S. W. 128; 1900, *Sale v. Eichberg*, — Tenn. —, 59 S. W. 1020 (cross-examination "to test the experience of the witness and his familiarity with the leading authorities," allowable); 1901, *Clukay v. Electric Co.*, 27 Wash. 70, 67 Pac. 379.

⁴ See the cases cited in the next note.

⁵ Some of the following cases merely recog-

(c) That counsel may read to the jury learned treatises is regarded as allowable in one jurisdiction at least;⁶ in effect, the treatise is thus used evidentially. In a few jurisdictions a hazy distinction is made between their use in "illustration" and their use as evidence, the former being sanctioned.⁷ But the general opinion discountenances any such use.⁸

(d) Finally (and apart from the use, already referred to, of literary works and dictionaries) there is often found an open and deliberate citation by the Court itself to encyclopedias, medical works, and the like, as giving a foundation of fact for subjects involved in their decisions.⁹ Of course the inconsistency is particularly palpable when the Court (as has happened more than once) has in the same case expressly declared that learned treatises cannot be resorted to for information.¹⁰

nise this use, others merely repudiate the above-mentioned use, and others do both: 1856, *Brown v. Sheppard*, 13 U. C. Q. B. 178; 1899, *Eggart v. State*, 40 Fla. 527, 28 So. 144 (abortion; defendant testified to having read in U. S. Dispensary that cotton-root extract was only an emmenagogue, not an abortifacient; U. S. Dispensary allowed to be read to contradict him); 1876, *Connecticut M. L. Ins. Co. v. Ellis*, 89 Ill. 519; 1884, *Bloomington v. Schrook*, 110 Ill. 222; 1901, *Clark v. Com.*, 111 Ky. 443, 63 S. W. 740 ("otherwise, an ignoramus in the profession might by an assertion of learning declare the most absurd theories to be the teachings of the science"; contradiction allowable either by cross-examination or by reading the book); 1873, *Davis v. State*, 38 Md. 36; 1883, *Marshall v. Brown*, 50 Mich. 160, 15 N. W. 55; 1888, *People v. Vanderhoof*, 71 id. 179, 39 N. W. 23; 1897, *Hall v. Murdock*, 114 id. 233, 73 N. W. 150 (excluded, where the counsel read extensive passages, under guise of cross-examination); 1902, *Butler v. R. Co.*, 130 N. C. 13, 40 S. E. 770; 1896, *New Jersey Zinc & L. Co. v. L. Z. & L. Co.*, 59 N. J. L. 189, 35 Atl. 915; 1872, *Ripon v. Bittel*, 30 Wis. 619; 1882, *Knoll v. State*, 55 id. 256, 12 N. W. 369.

⁶ 1876, *State v. Hoyt*, 48 Conn. 337 (conceded on local precedent only); 1899, *State v. Soper*, 148 Mo. 317, 49 S. W. 1007 (medical works may be read in the trial Court's discretion only).

⁷ 1853, *Legg v. Drake*, 1 Oh. St. 283; 1857, *Wade v. DeWitt*, 20 Tex. 400; 1854, *Cory v. Silcox*, 6 Ind. 40 (Hovey, J.: "Reason is neither more nor less than reason because it happens to be read from a book"); 1872, *Harvey v. State*, 40 id. 518; 1882, *Baldwin v. Bricker*, 86 id. 223 (allowing it "only for the mere purposes of illustration and never as statements of fact or as the expressions of opinion, . . . concerning the particular case in bearing or cases of a like character"); 1898, *State v. O'Neil*, 51 Kan. 651, 674, 33 Pac. 287 (not allowed except to illustrate a process of reasoning). In Illinois it has been said that they may be read as showing "theories," but not as evidence: 1863, *Yoe v. People*, 49 Ill. 412.

⁸ 1844, *R. v. Crouch*, 1 Cox Cr. 94; 1875,

R. v. Taylor, 13 id. 77, 78, Brett, J.; 1882, *People v. Wheeler*, 60 Cal. 4; 1853, *Ashworth v. Kittredge*, 12 Cush. 195; 1854, *Conn. v. Wilson*, 1 Gray 338; 1857, *Washburn v. Cuddihy*, 8 id. 431; 1882, *People v. Hall*, 48 Mich. 490, 12 N. W. 665; 1883, *Marshall v. Brown*, 50 id. 150, 15 N. W. 55; 1884, *People v. Millard*, 53 id. 77, 18 N. W. 562; 1854, *Melvin v. Easly*, 1 Jones L. 383; 1877, *Huffman v. Click*, 77 N. C. 56; 1898, *State v. Rogers*, 112 id. 874, 877, 17 S. E. 297; 1895, *Byers v. R. Co.*, 94 Tenn. 350, 29 S. W. 129, *semble*; 1883, *Boyle v. State*, 57 Wis. 480, 15 N. W. 327.

Compare the general rule for counsel's argument (post, § 1806).

⁹ The following are some illustrations: *Sinnot v. Colombet*, 107 Cal. 187, 40 Pac. 329 (to determine the meaning of "kindergarten," citing Compayre's *History of Pedagogy*, Payne's translation, and *Sonnenschein's Cyclopaedia of Education*); 1857, *Lumpkin, J.*, in *Smith v. State*, 23 Ga. 297, 306 (citing Dr. Gooch's *Lectures on Midwifery*); 1868, *Cooley, C. J.*, in *Garbutt v. People*, 17 Mich. 9, 17 (citing works on medical jurisprudence as to the physiological effect of insanity); 1897, *Steenerson v. R. Co.*, 69 Minn. 353, 72 N. W. 713 (in determining the reasonable income on a railway investment, the Court cited facts and doctrines from the *Yale Review*, the *London Economist*, *Bradstreet's Journal*, the *Bankers' Magazine*, the works of J. S. Mill, Adam Smith, David A. Wells); 1886, *Walworth, C.*, in *Devenbagh v. Devenbagh*, 5 Paige Ch. 554, 557 (citing Beck's *Medical Jurisprudence*).

¹⁰ In *Washburn v. Cuddihy*, 8 Gray 431 (1857), the Court first ruled out a scientific book on the question of horse-cribbing as constituting unsoundness, and then proceeded to cite Oliphant's "Horses" and Stephens' "Adventures of a Gentleman in Search of a Horse" to show that it could not be ruled as a matter of law that cribbing was not unsoundness. In *State v. Baldwin*, 36 Kan. 17, 20, 12 Pac. 318 (1886), the trial Court accepted the rule excluding medical works, and then proceeded to sanction an instruction on the subject of poisons, in which a dictionary and a cyclopaedia were quoted from. The Supreme Court said: "It is true the Court

Topic X: COMMERCIAL AND PROFESSIONAL LISTS, REGISTERS, AND REPORTS.

§ 1702. *In General.* In a few narrow and usually well-defined classes of cases, recognition has been given, by way of exception to the Hearsay rule, to certain commercial and professional lists, registers, and reports. Their admissibility in some instances is placed upon judicial principle, in others arises solely from statutory innovation; but in most of the classes statute has carried out hints originally given judicially.

The necessity (*ante*, § 1421) in all of these cases lies in part on the usual inaccessibility of the authors, compilers, or publishers in other jurisdictions, but chiefly in the great practical inconvenience that would be caused if the law required the summoning of each individual whose personal knowledge has gone to make up the final result. The necessity therefore is of the sort that is recognized in the preceding two Exceptions, i. e. a practical inconvenience existing generally for the statements as a class; and hence it is not required that the death, insanity, absence from the jurisdiction, or the like, of the author shall be shown before the statement can be used.

The circumstantial guarantee of trustworthiness (*ante*, § 1422) is found in the considerations that these lists, registers, reports, etc., are prepared for the use of the trade or profession, and are therefore habitually made with such care and accuracy as will lead them to be relied upon for commercial and professional purposes. There is a subjective test of trustworthiness, in that the author knows beforehand that his work will have no commercial or professional market unless it is found to have usual accuracy and that its inaccuracy will probably be discovered; and further in that there is ordinarily no motive to deceive. There is an objective test, in that the habitual use of the work by the trade or profession has tested its usual and practical accuracy and has sanctioned its trustworthiness. Thus the chief considerations which are recognized as the source of trustworthiness for the other Exceptions (*ante*, § 1422) are found to exist here also. Upon some such reports of judicial decisions, of deed-abstracts, and of sundry publications such as speed-registers, pedigree-registers, and the like, now to be considered.

§ 1703. *Reports of Judicial Decisions.* Printed reports of domestic decisions, as reproducing merely the law which the Court is supposed to know judicially, have not often suggested the need of a specific exception to the Hearsay rule. But their true aspect, as real instances of such an exception, has been perceived in the case of reports of decisions of foreign courts, — which include, of course, the courts of other of the United States. So far as

quoted the definitions" (but the passages were in reality descriptions and lists of poisons) "given in Webster's Dictionary and the American Cyclopædia, but there is no claim that the definitions are incorrect in any way. What cause then is there for complaint? . . . The Court

approved them and made the language employed in them its own." But the fact remains that the Court accepted one anonymous scientific writer, while it excluded other well-known writers.

these reports are prepared and published, according to modern practice, by official reporters appointed for the purpose, they are easily seen to be admissible as Official Statements; and under that head (*ante*, § 1684) the statutes and decisions dealing with them from that point of view have been considered. But in most jurisdictions, the earlier decisions (including almost all of the English precedents down to 1865) were published by reporters having no official authority to do so; and in this country decisions are also regularly reported, even since the régime of official reporters, not only in at least two private systems of comprehensive scope, but also in special collections on certain topics and in legal journals. If these are admitted to be read and consulted as evidence of the opinions and decisions reported, it cannot be under the Exception for Official Statements, just referred to, nor can it be under the Exception for Regular Entries (*ante*, § 1517); it must therefore be under the present Exception.

That such private reports are customarily resorted to in arguments of law as correctly representing the opinions rendered, the arguments made, and the facts upon which the decision was made, is notorious. That this practice has long been sanctioned by the judges as a proper mode, for the Anglo-American common law, of proving the tenor of the precedents, is clear.¹ That the reports of decisions in courts of the Continent, administering an alien system of law, would equally be included by the principle, seems also clear, provided the report offered was proved to be one in use among the profession in that jurisdiction. Statute has in most jurisdictions expressly removed all possible doubt by providing for the admission of such books of reports from any jurisdiction.²

¹ 1692, *Stainer v. Drottwich*, 1 Salk. 261, 12 Mod. 85 ("A year-book may be evidence to prove the course of the court"; but the year-books were perhaps official, so that this is hardly a precedent); 1744, *Hardwick v. L. C.*, in *Gage v. Bulkeley*, Ridgw. Cas. t. Hardw. 276; see further, for English usage, the quotations of judicial comment on the various reporters, collected in *Wallace's The Reporters*, and *Ram on Facts*; 1846, *Inge v. Murphy* 10 Ala. 885, 896 ("accredited reports" of Georgia decisions received; *Goldthwaite, J.*: "We every day elucidate our own common law by referring to these reports, and it would seem a singular anomaly if they cannot be admitted as evidence to show decisions of another State"); 1859, *Stanford v. Pruet*, 27 Ga. 243, 247 ("We admit their reports, without questioning their authenticity"); 1859, *Kingsley v. Kingsley*, 20 Ill. 202 (construction of foreign statutes; "reports of such tribunals" may be looked to); 1867, *McDeed v. McDeed*, 67 Id. 548; 1862, *Charlotte v. Oboutan*, 33 Mo. 194, 201 (printed books of English decisions, read); 1885, *Kennard v. Kennard*, 63 N. H. 308; 1879, *State v. Moy Looko*, 9 Or. 57; 1806, *Latimer v. Elgin*, 4 Dea. 32; 1872, *The Pawashick*, 2 Low. 146; 1873, *Mackay v. Eanton*, 19 Wall. 632. *Contra*: 1819, *Barbour v. Archer*, 2 A. K. Marsh. 9 (printed report of a decision of this Court, containing the opinion as

part of the record, excluded); 1848, *Gardner v. Lewis*, 7 Gill 394 (*Magruder, J.*: "We can only know from them that the printer said that the reporter said that the judge said that the law is as he is made to say that it is"). In *Baltimore & O. R. Co. v. Glenn*, 28 Md. 323 (1867), resort to decisions was had by consent. *Undecided*: 1847, *Territt v. Woodruff*, 19 Vt. 182, 185 (whether reported decisions are receivable "does not appear to have been determined"; but the Court then proceeds to cite *Cowen's* and *Wendell's* reports in evidence of New York law); 1856, *State v. Abbey*, 29 Id. 60, 65 (left undecided).

² To the following statutes add those cited *ante*, § 1684, which in sanctioning an officially printed book of statutes also sometimes provide for any book "commonly admitted" in its own jurisdiction: *Mass. Rev. St.* 1902, c. 57, § 32 (for foreign or domestic law, the judge may refer to "reports of cases and works upon legal subjects"); *Cal. C. C. P.* 1872, § 1902 ("printed and published books of reports of decisions of courts of such [sister] State or [foreign] country, or proved to be commonly admitted in such courts" are admissible); § 1905 (there is a presumption "that a printed and published book purporting to contain reports of cases adjudged in the tribunals of the State or country where the book is published contains correct reports of

Reports of *trial-proceedings and testimony*, however, stand on a different footing. They are ordinarily not printed as a part of the business of furnishing reports for use in the profession, nor are they in fact habitually resorted to and tested by professional use. Moreover, in past generations at least, they were often printed in condensed or fragmentary form only, on behalf of a party, for the purpose of vindicating his claim before the public, and were thus often garbled and untrustworthy. It was not the custom in England as late as the 1700s to receive such private reports to prove the testimony given at a prior trial,³ and to-day it cannot be supposed that, as a general rule, they would be received. Nevertheless, where a stenographic *verbatim* report, or one purporting to be such, made by an indifferent person or by one employed on behalf of both parties, and accepted in the profession as trustworthy, is available, there is no reason why the principle already considered should not suffice to admit it. That the celebrated Mr. Gurney's stenographic reports of English trials, or such a trusted document as Mr. Bemis' report of Webster's Trial, should be rejected, would be an extreme instance of pedantry.⁴

such cases"); Conn. Gen. St. 1857, § 1088 ("the reports of the judicial decisions of other States and countries" may be judicially noticed); Fla. Rev. St. 1892, § 1107 ("books of reports of cases adjudged" in courts of the U. S. or a State or Territory thereof, admissible); Ida. Rev. St. 1887, § 5971 (like Cal. C. C. P. § 1902, omitting "or proved to be," and inserting "Territory"); Ind. Rev. St. 1897, § 489 ("books of reports of cases adjudged" in courts of a U. S. State or Territory, admissible); Ia. Code 1897, § 4652 (like Neb. Comp. St. § 5994); Kan. Gen. St. 1897, c. 97, § 18 ("books of reports of cases adjudged" in the courts of "any other State, Territory, or foreign government, may also be admitted"); Ky. Stat. 1899, § 1640 ("the printed books of cases adjudged in the courts of a sister State," admissible); Me. Pub. St. 1883, c. 82, § 109 ("books of reports of cases adjudged" in another State or Territory of the United States, admissible); Mass. Pub. St. 1882, c. 169, § 72, Rev. L. 1902, c. 175, § 76 ("books of reports of adjudged cases" in the U. S., admissible); 1858, *Pemohcet v. K. R. Co. v. Bartlett*, 12 Gray 244, 248 ("books of reports of cases adjudged" in a sister State, admitted under the statute); 1863, *Oragin v. Lamkin*, 7 All. 385, 396 (similar); 1876, *Ames v. McCumber*, 124 Mass. 85, 91 (similar); Mich. Comp. L. 1897, § 10174 ("books of reports of cases adjudged" in another U. S. State or Territory or "any foreign State or country," admissible); Minn. Gen. St. 1894, § 5716 ("the books of reports of cases adjudged" in the courts of "any State or Territory of the U. S.," admissible); Mo. Rev. St. 1899, § 21.5 ("the printed books of cases adjudged in the courts of a sister State," admissible); Mont. C. C. P. 1895, § 3190 (like Cal. C. C. P. § 1902); Neb. Comp. St. 1899, § 5970 ("books of reports of cases adjudged" in the courts of "any other Territory, State, or foreign government," admissible); § 5994 (similar);

N. J. Gen. St. 1898, Evidence § 28 ("reports of judicial decisions of other States and countries" may be judicially noticed; the "usual printed books of such reports" to be "plenary evidence"); St. 1900, c. 150, § 26 (re-enacts Gen. St. Evid. § 23); N. Y. C. C. P. 1877, § 942 ("books of reports of cases adjudged" in foreign Courts, admissible); N. C. Code 1883, § 1333 ("books of the reports of cases" of a State, Territory, or foreign country, admissible); N. D. Rev. C. 1895, § 5690 (like Okl. Stat. § 4260); Okl. Rev. St. § 5244 ("books of reports of cases adjudicated" in the courts of another State, Territory, or foreign government, receivable); Okl. Stat. 1893, § 4260 ("books of reports of cases adjudged" in a State, Territory, or foreign government, admissible); C. C. C. P. 1892, § 727 (like Cal. C. C. P. § 1902); R. I. Gen. L. 1896, c. 244, § 46 ("published reports" of decisions of courts of the U. S., a State, Territory, or country, admissible); S. C. Code 1902, § 2890 ("the books of reports of cases adjudged" in courts of a domestic or foreign State, receivable); S. D. Stat. 1899, § 5533 (like N. D. Rev. C. § 5690); Utah Rev. St. 1898, § 3381 ("printed and published books of reports of decisions" in another State, Territory, or foreign country, "commonly admitted in such courts," admissible); W. Va. Code 1891, c. 13, § 4 (in noticing foreign law, judge "may consult any printed book purporting to contain" the same); Wis. Stat. 1898, § 4138 ("books of reports of cases adjudged" in the courts of a U. S. State or Territory, admissible); Wyo. Rev. St. 1887, § 2592 (like Oh. Rev. St. § 5244).

For cross-references to other rules concerning *proof of foreign law*, see *ante*, § 1684, note 15.

³ E. g., 1685, *Fernley's Trial*, 11 How. St. Tr. 381, 434; and there are other instances.

⁴ For reports of former testimony not printed, see *ante*, §§ 1692-1693.

§ 1704. *Standard Price-Lists and Market Reports.* A printed list of prices at which a class of goods is for sale to any purchaser, or a printed report of the prices obtained at actual sale in an open market, may become trustworthy so far as it is intended to be consulted by all persons who care to know the prices, and has been exposed to a test of accuracy by dealings with such persons on the faith of it, and has further been by their experience found generally reliable (*ante*, § 1702). A price-current list or a market report which fulfils these conditions and has thus sufficed for the correct information of persons who transact commercial operations on the faith of it may well suffice for informing a court of justice. It would not be necessary that the compiler of it should have personal observation of each dealing reported or going to make up the market price reported, because the practical equivalent of personal observation here exists; a report based on direct consultation with dealers or with the officers of an exchange or a market is in commercial circles taken as equally reliable (*ante*, § 719). Such standard price-lists and market reports, indorsed by trade experience, ought to be admissible on the principle of the present exception:

1866, *Cosley, J.*, in *Steele v. R. Co.*, 14 Mich. 496: "Evidence of the state of the markets as derived from the market reports in the newspapers should not have been excluded. . . . The principle which supports these cases will allow the market reports of such newspapers as the commercial world rely upon to be given in evidence. As a matter of fact, such reports, which are based upon a general survey of the whole market and are constantly received and acted upon by dealers, are far more satisfactory and reliable than individual entries or individual sales or inquiries; and Courts would justly be the subject of ridicule if they should deliberately shut their eyes to the sources of information which the rest of the world relies upon, and demand evidence of a less certain and satisfactory character."

1875, *Miller, J.*, in *Whelan v. Lynch*, 60 N. Y. 474: "The Court was also in error, I think, in admitting the shipping and price-current list as evidence of the value of the wool without some proof showing how or in what manner it was made up, where the information it contained was obtained, or whether the quotations of prices made were derived from actual sales or otherwise. It is not plain how a newspaper containing the price current of merchandises, of itself and aside from any explanation as to the authority from which it was obtained, can be made legitimate evidence of the facts stated. The accuracy and correctness of such publications depends entirely upon the sources from which the information is derived. Mere quotations from other newspapers, or information obtained from those who have not the means of procuring it, would be entitled to but little if any weight. The credit to be given to such testimony must be governed by extrinsic evidence and cannot be determined by the newspaper itself without some proof of knowledge of the mode in which the list was made out."

1882, *Smith, J.*, in *Fairley v. Smith*, 37 N. C. 367, 371 (rejecting a cotton-quotation in a Charlotte newspaper for Boston prices): "The evidence received in the present case has none of those essential safeguards to ensure the accuracy of the published information as to the state of a distant market, to warrant its unqualified submission to the jury. It does not appear that business men acted upon this information, as truthful and correct, in their dealings with each other; nor from what source the information itself comes. . . . [It was thus improper to admit the evidence] without any proof, outside the paper, of its trustworthiness and recognition as such by business men dealing in cotton."

Upon these principles, a number of Courts have recognised for price-lists

and market reports an Exception whose limits, more or less indefinite, are suggested by the above passages.¹

The Exception for Regular Entries (*ante*, § 1517) must of course be distinguished; its most marked difference is (*ante*, § 1521) that there the entrant must specifically be shown to be deceased or otherwise unavailable. Distinguish also the question whether a witness called to the stand to testify to prices is qualified if his only source of knowledge is a price-list consulted by him (*ante*, § 719).

§ 1705. *Abstracts of Title.* In the practice of probably most of the jurisdictions of this country, the attorney in charge of a transfer of real property does not make anew for each client's title a search of the deed-register for the preceding documents in the chain of title, but relies upon a written book, which contains abstracts of the preceding documents and records and has been handed along to each transferee; provided at least that the abstract appears to have been kept up by competent hands and that no questions of special difficulty appear to be involved. Furthermore, the persons engaged solely in the occupation of searchers of title or abstract-makers, and particularly the corporations making a business of guaranteeing land-titles, have compiled in the course of their business comprehensive collections of such abstracts, which are used from time to time as a settled basis in keeping up abstracts of subsequent transfers. Besides this, other attorneys often possess full abstracts of particular titles, of equal trustworthiness and general use with these larger collections. Such abstracts (including copies of record-entries, notes of surveys, and the like) fulfil the requirements of trustworthiness above indicated for this Exception (*ante*, § 1702). They are made by persons who have professional skill and actual knowledge of the documents abstracted; they are intended for use in professional work, and are made by persons usually having no motive to deceive; they are ordinarily expected

¹ Ala. Code 1897, § 1810 ("prices current and commercial lists, printed at any commercial mart, are presumptive evidence of the value of any article of merchandise specified therein, at that place, at the date thereof, and of the rate of exchange between that and other places; also of the rates of insurance, freights, and the times of arrival and departure of ships and other vessels"); 1898, *Tyson v. Chestnut*, 118 Ala. 387, 24 So. 73 (statute applied to exclude certain postal cards); 1894, *Willard v. Mallor*, 19 Colo. 524 (daily price-circulars by wool-buyers, excluded; but the principle of admission conceded for prices in a commercial journal); 1896, *Nash v. Claason*, 163 Ill. 409, 45 N. E. 276, *admissible* (admissible; here a trustworthy newspaper, giving in the morning the quotations of corn in the Chicago market for the day before); 1878, *Washington Ice Co. v. Webster*, 68 Me. 463, *admissible* (prices current, admissible); 1890, *Munshower v. State*, 55 Md. 24, *admissible* (prices current, admissible); 1900, *National Bank of C. v. New Bedford*, 175 Mass. 57, 58 N. E. 295 ("newspaper reports purporting to contain stock quotations furnished by named N. B. stock-

brokers, who could have been called," excluded; general principle left undecided); 1866, *Simon v. R. Co.*, 14 Mich. 96 (quoted *supra*); 1868, *Cleveland & T. R. Co. v. Perkins*, 17 Id. 296 ("such newspapers as the commercial world would rely on," admissible to show prices); 1883, *Peter v. Thickstun*, 51 Id. 594, 17 N. W. 68 (similar); 1893, *Aulls v. Young*, 96 Id. 231, 234, 57 N. W. 119; 1872, *Golson v. Ebert*, 53 Mo. 260, 270 (price current, unverified, excluded); 1875, *Whelan v. Lynch*, 60 N. Y. 474 (quoted *supra*); 1878, *Harrison v. Glover*, 72 Id. 454, *admissible* (price-lists, admissible); 1882, *Fairley v. Smith*, 57 N. C. 367 (quoted *supra*); 1865, *Clicquot's Champagne*, 3 Wall. 114, 117, 121, 141 (printed price current given by a French firm to an inquirer, and stating the prices of their goods, admitted; "it is as little liable to that objection [of hearsay] as the entries in the books of the dealer"); 1866, *Fennestain's Champagne*, 145 (preceding *price* approved; written letters from foreign dealers stating prices, here admitted on the principle of regular entries, *ante*, § 1525; these judges dissenting as to such letters).

to be tested by other professional persons, not through the latter's direct perusal, but through such examination and collation as these other persons may and often do make of the same original deeds, records, and entries; and, so far as they have survived this test unquestioned, they stand approved and accepted by the profession as trustworthy. As a class, then, they seem to come (so far at least as specific abstracts or collections of them may be shown to fulfil the above requirements) within the conditions of this Exception.

The principle of Producing the Original of a Writing (*ante*, §§ 1193, 1223) will of course ordinarily prevent the use of them until both the original deeds and the records of the deeds appear to be lost, destroyed, or otherwise unavailable. This much is always assumed. Furthermore, the principle of Completeness (*post*, § 2107) may forbid the use of abstracts so far as complete copies of the lost documents can be obtained; although the application of this principle might properly be less rigorous than that of the preceding one. It is partly because of the indefinite limits of this latter principle, and of the inconvenience of attempting to apply it to each document in a long chain of title before using an abstract, that has led to the necessity of enacting a simpler rule by statute. Finally, supposing the foregoing two principles to be satisfied, the Hearay rule stands in the way; this, first of all, requires each person contributing to the abstract to be summoned if available, — a practically impossible task; or next, it requires that some established exception be found in which these abstracts may be classed, and none such appears, unless we can construe the Exception for Regular Entries in the Course of Business (*ante*, § 1517) as sufficing for the purpose.¹ It results, then, that if these abstracts are to be used without summoning the makers and proving regularity of entry, the use must form the subject of a separate Exception to the Hearay rule. That it ought to be so treated, for certain classes of abstracts at least, in view of the conditions of their preparation and employment, has been already noticed.

Nevertheless, Courts do not seem anywhere to have reached this conclusion (as they did in the two preceding classes of cases under this Exception) upon common-law principles. Statutory enactment seems in every instance to have been waited for. These statutes usually provide that the contents and execution of deeds and records burnt or lost may be proved by specified kinds of abstracts, in general fulfilling requirements analogous to those above-mentioned. The judicial rulings ordinarily are concerned merely with the construction of these statutes.²

¹ Such seems to have been the view taken in England: 1810, *Ward v. Garpone*, 17 Ves. Jr. 134 (L. C. Eldon; abstract of title made in the course of business by a deceased attorney, admitted to show contents and execution of lost deed).

² The rulings which specifically deal with the rule for producing the original (*ante*, § 1223) and the rule for a complete copy (*post*, § 2107) are placed under those heads; the remainder are placed here:

Colorado: Annot. Stats. 1891, §§ 3755, 3756 (where records of deeds, etc., are destroyed, abstract-books, minutes, extracts, etc., "fairly made before the destruction of the records by any person or persons in the ordinary course of business," and bought by the county, are admissible where the original instrument "has been lost or destroyed or is not in the power of the party"); § 3761 (such a writing shall not be received "unless the same appear upon its face,

§ 1706. *Sundry Commercial and Professional Registers (Stock-Exchange, Business Directory, Shipping List, etc.).* There are many other kinds of regis-

without erasure, blamish, alteration, interlineation, or interpolation in any material part, unless the same be explained to the satisfaction of the Court, and to have been fairly and honestly made in the ordinary course of business"; § 3763 (when an original instrument affecting title is "lost or destroyed or not within the power of the parties to produce," and the record is destroyed, "any abstract of title made in the ordinary course of business prior to such loss or destruction . . . that may have been made and delivered to the owners or purchasers or other parties interested," is admissible); *Florida*: St. 1901, c. 4951 (where a record of deed has been burnt, and the original cannot be produced, and no certified copy is in the party's control, "any abstract of title, or letter-press copy thereof made in the ordinary course of business prior to such loss," or "any copy, extract, or minutes from such destroyed records or from the original thereof, which were at the date of such destruction in the possession of any person or persons then engaged in the business of making abstracts of title for others for hire," shall be admissible; or a sworn copy thereof, when the opponent has been given "a reasonable opportunity to verify the correctness of such copy"; but in either case a copy must be served on the opponent ten days before the offer in evidence); §§ 2-7 (further provisions for the use of such materials); *Idaho*: St. 1897, March 12, §§ 2, 4 (abstract of title, certified by a duly bonded abstractor, to be evidence "of the existence of the record of deeds, mortgages, and other instruments, conveyances, or liens affecting the real estate mentioned"; the party using it in evidence to furnish a copy to the opponent three days before trial, and a sufficient additional number of days for land out of the county of trial); *Illinois*: Rev. St. 1874, c. 116, § 18 (where official records of deeds, etc., are destroyed, judges are authorized to record and to approve the purchase of originals or copies of "any abstracts, copies, minutes, or extracts from said records existing after such destruction," if they "were fairly made, before the destruction of the records, by any person or persons, in the ordinary course of business, and that they contain a material and substantial part of such records"; and on petition of any owner of such abstracts, etc., if they are found to be "fairly made in the regular course of business before such destruction of the records," they may be recorded, and taken as *prima facie* evidence, if they purport to recite "all deeds and mortgages," etc., and to describe "the several tracts of land, etc."; and "all abstracts to separate tracts of land made by the owner of said abstracts," etc., shall be taken as *prima facie* evidence when accompanied by an affidavit of the owner that they contain "a full, true, and perfect copy of all transfers," etc.); § 14 (when such abstracts, etc., are bought and recorded, the recorder's certified copies shall be admissible "in case the originals have been lost or destroyed, or not in the power of the party

asking to use the same"); § 28 (any writings thus made admissible shall not be received "unless the same appear upon its face without erasure, blamish, alteration, interlineation, or interpolation in any material part, unless the same be explained to the satisfaction of the Court, and to have been fairly and honestly made in the ordinary course of business"); § 29 (as amended July 15, 1897; where records are destroyed and original conveyances are lost or destroyed or not within the power of the party to produce, as shown by testimony or affidavit of party or agent, "any abstract of title, or letter-press copy thereof, made in the ordinary course of business prior to such loss or destruction" is admissible, as also "any copy, extracts, or minutes from such destroyed records, or from the originals thereof, which were, at the date of such destruction or loss, in the possession of persons then engaged in the business of making abstracts of title for others for hire"; so also a sworn copy of any such writing, made by the person having possession, is admissible when the offeror has "given the opposite party a reasonable opportunity to verify the correctness of such copy"); 1872, *Blakely v. Farrell*, 99 Ill. 264 (abstract held sufficient under the statute); 1874, *Russell v. Mandell*, 78 Id. 184, 187 (abstract held sufficient); 1874, *King v. Worthington*, Id. 161 (letter-press copy of abstract, not admissible); 1876, *Smith v. Stevens*, 82 Id. 554 (abstract admitted); 1882, *Miller v. Shaw*, 108 Ill. 277, 285 (similar); 1882, *Compton v. Randolph*, 104 Id. 555 (letter-press copy, or a copy of it, of an abstract, not admissible); 1884, *Thatcher v. Olmstead*, 110 Id. 26 (copy of lost abstract, not admissible); 1888, *Heacock v. Lubuke*, 107 Ill. 396, 401 (abstract admitted); 1892, *Converse v. Wend*, 142 Ill. 182, 194, 81 N. E. 214 (§§ 1887 applied; letter-press copy of abstract, admitted; extracts and minutes admitted); 1894, *Sternheim v. Bureky*, 149 Id. 241, 244, 36 N. E. 1026 (extracts and minutes admitted; notice on the day before trial, sufficient on the facts); 1894, *Chicago & A. R. Co. v. Keegan*, 152 Id. 412, 417, 39 N. E. 23 (abstracts admitted; testimony founded on personal knowledge of their existence before the fire, etc., not required); 1899, *Kotr v. Belz*, 178 Id. 434, 53 N. E. 367 (abstracts used); 1901, *Gloss v. Halliwell*, 180 Id. 65, 60 N. E. 62 (abstracts not proved according to statute, excluded); *Mississippi*: Annot. Code 1892, § 2791 (in any county where a record of deeds is destroyed, the chancellor "if he find any abstracts, copies, minutes, or extracts from said records existing after such destruction, he shall appoint two persons learned in such matters to act with him, and the three shall investigate the same; and if they find that the abstracts," etc., "were fairly made before such destruction of the records, and that they contain material and substantial parts of the destroyed records," they may so certify to board of supervisors, who may purchase them or copies); § 2792 (such abstracts, etc., to be

ters, records, reports, compilations, and the like, which may in a given case fulfil the requirements already indicated (*ante*, § 1692) as sufficient for this exception. A printed *pedigree-register* of blooded animals, for example, made by a person having more or less direct acquaintance with the subject-matter, intended to be publicly circulated and consulted by persons interested and informed, tested by their use, and found by their experience to be trustworthy and actually relied upon as the basis of transactions in the trade, is a typical illustration. The principle, indeed, has large possibilities, which have already been recognized, though with due caution, by the Courts and in a few statutes.¹ The application of the principle might well be left largely in the hands of the trial Court.

filed and recorded; "and in case the originals have been lost or destroyed, or are not in the power of the party asking to use the same," certified copies of such abstracts, etc., are admissible, and are *prima facie* evidence of instruments executed; *Missouri*: St. 1901, March 22 (the abstracts known as Carlton's Abstracts for Pemont Co., made admissible on certain terms, owing to the burning of the county records); St. 1903, March 12, p. 104, March 14, p. 107 (Dupont's and Chalfant's abstracts of title for certain lands, made admissible); *Nebraska*: Comp. St. 1896, § 4156 (abstracts of title, made admissible after notice to opponent); *New Mexico*: Comp. L. 1897, § 3984 ("Any abstract of the title to real estate, located in the Territory of N. M., certified to as correct by the secretary, and under the seal of any title abstract company, incorporated and doing business under the laws of said Territory, shall be received in all the courts of said Territory as evidence of the things recited therein, in the same manner and to a like extent that the public records are now admitted"); *Ohio*: Rev. St. 1898, § 5339 c-5339 g (certain abstracts of records, etc., made by private persons, to be admissible); *Texas*: Rev. Civ. Stats. 1896, § 2312 ("All abstracts of land-titles or land abstract-books to lands in this State compiled from the records of any county in this State prior to the year 1877, which said records were partially or wholly destroyed or lost from any cause during the month of March, 1876," admissible for matters compiled prior to 1877; provided the compiler has made affidavit before officer authorized to take acknowledgments of deeds that the compilation is correct and was made before loss of records, and a copy of the abstract is filed with papers of the cause and notice given to opponent five days before trial; and provided the offeror makes affidavit that the original instrument "is not then on record, that he has made diligent search and inquiry for the same in places and from persons where and in whose possession it would most probably be found, and has been unable to find the same, that to his best knowledge and belief the same is lost or destroyed"; and provided the owner of the abstract has filed an application, which has been granted, to record in the county commissioners' court his contract binding him to permit the use of such abstracts by interested parties, for fees specified, to answer in

damages for failure to produce on demand, etc.; provided this article shall not apply "if it can be shown by competent evidence that any such deeds were improperly recorded"; when such abstracts are used, a party may offer evidence "tending to show the compiler thereof to have been incompetent or unreliable, or competent and reliable"); St. 1897, c. 108, and St. 1901, c. 35 (amending Rev. St. 1896, § 2312, in details); *Utah*: St. 1899, c. 26 ("any abstract of title to any piece, parcel, or parcels of real estate or mining claim or claims, certified to by any licensed abstractor or county recorder of the State of Utah" shall be admissible; the abstractor or recorder to certify to it under hand and seal); *Wisconsin*: Stats. 1896, § 661 g (substantially like Ill. R. S. c. 116, § 12, down to the provision for filing a judicial opinion, and then, for a provision of purchase, substituting, "and thereupon said abstracts, copies, minutes, and extracts, or certified copies thereof, shall be admissible as *prima facie* evidence"); § 661 n (substantially like Ill. R. S. c. 116, § 24, omitting the clause about parties' testimony, and inserting, before the proviso, "and shall receive as evidence any abstract of title made in the ordinary course of business prior to such injury, loss, or destruction, showing the title to such land or any part of the title thereto"; and adding, after the clauses for penalties and fees, that all persons engaged in such business shall file an assent to these provisions within thirty days of the filing of an opinion under § 661 g, *supra*, no abstract or certified copy to be received until such assent is filed, except certified copies made before June 7, 1878).

¹ With the following compare some of the cases cited *ante*, § 1695 (scientific tables) and § 665 (scientific instruments); 1890, *Abel v. Potts*, 3 Esp. 242 (Lloyd's register, admitted to prove a capture, in an action on a policy); 1829, *Bain v. Case*, 3 C. & P. 496 (Lloyd's list, admitted to prove a Chilean declaration of blockade; but here treated as an admission); 1877, *St. John Gaslight Co. v. Clarke*, 17 N. Br. 516 (record of a gas meter duly verified and stamped according to law is admissible; but here on the theory that the contract made the meter "the sole arbiter"); 1894, *People v. Eppinger*, 105 Cal. 26, 38 Pac. 538 (forgery in the name of "M. Howell & Co."; a city directory admitted

Topic XI: AFFIDAVIT.

§ 1708. *Affidavits inadmissible at Common Law.* The requirement of cross-examination, or an opportunity therefor, which is the essential feature of the Hearsay rule (*ante*, § 1362), is clearly not satisfied when an affidavit is offered; because, though under oath, it is uttered *ex parte*, without notice to the opponent to afford him the opportunity of cross-examination. Even, if notice were in fact given in a particular case and the opportunity of attendance thus afforded, the sworn statement thus made would not of itself satisfy the rule; for unless the officer before whom the oath was taken were one empowered by law to supervise and direct the procedure of taking the testimony, it could not be conceded that there was a real opportunity for a cross-examination in a true and adequate sense. So that, in order truly to furnish such an opportunity, the officer must be thus empowered, and then the sworn statement becomes in effect a deposition, which is conceded at common law to be admissible.¹

At common law, then, an affidavit, i. e. a mere sworn statement made out of court, is inadmissible, for lack of the opportunity of cross-examination. This rule, with the authorities, has been already examined (*ante*, § 1384).

§ 1709. *Exceptions recognized at Common Law (Lost Documents, etc.).* The exceptions to this rule at common law were rare. There was of course a considerable recognition of affidavits in certain classes of proceedings with which the present exposition is not concerned,¹ namely, in the courts of Chancery,² in the ecclesiastical courts (including admiralty matters³ and testamentary and matrimonial matters), and in non-responsory proceedings (motions, and the like) in the common-law courts.⁴ But in trials by jury in

¹ *In Shaw* "that there was no such firm as M. H. & Co."; 1885, *Kuhns v. R. Co.*, 65 Ia. 536, 22 N. W. 661 ("the *Hard Book*," admitted as "an historical work of a particular subject," under Code § 4618, quoted *ante*, § 1693, to show certain registered boilers to be full blood of a certain breed); 1901, *Louisville & N. R. Co. v. Kier*, 109 Ky. 786, 60 S. W. 705 (American stud-books, compiled by experts and universally accepted by dealers as trustworthy, admitted to show a horse's pedigree); 1903, *Louisville & N. R. Co. v. Frame*, — *Id.* —, 71 S. W. 496 (plaintiff's "private catalogue" of a horse's pedigree, not personally known to him, excluded); 1896, *State v. Hahn*, 38 La. An. 169, 171 (a city directory, in a prosecution for forging with a fictitious drawer's name, admitted to show merely "that M.'s name was not in it"); *Mich. Comp. L.* 1897, § 10202 (breeding of a horse, provable by Wallace's year-book, Wallace's American trotting-register or American register year-book, or the American trotting-register); 1866, *Payson v. Everett*, 12 Minn. 187 (bank-note "detectors" excluded); *Mo. Rev. St.* 1899, § 2450 (in trials for certain kinds of false dealing at horse-racing, the "records and books of racing and their associations" are admissible); 1883, *Slocovich v. Ins. Co.*, 103 N. Y.

62, 14 N. E. 802, *semble* (*the American Lloyd's* and other shipping registers, to show the condition, capacity, age, and value of ships, admissible); 1897, *Pittsburg C. O. & St. L. R. Co. v. Sheppard*, 56 Oh. 68, 46 N. E. 61 (the speed record of a famous horse, allowed to be shown by the annual reports of the American Trotting Association); 1898, *Citizens' R. T. Co. v. Dew*, 100 Tenn. 317, 45 S. W. 790 (register of pedigree of dogs, accepted in the community as evidence of pedigree, admitted); 1899, *Pacific Express Co. v. Lothrop*, 20 Tex. Civ. App. 339, 49 S. W. 896 (American Berkshire Association's registered pedigree of a hog, admitted to show value).

² Thus, where a statute empowering an officer taking affidavits provides for notice and cross-examination, the case is assimilated to a deposition, even though the name "affidavit" is used; and such statutes have been included in §§ 1380-1382, *ante*.

³ As explained *ante*, § 4.

⁴ *Ante*, §§ 1377, 1384.

⁵ 1860, *Dr. Lushington*, in *The Peerless*, 1 Lush. 20, 41.

⁶ 1841, *R. v. Eyle*, 9 M. & W. 227, 236; and the statutes cited *post*, § 1710.

the common-law courts, there seem to have been but two excepted cases, one of which was purely local.

(1) In *proving the loss of the original of a document* in order to admit a copy, the party himself, though interested, was allowed to testify to the loss; the hardship of proving it otherwise being thought to justify an exception to the rule of disqualification by interest. The party thus admitted was by some Courts allowed even to take the stand as a witness, but by all it was conceded that at least his affidavit might be received.⁵ Thus the result was reached, in most Courts, on the general principle of necessity (*ante*, § 1421); the party's incompetency to take the stand created a necessity for resorting to his extrajudicial statement. It would follow that, since parties have been made competent by statute, there is no longer a necessity for resorting to his affidavit. This is probably the law, for all ordinary cases (*ante*, § 1196) of proof of loss of a document; but the statutes which regulate the recording of deeds and the proof of a recorded deed (*ante*, § 1225) have in many States perpetuated for that class of documents the common-law exception and have expressly sanctioned the use of a party's affidavit.⁶ But neither at common law nor in the rule's perpetuation under these statutes about recorded deeds is there any authority for giving similar sanctions to a *third person's affidavit* to prove the document's loss; for this would fall quite without the reason of the exception.⁷

(2) In Pennsylvania, a long-standing tradition admits an affidavit from a *foreign country* to prove *facts of family history*, and particularly the copy of a parish-register or a family Bible.⁸

§ 1710. *Exceptions created by Statute (Publication of Notice, Attesting Will-Witness, Accounts, Foreclosure Sale, Copies of Bank and Corporation Books, Official Analyses, Forgery of a Bond, Translations, Ex Parte Proceedings, etc.).* The general principle of Necessity (*ante*, § 1421), underlying the Exceptions to the Hearsay rule, has been exemplified in many statutes sanc-

⁵ Cases cited *ante*, § 1196. The affidavit could not be received to prove the document's contents: 1873, *McFarland v. Dey*, 69 Ill. 419, 421.

⁶ Statutes and cases cited *ante*, § 1225.

⁷ 1870, *Becker v. Quigg*, 54 Ill. 290, 294 (the common-law allowance of affidavits by the party, who was incompetent to testify, and the statutory continuance of this, does not admit the affidavit of a third person); 1873, *McFarland v. Dey*, 69 Ill. 419, 421 (same); 1823, *Poignand v. Smith*, 8 Pick. 272, 277 ("The affidavit of a party on the question of loss of a paper may be admitted, to exclude any presumption that he may have it in his possession or know where it is; but those who may be admitted as witnesses must testify in the usual form, in order that the advantage of cross-examination may be preserved"); 1841, *Viles v. Moulton*, 13 Vt. 510, 515 (third person's affidavit not admitted). *Contra*, but unsound: 1852, *McCann v. Beach*, 2 Cal. 25, 30, *semble*; 1856, *Engley v. Eaton*, 10 Ill. 126, 146 (affidavit of one competent to testify

on the stand is receivable; though the Court may require examination on the stand); 1860, *Taylor v. McIlwain*, 94 Ill. 438, 491 (affidavit of search for a deed, by a recorder in another State, admitted).

⁸ 1756, *Hyam v. Edwards*, 1 Dall. 2 (affidavit before the Mayor of London, received to prove a copy of a birth-and-death register there); 1791, *Douglas v. Sanderson*, 1 Yentes 15 (affidavit of authenticity of a leaf of a family Bible, made before the borough Burgess and notary of Wilmington; admitted "under the special circumstances of the case in proof of pedigree"); post 1778, *Fockler v. Simpson*, ib. 17 ("an *ex parte* affidavit made in England was good evidence in case of pedigree"); 1823, *Kingston v. Lealey*, 10 S. & R. 283, 387 (affidavit of a copy of a parish-register in the Barbadoes, sworn before the deputy-secretary there, received; "the case of *Hyam v. Edwards* is law," though "there is no more reason to admit *ex parte* affidavits in case of pedigree than in other cases").

tioning the use of affidavits in various classes of cases where serious and frequent inconvenience would be caused by requiring the calling of witnesses in court and where under the special circumstances (*ante*, § 1422) there is little reason to fear false testimony and little need for the searching process of cross-examination. The subjects of these statutes are too varied to admit of a systematic classification, and in only a few instances has there been a general recognition of the exception in many jurisdictions. The statutory use of affidavits to prove the loss of a recorded deed has been already examined (*ante*, §§ 1709, 1225); the remaining instances concern chiefly the following subjects: service or publication of notice, particularly publication in a newspaper; attesting witness' proof of a will's execution;¹ items of an account; proceedings of a foreclosure or probate sale; copies of bank-books and corporation records;² chemical analysis of foods, fertilizers, and the like;³ genuineness or forgery of a government bond or note;⁴ non-residence of a witness;⁵ age of an employed minor; copy of a church register;⁶ translation of testimony in a foreign language;⁷ ancillary or preliminary proceedings in general; and inventories by an executor or administrator.⁸ The wider exten-

¹ For the use of an attesting witness' testimony in court, given at the time of preliminary probate, see *ante*, § 1417.

² For certificates of this sort, not under oath, see *ante*, § 1663.

³ For official certificates of this sort, not under oath, see *ante*, § 1674.

⁴ For reputation as evidence in this class of cases, see *ante*, § 1626. For certificates without oath, see *ante*, § 1674.

⁵ For the inadmissibility of affidavits for this purpose apart from statute, see *ante*, § 1384.

⁶ The statutes, with a few interpreting rulings, are as follows; compare the statutes *ante*, § 1674 (admitting certain certificates without oath): CANADA: *British Columbia*: St. 1902, c. 22, § 5 (in any action in a county court for a demand not in tort and not exceeding \$250, the judge may receive the affidavit of "any party or witness resident in the Province within or without the territorial jurisdiction" of the Court; but may require the person to answer written interrogatories, or "where it is reasonably practicable" to appear for *visu voce* examination); *Manitoba*: Rev. St. 1902, c. 57, § 55 (affidavits of service of notice, filed or deposited in a local land titles or registry office, admissible); c. 46, Rule 462 (the judge may admit proof by affidavit, on such terms as he thinks reasonable; except where the other party "bona fide desires the production of a witness for cross-examination and such witness can be produced"); R. 465 (affidavits may be used by consent or by leave of Court); c. 30, § 125 (affidavits in county courts); c. 41, § 53 (affidavits in surrogate courts); *New Brunswick*: Consol. St. 1877, c. 42, §§ 41, 42 (by leave of the judge, affidavits may be admitted; but the affiant "shall be subject to oral cross-examination at such time as any judge may direct," and also to re-examination); *Newfoundland*: Consol. St. 1892, c. 50, Rules of Court 23, par. 1, Rule 24, par. 24 (Court may re-

ceive affidavits, but may order the witness to be produced for cross-examination); *Northwest Territories*: Consol. Ord. 1898, c. 21, Rules 263, 286, 293 (affidavits may on special conditions be received); *Nova Scotia*: Rules of Court 1900, Ord. 25, R. 1 (like Man. Rule 462); Ord. 26, R. 1 (upon motions, etc., affidavits may be used; but the Court may order attendance for cross-examination); R. 28 (regulations for cross-examination of affiants); *Crown Rules* 5 (applies Ord. 26, *supra*); *Ontario*: Rev. St. 1897, c. 60, § 149 (affidavit of a person "resident without the limits of the county" may be received; but the judge may before judgment require the person to answer interrogatories); *Rules of Court* 1897, § 483 (*citad ante*, § 1380).

UNITED STATES: *Alabama*: Code 1897, § 31 (plaintiff's affidavit of loan, etc., contents, and non-payment of a mercantile instrument, admissible); § 3217 (printer's affidavit of publication of newspaper notice of limited partnership, admissible); § 2241 (admissible in guardian's settlements); § 209 (admissible in administration settlements); § 1804 (in suits upon accounts, an affidavit by a competent witness to an itemized statement of account, admissible on certain conditions); § 1866 (publisher's affidavit as to notice, etc., of deposition *in perpetuum*, receivable); *Alaska*: C. C. P. 1900, §§ 638-640 (like Or. Annot. C. 1892, §§ 801-810); *Arizona*: Stats. 1894, § 2271 (affidavit allowable "to verify a pleading, to prove the service of a summons, notice, or other process in an action, to obtain a provisional remedy, a stay of proceedings, or a warning order, or upon a motion"); § 2972 (affidavit sufficient to establish an account in a suit thereon, unless denied on oath); St. 1895, April 3, No. 23 (foregoing provisions amended); *California*: C. C. P. 1873, § 2009 ("An affidavit may be used to verify a pleading or a paper in a special proceeding, to prove the service of a

sign of these statutory exceptions is to be approved; for in most of these instances, and others as yet unrecognized, the general and uniform adoption of

summons, notice, or other paper in an action or special proceeding, to obtain a provisional remedy, the examination of a witness, or a stay of proceedings, or upon a motion"); § 2010 (publication of a document or notice required to be published in a newspaper, provable by affidavit of the printer or his foreman or principal clerk, annexed to a copy; amended by the Commissioners in 1901, by striking out, after "required," the words "by law or by an order of a Court or judge"; for the validity of this amendment, see *ante*, § 438); Pol. O. § 3769 (collector's affidavit of publication of notice of sale for taxes, admissible); Civ. O. §§ 2471, 2484 (affidavit of publication of change of partnership, by the newspaper's printer, publisher, or chief clerk, admissible); *Colorado*: Annot. *Stata*. 1891, § 1753 (notice required to be published in a newspaper, provable by the printer's or publisher's certificate; compare the statutes *ante*, § 1674); § 175 (proof of publication of notice of a bankrupt's assignment may be made by affidavit of "printer or publisher"); § 3161 (affidavit of improvements on a mining claim, admissible); § 2408 (publication of notice of irrigation claim; for a newspaper, provable by the "sworn certificate of the publisher of such newspaper"; for posted copies, "by the affidavit of some credible person, certified to be such" by the officer administering the oath; see also *id.* § 2411); § 4827 (service of subpoena, provable by server's affidavit); St. 1893, p. 437, § 2 (affidavit of notice by a purchaser or assignee of land sold for taxes, admissible); *Connecticut*: Gen. St. 1887, § 545 ("any or all of the attesting witnesses" may make affidavit, at request of testator or executor, which "shall be accepted" as if the oath had been taken in court); 1901, *Vivian's Appeal*, 84 Conn. 257, 50 Atl. 797 (affidavit of attesting witness, admitted under the statute); *Florida*: Rev. St. 1892, § 2059 (when a marriage certificate was not made, or is lost, or "by reason of death or other cause" cannot be obtained, "the marriage may be proved by affidavit" "made by two competent witnesses who were present and saw the marriage ceremony performed," filed and recorded like a certificate); § 2211 (in a prosecution for forging, etc., a note, etc., of the U. S. or a State or Territory, a certificate under oath of the secretary of the treasury of the respective government is admissible to prove the forged nature of the note, etc.); *Idaho*: Rev. St. 1887, § 6052 (like Cal. C. O. P. § 2009); § 6053 (like *id.* § 2010); § 1596 (tax-collector's affidavit of publication of notice of tax-sale, admissible); *Illinois*: Rev. St. 1874, c. 100, § 1 (when a notice is required by law, court order, or contract, to be published in a newspaper, and no other mode of proof is provided, "the certificate of the publisher, by himself or his authorized agent," with copy annexed, is admissible); c. 88, § 4 (certificate of "one or more of his neighbors" of a buyer branding or marking stock, admissible to prove the time of branding, nature of brand, and pre-

vicious branding, but not to prove ownership); 1900, *Kettering v. Jacksonville*, 50 Ill. 39, 41 (city ordinance; newspaper publisher's affidavit received under a charter); *Indiana*: Rev. St. 1897, § 479 ("acts and proceedings of corporations, provable by sworn copy"); § 486 (whenever notice is required to be published in a newspaper, the affidavit of the printer or his employee being clerk or printer, is admissible with a copy of the notice); § 494 (similar for published service of process by notice; ordinary service, provable by affidavit of the server); § 7616 (affidavit admissible to prove notice, etc., of lien of a mechanic, etc.); § 2067 (executor's or administrator's or other person's affidavit of notice, admissible); *Iowa*: Code 1897, § 8586 (service of notice of action, by publication in newspaper; proof allowable "by the affidavit of the publisher or his foreman"); § 4634 (like *Nebr. Comp. St.* § 5861); §§ 4677, 4678 (providing for notice and cross-examination, in the officer's discretion, of an affiant); § 4680 (publications "required to be made in a newspaper," provable "by the affidavit of any person having knowledge of the fact," if made within six months); § 4681 (affidavit of "any competent witness," admissible to prove the "posting up or service of any notice or other paper required by law"; see also *id.* § 4281); 1878, *Farrell v. Leighton*, 49 Ia. 174, 176 (Code § 4680, formerly 2697, applied; publisher's affidavit under § 2534, formerly 2620, not required); *Kansas*: Gen. St. 1897, c. 95, § 255 (affidavit allowable to verify a pleading, to prove service of a summons, notice, or other process, "to obtain a provisional remedy, the examination of a witness, a stay of proceedings, or upon a motion"); c. 97, § 21 ("written evidence" in a language not English; a translation is provable by the translator's affidavit); § 24 (religious society's register of marriages, etc., provable by affidavit-copy by the pastor, clerk, or other keeper); St. 1901, c. 125 (in proceedings for indirect contempt, the accused is entitled to confrontation as in criminal cases); *Maine*: Pub. St. 1883, c. 71, § 27 (affidavit of notice of sale of deceased's estate, admissible); *Maryland*: Pub. Gen. L. 1888, Art. 35, § 43 (oath of a "disinterested credible witness" before a justice or other officer, admissible to prove goods-sold, work done, money paid, and the value thereof and promise to pay; provided the party-claimant makes affidavit of *bona fides* before the first day of the trial term); § 44 (creditor's account for money, goods, or other account-items, sworn before an officer, admissible); Art. 73, § 8 (newspaper editor's or disinherited person's affidavit of publication of notice of terms of partnership, admissible); Art. 84, § 8 (vessel-captain's affidavit giving a copy of a shipping-article, admissible to prove subscription by a seaman); Art. 83, § 8 (administrator's affidavit-list of debts of a decedent, admissible on a plea of insufficient assets); §§ 235, 237 (affidavit of a foreign will's exec-

this simple mode of proof would bring great advantage without incurring appreciable risk.

tion by a subscribing witness, or of the handwriting of a testator or deceased subscribing witness, admissible); *Massachusetts*: Pub. St. 1882, c. 182, § 2, Rev. L. 1902, c. 139, § 3 (affidavit of executor's appointment, admissible on certain conditions); P. S. c. 192, §§ 7, 10, R. L. c. 194, §§ 6, 8 (same for mortgagee's notice of intention to foreclose, and pledges of personalty's notice); P. S. c. 134, §§ 13, 18, R. L. c. 146, §§ 15, 33 (same for notice of sale by executor, administrator, or guardian); P. S. c. 12, §§ 29, 34, 45, St. 1888, c. 390, §§ 39, 52, 58, 67, R. L. c. 13, §§ 57, 60, 68 (same for collector's demand of payment of taxes, notice of sale, etc.); P. S. c. 304, § 11, R. L. c. 209, § 12 (in charges connected with counterfeit Government securities, certificate under oath of certain appropriate Government officers is admissible to prove forgery); St. 1887, c. 89, R. L. c. 116, § 38 (affidavit of contents of a safe-deposit box, by a notary and a corporate officer, admissible in certain cases); St. 1887, c. 277, § 3, R. L. c. 69, § 13 (public warehouseman's affidavit of notice of sale of goods for charges overdue, admissible); St. 1888, c. 143, c. 380, R. L. c. 139, § 2 (affidavit of an executor's notice of appointment, admissible in certain cases); St. 1894, c. 317, § 49, R. L. c. 113, § 54 (copy of a domestic savings-bank's books, under affidavit of the bank custodian, admissible on certain conditions); St. 1901, c. 242, R. L. c. 136, § 2 (subscribing witness' affidavit, admissible in the uncontested probate of wills); *Michigan*: Comp. L. 1897, § 523 (affidavits in justices' courts, forbidden, except by consent); § 2915 (affidavit admissible to prove notice in village condemnation proceedings); §§ 2987, 3369 (village or city condemnation proceedings, etc.; notice provable by affidavit of the printer of the newspaper or "some person in his employ knowing the facts," or by the person posting it); §§ 4264, 4279 (election for county road system or order to lay out road; notice provable by the affidavit of any one "knowing the facts"); § 5331 d (township resolution licensing peddlers, etc.; affidavit of notice by one posting it, admissible); § 7000 (affidavit of notice of meeting of a mining company alienating lands, admissible); § 7169 (copy of a by-law of a printing and publishing association under corporate seal, provable by the director's oath); § 8439 (same for a corporation for treating disease); § 9100 (affidavit of an executor or administrator or "some other person having knowledge of the facts," admissible to prove notice of sale); §§ 10162-10165 (publication of a newspaper-notice, provable by affidavit of the printer or foreman or principal clerk); § 11147 (affidavit of notice of a foreclosure sale, by the printer of a newspaper" or some one in his employ knowing the facts," or an affidavit of sale, by the auctioneer, admissible); § 10716 (affidavit of service of a lien-notice by "such person serving or posting the name," admissible); § 11669 (in prosecutions for forging, etc., bills of credit issued for U. S.

or any State or Territory, the certificate under oath of the secretary of the treasury or treasurer of such government is admissible to prove "the same to be forged"); *Minnesota*: Gen. St. 1894, §§ 5720, 5722 (notice of application required to be published in a newspaper, provable by affidavit of the printer or his foreman or principal clerk, with a printed copy from the newspaper annexed); § 5721 (so also for notice of sale of realty); § 5723 (affidavit of a printer or his foreman of "the publication of any notice or advertisement which by any law of this State is required to be published in any such newspaper," admissible); § 5724 (affidavit by an officer of the State Historical Society, recorded with the register of deeds, of a legal notice in a newspaper purporting to be published in this State before 1870, admissible as to certain specified facts); § 5764 (in prosecutions for forging, etc. any bill, etc., issued for the U. S. or any State or Territory, a certificate under oath of the U. S. secretary of treasury or treasurer, or of the secretary or treasurer of the State or Territory, admissible to prove the forged character); §§ 3038, 3056, 3057 (certain affidavits as to proceedings of religious societies, admissible); § 157 (newspaper notice required under local improvements act, provable by affidavit of the publisher or printer or his foreman or clerk); §§ 2321, 2324 (certain affidavits in survey proceedings, admissible); § 2330 (newspaper notice of partnership, provable by affidavit of the publishers or foreman); §§ 1079, 1090, 1806 (publication of city or village notice, etc., as required, provable by affidavit of the city or village printer or his foreman); § 7749 (certain affidavits with a petition as to a sub-drainage district, admissible); § 6047 (to prove a sale on foreclosure, an affidavit of publication of notice, by the printer of the newspaper or "some person in his employ knowing the facts," admissible; and to prove the facts of sale, an affidavit by a person acting as auctioneer thereat, admissible); *Mississippi*: Annot. Code 1892, § 1803 (publication of notice in a newspaper required by law or court order, provable by copy with affidavit of "the printer, publisher, clerk, or superintendent of the newspaper"); § 1804 (posting of notice required by law or court order, provable by copy with affidavit of posting); § 1817 (affidavit of a subscribing witness, before an officer in the State, admissible if no contest); *Missouri*: Rev. St. 1899, § 89 (affidavit of the editor or publisher of a newspaper, admissible to prove publication of notice by an executor or administrator); §§ 195, 200 (affidavits admissible in certain cases for claims against a deceased's estate); § 3102 (church register of marriages, etc., kept in the State, provable by copy verified by the affidavit of the pastor or other head of the society or by the clerk or other keeper of the register); § 3129 (affidavit of a "competent witness" admissible to prove "an assignment of or an indorsement on any bond, bill, or note"); § 3130 (so also to prove the ex-

Topic XII: STATEMENTS BY A VOTER.

§ 1712. Voter's Declarations as to Qualifications, Domicil, or Bribery.
In order to ascertain the qualifications of a voter, for the purpose of striking

instance of a partnership; the details of statement being prescribed); § 3133 (such affidavits must be filed a specified number of days before trial); § 3145 (when written evidence is in other than the English language, a competent translator's affidavit of translation may be received); § 4563 (when a marriage record is destroyed and the celebrant is dead, cannot be found, or refuses to give a certificate, the affidavits of "two credible persons who witnessed such marriage" may be recorded and admitted); § 3356 (demand in forcible entry and detainer, provable by a private person's sworn return); § 4691 (affidavit of a printer or publisher, admissible to prove publication of any notice required by law or court order, or done under a deed of trust or power of attorney); §§ 5670, 6342, 6306, 6323 (affidavits by printers and others, admissible to prove publication of certain kinds of municipal notices); St. 1903, March 13 and 14, pp. 106, 107 (affidavit copy of certain private abstracts of title, by the custodian, admissible); *Montana*: C. C. P. 1898, §§ 3330, 3331 (like Cal. C. C. P. §§ 2009, 2010); Civ. C. § 3284 (affidavit of publication of a partnership notice, by the "printer, publisher, or chief clerk of a newspaper," admissible); *Nebraska*: Comp. St. 1893, § 5944 (affidavits allowable as in Cal. C. C. P. § 2009); § 5977 ("publications required by law to be made in a newspaper," provable by affidavit "of any person having knowledge of the facts," if sworn within six months of the last day of publication); § 5978 (posting or service of any paper required by law, provable by affidavit of "any competent witness," made within six months); § 5981 (copy of field-notes or plat of a county surveyor, "certified under oath," admissible to prove "the shape or dimensions of a tract of land, or any other fact whose ascertainment requires only the exercise of scientific skill or calculation"); 1903, Home Ins. Co. v. Clark, — Neb. —, 95 N. W. 1056 (affidavit of the publishing company's president, received); *Nevada*: Gen. St. 1886, § 2783 (on application of a non-resident for administration, affidavit sufficient to prove identity on certain conditions); § 2801 (affidavit of rejection of claim by an administrator or executor, admissible); St. 1903, c. 6 (subscribing will-witness' affidavit; cited ante, § 1310); *New Hampshire*: Pub. St. 1891, c. 56, § 17 (affidavit of notice of taxation, admissible); c. 61, § 7 (affidavit of notice of sale for taxes, admissible); c. 130, § 16 ("the affidavit of the party making an entry into real estate, under the second method of foreclosure, and of the witnesses thereto," and a copy of the notice under the second and third methods, "verified by affidavit," when recorded, "shall be evidence of entry, possession, and publication"); 1861, Wendell v. Abbott, 43 N. H. 63, 78 (affidavit of entrant and witnesses in foreclosure of mortgage; the exception is to be strictly construed,

and an affidavit of one witness merely, without that of the party, is insufficient); *New Jersey*: Gen. St. 1898, Dairy, etc., Products § 40 (sworn certificate of a public analyst or State chemist, admissible to show milk adulteration); *New Mexico*: Comp. L. 1897, § 1170 (in prosecutions for counterfeiting, etc., a note, etc., issued on behalf of the U. S. or any State or Territory, the certificate under oath of U. S. treasurer or secretary of the Treasury, or State or Territorial secretary or treasurer, is admissible); *New York*: C. C. P. 1877, § 923 ("Where a public officer is required or authorized to make a certificate or affidavit," it is admissible; "no quotation in full ante, § 1674"); § 926 (affidavit of newspaper publication of notice, by the printer, etc., admissible); § 927 (affidavit of service of notice, by the person serving, admissible if the person is dead or insane or his attendance is not compellable with due diligence); § 2398 (recorded affidavit of foreclosure-sale, admissible); Laws 1884, c. 400, § 2 (affidavit of publication of partnership, admissible); *North Dakota*: Rev. C. 1895, § 4423 (like Cal. Civ. C. § 2484); § 3579 (substantially like Cal. C. C. P. § 2006, omitting "a paper in a special proceeding," putting "process" for "paper" in the next clause, and omitting "or special proceeding"); § 5693 (like Cal. C. C. P. § 2010, adding "publisher" and substituting "clerk or bookkeeper" for "principal clerk"); *Ohio*: Rev. St. 1896, § 2134 (analyst's sworn certificate of analysis of butter, milk, etc., admissible); § 2804 (affidavit of notice of municipal improvement, receivable); § 5263 (affidavits allowable in certain ancillary proceedings); § 6089 (affidavit of an executor or administrator, admissible to prove notice of appointment); § 6419 (affidavit of notice of eminent domain proceedings, admissible); *Oklahoma*: Stats. 1893, § 2544 (notice of dissolution of partnership, provable by affidavit of "the printer, publisher, or chief clerk of a newspaper"); § 4124 (like Cal. C. C. P. § 2006, omitting "or a paper in a special proceeding" and "or special proceeding"); § 4272 (when written evidence is in a language other than English, a competent translator's affidavit of translation into English is admissible); *Oregon*: C. C. P. 1892, § 508 (like Cal. C. C. P. § 2008, omitting the first clause as to verification); § 510 (like Cal. C. C. P. § 2010, but allowing use only within six months); Cr. C. § 1820 (in a prosecution for forging, etc., a note, bond, etc., of the U. S. or any State or Territory, "the certificate duly sworn to" of the U. S. treasurer or secretary of the treasury or of a State or Territorial secretary or treasurer, is admissible to prove the note's counterfeit character); *Pennsylvania*: St. 1893, P. & L. Dig., Evidence 30-41 ("verified" copies of bank-book entries, receivable where the bank is not a party, unless against affidavit of injustice; nature of the verifying

out a vote if found to have been cast by a disqualified person, resort is sometimes desired to be made to the extrajudicial declarations of the voter himself. Such declarations can be available, upon the general principles of evidence, in only one of three ways.

(1) If the qualification depends upon the voter's *domicil*, then his declarations, at the time of an act of residence, or removal of residence, stating his intent as to the purpose or permanency of the act, are receivable, in the same way that any person's declarations of domiciliary intent are receivable, namely, as statements of a mental condition (*post*, § 1727), or as verbal acts (*post*, § 1784). The rule here would be neither more nor less favorable for the state-

affidavit specified); St. 1885, P. & L. Dig., Deced. Est. 97 (certified copy of an executor's or administrator's sworn recorded inventory and appraisal, to be "as good evidence" as the original); 1865, *Howser v. Com.*, 51 Pa. 332, 341 (to show that no effects of a murdered person were found, the sworn inventory of the administrator was received); *Rhode Island*: Gen. L. 1896, c. 48, § 3, c. 49, § 4 (sworn certificate of the analyzer of milk or of vinegar submitted for analysis by the inspector, admissible); c. 202, § 15 (affidavit of notice of sale, by a person causing a sale of an administrator, guardian, sheriff, mortgagee, etc., admissible); c. 243, § 1 (affidavit of service of any notice, admissible); c. 213, § 12 (filed affidavit of notice of sale by an executor or guardian, admissible); *South Carolina*: Code 1902, § 2453 (sworn return of a surveyor appointed by the parties or the Court, admissible on an issue of title or boundary); *South Dakota*: State. 1899, §§ 5257, 5265 (like Cal. Civ. C. §§ 2, 2484); § 6512 (like N. D. Rev. C. § 5649); § 6535 (publication of any notice, etc., required by law in any newspaper, provable by affidavit of "any printer, foreman of any printer, or publisher of any newspaper published in this State"); *Tennessee*: Code 1896, § 7343 (affidavit of defendant in bastardy denying intercourse in the period of gestation, admissible); *Texas*: Rev. Civ. State. 1895, § 1900 (affidavit of a subscribing witness, made "in open court," admissible to prove a will; such affidavits are also admissible for the two witnesses to handwriting of testator and subscribing witnesses); *Vt.*: Rev. St. 1898, §§ 2442, 2443 (like Cal. C. O. P. §§ 2009, 2010); § 1500 (affidavit of voting improvements, admissible); § 4005 (publication or posting of probate notice "required to be published or posted may be given by the affidavit respectively of the publisher or principal clerk of the newspaper in which notice was published, or of the person who posted the notice"); *Virginia*: Code 1887, § 2358 (affidavit that a witness or party is or resides without the State, receivable); "certificates" of an editor, or affidavit of any other person, as to publication in a newspaper as required by law, receivable; 1841, *Cunningham v. Smithson*, 12 Leigh 82, 28, 67, 70 (the certificate under Code § 2358 must be on oath); *West Virginia*: Code 1891, c. 120, § 33 (that a witness or party resides or is out of State, is provable by affidavit; that notice was published as required in a newspaper, is provable

by "certificates" of the editor or publisher or by affidavit of any other person); *Wisconsin*: State. 1898, § 2642 (proof of service of civil summons, etc., may be made by affidavit of the person serving or of the publisher or printer, or his foreman or principal clerk, in case of publication); § 2537 (proof of foreclosure sale may be made by affidavit of publication of notice by the newspaper printer or "some person in his employ knowing the facts," and by affidavit of sale by the auctioneer, or "in case of his death or other disability," by "any person having knowledge of the facts"); § 925 (47) (publication of a municipal ordinance, provable by the filed affidavit of the printer or his foreman); § 4164 (substantially like N. Y. C. O. P. § 922); § 4173 (notice required by law to be published, provable by affidavit of the printer or foreman of "any newspaper published in the State"); § 4173a (service of a writ, where no other mode is expressly prescribed); §§ 4174, 4175 (notice of application to court or of sale of realty, provable by affidavit of the printer or foreman or principal clerk of the newspaper, recorded respectively with the clerk of court or the register of deeds, etc.); § 4181a (notice required by corporate by-laws, provable by affidavit of the person giving it, filed with the corporate clerk); § 4627 (substantially like Minn. Gen. St. § 5764); *Wyoming*: Rev. St. 1887, § 47 (publication notice of foreclosure sale, etc., provable by recorded affidavit of the proprietor or manager of the newspaper or "some person in his employ knowing the facts"; sale provable by the auctioneer's recorded affidavit); § 2611 (like Oh. Rev. St. § 5233).

Affidavits are sometimes available in evidence upon other principles than the present Exception, i. e. in cases where they are not offered as the assertions of the affiant to prove the fact stated. These other available modes are three in number: (1) where an affidavit filed by an opponent, in the same or another litigation, is offered as his admission (*ante*, § 1075); (2) where the opponent's affidavit, in the present trial, that an absent witness would testify to a certain tenor, is judicially admitted to be true in order to prevent a continuance (*post*, § 2595); (3) where an affidavit furnished by the beneficiary to the insurer as a proof of loss is received as a verbal act fulfilling the conditions of the insurance contract (*post*, § 1770) or as an admission (*ante*, § 1073).

ments of voters in election controversies than for others' statements in other controversies.

(3) If the qualification depends upon any other circumstances, or if, though it depends upon domicile, the statement is of an external fact (such as the place of residence, and not of an existing intent), then the voter's statement presents the ordinary case of an assertion of fact obnoxious to the Hearsay rule; and it can be made available only (a) as being the admission of a party or privy (*ante*, § 1076), or (b) as coming under a special and separate exception to the Hearsay rule. The statements ordinarily presenting this question are statements that the voter has not the requisite *property-holding* or is not a *citizen* or has been *bribed*.

(a) In England, the theory that such statements may be treated as a *party's admissions* has always been advanced as the correct one:

1837, Mr. *Thesiger*, arguing, in *Nowlan's Case*, Falc. & Fitch. 70, 73: "A voter who has voted for the sitting member is always considered as a party, and it is on that ground that his declarations are admissible. The question is always considered to be between the voter and the party questioning his vote, and not merely between the sitting member and the petitioner."

It seems clear, however, that the voter is in no accurate sense a party to the proceedings; nor is he, after casting his vote, even indirectly or equitably interested in the controversy between rival claimants to the office:

1823, Serjt. *Mercusier*, arguing, in *Southampton Case*, 2 Cockb. & R. El. C. 100, 114: "The rule of law is that no evidence can be received except upon oath. . . . The principle [as to a party's admissions] does not apply to the case in question, for the voter, having once given his vote, has no longer any interest in it; his interest has been transferred to the sitting member. He has therefore no longer such an inducement to speak the truth, arising from a sense of his own interest, as would make it safe to receive his declarations as to his own right divested of the sanction of an oath."

This theory of a party's admissions sufficed, nevertheless (though with occasional modifications), to establish the rule in English parliamentary practice; and that practice has been followed by the English courts, since electoral controversies have been placed in their jurisdiction.¹

¹ 1775, *Milborne Port Case*, 1 Doug. El. C., 2d ed., 97, 102, 124 (declarations of intention to commit a fraud, by one apparently an agent of a candidate, were admitted; no reason stated); 1775, *Petersfield Case*, 3 id. 8, 11 (declaration by a voter of having been bribed, not admitted in order to prove the fact upon the candidate, but admitted to disqualify the declarant as voter); 1775, *Ivelchester Case*, ib. 151, 159 (same; the result being that the question "Whose money did the voters say they had received?" was excluded, but the question "In whose interest did they say that they were to vote in consequence of their taking this money?" was allowed); 1775, *Shaftesbury Case*, 3 id. 308, 309 (same ruling, even after a voter had taken oath denying bribery); 1776, *Worcester Case*, 3 id. 229, 276 (same ruling); 1785, *Bedford Case*, 2 Loders, 281, 411 (same, declarations admissible); 1794, *Leominster Case*, 2 Fockw. 391, 396 (a "decla-

tion of a voter which tends to destroy his vote, is admissible whether made before or after the election," unless it involves penal consequences); 1804, *Middlesex Case*, ib. 1, 141 (declarations as to property disqualification, held inadmissible; no reason given); 1804, *Weymouth Case*, ib. 195, 227 (similar declarations, held admissible); 1823, *Southampton Case*, Cockb. & R. 100, 114; *Per. & Kn.* 213, 222 (declarations as to illegal voting, admissible if made before the striking of the ballot); 1837, *Nowlan's Case*, Falcoun. & Fitch. 70, 73 (declarations as to property-disqualifications, admitted; the Committee declaring that in courts of law they had found, on inquiry, "the practice not uniform"); 1869, *Windsor Case*, 1 O'M. & H. 1, 5 (voter's declaration of corruption, admissible on the issue of striking out his vote); *King's Lynn Case*, ib. 203, 208 (same; but not admissible to prove bribery against candidate).

(b) There remains the possibility of recognizing a distinct exception to the Hearsay rule, for the purpose of admitting such declarations. If we recur to the fundamental policy of the exceptions (*ante*, §§ 1420-1422), we find two general requirements to be fulfilled; first, there must be a necessity for the hearsay, i. e. an impossibility of obtaining *viva voce* in court from the same source any testimony or, at least, as good testimony; and, secondly, the hearsay statement must have been uttered under circumstances rendering it fairly trustworthy. Would these requirements be fulfilled, in the case of a voter's extrajudicial statements as to his disqualifications? It would seem that they are not, and that it is undesirable to recognize such an exception. The reasons have nowhere been better set out than in the following congressional report:

1872, Mr. George F. Hoar, reporting for the House Committee on Elections, in *Cass v. Meyers*, Smith Dig. Congr. El. C. 60, 65: "Another question of importance which has arisen in the discussion of the cause is the question whether evidence of the declarations of alleged voters, made not under oath, in the country [*sic*], should be received to show the fact that they voted, or for whom, or that they were not legally entitled to vote. Some of the Committee think that such evidence ought in no case to be admitted; except, of course, so far as declarations, made at the time, of the party's intent or understanding as to his then present residence or his purpose in a removal, are admissible as part of the *res gestæ*. All of the Committee are of opinion that such evidence is to be received with the greatest caution, to be resorted to only when no better is to be had, and only acted on when the declarations are clearly proved and are themselves clear and satisfactory. As this question has been quite fully considered, it may be proper briefly to discuss it here. . . . [1] The general doctrine is usually put upon the ground that the voter is a party to the proceeding, and his declarations against the validity of his vote are to be admitted against him as such. If this were true, it would be quite clear that his declarations ought not to be received until he is first shown *alibi*, not only to have voted, but to have voted for the party against whom he is called; otherwise it would be in the power of an illegal voter to neutralize wrongfully two of the votes cast for a political opponent, first, by voting for his own candidate, secondly, by asserting to some witness afterward that he voted the other way, and so having his vote deducted from the party against whom it was cast. But it is not true that a voter is a party in any such sense as that his declarations are admissible on that ground. His interest is not legal or personal. It is frequently of the slightest possible nature. If he were a party, then his admissions should be competent as to the whole case—as to the votes of others, the conduct of the election officers, etc.; which, it is well settled, they are not. [2] Another reason given is that the inquiry is of a public nature, and that it should not be limited to the technical rules of evidence established for private causes. This is doubtless true. It is an inquiry of a public nature, and an inquiry of the highest interest and consequence. Some rules of evidence applicable to such an inquiry must be established; it is nowhere, so far as we know, claimed that in any other particular the ordinary rules of evidence should be relaxed in the determination of election cases. . . . [3] The practice of admitting this kind of evidence originated in England. So far as it has been adopted in this country, it has been without much discussion of the reasons on which it was founded. In England, as has been said, the vote was *viva voce*; the fact that the party voted, and for whom, was susceptible of easy and indisputable proof by the record. The privilege of voting for members of Parliament was a considerable dignity, enjoyed by few. It commonly depended on the enjoyment of a freehold, the title to which did not as with us appear on public registries, but would be seriously endangered by admissions of the freeholder which disparaged it. An admission by the voter of his own want of qualification was therefore ordinarily an admission against his right to a

special and rare franchise and an admission which seriously imperilled his title to his real estate; an admission so strongly against the interest of the party making it would seldom be made unless it were true. It furnishes no analogy for a people who regard voting, not as a privilege of a few, but as the right of all; where the vote, instead of being *exclusively*, is studiously protected from publicity, and where such admissions, instead of having every probability in favor of their truth, may so easily be made the means of accomplishing great injustice and fraud without fear either of detection or of punishment. [4] It may be said that the principle of the secret ballot protects the voter from disclosing how he voted, and, in the absence of power to compel him to testify and furnish the best evidence, renders the resort to other evidence necessary. The Committee are not prepared to admit that the policy which shields the vote of the citizen from being made known without his consent is of more importance than an inquiry into the purity and result of the election itself. If it is, it cannot protect the illegal voter from disclosing how he voted. If it is, it would be doubtful whether the same policy should not prevent the use of the machinery of the law to discover and make public the fact, in whatever way it may be proved. It is the publicity of the vote, not the interrogation of the voter in regard to it, that the secret ballot is designed to prevent. There would seem to be no need to resort to hearsay evidence on this ground, unless the voter has first been called and, being interrogated, asserts his privilege and refuses to answer.² Even in that case a still more conclusive objection to hearsay testimony of this character is this: It is not at all likely to be either true or trustworthy. . . . [Hearsay evidence] is only admitted in cases where hearsay evidence is in the ordinary experience of mankind found to be generally correct, — as in matters of pedigree and the like. But a man who is so anxious to conceal how he voted as to refuse to disclose it on oath, even when the disclosure is demanded in the interest of public justice, and who is presumed to have voted fraudulently (for otherwise, in most cases, the inquiry is of no consequence), would be quite as likely to have made false statements on the subject, if he had made any. To permit such statements to be received to overcome the judgment of the election officers, who admit the vote publicly in the face of a challenge and with the right to scrutinize the voter, would seem to be exceedingly dangerous. . . . [But, on account of the precedents and of the preparations of both parties in this case,] we have applied the English rule to the evidence, with the limitation (of the reasonableness of which it would seem there can be no question) that evidence of the hearsay declarations of the voter can only be acted upon when the fact that he voted has been shown by evidence *aliunde* and when the declarations have been clearly proved and are themselves clear and satisfactory.”

In the United States, the Courts have naturally been much influenced by the orthodox English practice. Yet the cogent reasoning of the Congressional Committee has in more recent rulings tended to prevail. The law therefore differs in the different States, and in a few Courts the rule has been left unclear in successive precedents.³

² For this privilege, see post, § 2315.

³ *U. S. Congress*: 1836, *Newland v. Graham*, 1 Bartl. Cong. El. C. 5, 6 (declarations of tenor of vote, excluded); 1840, *New Jersey Case*, ib. 19, 24 (declarations as to the fact of voting, excluded); 1853, *Vallandigham v. Campbell*, ib. 222, 220 (declarations “touching their qualifications and the candidates for whom they voted,” admitted, on the theory that “each voter challenged is a party to the proceeding”); 1872, *Ossana v. Meyers*, Smith Dig. Congr. El. C. 60, 65 (quoted *supra*); *Ala.*: 1901, *Black v. Pate*, 130 Ala. 514, 30 So. 434 (declarations as to qualifications, made after the election, held inadmissible); *Ariz.*: 1906, *Providence G. M.*

Co. v. Burke, — *Ariz.*, —, 57 Pac. 641 (declarations as to citizenship, by a voter not found, admitted); *Ark.*: 1868, *Patton v. Coates*, 41 Ark. 111, 180 (declarations as to voting twice, admitted, not to show the vote void, but as conduct exhibiting a conspiracy); 1891, *Rack v. Renfrow*, 54 Id. 409, 411, 16 S. W. 6 (declarations “showing their want of qualifications to vote,” inadmissible); *Cal.*: 1866, *Norwood v. Kenfield*, 30 Cal. 393, 398 (left undecided); 1896, *Smith v. Thomas*, 121 Id. 533, 54 Pac. 71 (declarations as to tenor of vote, inadmissible, except to impeach by self-contradiction); 1899, *Lauer v. Kates*, 120 Id. 682, 53 Pac. 262 (declaration as to tenor of vote, inadmissible); *Colo.*

§ 1712. Voter's Declarations as to Tenor of Vote or Intent of Words.

(1) Under the modern system of balloting, the ballot contains nothing to identify the ballot with a particular voter. Where a voter is found to have been disqualified, and it is desired to reject his vote, the question therefore arises whether his *extrajudicial* assertions as to the tenor of his ballot may be received. Here the same considerations apply, though more forcibly. The voter's statements cannot be considered as the admissions of a party-opponent, because it does not yet appear how he has voted, and therefore it cannot be said that he is opposed in interest to the party who wishes the vote to be discarded. Furthermore, an exception to the Hearsay rule would be highly impolitic, because this would virtually license a corrupt voter to vote for the contesting candidate and yet by his declarations to furnish evidence for striking out a vote for the successful candidate. These reasons have been sufficiently expounded in the Congressional report above quoted.¹

(2) Whether the voter may *on the stand* testify to the tenor of his ballot is an entirely different question; for the Hearsay rule is then satisfied. In the first place, there is a clear *privilege* (subject to certain limitations) not to testify against his will; but this privilege does not apply to unqualified persons (*post*, § 2215); so that such testimony would still be compellable in the class of cases here in question. But, in the next place, a few judges have been inclined to make this something more than a privilege, and to erect it into an absolute prohibition, whether the voter wishes or not to testify. In this view, the policy of this prohibition would equally exclude extrajudicial voluntary statements; this aspect of the subject is elsewhere treated (*post*, § 2215).

1863, *People v. Commissioners*, 7 Cal. 190, 2 Pac. 912 (declarations as to qualifications, inadmissible); 1890, *Sharp v. McIntire*, 23 Id. 90, 46 Pac. 115 (declarations at time of voting, as to domicile, admitted); 1875, *Beardstown v. Virginia*, 76 Ill. 24, 45 ("considering the voter as a party, then it comports with legal principle to receive in evidence his declarations against himself"; but here, the ballots being lost and the tenor of the votes not appearing otherwise, the declarations were rejected because it could not be known whether they were against interest); 1876, *Beardstown v. Virginia*, 81 Id. 541, 549 ("We will not commit ourselves to any absolute rule of admission or rejection," but most of the declarations were rejected on the facts); 1883, *Kreitz v. Behrensmeier*, 135 Id. 141, 196, 17 N. E. 232 ("In *Beardstown v. Virginia*, we . . . held that the declarations of a voter subsequent to the election were incompetent" (!); but declarations of a mental state, affecting his domicile, are admissible; see *post*, § 1727); 1890, *Eggers v. Fox*, 177 Id. 185, 52 N. E. 269 (declaration that he had voted twice, admitted, the declarant refusing to testify on the stand); 1872, *Gilleland v. Schuyler*, 9 Kan. 569, 582 (declarations as to illegal multiple voting, excluded); 1903, *Edwards v. Logan*, — Ky. —, 70 S. W. 852, *semble* (voter's declarations of the tenor of his vote, inadmissible); 1863, *People*

v. Cleett, 16 Mich. 232, 296 (*People v. Pease*, N. Y., disapproved, but on other grounds); 1892, *Berry v. Hall*, 6 N. M. 642, 30 Pac. 936 (declarations showing disqualifications received, after evidence of the fact and tenor of vote; Illinois rule supposed to be followed); 1863, *People v. Pease*, 27 N. Y. 45, 50, *per* Davies, J. (for rejecting illegal votes, "the declarations of the person casting the vote have been admitted and received as evidence of his qualifications or want of qualification"; see this case in other aspects, *ante*, § 581, *post*, § 2215); 1890, *Boyer v. Toague*, 106 N. C. 623, 11 S. E. 665 ("the declarations of a voter as to his qualifications generally, if made at the time of voting, are competent as a part of the *res gestae*"); 1900, *Kadlec v. Pavik*, 9 N. D. 275, 63 N. W. 5 (declarations of disqualification; not decided); 1868, *State v. Olin*, 23 Wis. 309, 319 (voter's declarations as to alienage, admitted; "the reason is" that such a person "is always considered as a party when the result of the election is in controversy"); 1863, *State v. Hillmantel*, 1b. 422, 426 (preceding case approved); 1900, *State v. Connors*, 106 Id. 425, 82 N. W. 238 (declarations as to qualifications and tenor of vote; not admitted on the facts, because the offer was not definite enough).

¹ For the precedents, see note 2, *ante*, § 1712.

(3) Whether the voter may *on the stand* testify to his *intent or meaning* in the words or initials on the ballot is still a different question. (a) In the first place, the *parol-evidence* rule may be thought to forbid the use of the voter's private intent for the purpose of qualifying or interpreting the terms of the ballot; this question is elsewhere dealt with (*post*, § 2452). (b) In the next place, supposing the *parol-evidence* rule not to stand in the way, the notion that a person is not competent to *testify to his own intent* may be invoked to prohibit such testimony. No such rule of prohibition exists (except in Alabama); but there have nevertheless been many efforts to establish it; the rulings have been already examined (*ante*, § 581).

SUB-TITLE II (continued): EXCEPTIONS TO THE HEARSAY RULE.

TOPIC XIII: DECLARATIONS OF A MENTAL CONDITION.

CHAPTER LVI

- § 1714. General Principle.
- § 1715. Circumstantial Evidence classified.
- § 1716. Order of Topics.

a. STATEMENTS OF PAIN OR SUFFERING.

- § 1718. General Principle.
- § 1719. Circumstances under which the Statement is made; Statement to a Physician or Layman.
- § 1720. Same: Other Principles affecting Statements to a Physician, discriminated.
- § 1721. Statements *Post Litem Motam*.
- § 1722. Kind of Fact Narrated; Statements of Past Events and Conditions, Mode of Injury, and the Like.
- § 1723. Other Statements affecting Health, discriminated.

b. STATEMENTS OF DESIGN, INTENT, MOTIVE, FEELING, ETC.

- § 1725. Statements of Design or Plan.
- § 1726. Same: Contrary Rulings explained.
- § 1727. Statements of Intent, in Domestic

- § 1728. Statements of Intent, in Bankruptcy cases.

- § 1729. Statements of Motive, Reason, or Intent.

- § 1730. Statements of Emotion, Fear, Malice, Affection, etc.; Wife's or Husband's Declarations.

- § 1731. Statements of Opinion or Belief.

- § 1732. Sundry Statements by an Accused Person (Purpose, Motive, Good-will, Fear, before or during or after the Deed; Political Opinions).

c. STATEMENTS BY A TESTATOR.

- § 1734. Different Classes discriminated.
- § 1735. Ante-testamentary Statements of Design, Plan, Intention.
- § 1736. Post-testamentary Statements as to Execution, Contents, or Revocation.
- § 1737. Statements indicating Intent to Revoke.
- § 1738. Statements as to Undue Influence or Fraud.
- § 1739. Statements showing Intelligent Execution.
- § 1740. Statements as to Insanity.

§ 1714. General Principle. In four of the preceding Exceptions (Topics VIII-XI), it was noticed that the Necessity principle, justifying them (*ante*, § 1421), is regarded as satisfied by considerations somewhat different from those applied to the first six Exceptions (Topics I-VI). The necessity, in the first six, is found to lie in the impossibility, by reason of death, insanity, absence, or the like, of producing the declarant on the stand as a witness; so that the only evidence obtainable from that person was his hearsay statement.¹ In the other four, the notion of inconvenience is substituted for that of impossibility; i. e. under all the circumstances, the inconvenience of obtaining the person's testimony on the stand is thought to create a sufficient necessity for resorting to his hearsay statements. In the present and the two ensuing Exceptions, this Necessity principle presents itself in still a third and different form. It rests on the consideration that, though the person's testimony on the stand may still be both actually and conveniently practicable, yet the probability of there receiving from him testimony which

¹ The Reputation-Exception (Topic VII) stands on peculiar grounds, already noted in § 1462, 1612.

shall be in value equal or superior to certain hearsay statements is small; thus, while there is hardly a necessity in the strict sense, there is at least a desirability of resorting also to the hearsay statements.

So far as this applies to the present Exception, the judicial doctrine has been that there is a fair necessity, for lack of other better evidence, for resorting to a person's own contemporary statements of his mental condition. It is indeed possible to obtain by circumstantial evidence (chiefly of conduct) some knowledge of a human being's internal state of pain, emotion, motive, design, and the like; but in directness, amount, and value, this source of evidence must usually be decidedly inferior to the person's own contemporary assertions of those conditions. It might be argued, however, that the person's own statements on the stand would amply satisfy the need for his testimonial evidence. The answer is that statements of this sort on the stand, where there is ample opportunity for deliberate misrepresentation and small means for checking it by other evidence or testing it by cross-examination, are comparatively inferior to statements made at times when no inducement to misrepresentation existed and the probability of trustworthiness was greater. For the use of such statements, then, made out of court and under certain circumstantial guarantees of trustworthiness, there is a fair necessity, in the sense that there is no other equally satisfactory source of evidence either from the same person or elsewhere.²

Such has been the general attitude of the Courts in sanctioning the use of this class of statements. They recognize the bearing both of a Necessity principle (*ante*, § 1421) and of a Circumstantial Guarantee of Trustworthiness (*ante*, § 1422). The two, however, are seldom distinctly separated in judicial utterances, and sometimes one, sometimes the other, receives the sole emphasis. These two broad aspects of the principle, as applicable to mental conditions in general, did not receive judicial formulation until the middle of the 1800s. Up to that time there was merely an indefinite doctrine, not distinguishing clearly between this and the Exception for Spontaneous Declarations (*post*, § 1745), and resting chiefly on an opinion of Lord Ellenborough's:

1806, *Asson v. Kinnaird*, 6 East 196; evidence was offered of declarations on a sick-bed by the plaintiff's wife that she was not well on the previous Tuesday, when she went to be insured; *Ellenborough, L. C. J.*: "A witness has been received to relate that which has always been received from patients to explain, — her own account of the cause of her being in bed at an unreasonable hour with the appearance of being ill. . . . What were the complaints, what the symptoms, what the conduct of the parties themselves at the time, are always received in evidence upon such inquiries, and must be resorted to from the very nature of the thing. . . . The declaration was upon the subject of her own health at the time, which is a fact of which her own declaration is evidence; and that too made unaware before she could contrive any answer for her own advantage and that of her husband, and therefore falling within the principle of the case in *Skinner* which I have alluded to."³

² It follows that the death, insanity, or non-residence of the declarant is not a condition precedent. This has not been questioned.

³ This was *Thompson v. Trevanion*, quoted *post*, § 1747, which became the foundation of the Exception for Spontaneous Declarations.

From this precedent and opinion was developed during the 1800s a broad doctrine admitting contemporary declarations of a mental or emotional condition in general. The judicial reasoning is illustrated in the following passages:

1878, *Mollat, L. J.*, in *Sagden v. St. Leonards*, L. R. 1 P. D. 184: "Wherever it is material to prove the state of a person's mind, or what was passing in it, and what were his intentions, there you may prove what he said, because that is the only means by which you can find out what his intentions are."

1888, *Upham, J.*, in *Hasley v. Carter*, 8 N. H. 49: "The evidence is admitted on the presumption, arising from experience, that when a man does an act his cotemporary declaration accords with his real intention, unless there be some reason for misrepresenting such intention."

1890, *Parson, J.*, in *Ellis v. Holmes*, 11 Ired. 20: "[It is] almost the only kind of evidence by which the condition of body or mind can be ascertained."

1892, *Johnson, C. J.*, in *Carnahan v. State*, 12 Ark. 608: "The declarations of the defendant as to his intent or object in killing the cow do not depend in the slightest degree upon the credit that might be awarded to him as a man, but solely and exclusively upon the presumption arising from experience that his cotemporary declarations accord with his real intentions."

1889, *Reisfeld, C. J.*, in *State v. Howard*, 22 Vt. 293, 404: "The present state of health or feeling is always allowed to be proved in this way, since it is the only mode in which it can be shown."

1898, *Swayne, J.*, in *Insurance Co. v. Medley*, 6 Wall. 297: "Wherever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings are original and competent evidence. These expressions are the natural reflexes of what it might be impossible to show by other testimony. . . . As independent explanatory or corroborative evidence, it is often indispensable to the due administration of justice. . . . Such evidence must not be extended beyond the necessity upon which the rule is founded. It must relate to the present, not to the past. Anything in the nature of narration must be excluded."

1876, *Bennett, J.*, in *Sanders v. Reister*, 1 Dak. 173: "I incline to the opinion that all that the Courts can mean by the use of the phrase under consideration ['from the necessity of the case'] is that necessity growing out of the inherent difficulties connected with an inquiry into, and the very nature of the proof required to show, the mental and physical condition of an individual. From the nature of the case, that condition can only be known as it finds its expression in external symptoms and in the common complaints of pain and distress which are the natural concomitants of illness and physical injury."

1890, *Holmes, J.*, in *Kimer v. Pessenden*, 181 Mass. 259, 24 N. E. 208: "Such declarations, made with no apparent motive for misstatement, may be better evidence of the maker's state of mind at the time than the subsequent testimony of the same persons."

1892, *Gray, J.*, in *Mutual Life Ins. Co. v. Hillman*, 145 U. S. 285, 12 Sup. 909: "A man's state of mind or feeling can only be manifested to others by countenance, attitude, or gesture, or by sounds or words, spoken or written."

1892, *Fild, J.*, in *Commonwealth v. Trufshen*, 187 Mass. 185, 31 N. E. 901: "The fundamental proposition is that an intention in the mind of a person can only be shown by some external manifestation, which must be some look or appearance of the face or body, or some act or speech; and that proof of either or all of these for the purpose of showing the state of mind or intention of the person is proof of a fact from which the state of mind or intention may be inferred."

* For the reasons of the rule as shown in decisions on statements other than those of physical suffering, see also: *Wright v. Tatham*, 5 Q. B. 683; *Gilchrist v. Hale*, 8 Watts 254; *Jacobs v. Whitcomb*, 10 Cosh. 267; *Day v. Stick-*

ney, 14 All. 253; *Hunter v. State*, 40 N. J. L. 5; *Lake Shore R. Co. v. Herrick*, 49 Oh. 26, 20 N. E. 1062; *Vilas v. Waltham*, 157 Mass. 542, 22 N. E. 901.

§ 1715. *Circumstantial Evidence and Res Gestæ Rule, distinguished.* (1) The condition of a person's mind may be indicated by his *conduct* or by his *assertions*. The former evidence is of an indirect or circumstantial nature, and the various uses of it have already been considered (*ante*, §§ 225-406). The latter evidence is of a direct or testimonial nature; the Hearsay rule therefore applies to it (*ante*, § 1361), and some exception to the Hearsay rule must therefore be invoked in order to admit it. That the Hearsay rule does not apply to conduct used evidentially is elsewhere noted (*post*, § 1788), in discussing the applicability of the Hearsay rule in general; but, since the distinction between conduct and assertions is for the present Exception of particular importance, it may be here also briefly examined. The practical result of the difference, of course, is that, so far as the evidence is in truth conduct and not assertions, the present Exception need not be invoked to admit it. Between conduct in general and plain assertions it is easy to distinguish; but articulate or verbal utterances are often employed, like wordless conduct, as indicating circumstantially a condition of mind; and utterances so used must be distinguished from utterances used purely testimonially, i. e. as a direct assertion of the state of mind. A reference to the general distinction between circumstantial and testimonial evidence (*ante*, § 25, *post*, § 1768) will serve to make this clear; but its application to the present Exception may now be more particularly noted.

The statement "I met your friend J. S. this morning" is in one aspect testimonial, i. e. as evidence that the fact asserted is true, namely, the meeting with J. S. But in another aspect it is merely circumstantial, i. e. as indicating that the speaker is acquainted with the features of J. S. and is aware of J. S.'s friendship. Again, an anonymous picture exhibited is charged as a libel on Doe; the remarks of spectators, that "Doe ought to bring an action against the painter Roe," are admissible circumstantially as revealing that the picture was believed by them to represent Doe;¹ though as assertions of what Doe ought to do or of what Roe had done, the remarks would be inadmissible as hearsay. Again, suppose that on a trial for murder of a woman by a seducer the defence of suicide is set up, and the woman's knowledge of her pregnancy, as creating in her mind a motive for suicide, became material; then the fact "that she had said that she was pregnant would be some evidence that she knew it," though not that she was pregnant.² Or, in an action on an insurance policy, the insured's knowledge of the existence of a disease being material on the issue of false representations, his statements that he had the disease would indicate circumstantially that he was aware of it, though they might not be admissible as assertions of the fact.³ All such indirect uses of verbal utterances must be distinguished from direct assertions of the state of mind ("I know that I am ill," "I did not intend to injure Doe"), to which alone the Hearsay rule applies, and for which alone it

¹ 1810, *Du Boz v. Berosford*, 3 Camp. 511.

² 1892, *Fild, C. J.*, in *Conn. v. Trufachen*, *ante*, § 204.
187 Mass. 188, 81 N. E. 861.

³ 1875, *Swift v. Ins. Co.*, 68 N. Y. 167;

is necessary to invoke the present Exception. In the same way, verbal utterances may indirectly evidence other kinds of mental condition, without being employed assertively. For example, the state of mind of a testatrix' relatives, whether affectionate or hateful, being in issue, the utterance of her sister about the testatrix, "She is too ugly to die yet," indicates indirectly her condition of feeling, and is of course not used as testimonial evidence of the fact asserted;⁴ the cases dealing with a testator's statements (*post*, § 1734) illustrate this plentifully; and it is the commonest evidence of the bias of a witness (*ante*, § 950). So, too, insanity is indirectly evidenced by assertions (for example, "I am the Emperor of America") which are not offered in any way for their assertive or testimonial value.⁵ In the following sections, then, it is to be understood that there is no need of resorting to the present Exception to secure the admission of verbal utterances as circumstantial evidence of a mental condition, but only so far as the utterances directly assert the existence of the condition and are offered as direct testimonial evidence of the fact asserted.

(2) The *res gestæ* phrase, it will be noticed, is frequently invoked as the source and test of admissibility for declarations of a mental condition. It is true that at certain points the Verbal Act doctrine and the present Exception coincide practically and serve equally to admit certain sorts of statements; but they are nevertheless wholly distinct in their nature and in their right to exist. The fact, for example, of a prior accident in a highway may be admissible both to indicate the dangerous nature of the place and to indicate probable notice to the municipal officers (*ante*, §§ 272, 458); nevertheless the principles about showing notice admit other kinds of evidence and the principles about showing dangerous qualities admit other kinds of evidence; they merely happen to coincide at one point. So also the doctrine of verbal acts admits declarations on any subject that help to characterize the act, and not merely declarations of intent (*post*, § 1772); while declarations of a mental condition form an Exception to the Hearsay rule and cover broadly all kinds of mental conditions, not merely intent. These doctrines merely happen to coincide at one point. Neither is hampered nor helped by the limitations or the liberality of the other; each has an independent existence. Many Courts are inclined to treat the Hearsay Exception as though it were limited by the rule about Verbal Acts; but the passages quoted in the preceding section show this to be unnecessary and improper. It is too much to hope to see this tendency disappear; it is enough to call attention to its impropriety, and to warn against its consequences.

§ 1716. *Order of Topics.* The present Exception has been broadly formulated in only comparatively recent times. It has thus come to embrace a number of sub-varieties of hearsay statements, each involving a special form of mental condition. Moreover, the considerations affecting admissibility may be different for these different subjects of the statements, and for each class

⁴ *Post*, § 1738.

⁵ *Ante*, § 122.

certain peculiar discriminations from other principles of evidence must be observed. It is therefore necessary to treat separately the classes of statements thus separated in precedent and in judicial treatment. The grouping must be somewhat arbitrary, but the most practicable seems to be the following:

a. Statements of Pain or Suffering.

b. Statements of Design, Intent, Motive, Feeling, etc.

c. Statements by a Testator.

No doubt the generic phrase "mental condition" is not correctly descriptive of all of these. Nevertheless, it sufficiently indicates the general nature of the class of facts stated, and for want of a better phrase must be retained.

a. STATEMENTS OF PAIN OR SUFFERING.

§ 1718. *General Principle.* It is for statements of physical pain or suffering that the exception has been longest recognized,¹ and the principle most fully and clearly reasoned out. The general principle is illustrated in the following passages:

1845, *Shapley, J.*, in *Kennard v. Burton*, 25 Me. 46: "If other persons could not be permitted to testify to them [complaints of suffering] when the person injured might be a witness, there might often be a defect of proof. The person injured might be unable to recollect or state them by reason of the agitation and suffering occasioned by it."

1851, *Bigelow, J.*, in *Bacon v. Charlton*, 7 Cash. 586: "Where the bodily or mental feelings of a party are to be proved, the usual and natural expressions of such feelings, made at the time, are considered competent and original evidence in his favor. And the rule is founded upon the consideration that such expressions are the natural and necessary language of emotion, of the existence of which, from the very nature of the case, there can be no other evidence. . . . Such evidence, however, is not to be extended beyond the necessity on which the rule is founded. Anything in the nature of narration or statement is to be carefully excluded, and the testimony is to be confined strictly to such complaints, exclamations, and expressions as usually and naturally accompany and furnish evidence of a present existing pain or malady."

1854, *Davis, J.*, in *Cattwell v. Murphy*, 11 N. Y. 419: "It is one of the natural concomitants of illness and of physical injuries for the sick or injured person to complain of pain and distress. . . . I think such evidence is admissible from the necessity of the case."

1857, *Rice, C. J.*, in *Phillips v. Kelly*, 29 Ala. 626: "In cases where the existence of pain in any particular part of the body is in its very nature incapable of proof except by the declarations of the sufferer, his declarations of its existence must, from necessity, be admitted as evidence of its existence, if its existence at the time such declarations were made be a material question. . . . The law is not so inconsistent with itself and with reason as to declare that a plaintiff may prove a thing and at the same time also to declare that the only proof of which the thing is in its nature capable shall not be heard or considered."

1858, *Redfield, C. J.*, in *State v. Davidson*, 30 Vt. 383: "The declarations of the party are received to show the extent of latent injuries upon the person, upon the general ground that such injuries are incapable of being shown in any other mode except by such declarations as to their effect."

¹ 1678, *Earl of Pembroke's Trial*, 6 How. St. Tr. 1309, 1325, 1327, 1331, 1336 (murder; deceased person's complaints of pain and the cause of the wound, made to bystanders and to a doctor, received; Counsel: "There are little circumstances which are always allowed for evidence

in such cases, — where men receive any wounds, to ask them questions, while they are ill, about it, who hurt them"); 1754, *Canning's Trial*, 19 id. 478 and *passim*; 1808, *Averson v. Kinnaird*, 6 East 196, quoted *ante*, § 1714.

1878, *Campbell, J.*, in *Grand Rapids & I. R. Co. v. Hawley*, 39 Mich. 548: "[Declarations of present suffering] are admitted from necessity. . . . It would be impossible in most cases to know of the existence or extent or character of pain without them. . . . The unstudied expressions of daily life, or the statements on which a medical adviser is expected to act, which if feigned he should have skill enough to subject to some test of truth, stand on a footing which removes them in general from suspicion."*

§ 1719. *Circumstances under which the Statement is made; Statements to a Physician or Layman.* The general requirement (as the preceding quotations indicate) is merely that the statements shall be the spontaneous and natural expressions of the pain or suffering. This principle has in some cases been applied with extreme liberality.¹ The main difficulty here has arisen over the question whether the rule is to be restricted to accounts of symptoms given by a patient in consultation with a physician for the cure of the illness. The origin of this supposed limitation seems to have been the language of Chief Justice Bigelow, in a much-cited Massachusetts opinion having some difficulties of interpretation:

1865, *Barber v. Merriam*, 11 All. 322: declarations concerning the way in which an injury was done were admitted, because made to a physician and "for the purpose of receiving medical advice"; *Bigelow, C. J.*: "Its admissibility is an exception to the general rule of evidence, which has its origin in the necessity of the case. . . . To the argument against their competency founded on the danger of deception and fraud, the answer is that such representations are competent only when made to a person of science and medical knowledge, who has the means and opportunity of observing and ascertaining whether the statements and declarations correspond with the condition and appearance of the persons making them, and the present existing symptoms which the eye of experience and skill may discover. Nor is it to be forgotten that statements made to a physician for the purpose of medical advice and treatment are less open to suspicion than the ordinary declarations of a party. They are made with a view to be acted on in a matter of grave personal concernment, in relation to which the party has a strong and direct interest to adhere to the truth."

Now this language, though it may possibly have been intended to apply generally to all statements of pain, appears on a scrutiny of the opinion to have been applied by the judge in this case merely to statements of past "condition and symptoms" of suffering (which, as will be seen, are not admitted

* The following cases merely illustrate the ordinary application of the rule: 1851, *Rowland v. Walker*, 18 Ala. 751; 1789, *Goodwin v. Harrison*, 1 Root Conn. 80 (action on the case for giving "a dose in some toddy"; plaintiff's "complaints" the next morning "and what she said about it," admitted "as being an exception from the general rule, founded upon the necessity of the case"); 1863, *Gray v. McLaughlin*, 26 Ia. 279; 1896, *State v. Hutchinson*, 95 Id. 606, 64 N. W. 610; 1891, *Hatch v. Fuller*, 131 Mass. 574; 1878, *Johanson v. McKee*, 27 Mich. 471; 1866, *Mayo v. Wright*, 68 Id. 32, 40, 29 N. W. 332 (statements of present pain, admitted, but not that a bandage "was too tight," this being opinion from a non-expert; the latter part is unsound); 1863, *Parkins v. E. Co.*, 44 N. H. 225; 1869, *Taylor v. R. Co.*, 48 Id. 399; 1876, *Flammer v. Conigee*, 59 Id. 66; 1848, *Haulhae*

v. White, 9 Ired. 65; 1860, *Biles v. Holmes*, 11 Id. 21; 1890, *Thomas v. Herrall*, 18 Or. 549; 1903, *Gosa v. Southern R. Co.*, — S. C. —, 45 S. E. 310; 1903, *Shearer v. Buckley*, 31 Wash. 370, 72 Pac. 76 (complaints as to "the nature and extent of his injuries," admitted). Compare *conduct as evidence of plaintiff's condition* (*ante*, §§ 220, 223).

¹ 1843, *Com. v. Fenno*, 134 Mass. 218 (exclamations on meeting a friend in the street, admitted). In a few rulings it seems to be required that the person be otherwise in an apparent condition of bodily ailment, of which his statements are the natural product: 1894, *Penn. Mutal L. I. Co. v. Wiler*, 100 Ind. 103 ("I have the asthma," excluded, because not accompanying an apparent diseased condition); 1890, *McMurrin v. Rigby*, 80 Ia. 325 (they must be "the natural result of suffering").

except in Massachusetts and a few other States). Such has been the construction of the language in Massachusetts; and a general limitation to physicians is to-day not recognized in that State, nor in most jurisdictions, as having anything to do with ordinary pain-statements.²

But in New York, and a few other jurisdictions following the New York rulings, the doctrine has been established (apparently by a misconstruction of the widely-quoted language in *Barber v. Merriam*) that all pain-statements whatever are subject to the general limitation that they must have been made to a physician during consultation. The passages expounding this peculiar doctrine are as follows:

1871, *Allen, J.*, in *Reed v. R. Co.*, 45 N. Y. 578: "[Declarations as to pain, not made to a physician, are not admissible.] From the necessity of the case the statements of parties who could not be examined as witnesses in their own behalf as to bodily suffering . . . have been received in evidence. . . . But by the amendment of the Code in 1860 (§ 368) there is no longer a necessity . . . and, the reason of the rule ceasing, the rule itself . . . should cease.

1886, *Per Curiam*, in *Hagenlocher v. R. Co.*, 90 id. 136, 1 N. E. 586: "Screaming or some similar exclamation is the natural language of pain in all men, and in all animals as well. It usually and almost invariably accompanies intense pain. . . . While the necessity for the reception of such evidence is not so great since parties have been permitted to be witnesses in their own behalf as it was before, yet the rule allowing such evidence has not been abrogated and it must still have operation. . . . [Otherwise a party] would be deprived of that corroboration of his evidence to which he is justly entitled."

1897, *Peckham, J.*, in *Reese v. R. Co.*, 105 N. Y. 294, 11 N. E. 680 (admitting evidence of screams, groans, and the like): "It was an involuntary and natural exhibition and proof of the existence of intense sources of pain therefrom [when even a sheet touched the foot]. True, it might be simulated, but this possibility is not strong enough to outweigh the propriety of admitting such evidence as fair, natural, and original and corroborative evidence of the plaintiff as to his then physical condition. Its weight and propriety are not therefore now sustained upon the old idea of the necessity of the case. . . . [But an assertion of pain made, not to a physician, while walking along the street some time after the accident,] is evidence of a totally different nature, is easily stated, liable to gross exaggeration and of a most dangerous tendency, while the former necessity for its admission has wholly ceased, [since the party himself may testify to the same effect, if living, and] . . . if dead, the suffering . . . cannot be compensated for."³

Upon the results and reasoning of these cases the following criticisms may be made. (1) The limitation was never heard of until *Barber v. Merriam*, and even in that case the opinion almost certainly meant to enlarge and not to restrict the Exception. In particular, the limitation had in prior New York

² Although this is undoubtedly so to-day in Massachusetts (*Rosen v. Loan Co.*, post, § 1723), yet there are there two rulings in which the judge writing the opinion has carelessly borrowed the language of *Barber v. Merriam*, and limited the general rule, not to statements to a physician, but to a similar and narrow situation. This language cannot be regarded as law even in Massachusetts: 1890, *Fay v. Harlan*, 123 Mass. 244 (Ames, J.): "They are not to be considered as mere hearsay, if made with a view to be acted

on in a matter of grave personal concernment, in relation to which the party has a strong and direct interest to adhere to the truth"; accord, *Amble*: 1891, *Fleming v. Springfield*, 154 id. 582, 28 N. E. 910.

³ The opinion not noticing *Reed v. R. Co.*
⁴ Accord: 1891, *Kennedy v. R. Co.*, 120 N. Y. 656, 29 N. E. 141; 1892, *Davidson v. Cornell*, 132 id. 237, 30 N. E. 573; 1892, *Link v. Sheldon*, 136 id. 1, 9, 33 N. E. 696.

ulings never made an appearance.⁵ (2) The view that, since legislation has permitted parties to testify, there is no longer a necessity for their hearsay statements, rests on a misunderstanding of the Necessity principle, which has here in view, as already noted (*ante*, § 1714), not the non-availability, by incompetency or decease, of the person himself, but the impracticability of getting from him on the stand better evidence than his own spontaneous and contemporary expressions.⁶ Moreover, the orthodox Exception availed to admit statements of third persons, not parties, wherever their pain or suffering was material; so that the Exception never rested on the common-law incompetency of parties. (3) To maintain, as in *Roche v. R. Co.*, that even the party's decease does not admit the ordinary statements is singular; for (a) it is inconsistent with the supposed original reason for the rule, namely, that the incompetency of the party created a necessity for these statements; and (b) the assumption which serves as its basis, namely, that no action survives for suffering followed by death, is not only incorrect for many jurisdictions, but ignores the existence of other kinds of claims for suffering for which an action may survive; moreover, it would equally exclude all testimony whatever as to suffering. (4) The distinction by which screams and other inarticulate exclamations are always admissible is utterly pedantic and impracticable.⁷ Moreover the preference for them as comparatively not liable to simulation is plainly fallacious; for a little reflection shows that, if a person has determined to falsify, it is as natural and as feasible for him to lie with screams, groans, and cries, as with articulate assertions of pain.

The truth seems to be that the New York limitation is inconsistent alike with precedent, with principle, with good sense, and with itself. Unfortunately, however, its place as a local anomaly has not always been perceived, and Courts in several other jurisdictions have accepted the physician-limitation of the modern New York cases as if they represented the orthodox rule.⁸ In a few other jurisdictions the limitation has been expressly

⁵ 1854, *Caldwell v. Murphy*, 11 N. Y. 419; 1863, *Werely v. Persons*, 28 id. 345; 1865, *Brown v. R. Co.*, 32 id. 608; 1866, *Mattison v. R. Co.*, 35 id. 481; 1868, *Tenchent v. People*, 41 id. 13.

⁶ 1888, *Elliott, J.*, in *Hancock Co. v. Laggett*, 115 Ind. 547, 18 N. E. 53 (refusing to concede that the modern eligibility of parties affects the rule): "The change in the rule does not dissipate the reason, for latent injuries can only be fully known by declarations made at the time the injured person is suffering. But, however this may be, . . . [the Courts] have no right to abrogate it."

⁷ 1897, *Quay, J.*, *dis.*, in *Williams v. R. Co.*, 68 Minn. 55, 70 N. W. 860: "So narrow and strict a rule is not practicable. The expression of suffering may be one-half groans and exclamations and one-half words or nine-tenths of the former and one-tenth of the latter, or vice versa. How can the law say how much of the utterance shall consist of words, and how much of groans, sighs, and exclamations, or that it

may not all consist of words? Again, how can the law say with what degree of anguish the words shall be uttered? One person complains cheerfully, and even laughs and jokes, when he is suffering intense agony, while another complains most dolefully about the slightest affliction. For these reasons, I cannot agree with the majority or with the New York cases, which attempt to make a distinction between words describing present existing suffering and other exclamations indicating such suffering."

⁸ In the following list are included Courts showing countenance at one time or another to the New York rule; though in some of these jurisdictions it does not yet appear which rule the Court has finally fixed upon: *California*: 1899, *James' Estate*, 124 Cal. 553, 67 Pac. 579 (by a deceased physician, the intestate, that he then had Bright's disease, dropsy, etc., excluded, apparently on this ground); 1900, *Green v. Pacific L. Co.*, 130 id. 455, 63 Pac. 747 ("involuntary declarations and exclamations of a person's present pain and suffering" are admis-

repudiated.⁹ In the remaining jurisdictions the orthodox rule, making no such limitation, would presumably be perpetuated.

able; following the Michigan and Wisconsin cases; *Connecticut*: 1888, *Kelsey v. Ins. Co.*, 88 Conn. 228, 226 (not clear); 1879, *Wilson v. Granby*, 47 id. 78, *admissible* (only when made to a physician); 1902, *Martin v. Sherwood*, 74 id. 478, 51 Atl. 526 (statements not to a physician must be "the natural and instinctive expressions of present suffering" to be admissible); *Delaware*: 1898, *Wilkins v. Wilmington*, 2 Marr. 182, 42 Atl. 418 (the plaintiff being alive and competent, his groans, etc., are admissible, but not his assertions of injury); *Georgia*: 1894, *East Tennessee V. & G. R. Co. v. Smith*, 94 Ga. 590, 20 S. E. 127 (undecided); 1895, *Atlanta St. R. Co. v. Walker*, 88 id. 462, 21 S. E. 48 (New York rule accepted); 1896, *Broyles v. Pincock*, 97 id. 648, 25 S. E. 389 (ordinary declarations of suffering, admissible only when made to a physician, except "involuntary and natural exhibitions of pain," *c. g.*, as here, where the person's injured arm was being examined and moved; following *Roche v. R. Co.*, N. Y.); 1896, *Savannah P. & W. R. Co. v. Wainwright*, 99 id. 265, 25 S. E. 623 (same; allowing testimony by a husband as to bruises and swellings visible); *Illinois*: 1896, *Globe Accident Ins. Co. v. Gerlach*, 163 Ill. 625, 45 N. E. 562 (no different rule for statements to a physician); 1897, *West Chicago St. R. Co. v. Carr*, 170 id. 478, 48 N. E. 992 ((1) declarations made to a physician during treatment, or upon an examination not *pro lito* unless at the opponent's instance, are receivable; (2) exclamations of pain immediately connected with the injury are receivable; (3) *res gestæ* statements are receivable; the New York rule is in effect followed, and the scope of the orthodox rule is not understood; the rule is also obscurely stated); 1897, *West Chicago St. R. Co. v. Kenelly*, 170 id. 508, 48 N. E. 996 (declarations made to other than a physician when under treatment, not receivable, unless part of the *res gestæ* at the time of the injury; nothing said as to claim (3) in the preceding opinion; in the preceding case, the opinion says, of "a groan, a sigh, a scream," that "any competent witness . . . may certainly be allowed to testify to them"; yet in the present case, testimony that "she screamed with the ankle awfully" was held incompetent; these two opinions were written by different judges, but were filed on the same day; they are a striking instance of that judicial carelessness which tends to reduce the profession of giving legal advice to the status of a speculative occupation); 1898, *Springfield O. R. Co. v. Hoefner*, 175 id. 634, 51 N. E. 894 (the rule of the preceding two cases said to admit declarations of pain and suffering only when made at the time of the injury as *res gestæ* or made to a physician during treatment); 1901, *Cicero & P. S. R. Co. v. Priest*, 190 id. 592, 60 N. E. 814 ("she groaned," admitted); 1901, *Salem v. Webster*, 192 id. 309, 61 N. E. 323 (plaintiff's statements to a physician, "describing his feelings," admitted); 1903, *Lake St. El. R. Co. v. Shaw*, 208

id. 30, 67 N. E. 374 ("she complained of pain in her right hip," to a layman, excluded); *Minnesota*: 1893, *Brosch v. R. Co.*, 52 Minn. 512, 513, 55 N. W. 57 (to a physician, admissible); 1894, *Firkins v. R. Co.*, 61 id. 31, 63 N. W. 173 (rejecting the answer to the question "How badly are you hurt?" and approximating to the principle of *Roche v. R. Co.*, N. Y.); 1897, *Williams v. R. Co.*, 68 id. 55, 70 N. W. 600 (distinguishes "mere descriptive statements of pain" and "spontaneous manifestations of distress"; the latter are always admissible; the former only when made to a medical attendant for the purpose of treatment and when he is called upon to give an expert opinion based in part upon them; the N. Y. cases are cited, but "we find no case which expressly and directly announces this proposition"; *Canty, J.*, diss.); *United States*: 1894, *Union P. R. Co. v. Novak*, 15 U. S. App. 400, 414, 9 C. C. A. 629, 61 Fed. 578 (declarations to a physician of present pains, etc., admissible; *admissible*, not if made to others); *Wisconsin*: 1879, *Quaife v. R. Co.*, 48 Wis. 524, 4 N. W. 608 (apparently making the physician-limitation); 1883, *Bridge v. Oshkosh*, 71 id. 363, 367, 37 N. W. 409 ("either to his attending physicians or to others," admissible); 1893, *Hall v. Acc. Ass'n*, 96 id. 518, 525, 57 N. W. 306 (that he was "feeling badly," said to a layman, admitted); 1896, *Keller v. Gilman*, 98 id. 3, 66 N. W. 300 ("exclamations, expressions, gestures, and complaints" of pain to anybody, admissible; but "statements of physical condition or feelings" in answer to questions or narrative in nature, admissible only when made to a physician); 1896, *Curran v. Stange Co.*, 98 id. 598, 74 N. W. 377 (Keller v. Gilman approved); 1902, *Bredian v. York*, 115 id. 554, 92 N. W. 361 ("expressions of pain," to a layman, admitted).

For an amusing parody in verse, justifiably ridiculing the two above Illinois opinions dated on the same day, see the *Chicago Law Journal* for June 10, 1896.

⁹ *Ind.*: 1888, *Hawcock Co. v. Leggett*, 115 Ind. 547, 18 N. E. 53; 1892, *Chicago St. L. & P. R. Co. v. Spilker*, 134 id. 380, 392, 33 N. E. 280, 34 N. E. 219; 1893, *Cleveland C. C. & St. L. R. Co. v. Prewitt*, 135 id. 557, 562, 33 N. E. 367; 1895, *Louisville N. A. & C. R. Co. v. Miller*, 141 id. 583, 586, 57 N. E. 843; 1902, *Indiana R. Co. v. Maurer*, 160 id. 25, 66 N. E. 156; *Ja.*: 1881, *Ferguson v. Davis Co.*, 57 Ia. 601, 605, 10 N. W. 906 (by a majority; complaints of suffering to a bystander, excluded, for a reason not stated); 1897, *Armstrong v. Ackley*, 71 id. 76, 78, 33 N. W. 160 (complaint to a physician admissible); 1898, *Winter v. R. Co.*, 74 id. 448, 450, 33 N. W. 154 (complaints of pain and inability to work, excluded); 1899, *Blair v. Madison Co.*, 81 id. 313, 314, 46 N. W. 1098 (complaint of pain, admitted; preceding cases ignored); 1901, *Stone v. Moore*, 83 id. 126, 129, 46 N. W. 76 ("It is competent for a physician to state the complaint made by a patient as part of the

§ 1720. Same: Other Principles affecting Statements to a Physician discriminated. The language in *Barber v. Merriam* (*ante*, § 1719) has also introduced some confusion between the different evidential questions raised by statements to physicians. In the opinion in that case, the admission of such statements was apparently justified in part on the ground that the reasons for the physician's opinion can always be shown. There are several aspects of such evidence.

(1) A physician testifying as to a patient's health may be asked, like any other witness, for the reasons for his conclusions, — either on direct examination, to show his opinion well-founded (*ante*, § 655), or on cross-examination, to show it ill-founded (*ante*, §§ 992, 994); and incidentally the fact that it is in part or entirely founded on the statements of the patient or of others may thus be brought out. Here, of course, the patient's statement has no hearsay quality; without regard to its correctness or incorrectness, it enters merely as an observed fact forming part of the physician's data. It is possible to bring it forward in a testimonial shape; nevertheless, it is also possible, up to a certain point, to treat it merely as a fact affecting the weight of the physician's opinion.

(2) It may be argued, further, when the physician's opinion appears to have been founded on such statements, not merely that the weight of his testimony is affected, but that it should be entirely excluded, as not founded on *personal observation*. This is done by many Courts, particularly where the opinion is founded entirely on the statements of attendants or even of the patient himself (*ante*, § 688). This, however, is purely a question of the testimonial qualifications of the physician; and the patient's statements may be inquired about to determine whether the physician's testimony should be received at all; moreover, only the fact of the patient's statement, not the tenor of it, would need to be inquired about.

(3) Finally, there is the genuine hearsay use of the patient's statements, involving the Hearsay exception now under consideration. This use is distinct from the two preceding ones. But it brings up the question whether patients' statements, not admissible under the present Hearsay exception, can be admitted, under the first head above, as showing the physician's reasons. Now so far as the statements, though not admissible under (3), have a legitimate place under (1), *supra*, it would seem that they should be received, on the general principle of multiple admissibility (*ante*, § 13) that evidence ad-

diagnosis of the case"); 1894, *Aryman v. Marshalltown*, 90 id. 350, 57 N. W. 867, *semble* (must be to a physician); 1899, *Keyes v. Cedar Falls*, 107 id. 509, 78 N. W. 227 (admissible "regardless of the person to whom made"; *repealing* *Ferguson v. Davis*, *supra*); 1899, *Crippen v. Des Moines*, — id. —, 78 N. W. 688 (preceding case approved); 1901, *Rupp v. Howard*, 114 id. 65, 86 N. W. 38 (same); *Kan.*: 1887, *Brooks v. Hall*, 33 Kan. 709, 14 Pac. 237; *Nebr.*: 1893, *Howitt v. Eisenbart*, 36 Nebr. 794, 55 N. W. 252; *S. C.*: 1902, *Oliver v. R. Co.*, 65 S. C. 1, 48 S. E. 207 (admissible, though

not made to a physician); *U. S.*: 1892, *Baltimore & O. R. Co. v. Rambo*, 16 U. S. App. 277, 290, 8 O. C. A. 6, 59 Fed. 75 (declarations of present pain admissible, though not made to a physician); 1894, *Northern P. R. Co. v. Urtin*, 155 U. S. 272, 15 Sup. 840 (similar); *Vt.*: 1896, *Bagley v. Mason*, 69 Vt. 175, 37 Atl. 237 (admissible though not made to a physician); 1897, *Brown v. Mt. Holly*, ib. 264, 38 Atl. 69 (similar); 1902, *Kligger v. Bacon*, 74 id. 263, 52 Atl. 323 (statements of mental suffering, admitted; obscure on this point).

missible on any single ground must be received.¹ No doubt the principle must not be wrested from its proper purpose. Where under the pretext of (1), *supra*, not merely the fact of a patient's statement, but the details of it, are so offered that its use for that purpose is a mere pretence, and its real use and predominating effect would be that of hearsay testimony of the patient, then it should be excluded.

§ 1721. *Statements post litem motum*. If the analogies of other Exceptions (*ante*, § 1422) be followed, all statements made *post litem motum* are to be rejected as untrustworthy. But it is questionable whether an absolute exclusion based on this distinction is either just or necessary. After corporal injuries, the thought of making a claim for compensation and perhaps of bringing suit is apt (in these days) to occur almost immediately to the injured person. A strict application of the *post litem* limitation would practically exclude entirely this class of evidence in the majority of cases, and would thus exclude even the most unfeigned statements of pain because of a mere general possibility of falsification. On the other hand, the fictitious and untrustworthy nature of a great deal of such evidence in personal-injury litigation is a matter of common knowledge, and some power to exclude it ought to exist. Its exclusion ought to depend on the circumstances of each case, and to be left to the trial Court's discretion. A flexible rule of this sort is indicated by some Courts:

1867, *Laurence, J.*, in *Illinois C. R. Co. v. Sutton*, 49 Ill. 440: "[The physician] may state what his patient said, in describing his bodily condition, if said under circumstances which free it from all suspicion of being spoken with reference to future litigation, and give it the character of *res gestæ*."

1878, *Campbell, J.*, in *Grand Rapids & I. R. Co. v. Huntley*, 38 Mich. 544: "We cannot think it safe to receive such statements, which are made for the very purpose of getting up testimony, and not under ordinary circumstances. The physicians here . . . were sent for merely to enable the plaintiff below to prove her case. . . . [The expressions] were therefore made under a strong temptation to feign suffering if dishonest, and a hardly less strong tendency if honest to imagine or exaggerate it. The purpose of the examination removed the ordinary safeguards which furnish the only reason for receiving declarations which bear in a party's own favor. . . . It is not necessary to consider whether there may not be properly received in some cases the natural and usual expressions of pain made under circumstances free from suspicion, even *post litem motum*. The case must at least be a very plain one which will permit this."

By some Courts the circumstance that the declarations were *post litem* is taken as not excluding them, but merely as affecting their weight. By still other Courts, representing the more common practice, the declarations are absolutely excluded if made to a physician at a consultation for the purpose of enabling him to testify to the injury, and otherwise may be admitted though made *post litem*. In some jurisdictions it is difficult to say that any of these three forms has definitely been adopted.¹

¹ In this view, the ruling in *Hunt v. Sutton*, 153 Mass. 100, holding that the right to ask for reasons for an opinion does not include the right to extract facts otherwise inadmissible,

seems unsound. Compare *Green v. R. Co.*, Mass., *post*, § 1732.

² Add some of the cases cited *ante*, § 1718, note 2: *Conn.*; 1884, *Darrigan v. R. Co.*, 53 Conn.

(a) Statements of the external circumstances of the injury, namely, the events leading up to it, the immediate occasion of it (e.g. that the person was knocked down by a horse), or the nature of the injury (e.g. that a leg was broken), do not satisfy the Necessity principle, because they do not relate to an internal state, and thus other evidence is presumably available; moreover they have not the usual Guarantee of Trustworthiness, because they are not naturally called forth by the present pain or suffering (though this latter reason is rarely noticed):

1865, *Mitchell, J., in Cleveland C. C. & I. R. Co. v. Newell*, 104 Ind. 260, 8 N. E. 890: "Expressions of present existing pain and of its locality . . . are admitted upon

291, 299 (inadmissible; in this case the statements were made during a consultation intended not to secure medical treatment but to enable the medical man to testify); 772: 1867, *Illinois C. R. Co. v. Sutton*, 49 Ill. 440 (quoted *supra*); 1906, *Chicago & E. I. R. Co. v. Donworth*, 208 Id. 182, 67 N. E. 797 (statements made to qualify the physician and not for treatment, excluded); *Ind.*: 1885, *Cleveland C. C. & I. R. Co. v. Newell*, 104 Ind. 271, 8 N. E. 890 (*post item* does not exclude); 1894, *Board v. Nichols*, 139 Id. 611, 38 N. E. 596 (statements up to time of action brought, admitted); *Md.*: 1903, *Sollman v. Wheeler*, — *Md.* — 54 Atl. 512 (statements of suffering made to a physician three months after the injury, admitted); *Mass.*: 1881, *Hatch v. Fuller*, 131 Mass. 574 (*post item* does not exclude); *Mich.*: 1878, *Grand Rapids & I. R. Co. v. Huntley*, 36 Mich. 544 (quoted *supra*); 1890, *Laughlin v. R. Co.*, 80 Id. 154, 44 N. W. 1049 (statements after suit begun, and four years after the accident, excluded); 1891, *Jones v. Portland*, 88 Id. 503, 600, 50 N. W. 721 (statements made *post item*, excluded); 1895, *Stradgion v. Sand Beach*, 107 Id. 496, 45 N. W. 616 (not inadmissible solely because *post item* medium; here statements made by a child in his own home and not while examined *pro lite* were admitted); 1894, *McKormick v. West Bay City*, 110 Id. 265, 68 N. W. 149 (exclamations, and even appearances of inability to walk, at an examination made two days before the trial, excluded, the data at an examination "with reference to the trial of a pending case" being absolutely excluded, unless clearly involuntary); 1897, *Heddlie v. R. Co.*, 112 Id. 547, 70 N. W. 1006 (inadmissible, if made to a physician called merely to examine for the purposes of the trial); 1894, *Batts v. Eaton Rapids*, 116 Id. 599, 74 N. W. 672 (McKormick and Stradgion cases approved); 1890, *Mott v. R. Co.*, 120 Id. 127, 70 N. W. 3 (plaintiff sent for a lawyer and a physician the day after the injury; declarations on and after that day, excluded); *N. H.*: 1898, *Towle v.*

Blake, 43 N. H. 96 (*post item* does not exclude); 1888, *Horris v. Haverhill*, 65 Id. 69, 18 Atl. 55 (*same*); *N. J.*: 1897, *Traction Co. v. Lamberton*, 60 N. J. L. 452, 38 Atl. 683 (declarations to a physician at an examination *pro lite*, inadmissible; except so far as "natural expressions of present pain"); *N. Y.*: 1886, *Mattison v. R. Co.*, 35 N. Y. 491 (*post item* does not exclude); *Oh.*: 1902, *Pennsylvania Co. v. Files*, 65 Oh. St. 408, 63 N. E. 1047 (statements to a physician called in expressly to qualify as a witness, excluded); *Tex.*: 1901, *Missouri K. & T. R. Co. v. Johnson*, 95 Tex. 400, 67 S. W. 768 (declarations of pain when under examination for the sole purpose of qualifying the physician to testify, said to be inadmissible by authorities "which seem to be better supported by reason"; but the question not here decided); *U. S.*: 1892, *Kansas O. F. & M. R. Co. v. Stoner*, 10 U. S. App. 206, 225, 2 O. C. A. 437, 51 Fed. 649 (the mere fact of *post item* medium is not decisive); 1895, *Delaware L. & W. R. Co. v. Roalefs*, 16 O. C. A. 601, 70 Fed. 23 (statements made at a consultation not with a view to medical aid, but to qualify the physician to testify, inadmissible); *Vt.*: 1890, *Kent v. Lincoln*, 33 Vt. 501, 506 (statements made *post item* and in order to qualify the testifying physician, admitted); 1896, *Bagley v. Mason*, 69 Id. 175, 37 Atl. 285 (*post item* does not exclude); *Wis.*: 1879, *Qualie v. R. Co.*, 48 Wis. 526, 4 N. W. 658 (declarations *post item* in the presence of physicians representing both sides, admitted); 1890, *Stewart v. Everts*, 78 Id. 35, 42, 44 N. W. 1092 (statements to a physician, after action commenced, "for the sole purpose of calling such expert as a witness" to the nature and cause of the injury, inadmissible); 1893, *Abbot v. Heath*, 84 Id. 320, 54 N. W. 574 (statements *pro lite*, excluded); 1894, *Stone v. R. Co.*, 88 Id. 93, 105, 50 N. W. 457 (admissible if not made after action brought, to qualify the physician as a witness); 1895, *Tebo v. Augusta*, 80 Id. 408, 63 N. W. 1045 (following *Stewart v. Everts*); 1896, *Keller v. Gilman*, 98 Id. 2, 64 N. W. 809 (following *Stone v. R. Co.*).

the ground of necessity as being the only means of determining whether pain or suffering is endured by another. . . . The rule is not to be extended beyond the necessity upon which it is founded," and therefore not to past events or the circumstances of the injury.¹

(b) Statements of past sufferings, pain, or symptoms are not excluded by the Necessity principle, for the necessity is equally the same for all internal conditions, whether past or present. They are, however, excluded by the principle of Guarantee of Trustworthiness (*ante*, § 1718), for they are not naturally caused by the existing pain or other symptoms, but, being deliberate accounts of past occurrences, are no better than statements of any other past events. They are, therefore, generally excluded:

1888, *Ryftu, C. J.*, in *Lusk v. McDaniel*, 18 Ired. 487: "The ground of receiving these declarations is that they are reasonable and natural evidence of the true situation and feelings of the person for the time being. But in reference to past periods they have no such claim to confidence, as they are manifestly, to that purpose, but the narrative of one not on oath."²

¹ See also the quotations in § 1712, *note*. This limitation is mentioned in almost every case on the general subject; the following citations deal with it directly: 1886, *Gardner Peckage Case*, LeMarchant's Rep. 170, 174 (woman's statement, to a physician attending for child-birth, of the date of conception, excluded); 1888, *R. v. Glover*, 16 Cox Cr. 471, 473 ("The statements must be confined to contemporaneous symptoms, and nothing in the nature of a narrative is admissible as to who caused them or how they were caused"); 1890, *State v. Dart*, 20 Conn. 183, 185 (declaration by a deceased that she was subject to fits and had several times fallen, excluded); 1893, *Rowland v. R. Co.*, 68 Id. 418, 419, 28 Atl. 103 (that his ribs had been broken six months before and were healed, excluded); 1897, *Illinois C. R. Co. v. Sutton*, 42 Ill. 486; 1897, *West Chicago St. R. Co. v. Carr*, 170 Id. 478, 49 N. E. 992 ("not to the past, nor to the manner and circumstances of receiving the injury"); 1903, *Weightnovel v. State*, — Fla. —, 35 So. 856 (abortion; deceased's statements about the defendant's treatment of her a week before, excluded); 1905, *Carthage Turnpike Co. v. Andrews*, 108 Ind. 144, 1 N. E. 384; 1903, *Gray v. McLaughlin*, 26 Ia. 379; 1900, *Kelst v. R. Co.*, 110 Id. 23, 81 N. W. 181; 1901, *Hall v. Cedar R. & M. Co. R. Co.*, 115 Id. 18, 57 N. W. 739 (statements as to "how she had been hurt," excluded); 1851, *Beacon v. Chariton*, 7 Onsh. 568; 1857, *Chapin v. Marlborough*, 9 Gray 244; 1893, *Ashland v. Marlborough*, 59 Mass. 46, *constr.*; 1872, *Morrison v. Ingham*, 111 Id. 66; 1883, *Reena v. Loan Co.*, 182 Id. 490; 1885, *Morkle v. Birmingham*, 55 Mich. 186, 190, 24 N. W. 776; 1893, *Dundas v. Lansing*, 75 Id. 490; 42 N. W. 1011; 1893, *People v. Foglesong*, 116 Id. 564, 74 N. W. 730 (former vomiting); 1891, *Johansen v. R. Co.*, 47 Minn. 490, 50 N. W. 473 (not as to "past events or facts"); 1893, *Cooper v. R. Co.*, 54 Id. 379, 383, 56 N. W. 43 (proceeding case approved); 1901, *People v. Meliman*, 168

N. Y. 204, 61 N. E. 206 (declarations to a physician, that the declarant had received by mail a box of powder, had taken a dose, and thought it the cause of his trouble, excluded; no authority cited); 1867, *Rogers v. Orwin*, 30 Tex. 284; 1884, *Newman v. Dodman*, 61 Id. 85; 1873, *Earl v. Tupper*, 62 Vt. 224; 1882, *Drew v. Sutton*, 55 Id. 586, 589; 1896, *Hawks v. Chester*, 70 Id. 371, 40 Atl. 727 ("I am terribly hurt," allowed); 1894, *Flummer v. Richter*, 71 Id. 114, 61 Atl. 1045 (injury by a dog's bite; plaintiff's expressions in sleep, "Take him off," etc., not admitted to show the plaintiff's mental and physical condition); 1901, *O'Boyle v. Com.*, 100 Va. 708, 40 S. E. 121 (deceased's declaration that her pain was due to a fall, excluded); 1867, *McKague v. Jancovilla*, 68 Wis. 57, 31 N. W. 226.

The word "narrative" is sometimes to stigmatize the class of statements excluded by the part of the rule; but of course it has no special propriety. All hearsay is narrative, *i. e.* assertion taken testimonially (*ante*, § 1361); if an utterance is not narrative, it is not covered by the Hearsay rule. A statement of present pain is just as truly "narrative" as a statement of the circumstances of the accident.

² *Accord*: 1851, *Rowland v. Walker*, 18 Ala. 749; 1865, *Rehler v. Bates*, 26 Id. 650; 1857, *Wilkinson v. Manley*, 30 Id. 572; 1859, *Barber v. Coleman*, 35 Id. 225; 1861, *Stone v. Watson*, 37 Id. 268; 1897, *Powell v. State*, 101 Ga. 9, 29 S. E. 309; 1893, *Atchison T. & S. F. R. Co. v. Frasier*, 27 Kan. 469; 1900, *St. Louis & S. F. R. Co. v. Barrows*, 62 Id. 80, 61 Pac. 429 (R. Co. v. Johns approved); 1878, *Grand Rapids & I. R. Co. v. Hestley*, 38 Mich. 543; 1892, *Girard v. Kalamazoo*, 33 Id. 610, 611, 22 N. W. 1021; 1892, *Leone v. R. Co.*, 42 Id. 412, 416, 50 N. W. 745; 1893, *Will v. Mendon*, 103 Id. 251, 66 N. W. 58; 1894, *Barbison v. Reading*, 110 Id. 512, 68 N. W. 204 ("present pain and suffering"); 1896, *Towle v. Maku*, 48 N. H. 96; 1896, *Wheeler v. R. Co.*, 31 Tex. 376, 43 S. W.

Expressions as to the *duration of an illness* are in effect statements of past feelings and symptoms, and should on principle be excluded in the same way; but they have usually been admitted without noticing this.⁵

(c) There is in Massachusetts (and a few other jurisdictions) a modification of the preceding rule where the statements are made to a physician. Statements of past facts in the shape of the circumstances of the injury are, as elsewhere, always rejected; but statements of *past suffering* and other symptoms in preceding stages of the illness are admitted *when made to a physician*. This peculiarity seems to have been the result of the suggestions in the obscure language of *Beacon v. Charlton* and *Barber v. Merriam* (quoted *ante*, §§ 1718, 1719); the rule finally taking this shape in *Roose v. Loan Co.* The modification (which seems to rest on the peculiar strength of the Circumstantial Guarantee in such cases) is rational and practical, and has been followed in a few other jurisdictions:

1892, *Endicott, J.*, in *Roose v. Loan Co.*, 189 Mass. 480: "While a witness not an expert can testify only to such exclamations and complaints as indicate present existing pain and suffering, a physician may testify to a statement or narrative given by his patient in relation to his condition, symptoms, sensations, and feelings, both past and present. In both these cases [physician and ordinary witness] these declarations are admitted from necessity, because in this way only can the bodily condition of the party . . . be ascertained. But the necessity does not extend to declarations by the party as to the cause of the injury . . . which may be proved by other evidence."⁶

This modification extends only to past sufferings and symptoms, and does not include the past external events attending the injury or illness.⁶

§ 1723. *Other Statements about Health, Discriminated.* (1) A statement by a party, as to his suffering, health, injury, or the like, may be receivable as an admission (*ante*, §§ 1042, 1060). Such an admission may be conveyed by silence or by conduct of various sorts; that a plaintiff, for example, now

679; 1896, *State v. Fournier*, 68 Vt. 292, 35 Atl. 178. *Contra*: 1899, *Morrison v. State*, 40 Tex. Cr. 473, 51 S. W. 233 (that the deceased was habitually not troubled by menstruation, admitted, though including a statement as to past conditions).

Failure to complain of pain would be receivable either as a party's admission (*ante*, § 1060), or under the present Exception: 1892, *Warren v. Wright*, 106 Ill. 284, 291 (sidewalk injury; to rebut testimony that the plaintiff had suffered from a weak back before the accident, testimony was thought admissible from persons who had never heard him complain of such an ailment). Compare the analogies of § 1554, *ante*.

§ 1903, *Wilkins v. Missouri Valley*, — Ia. —, 93 N. W. 868 (by a physician, how long the plaintiff continued to suffer pain, allowed); 1846, *Yeatman v. Armistead*, 6 Humph. 375; 1856, *Looper v. Bell*, 1 Head 573; 1867, *Rogers v. Crain*, 30 Tex. 234.

§ Accord: 1895, *Cleveland C. & I. R. Co. v. Howell*, 164 Ind. 264, 8 N. E. 826; 1897, *Omberg v. U. S. Mut. Ass'n*, 101 Ky. 308, 46 S. W. 309; 1891, *State v. Gediche*, 68 N. J. L.

80; 1873, *Hathaway v. Ins. Co.*, 48 Vt. 306, 320 (to a physician in consultation, "that at times he felt as if he must take his [own] life," admitted on an issue of insanity). *Contra*: 1897, *Weber v. R. Co.*, 67 Minn. 165, 60 N. W. 716; 1897, *Williams v. R. Co.*, 68 Id. 56, 70 N. W. 802.

The principle of § 1720, par. 1, *supra*, may sometimes suffice to admit: 1894, *People v. Shattuck*, 100 Cal. 673, 43 Pac. 315 (admitted as necessary to explain the physician's diagnosis).

§ 1893, *Rowland v. R. Co.*, 68 Conn. 414, 419, 28 Atl. 103; 1870, *Collins v. Watson*, 64 Ill. 485, 496 (statement to a physician that the injury had been caused by a kick, excluded); 1892, *Roose v. Loan Co.*, Mass., *supra*; 1898, *Dundas v. Lansing*, 75 Mich. 508, 42 N. W. 1011. *Contra*: 1897, *Omberg v. U. S. Mut. Ass.*, 101 Ky. 308, 46 S. W. 309 (statement that the suffering was caused by a mosquito bite, admitted).

The principle of § 1720, par. 1, *supra*, may sometimes serve to admit: 1902, *Cronin v. R. Co.*, 181 Mass. 302, 68 N. E. 326.

suing for a serious spinal injury has never been heard to complain of it under circumstances when complaint would have been natural, is receivable as an admission. When the party takes the stand as a witness, the same conduct may also be available to discredit him as being in effect an *inconsistent statement* (*ante*, §§ 1017, 1042). Under both of these principles, the limitations of the present Hearsay Exception have of course no bearing.

(2) Whether such admissions as to health, made by an insured, are available against the beneficiary of an insurance contract, is a matter of some controversy, already considered (*ante*, § 1081).

(3) On an issue, upon an insurance claim, of the *knowing falsity of an insured's representations* as to health, the general principles governing the use of conduct as evidence of knowledge allow the insured's statements of an ailment to be used as evidence that he was aware of its existence, even though the insured's admission is on the above principle not to be taken as affecting the beneficiary (*ante*, § 286).

A. STATEMENTS OF DESIGN, INTENT, MOTIVE, FEELING, ETC.

§ 1725. *Statements of Design or Plan.* It has already been seen (*ante*, § 102) that the existence of a design or plan to do a specific act is relevant to show that the act was probably done as planned. The design or plan, being thus in its turn a fact to be proved, may be evidenced circumstantially by the person's conduct (*ante*, §§ 253, 300). But, as a condition of mind, the plan or design may also, it is clear, be evidenced under the present Exception by the person's own statements as to its existence. The only limitations as to the use of such statements (assuming the fact of the design to be relevant) are those suggested by the general principle of this Exception (*ante*, § 1714), namely, the statements must be of a *present existing state of mind*, and must appear to have been made in a natural manner and not under circumstances of suspicion. The following passages expound and illustrate the principle:

1876, *Bentley, C. J.*, in *Hunter v. State*, 40 N. J. L. 405 (admitting statements of the deceased at Philadelphia that he was then going to Camden with the accused on business): "In the ordinary course of things, it was the usual information that a man about leaving home would communicate, for the convenience of his family, the information of his friends, or the regulation of his business. At the time it was given, such declarations could, in the nature of things, mean harm to no one; he who uttered them was bent on no expedition of mischief or wrong; and the attitude of affairs at the time entirely explodes the idea that such utterances were intended to serve any purpose but that for which they were obviously designed. . . . If it was in the ordinary train of events for this man to leave word or to state where he was going, it seems to me it was equally so for him to say with whom he was going."

1892, *Field, C. J.*, in *Com. v. Trefthen*, 187 Mass. 185, 31 N. E. 861: "The fundamental proposition is that an intention in the mind of a person can only be shown by some external manifestation, which must be some look or appearance of the face or body, or some act or speech; and that proof of either or all of these for the sole purpose of showing state of mind or intention of the person is proof of a fact from which the state of mind or intention may be inferred. . . . Although evidence of the conscious

voluntary declarations of a person as indications of his state of mind has in it some of the elements of hearsay, yet it closely resembles evidence of the natural expression of feeling which has always been regarded in the law, not as hearsay, but as original evidence; and when the person making the declaration is dead, such evidence is often not only the best, but the only evidence of what was in his mind at the time. . . . It is not necessary in the present case to determine what limitations in practice, if any, must be put upon the admission of this kind of evidence, because all the limitations exist which have ever been suggested as necessary. The person making the declaration, if once made, is dead; . . . and the declaration, if made, was made under circumstances which exclude any suspicion of an intention to make evidence to be used at the trial."

1893, *Gray, J.*, in *Mutual Life Ins. Co. v. Hillman*, 145 U. S. 285, 12 Sup. 209 (the whereabouts of the alleged deceased was in issue; letters of his were offered expressing an intention to leave Wichita, where he was, for Colorado): "Letters from him to his family and to his betrothed were the natural, if not the only attainable evidence of his intention. . . . A man's state of mind or feeling can only be manifested to others by countenance, attitude, or gesture, or by sounds or words, spoken or written. The existence of a particular intention in a certain person at a certain time is a material fact to be proved, evidence that he expressed that intention at that time is as direct evidence of the fact as his own testimony that he then had that intention would be. After his death, there can hardly be any other way of proving it; and while he is still alive, his own memory of his state of mind at a former time is no more likely to be clear and true than a bystander's recollection of what he then said, and is less trustworthy than letters written by him at the very time and under circumstances precluding a suspicion of misrepresentation."

The use of such statements of design or plan is illustrated in a variety of precedents. The typical situation, it must be noted, involves (1) the doing of an act as in some way part of the issue or relevant, (2) the existence of a design or plan to do this act, as evidence (ante, § 102) of the probable doing of the act, and (3) the hearsay use, under the present Exception, of the person's statements of this design or plan. In most of the precedents, the issue involves the conduct or whereabouts of a victim of a crime or an insured person or a sufferer from an injury.¹ But the principle has no narrow limit-

¹ With the following cases compare those cited ante, §§ 104, 112, 113 (design as evidence of the doing of an act): 1875, *R. v. Buckley*, 13 Cox Cr. 294 (to prove that a deceased constable was intending to be in the accused's vicinity on the night of his death, a report by the deceased to his superior officer was admitted, that the deceased "had had private intimation that the prisoner was at his old game of thieving again, and that therefore the deceased intended to watch his movements that night"); 1908, *Byrum v. Ins. Co.*, 133 Cal. 286, 71 Pac. 346 (letter of an insured planning suicide, admitted); 1894, *Denver & R. G. R. Co. v. Spencer*, 26 Colo. 9, 52 Pac. 211 (to show that the deceased was at a place, his declarations of intention a few days previous were received); 1900, *Denver & R. G. R. Co. v. Spencer*, 27 Id. 313, 61 Pac. 606 (plan to meet a person at a train, admitted); 1881, *State v. Smith*, 49 Conn. 380 (murder of a chief of police; the deceased's declarations, when leaving the house, that he "was going to arrest Chip Smith," admitted; the *res gestæ* phrase resorted to); 1903,

Wrightnovel v. State, — Fla. —, 35 So. 886 (abortion; the deceased's statements of an intention to submit to an abortion by the defendant, admitted); 1903, *Seifert v. State*, 160 Ind. 464, 67 N. E. 100 (abortion; deceased's statement of a design to get rid of her child, admitted); 1896, *Walling v. Com.*, — Ky. —, 38 S. W. 423 ("technically competent"; a declaration of intention to spend the night at a place, admitted, as showing that the night was so spent); 1873, *Alley's Trial*, Mass., Pamph. 36 (secret murder; that the deceased on the same day had sought to find the defendant, admitted); 1892, *Com. v. Trifethen*, 157 Mass. 105, 51 N. E. 361 (quoted *supra*); 1897, *Inness v. R. Co.*, 168 Id. 433, 47 N. E. 196 (a statement, when leaving the house, that he was going to take the train, admitted); 1895, *State v. Hayward*, 62 Minn. 474, 65 N. W. 63 (murder; a statement of the deceased that she had an appointment to meet the defendant, admitted); 1896, *Hale v. Life Co.*, 65 Id. 543, 68 N. W. 192 (declarations of intention to commit suicide, admissible "if made under circumstances pre-

tations; for example, an absence from the jurisdiction, by a party or a witness,² or the making of a contract,³ may be evidenced by plan or design, and the latter is then provable by declarations. So, too, on a charge of murder, the deceased's threats are admissible to prove him the aggressor.⁴ It is obvious, yet it needs to be emphasized, that the nature of the act to be evidenced by the design has nothing whatever to do with the admissibility of declarations of design. The latter are absolutely admissible as statements of a mental condition, under the present Exception, to prove the design; what the design evidences, or whether it is relevant at all, does not affect the broad scope of this Exception.

§ 1726. *Same: Contrary Rulings Explained.* (1) Where on a charge of murder the defendant seeks to prove that the deceased killed himself or that a third person killed him, this hypothesis is of course properly open to proof.

cluding any suspicion of misrepresentation"; following the Hillmon and Trefethen rulings); 1900, *Matthews v. R. Co.*, 81 id. 363, 84 N. W. 101 (whether a person was lawfully on a train; his declarations of his purpose when boarding, admitted); 1877, *Hunter v. State*, 40 N. J. L. 485 (quoted *supra*); 1903, *People v. Conklin*, 175 N. Y. 323, 67 N. E. 624 (deceased's declaration of intention, three years before, to commit suicide, admissible); 1892, *Lake Shore R. Co. v. Herrick*, 49 Oh. St. 25, 29 N. E. 1052 (admitting the statement of the plaintiff, made to a hotel-clerk at the time of leaving the hotel, that he was going to a place C.); 1842, *Carroll v. State*, 23 Tenn. 321 (statements as to destination, admitted); 1871, *Hamby v. State*, 36 Tex. 523, 526 (statements of the deceased that he was looking for the defendant, who had taken his horse, admitted as indicating that he was in search of him); 1892, *Mutual Life Ins. Co. v. Hillmon*, 145 U. S. 285, 12 Sup. 909 (quoted *supra*; this case *citata* has gone through more than twenty-five years of litigation; there have been three inequities and six jury trials; it has even affected State politics; the setting aside of the verdict in the sixth trial was ordered in 1903, *Connecticut M. L. Ins. Co. v. Hillmon*, 188 U. S. 306, 23 Sup. 294; the history of prior stages is found in *Mutual L. Ins. Co. v. Boyle*, 1897, 82 Fed. 705 (application for a Kansas license); see also the report of the Texas insurance examiner for 1899); 1900, *Sharland v. Ins. Co.*, 41 O. C. A. 307, 101 Fed. 206 (insured's expressions of intention to commit suicide, admitted); 1903, *State v. Mortenson*, — Utah —, 73 Pac. 523 (deceased's statements, when departing, as to his destination, admitted); 1859, *State v. Howard*, 32 Va. 401 (statements as to destination, admitted); 1886, *Claverius v. Com.*, 81 Va. 787, 810 (letter of the deceased, stating her intention to meet the defendant, admitted); 1901, *State v. Power*, 24 Wash. 34, 63 Pac. 1112 (abortion; deceased's statements of intention, while preparing for a journey, admitted); 1877, *State v. Dickinson*, 41 Wn. 299 (abortion; deceased's declarations that she was to go to the defendant for the purpose, admitted); 1896, *Rene v.*

Relief Ass'n, 100 Id. 294, 73 N. W. 991 (statements of intention to commit suicide, admissible, when close in point of time and made under circumstances indicating truth).

² 1902, *Jacobi v. State*, 183 Ala. 1, 32 So. 158 (in proving a former witness' permanent absence from the State, her declarations of intention not to return were held admissible on the present principle); 1851, *Timmons v. Timmons*, 3 Ind. 250 (absence as affecting jurisdiction; defendant's declarations of intention when leaving, admitted); 1893, *King v. McCarthy*, 54 Minn. 190, 194, 55 N. W. 900 (whether a witness was likely to remain without the State; his statement of intention, in a deposition taken between different parties, admitted, in connection with the fact of departure or absence). For other cases in which this was incidentally sanctioned in accepting proof of a deponent's absence from the jurisdiction, see *ante*, § 1404.

³ 1899, *Kyle v. Craig*, 125 Cal. 107, 57 Pac. 791 (whether a deed was given on a certain condition in view of death; grantor's declarations showing his intentions, admitted); 1899, *Riggs v. Powell*, 143 Ill. 453, 454, 33 N. E. 482 (whether a note bearing the husband's disputed indorsement was a gift to his wife; his declarations of intention to provide well for her, admitted); 1837, *Smith v. Montgomery*, 5 T. R. Monr. 593 (father's declaration, after giving slaves to two daughters, not to give during life to any other daughters, admitted, to show his intent in the transfer of a slave afterwards to another daughter); and some of the cases cited *post*, § 1777 (verbal acts), might be decided on this ground. *Contra*: 1896, *Mack v. Porter*, 18 O. C. A. 537, 73 Fed. 296, 341, 342 (to disprove the making of a contract as alleged, prior declarations during the negotiations that he would not make such a contract, excluded; "a statement of intention respecting it is no proof of the fact itself," a remark wholly unsound). Compare the general subject of evidencing the making of a contract by the plan to make it, *ante*, §§ 112, 377.

⁴ Cases cited *ante*, § 116.

Yet, as a matter of precaution, Courts usually require something more than a single piece of evidence, and will not admit, for example, the mere fact that the deceased was melancholy or that a third person fled the country.¹ But, assuming that the data as to suicide or a third person's guilt are sufficient to be considered, and that the deceased's plan of suicide, or the third person's plan of killing, is one item herein, then the declarations of the deceased or the third person are a proper mode, under the present Exception, of proving the plan.² To this no objection seems to have been raised for a *third person's threats*; ³ but in a few rulings the *deceased's* declarations of intention to commit suicide have been excluded.⁴ These rulings are entirely without foundation.

(2) In a number of precedents such declarations of intention have been excluded, usually without any other apparent reason than the supposed application of the *res gestæ* doctrine (*post*, § 1772).⁵ This doctrine, indeed, has also in some of the rulings admitting this evidence (*ante*, § 1725) been taken as the source of admissibility. It would be well if the invocation of the *res gestæ* doctrine in this connection could be wholly abandoned. The simple and sufficient reason for admission is the hearsay Exception receiving statements of an existing mental condition. Whether these accompany

¹ The cases are collected *ante*, §§ 139-144.

² See the citations in the preceding section.

³ Cases cited *ante*, § 140.

⁴ 1892, *Siebert v. People*, 143 Ill. 525, 33 N. E. 431 (murder by poison; deceased's declarations of intention to commit suicide, excluded, chiefly on the authority of *Com. v. Feich, infra*, which was later overruled by *Com. v. Trefethen*, cited *supra*, § 1725; the *Trefethen* ruling occurred two weeks before the *Siebert* ruling, and was of course then unreported and unknown to the Illinois Court; the latter, in the official report and in the bound volume of the *Northeastern Reporter* inserted in the opinion a reference to the *Trefethen* case; but it is fair to suppose that, had the *Trefethen* case been originally before them, they might have decided differently); 1900, *Howard v. People*, 185 Ill. 552, 57 N. E. 441, *semble* (foregoing case approved); 1894, *State v. Pumphrey*, 124 Mo. 445, 457, 27 S. W. 1111 (wife-murder; threats by the deceased to kill herself, excluded, since "the State was not bound by anything she may have said"; this singular idea that the State could possibly be "bound" is without foundation); 1892, *Com. v. Feich*, 132 Mass. 22 (murder by abortion; the deceased's statement of intention to perform the operation herself, excluded, for no intelligible reason; how valueless the opinion is may be seen in the circumstance that it seriously considers an argument to apply the pedigree exception, *ante*, § 1490).

Compare the cases cited *ante*, § 149.

⁵ 1875, *R. v. Wainwright*, 18 Cox Cr. 171 (murder of H. L.; on the last day when H. L. was seen alive, she made a statement, on departing from her house, declaring her intention; Cockburn, C. J., concluded the terms of the

statement; a reporter's note cites *R. v. Peck*, 1871, before Bovill, C. J., as involving a similar ruling); 1897, *Chicago & R. I. R. Co. v. Chancellor*, 145 Ill. 428, 46 N. E. 260 (to show that the deceased was at the station as an intending passenger, her statements were not admitted, made about an hour before, while preparing for departure, that she was getting ready to take the 9 A. M. train; the *res gestæ* rule alone considered; *R. Co. v. Herrick*, Ohio, the only case cited); 1897, *Hank v. State*, 145 Ind. 238, 46 N. E. 127 (abortion; a letter of the deceased, indicating an attempt to produce the abortion herself, excluded, following *Com. v. Feich*, and ignoring *Com. v. Trefethen*, Mass.); 1895, *Com. v. Gray*, — Ky. —, 30 S. W. 1015 (murder; the deceased's expressions of intention, after a prior quarrel, of giving up any further share in it, excluded); 1897, *Schultz v. Schultz*, 113 Mich. 502, 71 N. W. 854 (issue of payment; the defendant's words as he took a sum of money and left his house, excluded); 1873, *State v. Wood*, 53 N. H. 484, 494 (abortion; deceased's declarations of intention, excluded on the *res gestæ* theory); 1853, *Hartman v. Ins. Co.*, 21 Pr. St. 466, 471, 479 (to rebut the argument that insurance was procured under a recent plan to commit suicide, the insured's declarations of intention at various times to insure when he got money enough were excluded); 1822, *State v. Anderson*, 10 Or. 448, 454 (murder; defendant's declarations as to a plan to go hunting, not admitted for defendant on the facts); 1896, *McBride v. Com.*, 95 Va. 518, 30 S. E. 454 (declarations of the deceased as to where he was going on the night of the murder; excluded; no authority cited).

some conduct relevant in the litigation, or any movement or "act," is wholly immaterial. The labor shown in certain judicial opinions to discover some "act" of which the declarations "are a part" is wasted; such speculations serve only to confuse an otherwise simple situation. For example, Doe is said to have been killed on Friday at Millville; to show that he was there on Friday, a design on Thursday to go there on Friday is relevant (*ante*, § 102). His declaration on Thursday of such a design, if made under circumstances of naturalness, is admissible; and it cannot make any difference whether, as in the Herrick case (*ante*, § 1725), he uttered it in the "act" of leaving the house, or whether, as he sat reading the paper, he said to his wife, "I see that Roe in Millville has failed; I shall go down there the first thing to-morrow morning." The departure from the house is no more a material "act" in the case than the reading of the newspaper; it might as well be argued that, if he wiped his forehead and said, "It is so hot that I shall run down to the seaside to-morrow," the wiping of his forehead was an "act" which his declaration characterized. An examination of the doctrine of Verbal Acts (*post*, § 1772) will show that its correct application gives no sanction to its use in the present connection. The sooner this doctrine is left to its own legitimate sphere, the better. Its invocation to determine the admissibility of declarations of design or plan serves only to confuse a simple question, and to narrow a broad and useful rule. In the following passage a judicial protest against this error has been recorded:

1806, *Sturt, C. J.*, in *State v. Hayward*, 63 Minn. 474, 68 N. W. 68 (in which evidence of the murdered person's statements as to having an engagement to meet the defendant was admitted as a "verbal act"): "It was not admissible, in my opinion, on the ground that it tended to 'characterize her subsequent acts and her departure on the fatal ride soon after she made the statement,'—that is, that it was a part of the *res gestæ*,—for the reason that her statement neither accompanied nor characterized any act relevant to the issue. But it was relevant to the issue to show that she did meet the defendant, and evidence of her declarations of an intention and purpose to meet him was admissible as original evidence to prove that she did in fact intend to meet him.⁶ To sustain it on the ground that the statement of the deceased was a part of the *res gestæ* is, in my judgment, to assign a wrong reason for a correct conclusion, which may lead to complications in future cases."

§ 1727. *Statements of Intent, in Domicil Cases.* In domicil cases the same class of facts is involved as in the preceding section, *i. e.* a condition of mind, here usually termed "intent." It is worth while to distinguish the two in treatment, because in the former class the state of mind is a plan, which is merely evidential (*ante*, § 102) towards showing that the act purposed was subsequently consummated, while here the state of mind is itself a fact in issue, a separate element of the legal situation. The principle of the

⁶ After citing *Mutual Ins. Co. v. Hillman* and *Cam. v. Trefethen*.

⁷ Occasionally such statements are excluded merely because some other principle is alone invoked and the present one is ignored; *e. g.*: 1900, *Jenkins v. Ins. Co.*, 121 Cal. 121, 68 Pac.

190 (chiefly on the narrow ground that they were not admissions usable against the beneficiary of an insurance policy; see this rule *ante*, § 102¹).

⁸ Further distinctions as to declarations by an accused or a testator, see *post*, §§ 1782, 1784.

Mearns Exception is the same in both cases. But the judicial point of view, in receiving such statements, has almost always been that of the Verbal Act doctrine (*post*, § 1784), or sometimes that of the Spontaneous Declarations doctrine (*post*, § 1745). That the present is on principle their true place is shown by the frequent admission of expressions of an intent made some time before the act of moving; the process being thus to show by these statements the existence of a state of mind at the earlier time, and to argue therefrom to its continued existence at the later time, and thus to establish the then absence of the intent necessary for a domicile; this could not be allowed under the Verbal Act doctrine.

That declarations of intent as to residence are in general admissible is nowhere questioned, and the main inquiry is merely as to the limits of time in which those declarations may be sought. Under the present Exception the scope of search, as above indicated, would be much broader than under the Verbal Act doctrine; and in a few opinions the true place of such evidence under the present Exception seems to have been accepted:

1865, *Roberts, J.*, in *Ex parte Blumer*, 27 Tex. 743 (admitting declarations of an intention to return to a foreign country): "They are to be credited as the index of his intention when not unreasonable in themselves, not inconsistent with other facts in the case, and not under circumstances creating suspicion of insincerity."

1898, *Kneeton, J.*, in *Viles v. Waltham*, 157 Mass. 542, 32 N. E. 901 (a notice to assessors before removing, and conversations with reference to establishing a residence after removing, were admitted): "The change in his place of abode might be temporary or permanent. It might indicate a change of domicile or not, according to the circumstances attending it. Declarations of a person accompanying a change of his abiding-place have always been held competent to explain the change as a part of the *res gestæ*; but declarations in such cases are often admissible on a broader ground than as a part of the act of removing from one place to another. The intention of the person removing is competent to be proved as an independent fact, and anything which tends to show his intention in making the change may be shown, if it is free from objection in other particulars. . . . Declarations which indicate the state of mind of the declarant naturally have a legitimate tendency to show the intention [citing *Com. v. Trefethen, supra*]. . . . The danger that declarations may have been made for a purpose . . . has led to the exclusion of them . . . unless they are made under such circumstances as to give them some corroboration. In general, such corroboration is found in the fact that they accompany and explain acts which of themselves would be competent evidence on the issue involved."¹

No doubt, as pointed out in these passages, and as required by the general principle (*ante*, § 1714), the declaration must appear to have been made under circumstances of naturalness and without apparent motive to deceive; and for this reason they are occasionally rejected.²

¹ Since by most Courts such declarations are dealt with as Verbal Acts, the precedents can more conveniently be collected under that head, *post*, § 1784.

² 1853, *Watson v. Simpson*, 8 La. An. 397 (Herrick, C. J.: "It is evident that in most of his conversations, and whenever he had an opportunity to manufacture evidence, he pretended to be a resident of New Orleans. . . . Where it

appears that the declarations of a party are made with a reference to making testimony in his favor, they must be rejected"); 1823, *Cherry v. Slade*, 2 Hawks 406, 408 (A's declarations of intent as to residence, excluded, on an issue as to the defendant's false swearing as to the residence, though *ambis* otherwise admissible; Hall, J., diss.).

§ 1728. *Statements of Intent, in Bankruptcy Cases.* Similarly, statements of intent, where the character of an alleged act of bankruptcy depends on the intent, are also admissible on the present principle; though the question whether the Verbal Act doctrine is the doctrine really applicable is not free from difficulty. The Courts have almost invariably treated this evidence from the latter point of view;¹ though occasionally such evidence seems to be accepted under the broad principle of the present Exception, as in the following passage:

1862, *Johnson, C. J., in Cornelius v. State*, 12 Ark. 506: "In the case of the bankrupt, the declaration which he makes, at the time of leaving his house, of his intention of so doing, is founded not upon his character for veracity, but on the presumption arising from experience that where a man does an act, his contemporary declaration accords with his real intention, unless there be some reason for misrepresenting his real intention."

§ 1729. *Statements of Motive, Reason, or Intent.* The line between motive and intent is not easy to draw, and is in practice seldom carefully observed. Apart from the propriety of nomenclature, there are at any rate at least two distinct thoughts involved. When a person shoots a gun, for example, the hoped for result may be to kill a bird or to hit a target or to empty the gun of an old charge; this result, conceived as anticipated by him to ensue from his act of pulling the trigger, may be termed Intent. But the act of shooting may have been induced by the necessity of obtaining food for a meal or by the desire of winning a prize or by the fear that the old charge was useless; the conception by him of a specific circumstance as making it desirable to do the act of shooting the gun may be termed Motive or Reason. So far as the present Exception is concerned, nothing turns on this distinction between motive and intent. Each is a mental condition, and each is therefore provable by contemporaneous declarations. But it is necessary, because of the Verbal Act doctrine, to consider them separately.

(1) A statement of intent, so far as made by an accused person, is considered elsewhere (*post*, § 1731). A statement of intent, made by other persons, does not so frequently come into question, for the reason that the intent itself is less often a material and relevant fact to be proved. Moreover, whenever it is relevant and therefore provable, it is commonly so only when attending an act otherwise ambiguous and equivocal. For example, when money is handed over, the precise nature of the act, whether a loan or a payment, will depend much upon the intent; when land is occupied, the precise effect of the occupation, whether adverse or not, will depend much upon the intent. In such cases, declarations accompanying the act will be admissible as coloring and completing its significance, under the Verbal Act doctrine (*post*, § 1772), whether they do or do not include an assertion of intent; and as this larger doctrine suffices to admit declarations of intent accompanying the act, the applicability of the present Exception (though clear enough) is a merely academic question. Moreover, since the person's

¹ The cases are collected under that head, *post*, § 1731.

intent at the time of the equivocal act is alone material, his declarations of intent made at a former or a subsequent time are declarations of an immaterial fact. His subsequent declarations of a past intent are, furthermore, of course not admissible under the present Exception; and his prior declarations, being ordinarily construable as declarations of a design or plan (*ante*, § 1725) are sufficiently available in that aspect. There is therefore little field for invoking the present Exception for ordinary declarations of intent. Nevertheless there are many instances in which a prior or subsequent state of mind is relevant to show the state of mind at a specific time (*ante*, §§ 238, 241, 395); and wherever this state of mind is an intent, prior or subsequent declarations of an existing intent would properly be admissible. Apart from the case of a testator (*post*, § 1734), little use seems to have been made of this application of the principle.¹

(2) A declaration of a present existing motive or reason for action is admissible,—assuming, of course, that the declarant's motive is relevant. So far as concerns accused persons, this use is later considered (*post*, § 1732). In other cases, the typical instances in which motive becomes material are actions for loss of service or of custom, in which it is necessary to show that the customer's or servant's abandonment of the plaintiff was motivated by the defendant's persuasion or threats; and actions in which the reliance of a person on another's representations becomes a part of the issue. The use of declarations of this sort is fully recognized in numerous precedents.²

¹ 1821, *Redford v. Birley*, 1 State Tr. N. S. 1071, 1238, 1244 (exciting a seditious mob; expressions of motive or intent by persons attending the meeting, admitted to show the purpose of its various members and its quality as a seditious meeting). This sort of evidence was also admitted in some of the other riot cases collected *ante*, § 1079, note 2.

² With the following cases belong some of those under § 1729, *post* (a wife's reason for leaving her husband), and § 1732, *post* (accused's motive); 1829, *Fellows v. Williamson*, Moo. & M. 307 (in an action upon a representation that D. was solvent, the plaintiff's declarations, at the time of sending, "that they had received a favorable account of him and would accordingly send them," was received as showing their reason for sending, the issue being whether they sent them in reliance on the representations); 1804, *Skinner v. Shew*, 2 Ch. 581, 593 (loss of a contract by defendant's illegal threats of litigation against the plaintiff's patented article; aver of a would-be customer, admitted to show his reason for not dealing with the plaintiff); 1892, *Mobile R. Co. v. Ashcroft*, 48 Ala. 81 (statements of passengers, in jumping from a train, as to their reasons, admitted, the issue being the reasonableness of the plaintiff's jumping); 1895, *Ellis v. Lamer*, 94 Ga. 166, 21 N. E. 294 (admitted, where motive was important in determining the validity of a gift of land); 1899, *Webb v. Drake*, 68 La. An. 290, 35 S. 791 (reports of defendant's boycott of plaintiff, admitted as showing its effectiveness

on the community); 1890, *Elmer v. Fessenden*, 151 Mass. 161, 24 N. E. 206 (action for loss of services of workmen caused to leave by the defendant's false statement that the plaintiff's goods on which they worked contained poison; Holmes, J.: "If, as may be assumed, the excluded testimony would have shown that the workmen, when they left, gave as their reason to the superintendent that the defendant had told them that the board of health reported arsenic in the silk, the evidence was admissible to show that their belief in the presence of poison was their reason in fact. We cannot follow the ruling at *not prius* in *Tilk v. Parsons*, 2 O. & P. 261, that the testimony of the persons concerned is the only evidence to prove their motive. We rather agree with Mr. Starkie, that such declarations, made with no apparent motive for misstatement, may be better evidence of the maker's state of mind at the time than the subsequent testimony of the same persons"); 1900, *Weston v. Barnicoat*, 175 id. 454, 56 N. E. 619 (special damage in defamation; letters from third persons to plaintiff, refusing to deal with him because his name was on defendant's blacklist, admitted; unnecessarily treated as "an act of refusal"); 1892, *Stekotes v. Kimm*, 48 Mich. 322, 324, 12 N. W. 177 (libel charging the sale of counterfeit oil; to show loss of business in consequence, statements by customers returning the oil and giving the defendant's publication as the reason were admitted); 1835, *Hadley v. Carter*, 8 N. H. 43 (declarations of a servant, at the time of leaving, as to his motives, admitted;

§ 1730. *Statements of Emotion, Bias, Malice, Affection, etc.; Wife's or Husband's Declarations.* — The existence of an emotion — hatred, malice, affection, fear, and the like — is usually evidenced by conduct or by utterances indirectly indicating the feeling that inspires them (*ante*, §§ 1715, 250, 394). But a declaration directly asserting the existence of the emotion is admissible, under the present Exception, like a statement of any other kind of mental condition.¹ The use of such statements to impeach a witness (*ante*, § 950) and to prove an accused person's malice (*post*, § 1732) furnish the commonest instances of the application of the principle.

A special application is also found in actions for alienation of affections, criminal conversation, divorce, or wife-murder, where the *state of affections of the wife to the husband*, or of the husband to the wife, becomes material. Here, the declarations of the person as to her or his own state of affections are admissible under the present principle. In most instances, such expressions are chiefly useful in an indirect or circumstantial way only (*ante*, §§ 394, 1715); in some instances, they merely state reasons for a departure from the home and thus belong in the preceding section. But in general no discrimination is made on these points; and it is said merely that declarations made at a time when there was no motive to deceive are admissible:

1833, Sir F. Pollock, arguing, in *Wright v. Tatham*, 5 Cl. & F. 688: "The letters of a wife written to her husband before the time of an alleged adultery are admitted, . . . [though] the wife herself is not examined. Why? Because credit is given to her for having acted with sincerity at the time; and her letters are receivable to show the state of her affections before her elopement, being written at a moment when she had no purpose to answer in writing them."

1839, Rogers, J., in *Glührist v. Dale*, 6 Watts 356 (the wife's declarations as to bad treatment from her husband were offered to show that she had an inclination to leave him, and was not enticed by the defendant): "The motives . . . in most cases cannot be shown except by her declarations made at the time to her relations and friends."

1851, Catron, J., in *Gaines v. Relf*, 12 How. 635: "The letter of D. . . is competent to prove the state of feeling, affection, and sympathy of D. towards his wife when he wrote

good opinion by Upham, J.); 1855, Baker v. Baker, 16 Abb. N. C. 308, 309 (husband's declaration, at time of leaving, of the reason for leaving, admitted); 1896, Hine v. R. Co., 149 N. Y. 154, 43 N. E. 414 (the smaller rental value of property as a result of the defendant's acts being in issue, the plaintiff's tenants' statements of the reasons for their demanding a reduction were admitted; put by the Court on the *res gestæ* ground); 1898, Claverius v. Com., 81 Va. 787, 801 (remarks of the deceased, about the time of leaving, stating her reason for leaving, admitted); 1893, Academy of M. Co. v. Davidson, 85 Wis. 129, 130, 55 N. W. 173 (issue as to the motive of a deceased tenant for leaving; his declarations when leaving, as to the motive, admitted); 1903, Charley v. Potthof, — id. —, 95 N. W. 124 (theatrical contract; breach in not furnishing adequate services; the statements of persons in the audience, when leaving the theatre, giving their reasons for so doing, admitted to show their motive; compare *Ellis v. Thompson*, N. Y., *post*, § 1770). *Contra*:

1835, Tilk v. Parsons, 2 C. & P. 202 (loss of custom as the result of a slander; declarations of the customers, giving their reason for ceasing to buy, excluded); 1846, Walker v. Meets, 2 Rich. 570 (libel in letters to G., causing breach of promise of marriage by G.; G.'s statement in conversation that "she could not marry the plaintiff after receiving and reading the letters," excluded as hearsay).

For certain cases of utterances by mobs, perhaps decided on this principle, see *ante*, § 1671, note 2.

For a debtor's declarations, indicating his motive in an alleged fraudulent conveyance, see *ante*, §§ 1083, 1086.

Distinguish the question of identifying on the stand to one's own intent (*ante*, § 681).

¹ 1867, Wells, J., in *Day v. Stickney*, 14 All. 258 (admitting hostile expressions to impeach a witness' credit): "His prejudices can be known only by his expressions of them; and therefore such declarations are the legitimate evidence of their existence."

the letter. . . . There is no ground to suppose that the letter was written collusively. It appears to have been ingenuous and honestly intended."

* The following list includes a few cases which reject the declarations for one or another reason: *England*: 1825, *Walton v. Green*, 1 O. & P. 631 (necessaries to a wife; defence, her adultery; wife's statements admitted as "forming part of the cause of her being so turned out"); 1832, *Willie v. Bernard*, 8 Bing. 376 (letters of a wife to her husband or others, admitted to show her feelings towards him); 1834, *Jones v. Thompson*, 6 O. & P. 415 (statement of a wife, in crim. con., as to a diary kept by her, that she kept it to show to her husband, admitted to evidence her feelings towards her husband); 1835, *Wilton v. Webster*, 7 id. 193 (letters by a wife, offered to show her happiness with her husband, not admitted because written after attempted adultery); *United States: Ala.*: 1850, *Long v. Boos*, 106 Ala. 570, 17 So. 716 (wife's letters, admitted); *Ill.*: 1894, *Laurence v. Laurence*, 164 Ill. 267, 45 N. E. 1071 (issue as to a marriage of the deceased; letters written to the alleged wife, admitted as showing "how the deceased regarded" her); *Ind.*: 1884, *Higham v. Vancodel*, 101 Ind. 160, 163 (crim. con.; wife's declarations of the husband's ill-treatment, made on the day of elopement, excluded; being made after the influence of the defendant had arisen, the present rule was held not satisfied); 1893, *Pettit v. State*, 135 id. 393, 416, 34 N. E. 1118 (wife-murder; the wife's letters to the husband, exhibiting her affection, held admissible); 1894, *Driver v. Driver*, 153 id. 33, 53 N. E. 401 (divorce; letters of husband and wife received to show their condition of feelings); *Ia.*: 1896, *Kennedy v. Hensley*, 94 Ia. 639, 63 N. W. 341 (action against a father-in-law for alienation of affections; expressions of defendant and of his son, admitted to show the state of their feelings); 1896, *Poth v. Zimbleman*, 99 id. 641, 68 N. W. 395 (crim. con.; letters to the defendant after the alleged misconduct, admitted); 1899, *State v. Butts*, 107 id. 653, 78 N. W. 687 (letter of a co-respondent on a charge of adultery, showing his feelings towards the respondent, admitted); *Kan.*: 1902, *Rosner v. Darrab*, 65 Kan. 599, 79 Pac. 597 (wife's declarations before guilty intimacy with defendant, admitted); *Md.*: 1881, *Robinson v. State*, 57 Md. 14, 19 (abduction of wife and children of M.; the wife's declarations, while riding in the wagon driven by defendant, that she was leaving M. of her own choice, admitted to show that she was not under constraint); *Mass.*: 1852, *Jacobs v. Whitcomb*, 10 Cush. 257 (admitting a wife's expressions of hostile feelings; "the usual expressions of such feelings are original evidence, and often the only proof of them which can be had"); 1857, *Collins v. Stephenson*, 8 Gray 440, *semble* (by a wife when leaving her husband, as to her motive, admissible); *Mich.*: 1831, *White v. Ross*, 47 Mich. 172, 10 N. W. 106 (alienation of wife's affections; wife's letters before and after marriage, excluded, where no misconduct of defendant had been otherwise shown; no precedent cited); 1883, *Perry v. Lovejoy*, 49 id. 329, 14

N. W. 425 (same; wife's letters admitted; the preceding case practically repudiated); 1887, *Edgell v. Francis*, 66 id. 303, 23 N. W. 501 (similar); 1894, *Dalton v. Dregg*, 99 id. 250, 252, 53 N. W. 57 (husband's remarks showing feelings, in crim. con., admitted); 1897, *McKenzie v. Lautenschlager*, 113 id. 171, 71 N. W. 489 (alienation of wife's affections; her letters and utterances, admitted); *Miss.*: 1894, *Lockwood v. Lockwood*, 67 Miss. 476, 70 N. W. 784 (action for loss of husband's affections; the husband's declaration that he had decided to separate from his wife, admitted); *Mo.*: 1894, *State v. Lembo*, 84 Mo. 163, 171 (wife-murder; the wife's letters showing affection, admitted); 1900, *State v. Callaway*, 184 id. 91, 55 S. W. 444 (husband's and wife's letters to a third person, admitted); *Ok.*: 1891, *Preston v. Bowers*, 18 Oh. St. 1, 11 (alienation of affection; the statements, "made recently prior to the alleged seduction," admitted "to show the state of her affections"; here made before the marriage); *Pa.*: 1900, *Lyon v. Lyon*, 197 Pa. 212, 47 Atl. 193 (alienation of affections; husband's statements after abandonment, excluded); *R.I.*: 1899, *Rose v. Mitchell*, 31 R. I. 270, 43 Atl. 67 (alienation of wife's affections; wife's utterances, after leaving, admitted); *U.S.*: 1901, *Ash v. Prunier*, 44 O. C. A. 473, 105 Fed. 722 (alienation of husband's affections; correspondence of husband and plaintiff, before and after the time in issue, admitted); *Vt.*: 1892, *Rudd v. Rounds*, 64 Vt. 432, 439, 25 Atl. 438 (crim. con.; wife's declarations, while leaving, as to reasons for leaving the husband, admitted to show her feelings); 1894, *Frattini v. Casland*, 66 id. 273, 29 Atl. 352 (crim. con. and alienation of affections; the wife's letters not admitted for the plaintiff in rebuttal, because not shown to have been written before grounds to suspect collusion, etc., existed); 1896, *Wilkins v. Metcalf*, 71 id. 103, 41 Atl. 1085 (husbandly; defendant's expressions of feeling towards plaintiff, excluded, only because his feelings at the time in question were irrelevant); *Wash.*: 1896, *Bench v. Brown*, 20 Wash. 366, 55 Pac. 45 (spouse's letters of affection, admitted); 1902, *Stanley v. Stanley*, 17 id. 570, 68 Pac. 187 (alienation of husband's affections; husband's declarations more than two years after separation, and six months after suit begun, excluded); *Wis.*: 1896, *Horner v. Yance*, 38 Wis. 252, 67 N. W. 720 (crim. con.; wife's letters showing affection, admitted).

In this class of cases, as in others preceding, a Court occasionally rests the admission on the Verbal Act doctrine: 1863, *Cattison v. Cattison*, 22 Pa. 277 (divorce claimed for wilful desertion; declarations of the wife on the night of her flight, admitted); 1890, *Glass v. Bennett*, 39 Tenn. 462, 14 S. W. 1085 (declarations of a wife's motive on leaving home, admitted).

In *State v. Punahon*, 124 Mo. 443, 27 S. W. 1101 (1894), such evidence was against all precedent rejected.

Statements of a present emotion of *fear, alarm, disgust*, or the like, are also equally admissible under the present Exception,³ although such utterances have usually an indirect and circumstantial force (*ante*, § 1715) rather than a direct and assertive one.

§ 1731. *Statements of Opinion or Belief.* Utterances of opinion or belief are usually circumstantial in their significance (*ante*, § 266) rather than direct assertions. But so far as the existence of an opinion or belief in a specific person is material, the person's contemporaneous assertions of its existence, made without any apparent motive to deceive, are admissible. This was always recognized, for example, as a proper mode of proving atheism to disqualify a witness;¹ other instances are naturally rare.²

§ 1732. *Sundry Statements by an Accused Person (Purpose, Motive, Good-will, Fear, before or during or after the Deed; Political Opinions).* Statements by an accused person may involve instances of almost every one of the preceding sorts, but it is convenient to consider them in one place, in order that the necessary discriminations may be made.

In the first place, any and every statement by an accused person, so far as not excluded by the doctrine of confessions (*ante*, § 815), or by the privilege against self-accrimination (*post*, § 2250), is usable *against him* as an admission (*ante*, § 1048). Thus, it is wholly unnecessary for the prosecution to establish the propriety of such statements under the present Exception, because they would be in any case receivable as admissions. For this reason, since a person's own statements are not receivable *in his favor* as admissions, there has been a strong judicial tendency to ignore the bearings of the present Exception for statements offered in favor of the accused. It is therefore proper to inquire how far the present principles are after all available for such a purpose.

(1) Statements of *design or plan*, as already noticed (*ante*, § 1725), are in

¹ 1699, *Spencer Cowper's Trial*, 18 How. St. Tr. 1165 ff. (statements of the deceased as to being melancholy, ill, and in love, admitted); 1821, *Redford v. Birley*, 1 State Tr. N. S. 1071, 1229, 1244 (seditious mob; expressions of alarm by persons in the neighborhood, admitted to show the feelings produced by the gathering); 1840, *R. v. Vincent*, 9 C. & P. 375 (complaints to police by persons alarmed at violent Chartist meetings, admitted, the persons not being called; compare § 1729, *post*); 1859, *Kearney v. Farrell*, 26 Conn. 389 (nonsense; complaints by a deceased wife as to offensive smells, while suffering from them, received "as an expression of bodily or mental feeling"); 1894, *State v. Baldwin*, 38 Kan. 10, 12 Pac. 818 (letters of a deceased person showing cheerfulness, admitted); 1892, *People v. O'Laughlin*, 3 Utah 123, 1 Pac. 658 (riot; testimony to expressions of "a general feeling of insecurity and alarm" and the riotous conduct, admitted). *Contra*: 1896, *Gloystine v. Com.*, — Ky. —, 28 S. W. 324 (statements about bad smells, excluded; but here the statements were probably assertions of external facts).

² *Post*, § 1820.

Statements of *political opinion* have also been admitted as circumstantial evidence (*ante*, § 186, and § 386, notes 18 and 19).

³ 1702, *Hathaway's Trial*, 14 How. St. Tr. 685 (cheating by pretending to be so bewitched by Sarah M. that he could not eat; to show that the community was imposed on by the fraud, evidence was offered of the abuse and imprecations uttered by sundry persons against Dr. M., who had procured the liberation of the supposed witch and had held to expose the fraud; objected to as hearsay; L. C. J. Holt: "This evidence is proper; he is indicted for a cheat, for endeavoring to begot an opinion in people by his fraudulent practices that he is bewitched; . . . now is not this an evidence that his pretending himself to be bewitched begot that opinion in the people?"); 1848, *McCrooken v. West*, 17 Oh. 13, 24 (declaration by a defendant, sued on a representation as to M.'s credit, as to what he thought M. was worth, and made prior to the representation, admitted as evidence of his belief).

general admissible, so far as the design or plan is relevant to show the doing of the act designed. Accordingly, it has never been doubted that the threats of an accused person are admissible to show his doing of the deed threatened,¹ so also the threats of the deceased, on a charge of homicide, are by most Courts admitted to show the deceased to have been the aggressor.² Upon the same principle, the expressions of plan, by the accused, *not to do the thing charged*, or to do a different thing, are equally admissible.³

(2) Statements before the act, asserting *malice* or *hatred*, are always received against an accused;⁴ except so far as the time of feeling is so remote as to make it irrelevant (*ante*, § 395). Is there any reason why prior statements in favor of the accused—for example, of *good feeling* towards the injured party, or of *fear* of him as an aggressor—should not be equally admissible? Conduct offered as circumstantially evidential does not seem to be objected to.⁵ But statements asserting directly the existence of such feelings are by some Courts treated as inadmissible, so far as they do not accompany the very act charged.⁶

It is argued that the party must not be allowed to "make evidence for

¹ 1848, *New Gloucester v. Bridgman*, 20 Me. 66 ("declarations of defendants, tending to show their having formed determinations to commit crimes, are always admissible against them when accused of committing the same"; here said of the illegal sale of liquor). The cases are collected *ante*, § 105.

² The cases are collected *ante*, §§ 110, 111.

³ 1800, *Spencer Cowper's Trial*, 13 How. St. Tr. 1170 (murder at night; to prove an alibi at a certain lodging-house, the fact was admitted that the defendant had come to town that day and had gone to the house and engaged lodgings, promising to come there for the night); 1876, *R. v. Channon*, 16 N. Br. 544, 563 (murder; purpose of defendant and his companions as expressed in going to a house and entering, allowed); 1879, *Grimes v. State*, 66 Ind. 193 (sarceny; the defendant borrowed a gun, declaring that he was going to R. to shoot; his intent being material, a plan with D. to go to R., made before taking the gun, was admitted to show that he actually intended to go to R.); 1887, *Garber v. State*, 4 Coldw. 161 (defendant's declarations, when starting to find deceased, of intent as an army officer to arrest him as a deserter, admitted); 1937, *U. S. v. Craig*, 4 Wash. C. C. 730, 783 (the defendant was arrested in a compromising position; declarations made beforehand that he was going to the place to get bail for his brother-in-law, received). *Contra*, but wholly unsonant: 1855, *R. v. Petherick*, 7 Cox Cr. 82, 1ro. (charge of blasphemously burning the Holy Scriptures; the defendant denied having knowingly done so; his declaration of intention some days before the act, as to the kind of books he intended to destroy, were rejected by Crompton, J., and Greene, B.); 1843, *Com. v. Kent*, 6 Metr. Mag. 231 (counterming dice; the defendant's declaration, at the

time of ordering them, as to his purpose in wanting them, excluded; no reason given).

⁴ This is not questioned; illustrations will be found in the citations *ante*, §§ 105 E., 304.

⁵ *Ante*, § 394.

⁶ Cases on both sides are as follows: 1872, *Birdsong v. State*, 47 Ala. 68, 71, 77 (defendant's statements, before the killing, of a desire to avoid the deceased, excluded); 1900, *Fields v. State*, — Fla. —, 35 So. 186 (assault with intent to kill; defendant's prior application to an officer for protection, excluded); 1848, *Monroe v. State*, 5 Ga. 86, 133 ("testimony which went to establish by the prisoner's own acts and declarations his knowledge of the threats and violent conduct of the deceased and his constant alarm and apprehension, by reason thereof, of death or some great bodily hurt at the hands of M."; its admissibility held to depend on whether it accompanied an act as a "part of the res geste"); 1850, *Newcomb v. State*, 37 Minn. 363, 396 (defendant's statement, shortly before the homicide, that he "had no harm against [deceased], and would not hurt a hair of his head," excluded; because to admit it would be "to allow a party to make evidence for himself"); 1880, *State v. Van Zant*, 71 Mo. 541 (assault; defendant's statements prior to and at the time of the affray, as to his physical condition, excluded); 1901, *Colanin v. State*, 107 Tenn. 381, 64 S. W. 713 (defendant's prior statements that the deceased had threatened him, excluded); 1908, *Red v. State*, 39 Tex. Cr. 414, 46 S. W. 406 (that he wished to get away from the vicinity of the deceased, excluded); 1900, *Neelson v. State*, — Id. —, 53 S. W. 107 (defendant's application to city marshal for protection, etc., admitted); 1903, *Pool v. State*, — Id. —, 78 S. W. 586 (accused's statements, before the homicide, that he did not wish to have trouble, admitted).

himself." But this objection applies equally to many classes of statements under the present Exception, and is yet not thought of as fatal. Moreover, the notion of "making," that is, "manufacturing" evidence, assumes that the statements are false, which is to beg the whole question. Then it is further suggested that at any rate the accused, if guilty, may have falsely uttered these sentiments in order to furnish in advance evidence to exonerate him from a contemplated crime. But here the singular fallacy is committed of taking the possible trickery of guilty persons as a ground for excluding evidence in favor of a person not yet proved guilty; in other words, the fundamental idea of the presumption of innocence is repudiated. We elaborate this presumption in painful and quibbling detail; we expend upon it pages of judicial rhetoric; we further maintain, with sentimental excess, the privilege against self-crimination; in short, we exhaust the resources of reasoning and strain the principles of common sense to protect an accused person against an assumption of guilt until the proof is irresistible; and yet, at the present point, we throw these fixed principles to the winds and make this presumption of guilt in the most violent form. Because (we say) this accused person *might* be guilty and therefore *might* have contrived these false utterances, therefore we shall exclude them, although without this assumption they indicate feelings wholly inconsistent with guilt, and although, if he is innocent, their exclusion is a cruel deprivation of a most natural and effective sort of evidence. To hold that every expression of hatred, malice, and bravado is to be received, while no expression of fear, goodwill, friendship, or the like, can be considered, is to exhibit ourselves the victims of a narrow whimsicality, which might be expected in the tribunal of a Jeffreys, going down from London to Taunton with his list of victims in his pocket, or on a bench "condemning to order," as Zola said of Dreyfus' military judges. But it was not to have been anticipated in a legal system which makes so showy a parade of the presumption of innocence and the rights of the accused. The question-begging fallacy about "making evidence for himself" runs through much of the judicial treatment. There is no reason why a declaration of an existing state of mind, if it would be admissible against the accused, should also be admissible in his favor, except so far as the circumstances indicate plainly a motive to deceive.

(3) Statements of *intent* or *motive*, at the *time of the act charged*, are of course admissible under the present Exception. Whether in strictness the principle properly involved is the present one, or that of the Verbal Act doctrine (*post*, § 1772), is perhaps open to question. Practically there can be little difference in the result; for, under either principle, the statements must relate to the present state of mind at the time of the act. Most Courts treat the question in terms of the Verbal Act doctrine.⁷ The statements,

⁷ Compare with these the cases cited *ante*, § 296 (hostility evidenced by conduct); 1854, *R. v. Petcherini*, 7 Cox Cr. 81 (declarations while throwing books into a fire, admissible to prove the intention, on a charge of blasphemy);

menace burning the Holy Scriptures); 1858, *Cornelius v. State*, 12 Ark. 805 (defendant's statements, at the time of killing a cow, as to his object in doing so, admitted; good opinion by Johnson, C. J., quoted *ante*, § 1714); 1871, *Hamilton v.*

as already indicated, ought to be admissible as well in favor of the accused as against him.

(4) *Statements after the act*, stating the past intent or motive at the time of the act, are of course inadmissible under the present Exception;⁹ though usable against the accused as admissions. But subsequent statements predicated a then existing state of mind are properly admissible under the present Exception. No question is made about this when they are offered against the accused, because they are at any rate available as admissions.¹⁰ But they should be equally admissible in his favor.¹¹ In both cases the object is to ascertain his subsequent state of mind, and thence to infer (*ante*, § 305) his state of mind at the time of the act. It is true that these declarations may not be thought to fulfil the requisite of the present Exception (*ante*, § 1714) that there should be no apparent motive to deceive; but this argument, as before, seems to involve the assumption of guilt.¹²

(5) *Statements of political opinion* form a class difficult to place. In one aspect they are statements of opinion, admissible under the general principle (*ante*, § 1731). In another aspect, as expressions of a feeling or sentiment, —

State, 36 Ind. 286, 288 (robbery; defendant's declaration, while beating the person, that he was avenging himself for an assault, admitted); 1885, *State v. Walker*, 77 Mo. 488, 490 (killing of one of a party attacking the defendant's house; defendant's statements at the time of the shooting, admitted to show "in what condition of mind the respondent was at the time"); 1881, *Com. v. Abbott*, 180 Mass. 472 ("the intent or disposition, when it constitutes an element of crime, can only be ascertained, as all moral qualities are, from the acts and declarations of the party"); 1842, *State v. Huntly*, 3 Ind. 418, 422 (charge of going about armed to the terror of the people; declarations of defendant at the time, admitted as "characterizing the very acts charged"); 1875, *State v. Abbott*, 8 W. Va. 741, 751, 755 (defendant's declarations at the time of shooting, stating his reason, admitted for him; "the jury are to consider them in connection with all the other evidence in the case; the jury must judge from all the facts and circumstances shown in evidence whether the mature purpose or intention of the accused as declared by him at the time were feigned or were a mere pretence or pretext assumed to cover up his real purpose, object, or intention in shooting").

In cases involving the doings of a mob or riotous assemblage, several principles have a bearing; these are explained, with references to the various places of treatment, *post*, § 1790.

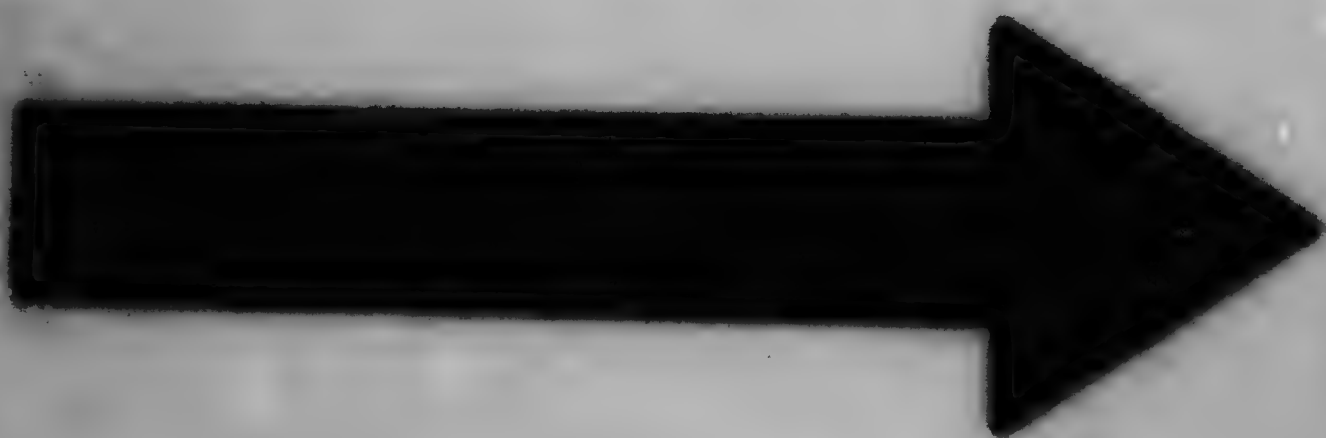
⁹ 1890, *State v. Howard*, 53 N. C. 627 (murder at night; the defendant had gone on the same morning to the house of the deceased, and then left, going to S.'s house; his statement, while at S.'s house, of his reason for going to the house of the deceased, rejected); 1880, *State v. Vann*, ib. 681, 683 (Dillard, J.: "We understand the rule to be that a party charged with a crime can never put in evidence in his own behalf any declarations of him after its commission, . . . unless as a part of the *res gestæ*

to some act which is admitted in evidence"); 1900, *State v. Davis*, 104 Tenn. 501, 58 S. W. 123 ("that 'he didn't go to kill him,' excluded).

¹⁰ 1860, *R. v. Dixon*, 11 Cox Cr. 241 (the accused, as he shot, said, "Take that!" and immediately afterwards, "I know what I have done and am not sorry for it"; admitted to show motive); 1895, *State v. Brown*, 28 Or. 147, 41 Pac. 1042 (the defendant, just after the killing, ran off, saying, "I am the toughest son of a — that ever struck this town").

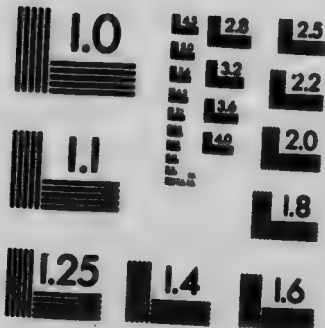
¹¹ 1895, *Com. v. Crowley*, 105 Mass. 500, 43 N. E. 509 (exclamations by a defendant after an assault, as showing his apprehension of its repetition, admitted). *Contra*: 1900, *State v. Moore*, 186 Mo. 204, 86 S. W. 383 (exclamations, at the time of arrest, of his reasons for having shot, excluded); 1849, *State v. Hildroth*, 3 Ind. 440, 446 (defendant's statement after a homicide to his accomplice, "You ought not to have done so," excluded). Compare the cases cited *post*, § 1749.

¹² Other principles applicable are as follows: Where a *confession* statement has been received, the whole said at the time in exculpation is also admissible, under the rule of Completeness (*post*, § 2115). But, apart from this principle, it seems highly desirable that any statement protesting innocence, made upon arrest, should be receivable, upon the principle of corroborating a witness (*ante*, § 1144, where the cases are collected), as also conduct indicating a consciousness of innocence (*ante*, § 2-3). Statements after the act may also be receivable, for or against the accused, as *spontaneous exclamations (res gestæ)*, under another principle (*post*, § 1749, where the cases are collected). Statements made during possession of stolen goods, naming the source of title — by purchase, finding, or the like — or claiming ownership, are receivable on the verbal-act principle (*post*, § 1781, where the cases are collected).



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of antagonism, hostility, loyalty, disaffection, or the like, — they are equally admissible under that principle (*ante*, § 1730) in favor of as well as against the accused. In still another aspect, when offered for the accused, they are mere instances of conduct as exhibiting a good loyal character or intent, and are thus sometimes inadmissible (*ante*, §§ 195, 367). Whatever the more correct theory, they were at any rate long admitted without question in favor of the accused on trials for sedition and treason. About the end of the 1700s the matter came into frequent controversy, and some of Erskine's greatest arguments dealt with the admissibility of this class of evidence. The notable trials of Thomas Hardy and of Horne Tooke left it settled that such evidence was available for the accused; and, though the limits of its use are not clear, the theory seems to be in effect the first above noted.¹³

C. STATEMENTS BY A TESTATOR, IN WILL CASES.

§ 1734. *Different Classes discriminated.* Statements by a testator involve principles no different from those already considered; but the superficial circumstance of unity — namely, their utterance by a testator — and the necessity of carefully discriminating the widely different principles applicable to superficially similar statements, makes it desirable to consider the various classes together. The principles of Relevancy of Circumstantial Evidence affecting a testator's mental condition have already been examined (*ante*, §§ 112, 228, 233, 271); they involve chiefly the process of inference from a mental condition at one time to a mental condition at another, and of infer-

¹³ Compare the cases cited *ante*, § 195, note 2, § 369, notes 18, 19, and *post*, § 2119; in the following cases the evidence was admitted, unless otherwise noted; the quotations are merely illustrations from a larger mass of instances: 1683, Lord Russell's Trial, 9 How. St. Tr. 577, 622 ("I have heard him profess solemnly, he thought it would ruin the best cause in the world to take any of these irregular ways for the preserving of it"); 1684, Rosewell's Trial, 10 id. 214 ("he kept that day, and the 30th of January, as a day of fasting and prayer, and he preached from that text on the 1st Timothy, 2, 1, 'Pray for kings and all in authority'"); 1696, Freind's Trial, 18 id. 39; 1696, Cook's Trial, ib. 372, 391 ("I have heard him very much wish prosperity and success to our fleet"); 1710, Dammarce's Trial, 15 id. 582 ("At any time when there have been public rejoicings for any victories, how has he behaved himself?"); 1717, Francis Francis's Trial, ib. 975 ("It was a great surprise to me when I heard that he was taken up, for he used often to drink a health to king George"); 1730, Mac-kall's Trial, 21 id. 677; 1781, Lord Gorton's Trial, ib. 542, 564; 1794, Walker's Trial, 23 id. 1133 (Mr. Erskine, for the defence: "When a man is indicted for exciting sedition and rebellion, is it not evidence, to show that he held a language directly repugnant to any such idea? If he had said, 'God bless the king!', would

not that be evidence?" Mr. J. Heath: "[Yes,] if it was at that meeting"; Mr. Law, for the prosecution: "If it goes to the whole tenor of his conduct; but a man shall not be justified by saying 'God bless the king!' in the street, when he has been damning him in his house"; Mr. J. Heath: "You should have examined to that in chief"); 1794, Thomas Hardy's Trial, 24 id. 1066-1094 (Eyre, L. C. J.: "If the question be, What was the political speculative opinion which this man entertained touching a reform of parliament, I believe we all think that opinion may very well be learned and discovered by the conversations which he has held at any time or in any place. . . . But if the declaration was meant to apply to a disavowal of the particular charge made against this man, that declaration could not be received, — as, for instance, if he had said to some friend of his, 'When this convention was planned I did not mean to use this convention to destroy the king and his government'"); 1794, Horne Tooke's Trial, 25 id. 344-361 (the arguments of Mr. Erskine and Mr. Scott (Lord Eldon), and the opinion of L. C. J. Eyre deal at length with this class of evidence; and the "prior sentiments and opinions of a man, very publicly declared," are held admissible to rebut the evidence of seditious intention). *Contra*: 1809, Le Blanc, J. (without argument) in Joseph Hanson's Trial, 31 id. 43, 51.

ence from conduct to mental condition. Keeping these in mind, it remains here to consider how far the testator's statements are admissible under the present Exception as assertions of a state of mind, and how far they are excluded because mere hearsay assertions of other kinds of facts.

For the purpose of distinguishing the principles involved, utterances of a testator may be classified as follows: (1) That he does or does not *intend to make a will* of a particular tenor; (2) that he *has* or has not *made a will* of a particular tenor; (3) that he *has* or has not *made a will*, or that a particular will is or is not *in existence*, or is or is not genuine; (4) that a particular will has or has not been *destroyed* or otherwise *revoked*; (5) that a particular will has been or are the object of his *affection* or *dislike*; and (7) utterances indicating *insanity*, mental feebleness, or the like. In examining the propriety of using any of these, it is essential to keep separately in mind (a) what is the fact which the utterance is offered to evidence, (b) whether this fact is relevant, and in what way, and (c) supposing it to be relevant, whether the utterance is admissible to evidence it.

§ 1735. *Ante-testamentary Statements of Design, Plan, Intention.* A design or plan to do or not to do a specific act is always relevant to indicate that the act named was or was not subsequently done (*ante*, § 102). Accordingly, if the issue is whether a will was executed, or a will of a particular tenor, or whether at the time of execution it contained an alteration, the preexisting testamentary design of the alleged testator is always relevant (*ante*, § 112). To evidence that design or plan, the person's statements of his existing design or plan are admissible, under the general principle of the present Exception (*ante*, § 1725).¹ These statements may be found in oral utterances, in letters, in the draft of a will or instructions to an attorney, or in any other form. The admissibility of such evidence, by the process of analysis just outlined, is entirely settled.²

§ 1736. *Post-testamentary Statements as to Execution, Contents, or Revocation. First Theory.* Statements of the second, third, and fourth sorts above enumerated, i. e. statements affirming or denying the fact of execution, contents, or revocation of a will, are, in their first and simple aspect, to be taken as mere *assertions of an external fact*, offered as evidence of the truth of the assertion. They do not come within the present Exception, nor within

¹ 1876, *Sagden v. St. Leonards*, L. R. 1 P. D. 154 (Mellish, L. J.: "The declarations which are made before the will are not, I apprehend, to be taken as [direct] evidence of the will which is subsequently made; they obviously do not prove it; and [but] wherever it is material to prove the state of a person's mind, or what was passing in it, and what were his intentions, there you may prove what he said, because that is the only means by which you can find out what his intentions were").

² The cases are collected *ante*, § 112 (intention, as evidence of the doing of an act). To these add the following ruling *contra*, which was

inadvertently there omitted: *Contra*: 1901, *Throckmorton v. Holt*, 180 U. S. 552, 21 Sup. 474 (excluding ante-testamentary declarations of intention, since "there is no good ground for the distinction" between these and subsequent ones; citing only *Stevens v. Vancleve*, 4 Wash. C. C. 362, *post*, § 1738, and making the surprising statement that the "weight of authority" so agrees; the opinion hopelessly ignores the various distinct kinds of testamentary declarations; *Harlan, White, and McKenna, JJ.*, *diss.*; *Brown, J.*, accord as to the result of the case only).

any other of the established ones.¹ They are therefore ordinary hearsay assertions, and are inadmissible. This is the view taken by a number of Courts, represented in the following passages:

1851, *Campbell, L. C. J.*, in *Dee v. Palmer*, 16 Q. B. 747: "Declarations of the testator after the time when a controverted will is supposed to have been executed would not be admissible to prove that it had been duly signed and attested as the law requires."

1861, *Wilde, J.*, in *Quick v. Quick*, 3 Sw. & Tr. 442 (rejecting subsequent declarations to prove contents of a will): "It is familiar enough practice to receive the unsworn declarations of the testator in evidence, for the purpose of arriving at his general intention where his competency is in dispute or where there is any imputation of fraud in the making of his will; for in such cases the state of his mind and affections is in itself a material fact, of which such statements are the fair exponents. But where those declarations are vouched to prove . . . the fact that he had declared and embodied those intentions in a certain will, they have no other title to confidence than the statements of any other person who had seen the will and could speak to its contents. In this aspect they become mere hearsay."

1876, *Mellish, L. J.*, in *Sugden v. St. Leonards*, L. R. 1 P. D. 154, 240 (a minority opinion on this point): "A declaration after he has made his will, of what the contents of the will are, is not a statement of anything which is passing in his mind at the time; it is simply a statement of a fact within his knowledge, and therefore you cannot admit it unless you can bring it within some of the exceptions to the general rule that hearsay evidence is not admissible to prove a fact which is stated in the declaration. It does not come within any of the rules which have been hitherto established, and I doubt whether it is an advisable thing to establish new exceptions."²

Second Theory. But a few Courts (increasing perhaps in numbers), while facing the truth that such utterances are used distinctly as hearsay assertions, have frankly invoked a *special exception* to the Hearsay rule in order to admit them. It is not clear to what extent this Exception would be carried; apparently its recognition would depend upon the circumstances of trustworthiness appearing in each case. The bulwark of this doctrine is the opinion

¹ That they are not to be taken as assertions of a fact against interest is noted *ante*, § 1461.

² In the following cases this is the attitude taken: 1861, *Staines v. Stewart*, 2 Sw. & Tr. 320, 329 (declaration that he had destroyed his will, excluded); 1876, *Mellish, J.*, in *Sugden v. St. Leonards*, quoted *supra*; 1895, *Henry v. Hall*, 106 Ala. 84, 17 So. 187 (declarations as to a will's non-existence, excluded); 1879, *Mercer v. Mackin*, 14 Bush 441 (declarations that he had made a will, no will being found, were rejected as hearsay; though the Court on the evidence confessed that "there is hardly room to doubt" that he made the will; *Sugden v. St. Leonards* is relied upon, but is entirely misunderstood); 1800, *Collins v. Elliott*, 1 H. & J. 1 ("that he had made a will," excluded); 1898, *Wells v. Wells*, 144 Mo. 198, 45 S. W. 1095 (declarations that he never made a will, not admissible to disprove the making); 1860, *Boylan v. Meeker*, 28 N. J. L. 276 (declarations as to the non-existence of a will, excluded; see quotation *post*); 1892, *Gordon's Will*, 50 N. J. Eq. 397, 421, 56 Atl. 268 (*Boylan v. Meeker* approved); 1825, *Dan v. Brown*, 4 Cow. 490 (declarations as to the existence of a will and where

to find it, excluded); 1826, *Jackson v. Betts*, 6 id. 382; 1844, *Grant v. Grant*, 1 Sand. Ch. 235, 237 (declarations as to execution, excluded, following *Dan v. Brown*); 1901, *Kennedy's Will*, 167 N. Y. 163, 60 N. E. 442 (issue as to the revocation of a lost will; declarations not admitted to show its existence at the time of testatrix' death); 1901, *Earp v. Edgington*, 107 Tenn. 23, 64 S. W. 40 (declarations, not clearly specified, as to the making of a will, excluded; following *Throckmorton v. Holt*, U. S.; the opinion does not make the proper distinctions); 1885, *Kennedy v. Upshaw*, 64 Tex. 411, 417 (forgery of a codicil; testator's declarations that he had made no change in his will, excluded); 1901, *Throckmorton v. Holt*, 180 U. S. 552, 21 Sup. 474 (burnt document, sent anonymously to the probate office, after alleged testator's death; his declarations indicating a state of mind as to revocation, excluded; post-testamentary declarations of an unspecified kind, excluded; following *Boylan v. Meeker*; confused opinion; *Harlan, White, and McKenna, JJ.*, diss.; *Brown, J.*, acc. as to the result of the case only).

of the Master of the Rolls, Sir George Jessel, perhaps the greatest English judge of the 1800s in the qualities of directness and penetration of thought. In the following passages this doctrine is expounded:

1876, *Jessel, M. R.*, in *Sugden v. St. Leonards*, L. R. 1 P. D. 164, 231: "[The reasons for the exceptions to the Hearsay rule] all exist in the case of a testator declaring the contents of his will. . . . Having regard to the reasons and principles which have induced the Courts of this country to admit exceptions in the other cases to which I have referred, we should be equally justified and equally bound to admit it in this case. When I say equally, perhaps I state the case a little too low, because if there is any case in the world in which it is incumbent upon a tribunal not to grant a premium for fraud or wrong, . . . it is the case of a lost will. The Court should be anxious, not narrowly to restrict the rules of evidence, which were made for the purpose of furthering truth and justice, but, guided by those great principles which have guided other tribunals in other countries in admitting this kind of evidence generally, to admit it at all events in the special case which we have under consideration."

1876, *Cockburn, C. J.*, in *Sugden v. St. Leonards*, L. R. 1 P. D. 164, 225: "Declarations of deceased persons are in several instances admitted as exceptions to the general rule; where such persons have had peculiar means of knowledge and may be supposed to have been without motive to speak otherwise than according to the truth. It is obvious that a man who has made his will stands preeminently in that position. He must be taken to know the contents of the instrument he has executed. If he speaks of its provisions, he can have no motive for misrepresenting them, except in the rare instances in which a testator may have the intention of misleading by his statements respecting his will. Generally speaking, statements of this kind are honestly made, and this class of evidence may be put on the same footing with the declarations of members of a family in matters of pedigree. . . . I am at a loss to see why, when such evidence is held to be admissible for the two purposes just referred to, it should not be equally receivable as proving the contents of the will. If the exception to the general rule of law which excludes hearsay evidence is admitted, on account of the exceptional position of a testator, for one purpose, why should it not be for another, where there is an equal degree of knowledge, and an equal absence of motive to speak untruly?"

1895, *Jordan, J.*, in *McDonald v. McDonald*, 142 Ind. 55, 41 N. E. 345: "Such statements of the testator should be received as evidence with great caution, for the reason that they are sometimes made by him for the express purpose of misleading or satisfying curious friends or expectant relatives. But the declarations in the case at bar are not open to this objection. They are voluntarily made to a confidential friend, — one who apparently had no interest in the estate of the testator, — and not in response to any inquiry by him made. Considering the circumstances under which they were made by the testator, — at a time when sick, but in the full control of his mental faculties, and when he seemingly recognized that his death was a near probability, — they appear to us to bear upon their face the very impress of sincerity."*

* This view is represented in the following cases; but it should be said that some of the American Courts merely admit the statements in supposed accord with *Sugden v. St. Leonards*, not noting plainly which of its theories are followed; compare the comments on that case in note 4, *infra*: 1873, *Sykes' Goods*, L. R. 3 P. & D. 27 (declaration of contents of will as altered, made before a codicil confirming the will, admitted); 1876, *Cockburn, C. J.*, and *Jessel, M. R.*, in *Sugden v. St. Leonards*, L. R. 1 P. D. 164, 163, 172 (lost will; certain unspecified declarations about the will, held admissible to prove its contents; "he was in the

constant habit of talking to every one with whom he came into contact . . . of the testamentary provisions he had made"; compare the later opinions doubting this, cited *infra*, note 4); 1890, *Harris v. Knight*, L. R. 15 P. & D. 174 (declarations that a will had been made, admitted); 1890, *Re Bell*, 25 L. R. Ir. 557 (admitting declarations of contents, made after execution, on the general ground that there is no difference between declarations before and declarations after; purporting to follow *Sugden v. St. Leonards*); 1891, *Flood v. Russell*, 29 id. 97 (purporting to follow *Sugden v. St. Leonards*; admitting declarations as to execution); 1876,

Third Theory. There is, however, still a third view, agreeing with the second in so far as it admits the declarations, but reaching the result by another mode and without invoking a special exception to the Hearsay rule. The testator's declarations may be conceived as either directly asserting his belief (*i. e.* that he had or had not executed or revoked a will of certain contents), or as indirectly and circumstantially indicating such a belief; in the former view, they are admissible to evidence his state of mind, under the present Exception (*ante*, § 1731); in the latter view, they are admissible as circumstantial evidence to indicate his state of mind (*ante*, § 271). Having thus evidenced his belief or consciousness, we may infer from it (backwards in time) the doing of the act which produced that belief or consciousness (*ante*, § 176). In other words, by a double process of inferences, from utterance to belief, and from belief to a preceding act, we argue that the testator did or did not execute or revoke. The propriety of the second inference is a question of relevancy, and has been already examined (*ante*, §§ 176, 271); the propriety of the first inference is judicially expounded in the following passages:

1873, *Hannen, J.*, in *Keen v. Yeen*, L. R. 8 P. & D. 107 (admitting subsequent declarations asserting and denying the existence of a will which was lost, the issue being as to whether it had been revoked): "A statement by the testator that he has altered his mind as to the disposition of his property, and that he has therefore destroyed his will, although it may not be evidence of the fact of the destruction of the will, is evidence of intention, from which the fact of destruction may be inferred, there being other circumstances leading to the same conclusion."

1876, *Hannen, J.*, in *Sugden v. St. Leonards*, L. R. 1 P. D. 203: "Believing, as I do, the testator made these statements [alluding to the existence of the will] showing a belief in his mind that the will was in existence at a time subsequently to that at which he could have revoked it, I am led to the conclusion that he had not in fact revoked it at any time when he had the opportunity of getting access to it. . . . I come to the conclusion that his declarations down to the latest period of his life show that he died under the belief that that will was still in existence, and rebut the presumption that he had revoked it."

Conolly v. Gayle, 61 Ala. 116, 124, *semble* (execution and loss having been evidenced, the testatrix's letter, speaking of having made her will, etc., was admitted); 1861, *Patterson v. Hickey*, 39 Ga. 159 (subsequent declarations of a testator indicating the non-existence of a will, admitted, apparently as an exception to the Hearsay rule); 1895, *McDonald v. McDonald*, 142 Ind. 55, 41 N. E. 345 (statements describing a will's contents, admitted to show contents and non-revocation); 1893, *Scott v. Hawk*, 105 Ia. 467, 75 N. W. 368 (that "the deceased, upon examination of the instrument and the signatures thereto, declared it his will, is convincing evidence"); 1900, *Schnee v. Schnee*, 61 Kan. 643, 60 Pac. 738 (declarations as to contents of a lost will, admissible); 1900, *Muller v. Muller*, 108 Ky. 511, 56 S. W. 802 (declarations admissible to show contents; no authority cited); 1893, *Lambie's Estate*, 97 Mich. 49, 57, 58 N. W. 323 (after evidence of a revoking will, testatrix's declarations that she had changed her will, received in corroboration); 1895, *Lane v. Hill*, 68 N. H. 275, 44 Atl. 393 (testator's declarations as

to the contents of a lost will, admitted, expressly on the principle of *Jessel, M. R.*, in *Sugden v. St. Leonards*, as a special exception to the Hearsay rule; declarations as to its execution, also admissible, but only in corroboration of "direct evidence"); 1856, *Smiley v. Campbell*, 2 Head 145 (subsequent declarations of the destruction of a will, admitted); 1877, *Beadles v. Alexander*, 9 Bart. 604, 606 (declarations by the testator that he had signed the will in the witnesses' presence, admissible in corroboration as "the declaration of the only party having a vested interest to declare the whole truth"; approving *Reel v. Reel*, quoted *post*, § 1738); 1863, *Tynan v. Paschal*, 27 Tex. 300 (assertions received to show the execution of the will and to rebut the inference of revocation); 1903, *McElroy v. Phink*, — Tex. —, 76 S. W. 753 (lost will; deceased's statements that she had destroyed it, for certain reasons, held admissible, being "treated as an exception" confined to the case of a lost will last in the custody of some person other than the testator; careful opinion by *Gaines, C. J.*).

1847, *Ormond, J.*, in *McBeth v. McBeth*, 11 Ala. 602 (the testator's declarations as to the existence of a will, not found at death, were admitted as showing his belief): "It is certainly true that the declarations of the testator should be received with great caution, impertinence of relatives and friends. To entitle them to much weight, there ought to be intrinsic evidence of their sincerity, and such we think is the case here. The conversation with F. B. has all the evidences of sincerity and reality about it which might be looked for where the object was not merely to parry or evade a disagreeable subject or baffle events, and also speculations of the probable conduct of those opposed to the will, as gives it all the appearance of reality and attests its genuineness and sincerity."

* The following cases seem to go upon this theory: 1854, *Patten v. Pulton*, 4 Jur. N. S. 241 (subsequent declarations of a testator admitted, asserting the existence of a will, the issue being whether, though it was lost, it had been revoked); 1864, *Whitely v. King*, 10 id. 1079 (same); 1873, *Keen v. Keen*, L. R. 3 P. & D. 107 (quoted *supra*); 1874, *E. v. Castro* (Tichborne Case), *Charge of O. J. Cockburn*, I. 614 ("It certainly does seem strange that the man who had signed his will in London in June should imagine he had signed it in the ensuing month of November"); 1876, *Hannen, J.*, in *Sugden v. St. Leonards*, quoted *supra*; 1880, *Gould v. Lakes*, L. R. 6 P. D. 1 (per *Hannen, J.*, that "the state of the testatrix's mind and intentions" after the will, as shown by her declarations, was evidence to show "what were the constituent parts of the will"; purporting to follow *Sugden v. St. Leonards*); 1882, *Pike's Will*, 4 *Morris Newt.* 445 (approving *Sugden v. St. Leonards*, and admitting similar evidence on the theory of *Hannen, J.*); 1847, *McBeth v. McBeth*, 11 Ala. 602 (quoted *supra*); 1873, *Johnson's Will*, 40 Conn. 587 (a will having disappeared and the testator becoming insane, later declarations indicating his belief that the will still existed were admitted, and the Court thence argued back to the conclusion that he did not destroy the will *animo revocandi*); 1898, *Throckmorton v. Holt*, 13 D. C. App. 552, 574, 581 (on an issue of forgery of a will, "the feelings of the testator towards all the parties and his relations with them and apparent intentions as disclosed by his conduct and declarations," admissible, as "suppletory proof," "tending to show the state of mind of the testator"; good opinion by *Shepard, J.*); 1864, *Burge v. Hamilton*, 72 Ga. 568, 619, *semble* (statement of the testator to the scrivener of a codicil, admitted "to show that ten pages fastened together are the will and the whole will of the testator"); 1886, *Re Page*, 118 Ill. 581, 8 N. E. 862 (the issue being the revocation of a lost will, subsequent declarations recognizing the existence of the will were admitted, as pointing to a non-revocation; *Scholfeld, J.*: "Why should he have spoken falsely in this respect, and this, too, in the face of impending death realized by him? Not the shadow of an excuse is shown"); 1844, *Steele v. Price*, 5 B. Monr. 63 (admitting the testator's declarations showing a subsequent disinclination to revoke a will that has been lost); 1883, *Hoppe v. Byers*, 60 Md. 398 (subsequent belief

of a testator that he had made a will of the tenor of a document offered, held admissible to show the genuineness of the document, other evidence of genuineness being also offered; following *Sugden v. St. Leonards* and *Gould v. Lakes*); 1890, *Behrens v. Behrens*, 47 Oh. St. 332, 25 N. E. 209 (purporting to follow *Keen v. Keen*, yet apparently using the declarations—that a will had been destroyed—directly as hearsay assertions of the past act); 1878, *Foster's Appeal*, 87 Pa. 75 (the testator's reliance upon the existence of a will, used to infer back to the non-revocation of a lost will); 1858, *Smiley v. Gambill*, 2 Head 165 (subsequent belief of a testatrix, as shown by acts, that she had destroyed a will, admitted to show the fact of destruction and the intent); 1896, *Valentine's Will*, 93 Wis. 45, 67 N. W. 12 (a will shown to have been executed, but now not found; to show whether the will had been destroyed and revoked by the testatrix, declarations of hers, as to such destruction and also as to her still possessing the will, were received, not as "evidence of the fact so declared," but as showing "that she died in the belief that she left no will, and thus support the presumption of revocation"; purporting to follow *Sugden v. St. Leonards*); 1897, *Steinke's Will*, 95 id. 121, 70 N. W. 61 (like *Sugden v. St. Leonards*; declarations that "H. has the will," admitted, as indicating "that she died in the belief that the will was still in existence").

The following case perhaps belongs here: 1897, *Bergere v. U. S.*, 168 U. S. 66, 18 Sup. 4 (a will showing that the testator was dealing with all his assets; the omission of a tract of half a million acres, held to be evidence that he did not suppose that he owned the land, and therefore that there was a defect of title).

It will be noticed that Mr. Justice Hannen, in *Keen v. Keen*, and in *Sugden v. St. Leonards* in the court below, came to the same result as Chief Justice Cockburn and the Master of the Rolls in the latter case on appeal, but this result was reached on very different principles. For this reason, in the cases purporting to follow the ruling in *Sugden v. St. Leonards*, it is by no means certain which of the two principles of decision has been adopted, or whether it has been always clearly understood that a distinct choice of principles is open. Perhaps it may be assumed that the view of the majority on appeal—the second theory *supra*—is the one intended to be accepted. But this difference of principle in the opinions in *Sugden v. St. Leonards*, to:

So far as this result rests on the propriety of the second inference above named — i. e. from the person's belief or consciousness to his preceding act inducing that consciousness (*ante*, § 176), it seems unassailable; if a person in fact has a fixed belief that he has made or revoked a will of a certain tenor, either he has done so, or he is insane or feeble-minded, in all probability; the evidence is at least strong. But it is the first inference that is weak. Are his utterances trustworthy? Do not testators constantly make such statements deliberately in order to deceive designing or annoying relatives? Perhaps here the matter should be left to depend on the circumstances of each case. The possibilities of error in this part of the process of inference have been pointed out in the following passage:

1860, *Whitpley, J.*, in *Boylan v. Meeker*, 28 N. J. L. 276: "The plaintiffs relied on the declarations and conduct of Meeker, both before and after the day of execution, to show that while living he never knew of the existence of such a will and that therefore he had never knowingly executed the paper. . . . The admissibility of this evidence on the issue of fraud and forgery has been argued on two grounds, first, that they were exterior manifestations of an inward condition of mind, that is to say, ignorance of the existence of the will. It is argued . . . that sanity and ignorance are both states of mind, that exterior manifestations must be relied upon to prove both. If this were so, there might be some force in the argument. But . . . the exterior manifestations of insanity are involuntary, those of knowledge purely voluntary. . . . The deviser may to secure his own peace and comfort during life . . . conceal the nature of his testamentary dispositions and make statements calculated and intended to deceive those with whom he is conversing. He has neither the sanctity of an oath nor the strong bond of self-interest to secure his adherence to the truth."

§ 1737. *Statements indicating Intent to Revoke.* (1) In the precedents of the foregoing section, where a will cannot be found, and an issue arises as to its revocation, the object of using the testator's declarations was to show the *very act of revocation* (or the opposite); that is, to use the declarations either as assertions of the past act, or as evidence of a belief from which in turn the past act could be inferred.

(2) But the case may arise where the *act of destruction or cancellation* by the testator is *conceded*, and the inquiry is merely as to the *accompanying intent*, whether it was revocatory or not:

(a) Declarations of intent *at the time of the act* are of course admissible, not only under the present Exception, but also (as usually treated) under the Verbal Act doctrine (*post*, § 1782).¹

together with the strong dissenting opinion of Lord Justice Mellish, have deprived the case of the authority that it might otherwise have had. It is clearly not to be taken as representing the final settlement of the law in England, as subsequent opinions have pointed out: 1886, *Woodward v. Goulstone*, L. R. 11 App. Cas. 469 (Herschell, L. C.: "I do not desire to be understood as dissenting from the judgment of the majority of the Court of Appeal in *Sugden v. St. Leonards*, upon this point. I have expressed the doubts which I entertain; all I desire is to leave the question open should it hereafter come before your Lordships' House for decision";

similar statements were made by Lords Blackburn and Fitzgerald); 1897, *Atkinson v. Morris*, Prob. C. A. 40 (a will imperfectly cancelled was found; the defendants, to prove that the will had been executed in duplicate, and that the non-appearance of the duplicate raised a presumption of destruction, thus legally effecting a revocation, offered the testatrix's declarations that she had executed the will in duplicate; excluded, since, even assuming *Sugden v. St. Leonards* to be fully accepted, it did not authorize the use of declarations as sufficient proof that a will had been duly executed).

¹ The cases are there collected.

(b) But since the question is here merely one of the existence of a state of mind, may we not infer the testator's then state of mind from his *state of mind* at a *prior or subsequent time* not too remote? The principle of Relevancy already examined (*ante*, §§ 241, 242) certainly justifies this; hence, as evidence of this prior or subsequent state of mind, utterances at the prior or subsequent time are admissible. The propriety of this is generally conceded (where the point has been explicitly raised); but some rulings distinctly reach the result by the above analysis;² while others ignore the double process of inference, and admit the utterances either without specific reasons, or (incorrectly) as a result of the Verbal Act doctrine, or by way of a special Hearsay exception.³ It will be noticed that Courts refusing to accept the theory of Mr. Justice Hannen (*ante*, § 1736), may nevertheless accept the present doctrine where the act of destruction is conceded; because there, when post-testamentary utterances were employed, an inference was required from the subsequent state of mind to the prior act, while here the inference is merely from the subsequent to the prior state of mind.

§ 1738. *Statements as to Undue Influence or Fraud.* Utterances of the fifth and sixth classes already enumerated (*ante*, § 1734) may be regarded in several aspects. The chief distinction is between their use as direct *assertion of the fact of fraud* or undue influence — for here they are met immediately by the Hearsay rule —, and their use as indicating (directly or indirectly)

² As in *Massachusetts*.

³ Compare the cases cited *post*, § 1762: 1848, *Weeks v. McBeth*, 14 Ala. 474 (a will being not found, the testator's declarations of having burned it were admitted, on the verbal-act theory); 1861, *Patterson v. Hickey*, 32 Ga. 189 (a will having been torn, subsequent language of the testator indicating indirectly the non-existence of a will at the time was held admissible to show the intent with which the will was torn); 1867, *Collagan v. Burns*, 57 Me. 458 (a will was found torn, and the testator's declarations while re-pasting it were admitted to show his belief and intention at the time as to revocation; four judges dissented on the ground that the declarations were purely hearsay narrative of past facts); 1875, *Whitney v. Wheeler*, 116 Mass. 492 (the controversy was whether a gift had been made *causa mortis*; "when there is any ground for doubt as to the intent with which a delivery of property was made, . . . evidence tending to show a continuous and apparently fixed state of mind and purpose, inconsistent with such alleged gift, existing previously thereto, may have a legitimate bearing upon the case"); 1883, *Whitwell v. Winslow*, 132 id. 307; 1883, *Pickens v. Davis*, 133 id. 257 ("The state of mind of a testatrix before and after cancellation of a will being relevant in inferring the intent at the time of cancellation, the testator's declarations before and after revocation are evidence of his state of mind at those times"); 1883, *Lane v. Moore*, 151 id. 90, 23 N. E. 828 (following *Pickens v. Davis*); 1901, *Stewart v. Stewart*, 177 id. 493, 59 N. E. 116 (whether an instrument was intended as a codicil or a power

of attorney; decedent's declarations and conduct after as well as before execution, admitted); 1860, *Lawyer v. Smith*, 8 Mich. 360 (a will having been torn up, declarations of the testatrix, made subsequently, that she had destroyed her will, were admitted on the question whether the tearing was "done by the testatrix or some other person, and if by her, whether accidentally or intentionally and for the purpose of revoking her will"); 1882, *Tucker v. Whitehead*, 59 Miss. 594 (the destruction being presumably by the testator, declarations up to the time of death were admitted to show his state of mind); 1890, *Betts v. Jackson*, 6 Wend. 175 (Walworth, C.: "Where the question is as to the intent present in an equivocal act possibly a revocation, the possible motives for revocation may be offered in evidence"). *Contra*: 1901, *Throckmorton v. Holt*, 180 U. S. 552, 21 Sup. 474 (cited *ante*, § 1736, note 2).

A declaration concerning revocation may be in truth an attempt at a present verbal revocation. In this view it is usually, under the substantive law of wills, ineffective and therefore immaterial to be proved; a few early cases to this effect, not dealing with the present evidential question, have sometimes been misunderstood: 1776, *Bibb v. Thomas*, 2 Wm. Bl. 1043 (no rulings on evidence; the effect of an attempted and partial destruction considered; declarations at the time and subsequently admitted without question); 1820, *Doe v. Perkes*, 3 R. & Ald. 489 (similar to *Bibb v. Thomas*); 1829, *Provis v. Read*, 5 Bing. 435 (declarations of the testator that his will was not valid, rejected); 1866, *Dickie v. Carter*, 42 Ill. 389 (similar).

a condition of mind relevant to the issue — for here they are admissible either as circumstantial evidence or as statements of a mental condition under the present Exception.

(1) The testator's assertion that a person, named or unnamed, has procured him by fraud or by pressure to execute a will or to insert a provision, is plainly obnoxious to the Hearsay rule, if offered as evidence that the fact asserted did occur:

1868, *Cott, J.*, in *Shaller v. Bumstead*, 90 Mass. 123: "When used for such purpose, they are mere hearsay, which by reason of the death of the party whose statements are so offered, can never be explained or contradicted by him. Obtained, it may be, by deception or persuasion, and always liable to the infirmities of human recollection, their admission for such purpose would go far to destroy the security which it is essential to preserve"; they are thus inadmissible so far as they form a declaration or narrative to show the fact of fraud or undue influence at a previous period."

For this reason they are by most Courts regarded as inadmissible.¹ Yet it has been argued that where the declarations appear in fact to have been made under circumstances of trustworthiness, they should be considered; a special Exception, in effect, being established for them, analogous to that which has been recognized (*ante*, § 1736), by certain opinions in *Sugden v. St. Leonards*, for declarations as to the fact of execution, revocation, or contract. The propriety of such an exception has been defended in the following opinion:

¹ 1896, *Calkins' Estate v. Calkins*, 113 Cal. 296, 44 Pac. 577; 1897, *Kaufman's Estate*, 117 id. 238, 49 Pac. 192; 1903, *Donovan's Estate*, 140 id. 390, 73 Pac. 1081; 1890, *Comstock v. Hadlyme*, 5 Conn. 263; 1897, *Townson v. Moore*, 11 D. C. App. 377, 385 (declarations held not admissible "to show such undue influence; although they may be admitted to show mental condition"); 1898, *Manogue v. Herrell*, 13 id. 455, 458 (testator's declarations excluded, because here there was no other evidence of undue influence); 1894, *Mallery v. Young*, 94 Ga. 304, 22 S. E. 143; 1900, *Underwood v. Thurman*, 111 id. 325, 36 S. E. 788; 1897, *Gwin v. Gwin*, — *Ida.* — 48 Pac. 295; 1878, *Reynolds v. Adams*, 20 Ill. 147; 1858, *Bunkle v. Gates*, 11 Ind. 94 (here, declarations six or eight days after execution were held to be not "so near as to be part of the *res gestæ*"); 1871, *Hayes v. West*, 35 id. 21, 34 (if "not made contemporaneously with the execution," inadmissible); 1890, *Kirkpatrick v. Jenkins*, — *Ky.* —, 33 S. W. 830, *semble*; 1857, *Gibson v. Gibson*, 24 Mo. 236 (that he was drunk at the time of execution); 1885, *Bush v. Bush*, 37 id. 490, 485; 1896, *Doherty v. Gilmore*, 126 id. 414, 37 S. W. 1127; 1900, *Schierbaum v. Scherme*, 157 id. 1, 57 S. W. 526 (statements that he had "mistreated" a daughter in his will, implying that a son had practised impaction on him, excluded); 1901, *Davidson v. Davidson*, — *Nebr.* —, 26 N. W. 409 (statements that "it was a will on paper but it was not his intention; it was not his heart's desire," excluded); 1874, *Lynch v.*

Clements, 34 N. J. Eq. 421, 437; 1882, *Kitchell v. Beach*, 35 id. 446, 454; 1883, *Rualing v. Rualing*, 36 id. 603, 606 (statements, before and after execution, of the legatee's conduct to the testator, not admitted "as evidence of the facts" they were offered to prove; quoted *supra*; *Boylan v. Meeker*, N. J., *ante*, § 1736, approved); 1885, *Pemberton's Case*, 40 id. 520, 523, 4 Atl. 770; 1889, *Middleditch v. Williams*, 45 id. 728, 736, 17 Atl. 826; 1896, *Jackson v. Kniffen*, 3 John. 33 (declarations of a testator that a will had been extorted from him by compulsion were rejected, as being hearsay and not exempt from the rule); 1854, *Waterman v. Whitney*, 11 N. Y. 157; 1877, *Cudney v. Cudney*, 68 id. 148, 150; 1882, *Varz v. McGlynn*, 88 id. 374; 1837, *Moritz v. Brough*, 16 S. & R. 408; 1856, *Hoshauer v. Hoshauer*, 26 Pa. 404; 1897, *Kaufman v. Caughman*, 49 S. C. 159, 27 S. E. 16; 1885, *Kennedy v. Upshaw*, 64 Tex. 417; 1883, *Robinson v. Hutchinson*, 30 Vt. 47; 1885, *Crocker v. Chase's Estate*, 57 id. 413; 1901, *Loennecker's Will*, 112 Wis. 461, 85 N. W. 215 (declarations that she had been ill-treated and had made the will from fear, excluded).

The same rule would be applicable to a deed on an issue of undue influence: 1866, *Dickie v. Carter*, 42 Ill. 376, 389; 1886, *Massey v. Huntington*, 118 id. 80, 88, 7 N. E. 269; 1889, *Guild v. Hull*, 127 id. 523, 532, 20 N. E. 665; 1893, *Francis v. Wilkinson*, 147 id. 370, 384, 35 N. E. 150.

1821, *Henderson, J.*, in *Reel v. Reel*, 1 Hawks 268 (the claim being that a will had been secured by fraud from the testator when drunk, subsequent declarations by the testator as to the contents of the will, showing them to be different from its actual contents, were admitted): "To our minds, to reject the declarations of the only person having a vested interest and who was interested to declare the truth, whose fiat gave existence to the will, and whose fiat could destroy, and in doing the one or the other could interfere with the rights of no one, involves almost an absurdity. . . . The . . . which is to try the fact is to decide whether the declarations contain the truth, or are deceptive in order to delude expectants and procure peace." 2

(2) But these utterances may be nevertheless availed of as evidence of the testator's *mental condition* (*ante*, § 1714), if the latter fact is relevant. Though the issue is as to his mental condition with regard to deception or duress at the time of execution, yet his mental state both before and afterwards is admissible as evidence of his state at that time (on the principles of §§ 230, 242, 394, 395, *ante*). Thus the question is reduced to a simple one, namely, What particular mental conditions of the testator, thus evidenced, are material as being involved in the broader issue of deception or undue influence? There are here recognized by the Courts two distinct sorts of mental condition.

(a) The existence of undue influence or deception involves incidentally a consideration of the testator's *incapacity to resist pressure* and his *susceptibility to deceit*, whether in general or by a particular person. This requires a consideration of many circumstances, including his state of affections or dislike for particular persons, benefited or not benefited by the will; of his inclinations to obey or to resist these persons; and, in general, of his mental and emotional condition with reference to its being affected by any of the persons concerned. All utterances and conduct, therefore, affording any indication of this sort of mental condition, are admissible, in order that from these the condition at various times (not too remote) may be used as the basis for inferring his condition at the time in issue. This use of such data is universally conceded to be proper:

1883, *Dixon, J.*, in *Rusling v. Rusling*, 36 N. J. Eq. 603, 607: "When undue influence is set up in impeachment of a will, the ground of invalidity to be established is that the conduct of others has so operated upon the testator's mind as to constrain him to execute an instrument to which of his free will he would not have assented. This involves two things: first, the conduct of those by whom the influence is said to have been exerted; second, the mental state of the testator, as produced by such conduct, which may require a disclosure of the strength of mind of the decedent and his testamentary purposes, both immediately before the conduct complained of and while subjected to its influence. In order to show the testator's mental state at any given time, his declarations at that time are competent, because the conditions of the mind are revealed to us only by its external manifestations, of which speech is one. Likewise, the state of mind at one time is competent evidence of its state at other times not too remote, because mental conditions have some degree of permanency. Hence in an inquiry respecting the testator's state of mind,

² *Accord*: 1832, *Howell v. Barden*, 3 Dev. 449 (declarations by a testator, that a will had been obtained by fraud and undue influence, admitted; treated as assertions, and in direct held

to be exceptions to the hearsay rule; approving *Reel v. Reel*); 1877, *Beadles v. Alexander*, 9 Baxt. 604 (following *Reel v. Reel*); 1878, *Linch v. Linch*, 1 Lea 539.

before or pending the exertion of the alleged influence, his words, as well as his other behavior, may be shown for the purpose of bringing into view the mental condition which produced them, and, through that, the antecedent and subsequent conditions. To this extent his declarations have legal value. But for the purpose of proving matters not related to his existing mental state, the assertions of the testator are mere hearsay. They cannot be regarded as evidence of previous occurrences, unless they come within one of the recognized exceptions to the rule excluding hearsay testimony."

It is no doubt often difficult to distinguish between this legitimate use and the improper one noted in par. (1), *supra*; for example, when the utterance offered is "The will that I made was signed only to keep the peace with James." Such utterances will probably be received or rejected according to the kind of use of which they seem to the Court in the case in hand to be most susceptible.⁸

⁸ The cases in note 1, *supra*, also refer usually to the propriety of this use: 1864, *Quick v. Quick*, 3 Sw. & Tr. 442 (Sir J. P. Wilde: "It is a familiar enough practice to receive the unsworn declarations of the testator in evidence, for the purpose of arriving at his general intention, where his competency is in dispute, or where there is any imputation of fraud in the making of his will; for in such cases the state of his mind and affections is in itself a material fact, of which such statements are the fair exponents"); 1891, *Knox v. Knox*, 98 Ala. 486, 503, 11 So. 125 ("all the facts and circumstances which tend to elucidate its [the testator's mental] condition, or to show the freedom of the will, or that it was unduly coerced and influenced at the particular time, although such facts and circumstances may have existed or occurred previous to the time of the execution of the will, are admissible"); 1896, *Coghill v. Kennedy*, 119 id. 641, 24 So. 450 ("Put them out of the house," and other expressions, admitted); 1874, *Dennis v. Weekes*, 51 Ga. 24, 32 (admitting the following: "I have done something I ought not to have done; I have made my will and did not make it as I wanted; I know I did wrong, but I could not help it; Lord God Almighty, who ever heard of such a will!"); on the ground that "they tended to show that he was in a condition to be easily influenced"); 1896, *Jones v. Grogan*, 98 id. 552, 25 S. E. 590 (declarations "tending to show" that the testator was "satisfied with" the will, admissible; but not "declarations to the contrary"); 1895, *Hill v. Bahra*, 153 Ill. 314, 318, 41 N. E. 912; 1903, *Dowie v. Driscoll*, 203 id. 480, 68 N. E. 56; 1869, *Bates v. Bates*, 27 Ia. 113; 1882, *Re Hollingworth's Will*, 58 id. 527, 12 N. W. 590; 1853, *Stephenson v. Stephenson*, 62 id. 165, 17 N. W. 456; 1885, *Parsons v. Parsons*, 66 id. 757, 21 N. W. 570, 24 N. W. 544; 1887, *Muir v. Miller*, 72 id. 590, 34 N. W. 429; 1895, *Goldthorp's Estate*, 94 id. 336, 62 N. W. 845; 1896, *Kirkpatrick v. Jenkins*, — Ky. —, 38 S. W. 820 (when accompanied by independent evidence); 1903, *Wall v. Dimitt*, — id. —, 72 S. W. 300; 1820, *Somes v. Skinner*, 15 Mass. 248, 360 (deed said to have been obtained by undue influence; transactions of the grantor

with the grantee, before and after the time, admitted to show the existence of that influence and its probable continuance); 1895, *Batchelder v. Batchelder*, 130 id. 1, 39 N. E. 61 (undue influence by the testator's wife; their relations many years before, excluded in the trial Court's discretion); 1869, *Haines v. Hayden*, 96 Mich. 352, 246, 54 N. W. 911 (declarations after execution, as to the supposed illegitimacy of a child, admitted to show the state of mind as to that child then and at execution; "such declarations are admissible in any case where the fair inference from all the circumstances is that they truly represent the testator's state of mind at the time"); 1902, *Zibbe v. Zibbe*, 131 id. 655, 92 N. W. 248 ("she dinged me at me from morning till night," held admissible to show "the effect of the alleged influence," but not to "establish such fact" of influence); 1897, *Gordon v. Burra*, 141 Mo. 302, 43 S. W. 642 (declarations that the devices had worked upon the testatrix, excluded; but her weeping at the time of the declarations, admitted); 1903, *Crowson v. Crowson*, 172 id. 601, 73 S. W. 1065; 1897, *Clark v. Turner*, 50 Neb. 390, 69 N. W. 843 (apparently sanctioning the indirect use to show the existence of a will; but not allowing them to suffice as sole evidence of contents); 1854, *Waterman v. Whitney*, 11 N. Y. 157 (Selden, J.: "The difference is certainly very obvious between receiving the declarations of the testator to prove a distinct external fact, such as duress or fraud, for instance, and as evidence merely of the mental condition of the testator"); 1885, *Macrae v. Malloy*, 98 N. C. 150; 1821, *Rambler v. Tryon*, 7 S. & R. 93; 1890, *Herster v. Herster*, 122 Pa. 239, 16 Atl. 242; 1902, *Robinson v. Robinson*, 203 id. 400, 53 Atl. 253 (declarations admitted to show "the mental weakness of the testatrix and that the will was procured by the undue influence of her son"); 1879, *Johnson v. Brown*, 51 Tex. 80 (the issue was the genuineness of an offered will; Bonner, J.: "The declarations of [the testator], before and after the date of the proposed will, expressive of feelings of ill-will toward the beneficiaries, as were his feelings of kindness towards them, were properly admitted in evidence, . . . not so much as declarations disparaging a duly executed will, as

(b) Furthermore, the normality of the will's dispositions, with reference to the natural and uninfluenced desires of the testator, must be investigated. That influence is "undue" implies in part that the testamentary disposition in controversy diverges from that which the testator under the influence of his ordinary inclinations would have made. If the tribunal can ascertain his normal tendencies and plans, a standard is found by which to test the dispositions in issue. If these harmonize with this normal standard, the charge of undue influence can have little or no support; if they diverge abnormally, there is then some inducement to examine further into the nature of the influence producing this divergence. Accordingly, to establish this normal tendency or inclination, the testator's condition of mind before and after the time in issue not only may be but must be examined; his state of affection or dislike to specific persons, and his general testamentary attitude towards them, will help to form the standard of his normal dispositions. For this purpose, his utterances indicating the state of his affections and intentions, and in particular his other testamentary acts or expressions, if any, whether prior or subsequent, may all be considered; the evidential principles already noted (par. (a), *supra*) sufficing equally for this purpose. This use of such evidence is also universally sanctioned:

1840, *Chilton, J.*, in *Roberts v. Trautick*, 17 Ala. 58: "This proof conduces to establish that the testator, many years previous to the execution of the will in controversy, had a fixed and settled purpose to make a will similar to the one he is alleged to have executed. It was then proper . . . [as tending to disprove that] the will was not the deliberate act of the deceased."

1858, *Stone, J.*, in *Hughes v. Hughes' Ex'r*, 31 id. 534: "Is it not equally true, if a will be made which is variant from the testator's determination entertained and expressed for years, that this fact is admissible evidence against the capacity of the testator? If the conformity tend to establish the will, does not the non-conformity tend to impair its validity?"

1860, *Hinman, J.*, in *Denison's Appeal*, 39 Conn. 403: "Declarations and acts of kindness and affection towards a legatee . . . go to show that a legacy, otherwise inexplicable upon the ordinary motives of human conduct, is a natural and probable act and therefore a free and reasonable one. Of course it would seem to follow that contrary declarations and acts must have a contrary effect. . . . That such declarations might be made at so remote a period as to be entitled to little if any weight, unless succeeded by other acts or declarations, showing that the state of feeling that called them forth continued up to the time the will was executed, is undoubtedly true."

1879, *Brewer, J.*, in *Mooney v. Olsen*, 22 Kan. 78: "Where, as in a case like this, the circumstances attending the execution raise a doubt as to the mental strength of the testatrix, evidence that the disposition of the property runs along the line of her established friendships and previously expressed intentions tends strongly against the idea of any

evidence of an independent collateral fact—the state of feeling between the parties—and which would in some degree tend to prove the issue before the court"); 1853, *Robinson v. Hutchinson*, 26 Vt. 46; 1869, *Thompson v. Updegraff*, 3 W. Va. 636, 638 (testator's declarations that devisees T. did not want him to give anything to certain grandchildren, admitted to show his condition of mind); 1897, *Bryant v. Pierce*, 26

Wis. 331, 70 N. W. 297 ("not evidence that extraneous and undue influence was actually exerted, but to prove or disprove the capacity of the testator to discover and resist importunities, flatteries, or other acts tending to undue influence"). *Smith v. Fenner*, 1 Gall. 171 (1812), a case often cited but of obscure import and little value, seems to belong here.

undue influence, while evidence that it is contrary to such friendships and intentions makes in favor of improper influences."

1896, *Whitfield, J.*, in *Sheehan v. Kearney*, — *Miss.* —, 21 So. 41: "It may be that the true solution of the apparent confusion is this: That what such declarations are evidence of is, not in themselves alone that the testator did have the testamentary intentions he declared he had, for he may have wished to conceal his intentions, but that he did say he had the testamentary intentions testified to; and the jury are then to draw such inference as the whole evidence warrants, that they were or were not his real testamentary intentions at the time of making the declarations, from these declarations, as compared with those set forth in the will, and looking to the change or absence of change in his condition, family, property, state of feelings, affections, etc., between the time of making them and the will. . . . And if, from the whole evidence, they believe they were really as declared, at that time, an inference might legitimately be drawn that, when the subsequent will confirmed to them, they had continued down to the making of the will, and, when the subsequent will did not conform to them, the testator had purposely misstated his intentions for some reason, or that he had changed his intentions, or that the will was not his will, but the product of undue influence."*

* *Accord: Eng.*: 1864, *Quick v. Quick*, 3 Sw. & Tr. 442, *semble*; *Ala.*: 1845, *Couch v. Couch*, 7 Ala. 524 (Ormond, J.: "The will itself being made in conformity to a fixed determination, entertained and expressed for years, is the strongest proof of her capacity"); 1849, *Roberts v. Trawick*, 17 id. 58 (quoted *supra*); this case, however, excluded facts showing the normal intentions to be different from the will; but this untenable distinction was repudiated in *Hughes v. Hughes' Ex'r*, quoted *supra*; 1853, *Gilbert v. Gilbert*, 22 id. 529, 523 (before and at the time of execution); 1859, *Boale v. Chambliss*, 35 id. 19, 22; 1900, *Schleffelin v. Schleffelin*, 127 id. 14, 23 So. 687; *Cal.*: 1892, *McDevitt's Estate*, 95 Cal. 11, 30 Pac. 101 (the declaration must be fairly near the time of examination of the will); 1896, *Calkins' Estate v. Calkins*, 112 id. 296, 44 Pac. 577; *Del.*: 1828, *Rash v. Purnell*, 3 Harringt. 448, 457; 1838, *Duffield v. Morris' Ex'r*, 1b. 375, 391 (a former will, admitted on an issue of sanity, to show the normal state of purposes and affections); *Ga.*: 1853, *Williamson v. Nebers*, 14 Ga. 311; 1900, *Oato v. Hunt*, 112 id. 139, 37 S. E. 133; *Ill.*: 1867, *Roe v. Taylor*, 45 Ill. 435, 438, *semble*; 1875, *Rutherford v. Morris*, 77 id. 421, *semble*; 1894, *Taylor v. Pegram*, 151 id. 106, 115, 37 N. E. 837 (declarations as to contents of former wills, admitted); 1895, *Hill v. Bahrns*, 153 id. 314, 318, 41 N. E. 912 (other testamentary intentions admissible, "where it appears that such disposition of his property by such prior will is approximately the same"); 1897, *Harp v. Parr*, 153 id. 459, 48 N. E. 112 (declarations as to an intention of disposition before execution, receivable to show normal intentions); 1899, *Kaenders v. Montague*, 180 id. 300, 54 N. E. 321 (prior statements, including revoked wills, as to testamentary plans, admitted to show normal intent and disprove undue influence, provided they are in harmony with the will in question; a distinction made to reconcile the cases before *Harp v. Parr*, but unsound in principle; compare *Hughes v. Hughes' Ex'r*, *Ala.*); *Ind.*: 1889, *Staser v. Hogan*, 120 Ind. 207, 216, 21 N. E.

511, 22 N. E. 990 (conduct of the testator showing his normal affections, admitted); 1893, *Goodbar v. Lidikay*, 136 id. 1, 8, 35 N. E. 691; *Ia.*: 1890, *Dye v. Young*, 44 Ia. 435; 1899, *Perkins' Est.*, 109 id. 216, 50 N. W. 335 (declarations of affection, etc., admitted; also statements as to advancements to omitted children, as showing the state of his mind); *Ky.*: 1894, *Barlow v. Waters*, — *Ky.* —, 28 S. W. 785; 1896, *Kirkpatrick v. Jenkins*, — *id.* —, 33 S. W. 890; *Md.*: 1878, *Griffith v. Diffenderffer*, 50 Md. 432; *Mass.*: 1868, *Shailer v. Bunstead*, 99 Mass. 112, 122 (admissible "in proof of long cherished purposes, settled convictions, deeply rooted feelings, opinions, affections, or prejudices, or other intrinsic or enduring peculiarities of mind inconsistent with the dispositions made in the instrument attempted to be set up as the formal and deliberate expression of the testatrix's will"); *Mich.*: 1864, *Beaubien v. Cicotta*, 12 Mich. 438; 1894, *Renand v. Pageot*, 102 id. 568, 61 N. W. 2; 1897, *Bush v. Delano*, 113 id. 321, 71 N. W. 623; *Miss.*: 1896, *Sheehan v. Kearney*, — *Miss.* —, 21 So. 41 (to show the normality of his testamentary plans, declarations of intent to make a will and of having made a will were admitted; quoted *supra*); *N. J.*: 1858, *Pancost v. Graham*, 15 N. J. Eq. 309; *Pa.*: 1822, *Irish v. Smith*, 8 S. & R. 579 (former wills); 1854, *Wilkinson v. Pearson*, 23 Pa. 119 (former plans); 1861, *Neel v. Potter*, 40 id. 433 (previous declarations of a purpose to dispose as in the will were admitted; *Thompson, J.*: "It would strongly rebut the idea of any such influence on the mind of the testator when making his will, if it were shown that he made it in accordance with a long-cherished purpose"); 1867, *Titlow v. Titlow*, 54 id. 216, 221 (similar; yet not consistently); 1898, *Perret v. Perret*, 184 id. 131, 39 Atl. 33 (former intentions, receivable to show normal wishes); *R. I.*: 1889, *Gardner v. Friess*, 16 R. I. 641, 19 Atl. 113 (declarations of a testatrix as to an intention to dispose in accordance with the will's terms were admitted; *Durfee, C. J.*: "When the will corresponds to the declarations, it excites much

In surveying these three distinctions, together with those already noticed for other kinds of post-testamentary declarations (*ante*, § 1736), one is impressed with the practical futility of attempting to enforce them strictly. It is doubtful if often they amount to anything more than quibbles which a Supreme Court may lay hold of for ordering a new trial where justice on the whole seems to demand it. It would seem more sensible to listen to all the utterances of a testator, without discrimination as to admissibility, and then to leave them to the jury with careful instructions how to use them. The doctrine of multiple admissibility (*ante*, § 13) almost always would justify this. If the jury are plainly acting upon their prejudices only, when the verdict is returned, the Court's control of new trials affords an ample safeguard.

§ 1739. *Intelligent Execution.* Where the question is raised whether the testator signed the will understandingly (usually in cases of alleged undue influence), the fact of a *previous* or *subsequent understanding* of its terms or of a satisfaction with them is relevant (*ante*, §§ 233, 242, 266) to show a comprehension of its terms at the time of execution; and subsequent ignorance or dissatisfaction could be used in the same way. The argument is equally applicable to the execution of deeds and other documents:

1846, *Green, J.*, in *Patton v. Allison*, 7 Humph. 335: "Previous declarations of a testator, in conformity to the will, often repeated and continuing up to near the time of its execution, all indicating the purpose which the contents of the will develop, is certainly in reason, as well as in authority, satisfactory evidence that the testator knew the contents of the will."¹

§ 1740. *Statements as to Insanity.* The utterances of a testator indicating circumstantially his sanity or insanity are governed by no different principles from those applicable to evidence of insanity in other cases; and these principles have already been considered (*ante*, §§ 227-233). But a direct assertion by a testator that he was at a past time sane or insane

less apprehension of improper practices than when it differs from them"); *S. C.*: 1897, *Kaufman v. Caughman*, 49 S. C. 159, 27 S. E. 16; *Tenn.*: 1895, *Peery v. Peery*, 94 Tenn. 28, 29 S. W. 1; *Tex.*: 1895, *Brown v. Mitchell*, 83 Tex. 350, 31 S. W. 621; *U. S.*: 1901, *Throckmorton v. Holt*, 180 U. S. 552, 21 Sup. 474, *semble* (declarations indicating the testator's affections, admissible on an issue of capacity, when not too remote; opinion confused and useless; three judges dissenting); *Vt.*: 1862, *Fairchild v. Bascomb*, 35 Vt. 398, 417 (affection for brothers and sisters, knowledge of a brother's intemperance, etc., admitted); 1866, *Thornton v. Thornton*, 39 id. 122, 158 (prior wills drawn up but not executed, admitted); *W. Va.*: 1881, *McMechen v. McMechen*, 17 W. Va. 683, 714, *semble*; 1888, *Kerr v. Lansford*, 81 id. 659, 8 S. E. 493; *Wis.*: 1870, *Jackman's Will*, 28 Wis. 104, 122, 130 (declarations before and after making, receivable to show the state of his feelings and intentions in regard to a will). *Contra*: in two early cases, not well considered,

the evidence was rejected: 1819, *Den v. Vancleve*, 2 South. N. J. 589, 657; 1822, *Stevens v. Vancleve*, 4 Wash. C. C. 263; also in *Muir v. Miller*, 72 Ia. 585, 590, 34 N. W. 429 (1887), overlooking *Dye v. Young*, *supra*.

For the admissibility in general of a prior or subsequent condition, to evidence undue influence or insanity, see *ante*, § 233.

¹ 1868, *Howe v. Howe*, 99 Mass. 96 (subsequent mention and approval of a deed, admitted to show that it was understood at the time); 1894, *Nelson's Will*, 141 N. Y. 152, 157, 36 N. E. 3 (declarations after execution of a will, admitted to disprove ignorance of its terms); 1890, *Maxwell v. Hill*, 89 Tenn. 595, 15 S. W. 253 (the issue being whether the testatrix, an illiterate person, fully understood the will she signed, declarations at other times showing intentions similar to the terms of the will were admitted); 1898, *Barney's Will*, 70 Vt. 352, 40 Atl. 1027 (subsequent ignorance of the terms of the will, admitted to indicate undue influence).

stands on no better footing than any other hearsay assertion; it is not admissible under the present Exception, because it does not assert a present mental condition.¹

¹ 1886, *Norwood v. Marrow*, 4 Dev. & B. 451. *Contra*: 1876, *Ross v. McQuiston*, 45 Ia. 147 (the declaration of a testator, when same, that he had for 20 years been insane, was admitted, no special principle being named).

SUB-TITLE II (continued): EXCEPTIONS TO THE HEARSAY RULE.

TOPIC XIV: SPONTANEOUS EXCLAMATIONS¹ (RES GESTÆ).

CHAPTER LVII

A. GENERAL FORM OF THE EXCEPTION.

§ 1745. Introductory; *Res Gestæ*; Discrimination between the Verbal Act Doctrine and the Exception for Spontaneous Exclamations.

§ 1746. The Present Cases a Genuine Exception to the Hearsay Rule.

§ 1747. (I) General Principle of the Exception.

§ 1748. The Necessity Principle: Death, Absence, etc., need not be shown.

§ 1749. The Circumstantial Guarantee: Spontaneous.

§ 1750. Same: Requirements: (a) a Startling Occasion, producing (b) a Statement made before Time to Fabricate, (c) and Relating to the Circumstances of the Occurrence.

§ 1751. Knowledge Qualifications.

§ 1752. (II) Spurious Limitations of the Rule, borrowed from the Verbal Act Doctrine.

§ 1753. Same: (1) There must be a Main or Principal Act.

§ 1754. Same: (2) Declaration must Evidently be the Act.

§ 1755. Same: (3) Declaration must be by the Actor himself; Bystander's Utterances.

§ 1756. Same: (4) Declaration must be Contemporaneous.

§ 1757. (III) Spurious Enlargements of the Rule, borrowed from the *Res Gestæ* phrase; All Declarations which are Part of the Transaction are admissible.

B. SPECIAL FORMS OF THE EXCEPTION.

§ 1760. Woman's Complaint of Rape; (1) History of its Use in England.

§ 1761. Same: (2) American Doctrine.

§ 1762. Owner's Complaint after Robbery or Larceny.

§ 1763. Charge made by a Bastard's Mother in Travail.

§ 1764. Statements as to Private Boundary.

§ 1765. "Self-serving" Statements by an Accused Person.

A. GENERAL FORM OF THE EXCEPTION.

§ 1745. Introductory; *Res Gestæ*; Discrimination between the Verbal Act Doctrine and the Exception for Spontaneous Exclamations. The exposition of this Exception is to be approached with a feeling akin to despair. There has been such a confounding of ideas, and such a profuse and indiscriminate use of the shibboleth "*res gestæ*," that it is perhaps impossible to disentangle the real basis of principle involved. On the one hand, to repeat without comment the often meaningless and unhelpful language of the Courts is to shirk the duty of the expositor of the law as it is, and to delay the day of clear notions that must inevitably come. On the other hand, to discriminate between the principles genuinely involved is to risk the reproach of representing as law that which the Courts do not concede. The expositor of the law can only endeavor to avoid impalation upon either horn of the dilemma; relying, in any event, upon the plain language of those Courts which have sought to recognize the Exception in its real character, and calling to mind the frank concession of Chief Justice Beasley:² "I think I may safely say

¹ The term "Spontaneous Exclamations," as a name for this Exception, has been employed in default of a better one. It has been judicially used in *Lander v. People*, 104 Ill. 256; *Mitchum v. State*, 11 Ga. 621; *Dismukes v. State*, 83 Ala. 200.

² In *Hunter v. State*, 40 N. J. L. 536. But the best thing ever said of the problem is one of Chief Justice Blackley's, in *Cox v. State*, 64 Ga. 374, 410 (1879): "The difficulty of formulating a description of the *res gestæ* which will serve for all cases seems insurmountable. To

that there are few problems in the law of evidence more unsolved than what things are to be embraced in those occurrences that are designated in the law as the *res gestæ*."

To begin with, then, there are two distinct and legitimate principles; each in some situations applied to its proper material without doubt or confusion, but both occasionally confused, interchanged, and made to overlap in certain classes of cases. One of these principles establishes a *real Exception to the Hearsay rule* and sets certain limitations to the kinds of statements admissible under this Exception. The other principle does not establish an exception to the Hearsay rule, but merely defines those classes of utterances to which the rule is in its nature not applicable. The former principle admits certain statements because, though hearsay, they form a genuine Exception to the rule; the latter principle admits certain other utterances because they never came within the prohibition of the rule at all, and therefore do not need any Exception to sanction them. The confusion consists in applying the limitations of the one principle to cases calling only for the application of the other. The result has been partly to narrow needlessly the scope of certain kinds of evidence, partly to broaden loosely certain other kinds, and in general to deprive important distinctions of their true significance.

In this case, we are concerned only with the former principle, the Exception to the Hearsay rule; and the explanation of the second principle, including the various senses of the term "*res gestæ*," may be reserved (*post*, §§ 1768-1797). Some of the limitations of the present Exception are based upon a mistaken borrowing of the Verbal Act doctrine (*post*, §§ 1772-1786), and therefore an acquaintance with those limitations will be assumed; but it is necessary to expound the Exception separately here in its proper place.

§ 1746. *The Present Cases a Genuine Exception to the Hearsay Rule.* The problem is this: Certain kinds of statements are admissible, by universal concession, and without the help of the preceding Exceptions. If, then, these admissible statements cannot be accounted for as being without the prohibition of the Hearsay rule (i. e. under the principle of the next Chapter), they must plainly constitute a separate and additional Exception to the rule. It cannot matter what names or phrases the Courts chance to use, — whether they disguise the ruling under the phrase *res gestæ* or otherwise. The material thing is what the Courts actually do, not what names they use; and if they actually do admit a class of statements to which the Hearsay rule is applicable, then the truth is that a distinct Exception to it is recognized.

The typical case presented is a statement or exclamation, by an injured person, immediately after the injury, declaring the circumstances of the injury, or by a person present at an affray, a railroad collision, or other exciting occasion, asserting the circumstances of it as observed by him. Now this kind of statement cannot ordinarily be accounted for as one to which the prohibition of the Hearsay rule is not applicable. The Hearsay rule, as already noted

make the attempt is something like trying to secure to recognise every member of a numerous family."

(*ante*, §§ 1361, 1362), forbids the use of an assertion, made out of court, as testimony to the truth of the fact asserted. It follows that utterances not thus used testimonially, as assertions to prove the truth of the fact asserted, are without the scope of the prohibition and are receivable in spite of the Hearsay rule. Such utterances may be of three different sorts (more fully examined in the next chapter); (1) words the utterance of which is a fact forming part of the issue (*e. g.* the words of a contract or a slander); (2) words uttered at the time of doing a material equivocal act, and forming part of the total conduct which determines the legal significance of the act (*e. g.* words of ownership-claim accompanying the occupation of land); and (3) words used circumstantially as indirect evidence (*e. g.* words of notification, as evidence that the person notified received knowledge). In all these three classes the utterances are offered, not as assertions to prove the truth of the fact asserted, but irrespective of their truth. Whenever, therefore, an utterance is used as testimony that the fact asserted in it did occur as asserted, *i. e.* on the credit of the speaker as a credible person, it is being used testimonially, and is within the prohibition of the Hearsay rule.

Now this testimonial use is precisely the use that is made of the present class of statements. On the one hand, they cannot be accounted for under any of the three classes above mentioned to which the Hearsay rule does not apply. They clearly do not fall within either the first or the third class. They do not fall within the second class, because in that class there is by hypothesis a material equivocal act which needs to be colored and completed in legal significance by the words of the actor accompanying it—for example, the occupation of land, the handing over of money, the tearing of a will. That fundamental requisite is lacking in this class of cases. On the other hand, they clearly do involve the testimonial use of the assertion to prove the truth of the fact asserted,—for example, when the injured person declares who assaulted him or whether the locomotive bell was rung, or when the bystander at an affray exclaims that the defendant shot first. Such statements are genuine instances of using a hearsay assertion testimonially; *i. e.* we believe that Doe shot the pistol, or that the bell was rung, *because* the declarant so asserts,—which is essentially the feature of all human testimony (*ante*, § 25).

There was a time when the state of the judicial precedents was such that no established Exception of this tenor could yet be said to exist. But now, and for a generation past, it does exist, under one or another guise of phraseology. Since in the law, then, it does exist,—since the Courts actually do admit a class of statements to which the prohibition of the Hearsay rule applies,—since we must shape our treatment of the law of evidence by what the Courts do, and not by what they say, the time seems to have come to call these doings by their true name,—in other words, to recognise the existence of this Exception to the Hearsay rule. The limits of the Exception may be elusive and the practice in different courts may vary. But that the core and substance of such an Exception is universally accepted cannot be open

to doubt. Historically, this conscious recognition appears in England before the end of the 1700s, beginning with *Thompson v. Trevanion* and *Aveson v. Kinnaird*; though it is only within the last generation that it is firmly and unquestionably established. Such is, however, the inherent congruity of the doctrine that we are still able to resort to the earliest precedent for a succinct and accurate statement of the principle.

§ 1747. (I) *General Principle of the Exception.* This general principle is based on the experience that, under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control, so that the utterance which then occurs is a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock. Since this utterance is made under the immediate and uncontrolled domination of the senses, and during the brief period when considerations of self-interest could not have been brought fully to bear by reasoned reflection, the utterance may be taken as particularly trustworthy (or, at least, as lacking the usual grounds of untrustworthiness), and thus as expressing the real tenor of the speaker's belief as to the facts just observed by him; and may therefore be received as testimony to those facts.¹ The ordinary situation presenting these conditions is an affray or a railroad accident. But the principle itself is a broad one. Its phrasings differ widely in different Courts; but there is in the judicial opinion of to-day something of an approach to uniformity. In essence, the language of Lord Holt, in *Thompson v. Trevanion*, still serves to indicate clearly and concisely the principle of the Exception. In the following passages, the most satisfactory expositions are those of Mr. Justice Barrow, in *State v. Wagner*, Mr. Justice Lacombe, in *U. S. v. King*, and Chief Justice Bleckley, in *Insurance Co. v. Sheppard*:

1698, *Thompson v. Trevanion*, Skinner 402; action for assault and battery upon the wife of the plaintiff; Lord Holt "allowed that what the wife said immediately upon the hurt received, and before that she had time to devise or contrive anything for her own advantage, might be given in evidence."

1805, *Aveson v. Kinnaird*, 6 East 193; *Counsel*: "Declarations by the wife upon her elopement from her husband, accusing him of misconduct, could not be given in evidence against him in an action against the adulterer." *Ellenborough*, L. C. J.: "It is not so clear that her declarations made at the time would not be evidence under any circumstances. If she declared at the time that she fled from immediate terror of personal violence from the husband, I should admit the evidence; though not if it were a collateral declaration of some matter which happened at another time"; citing *Thompson v. Trevanion*.

1824, *R. v. Foster*, 8 C. & P. 325; manslaughter by driving a cabriolet over a person; a statement made by the deceased, to one who did not see the accident but immediately afterward heard the deceased groan and went up and asked what was the matter, was admitted; *Park, J.*: "It was the best possible testimony that under the circumstances can be adduced to show what it was that had knocked the deceased down"; citing *Aveson v. Kinnaird*.

1839, *Gibson, C. J.*, in *Reed v. Lick*, 8 Watts 481 (admitting the remarks of a crew as

¹ The theory is thus somewhat analogous to that of dying declarations, as pointed out in *State v. Wagner*, quoted post.

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to the soundness of a cable while paying it out in a storm): "The objection to the opinion of the crew in consultation with the master was not for its supposed incompetence in the abstract, but for the want of an attestation of it by the oaths of those who had expressed it. . . . Seamen are expert in nautical affairs, and their judgment in matters of opinion, touching the working and preservation of a ship, may be as satisfactorily attested by their acts when impelled by motives of duty and self-preservation as if it were given under the sanction of an oath. . . . Certainly their opinions cannot be better manifested by their oaths than they are by their acts, which go to make up the usages of the port."

1852, *Nisbet, J.*, in *Mitchum v. State*, 11 Ga. 521: "They derive their credibility not from his veracity, but from their relation to the transaction out of which they spring. Made at the same time with the main fact, evoked by it without premeditation, and for that reason explanatory of the mind and purpose of the actor as it is involved in that fact, they are presumed to be as veritable, as reliable, as the fact itself, and would derive no enhancement of their credibility from the oath of the declarant. Such I take to be the philosophy of *res gestæ*, so far as constituted of declarations. . . . [In this case] his coming to where the witness was seems to have been voluntary and the exclamation spontaneous. . . . The short period of time that had intervened, and the agitated manner of the prisoner, forbid the idea of deliberate design. . . . His distressed and agitated appearance when he reached the witness exhibit a state of mind incompatible with such a belief."

1855, *Lumpkin, J.*, in *Hart v. Powell*, 18 Ga. 639 (the declarations here related to a conflict between the declarant and a slave, and were made after the affray): "If the declarations derive a degree of credit from their connection with the surrounding circumstances, and independently of any credit to be attached to the speaker, they should, in such cases, be admitted. . . . Were not the jury authorized to believe that they were made without premeditation or artifice, and without a view to the consequences? We think so unquestionably. . . . To preclude this proof would be to shut out the party's only defence."

1859, *Swayne, J.*, in *Insurance Co. v. Mosley*, 6 Wall. 397 (here the deceased described his alleged injury shortly after its occurrence): "The *res gestæ* are statements of the cause made by the assured almost contemporaneously with its occurrence and those relating to the consequences made while the latter subsisted and were in progress. . . . Rightly guarded in its practical application, there is no principle in the law of evidence more safe in its results. . . . In the ordinary concerns of life, no one would doubt the truth of these declarations, or hesitate to regard them, uncontradicted, as conclusive. Their probative force would not be questioned."

1873, *Barrows, J.*, in *State v. Wagner*, 61 Mo. 195: "We think that the precise ground upon which their admission [evidence of outcries naming an assailant] should be placed in a case like this is substantially the same as that upon which dying declarations are admissible [*i. e.* necessity and sincerity]. . . . No one can doubt that the exclamations of these two women embodied the truth as it appeared to each, and that the cries of alarm and supplication uttered by any and all human beings under similar circumstances would express their perceptions of existing facts as truly as if backed by the sanction of all the oaths known in Christendom. . . . We merely say that, whatever force is given to dying declarations as the utterances of those who on account of their peculiar situation may be relied on to tell the exact truth as it appears to them, must needs be accorded also to the exclamations of mortal terror caused by a deadly assault. . . . To reject the evidence afforded by the agonized entreaties of one standing face to face with death in the person of a murderer with an uplifted weapon, when we would accept the account of the affair afterwards given by the enfeebled victim, with perceptions and recollections

* This language has been in substance adopted in *Brownell v. R. Co.*, 47 Mo. 246, and perhaps to be termed leading cases. *Id.* 93, *Wagner, J.* (1874), two cases much cited *Wagner, J.* (1871), and in *Harriman v. Stowe*, 57

darkened and dimmed by the mists and shadows of approaching dissolution would be, we think, but a bad sample of 'the perfection of human reason.'"

1892, *Hargis, C. J.*, in *McLeod v. Glither's Adm'r*, 80 Ky. 405: "The declarations of Fish were made within a few seconds after the casualty. . . . He had no time to contrive or devise a falsehood by which to exonerate himself from blame, and his declaration was so connected with the circumstances which form a part of this case, as to give it importance in determining the fact that he and his engineer had run the engine in the honest belief that they had until 10.10 o'clock to reach Beard's Station. . . . It was made prior to any knowledge that he . . . had misconstrued the dispatch. . . . Therefore, if we ignore the credit to which Fish may have been entitled as a truthful man, his declaration, made under the circumstances, impresses the mind with confidence in its truth, and is entitled to be given its weight as any other fact going to make up the whole transaction."

1896, *Battle, J.*, in *Little Rock R. Co. v. Leverett*, 48 Ark. 242, 8 S. W. 50: "The statement of Leverett was made immediately after he was run over. . . . It was an emanation of the act in question and so connected with the cause of his injuries as to preclude any idea that it was the product of calculated policy. Aside from any credit due Leverett for veracity, the circumstances immediately preceding and connected with his statement impress the mind with confidence in its truth."

1897, *Somerville, J.*, in *Dimukes v. State*, 88 Ala. 269, 3 So. 671: "The exclamation of Miss Harris, [on running from her room in her night-clothes, that she saw some one at the window,] . . . being uttered so near the scene of the transaction, and being apparently spontaneous in its nature, . . . was free from all suspicion of device, premeditation, or afterthought," and was therefore properly admitted."

1898, *Lacombe, J.*, in *U. S. v. King*, 24 Fed. 314 (charging the jury): "There is a principle in the law of evidence which is known as '*res gestæ*'; that is, the declarations of an individual made at the moment of a particular occurrence, when the circumstances are such that we may assume that his mind is controlled by the event, may be received in evidence, because they are supposed to be expressions involuntarily forced out of him by the particular event, and thus have an element of truthfulness they might otherwise not have. . . . But you are not to give any more weight to a declaration thus made, or any weight at all, unless you are satisfied that it was made at a time when it was forced out as the utterance of a truth, forced out against his will or without his will, and at a period of time so closely connected with the transaction that there has been no opportunity for subsequent reflection or determination as to what it might or might not be wise for him to say."

1899, *Bleckley, C. J.*, in *Travelers' Ins. Co. v. Sheppard*, 85 Ga. 751, 776, 12 S. E. 18: "There must be no fair opportunity for the will of the speaker to mould or modify them. His will must have become and remained dormant, so far as any deliberation in concocting matter for speech or selecting words is concerned. Moreover, his speech, besides being in the present time of the transaction, must be in the presence of it in respect to space. He must be on or near the scene of action or of some material part of the action. His declarations must be the utterance of human nature, of the *genus homo*, rather than of the individual. Only an oath can guarantee individual veracity. But spontaneous impulse may be sufficient sanction for the speech of man as such,—man, distinguished from this or that particular man. True, the verbal deliverance in each instance is that of an individual person. But if the state of his mind be such that his individuality is for the time being suppressed and silenced, so that he utters the voice of humanity rather than of himself, what he says is regarded by the law as in some degree trustworthy."

§ 1748. *The Necessity Principle; Death, Absence, etc., need not be shown.* It has already been noticed (*ante*, § 1421) that through the Exceptions to the Hearsay rule run two general principles, one of which is that some necessity shall exist for resorting to hearsay statements. This necessity, for the first

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six Exceptions, consists in the impossibility of obtaining from that person testimony on the stand; for the seventh it consists in the general scantiness of other evidence on the same subject; for the eighth, ninth, tenth, and eleventh, in the practical inconvenience of requiring the person's attendance upon the stand; and, for the thirteenth, in the superior trustworthiness of his extrajudicial statements as creating a necessity or at least a desirability of resorting to them for unbiassed testimony. It is this last reason that suffices equally for the present Exception. The extrajudicial assertion being better than is likely to be obtained from the same person upon the stand, a necessity or expediency arises for resorting to it. This reason, though rarely noted by the Courts, appears clearly to be the sufficient one.¹ The rarity of its mention may be ascribed to the influence of the Verbal Act doctrine (*post*, § 1772), which has concealed the analogy of the other exceptions and has thus usually obviated argument as to the propriety of showing a specific necessity for the hearsay.

It follows that the *death, absence, or other unavailability* of the declarant need never be shown under this Exception, — a proposition never disputed.

§ 1749. *The Circumstantial Guarantee of Trustworthiness: Spontaneousness.* The second principle (*ante*, § 1422) running through all the Exceptions is that the statement must have been made under circumstances calculated to give some special trustworthiness to it, and thus to justify us in exempting it from the ordinary test of cross-examination on the stand. This principle is represented, in the present Exception, by the phrase, often repeated,¹ that the statement must from the circumstances "derive a degree of credit independently of the declaration," i. e. other than the faith to be given to an ordinary extrajudicial assertion. This circumstantial guarantee here consists in the consideration, already noted (*ante*, § 1747), that in the stress of nervous excitement the reflective faculties may be stilled and the utterances may become the unreflecting and sincere expression of one's actual impressions and belief. The utterance, it is commonly said, must be "spontaneous," "natural," "impulsive," "instinctive," "generated by an excited feeling which extends without let or break-down from the moment of the event they illustrate."²

What practical limitations does this principle place upon the conditions under which such statements become admissible? Before attempting to generalize, typical passages applying the principle may be compared:

1693, *Thompson v. Trevanion*, Skinner 402; assault and battery upon a wife; Lord Holt admitted what the wife said "immediate upon the hurt received, and before that she had time to devise or contrive anything for her own advantage."

¹ The following passages illustrate its recognition: *Stotes, C. J.*, in *Galena & C. U. R. Co. v. Fay*, 16 Ill 568 ("It is impossible for a witness to convey such scenes to the mind and their effect and influence upon it"); *Lumpkin, J.*, in *Hart v. Powell*, 18 Ga. 630, *supra* ("To preclude this proof would be to shut out the party's only defence"); *Mobile & M. R. Co. v. Ashcraft*, 43 Ala 31 ("more convincing than the testimony

of the persons themselves some time after the occurrence"); and particularly the opinion of *Barrows, J.*, quoted *supra*, in *State v. Wagner*, 61 Me. 195; so also *Staples, J.*, in *Jordan's Case*, 25 Gratt. 245.

² Apparently first used by *Upham, J.*, in *Hadley v. Carter*, 3 N. H. 42 (1835).

³ For these reasons, see the ensuing quotations.

1843, *Duncan, J.*, in *Hill's Case*, 3 Gratt. 604: "And why are not [the decedent's] declarations as to the commission of the act [a part of the *res gesta*]? The [supposed] reason is that he may have fabricated or made up a story. But on the one hand, if under the circumstances of the case he could not have had time to make up a story, and the declarations were made when the *res gesta* did not exist, then they may be received as part of the *res gesta*. On the other hand, if made after time sufficient had been allowed to fabricate a story, or the *res gesta* may be supposed to exist, they are not to be considered as part of the *res gesta*. . . . *A priori* a stab in the heart would instantaneously suspend the powers of reflection. . . . All the time, then, from receiving the stab until he revived from his fit of fainting he was clearly not in a condition to arrange his ideas and fabricate a story. . . . All that is necessary . . . to make the declaration part of the *res gesta* is that it should be made recently after the injury and before he had time to make up a story 'or devise anything for his own advantage.'"

1847, *Thacher, J.*, in *Scaggs v. State*, 8 Sm. & M. 794: "Declarations are admitted . . . only upon the presumption that they elucidate the facts with which they are connected, having been made without premeditation or artifice and without a view to the consequences. . . . It was reasonable to presume that he had premeditated his explanation of its cause [blood upon his hands] when it was also shown that he was half a mile from the spot where the crime was alleged to have been committed and had sufficient time to determine upon the explanation he would give concerning the circumstance. The explanation . . . was not of that impulsive character which distinguishes declarations at the time of the transaction."

1860, *Lewis, C. J.*, in *State v. A. A. Let*, 5 Nev. 101: "Undoubtedly such statements should be received with great caution, and only when they are made so recently after the injury is received and under such circumstances as to place it beyond all doubt that they are not made from design or for the purpose of manufacturing evidence. Hence, from the very nature of the thing, very much must be left to the discretion of the presiding judge."

1864, *Earl, J.*, in *Waldole v. R. Co.*, 95 N. Y. 374: "This [present piece of] evidence cannot be received upon the theory that there is a very strong probability that the declarations made by the intestate were true. . . . Declarations which are received as part of the *res gesta* are to some extent a departure from or an exception to the general rule [requiring confrontation, cross-examination, and oath]; and when they are so far separated from the act which they are alleged to characterize that they are not part of that act or interwoven into it by the surrounding circumstances so as to receive credit from it and from the surrounding circumstances, they are no better than any other unsworn statements made under any other circumstances. . . . [In this case, made thirty minutes after the injury,] they are purely narrative, giving an account of a transaction not partly past, but wholly past and completed. They depend for their truth wholly upon the accuracy and reliability of the deceased and the veracity of the witness who testified to them."

1884, *Stanton, J.*, in *Galveston v. Barbour*, 62 Tex. 176 (declarations being offered of a child interrogated by the father on the day after being injured): "Too great a time elapsed; the statements and acts of the son were not the natural utterances of a simple, truthful child prompted by the suffering endured at the time through the injury; there was too much calculation and method on the part of the father. . . . It was simply hearsay, with no feature to relieve it from the operation of the rule. . . . [Then, of other declarations,] the declarations made to the mother, by the child, were of a different character; he came home immediately after he had received the injury, crying, and smarting with the pain resulting from it, and, childlike and naturally, made known to her how he had been hurt."

1885, *Cooley, C. J.*, in *Merkle v. Bennington*, 58 Mich. 163, 24 N. W. 776: "These declarations were not made on the spot and spontaneously. . . . One very good reason for excluding such narratives is that the party has had time to deliberate and shape them in his own interest and may be under strong temptation to do so. . . . In this case . . .

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It was for his interest, if he could do so, to fix the responsibility for the injury upon the township. . . . The longer the time allowed for deliberation, the greater would be the danger that his utterances would be unreliable. But after such lapse of time as appeared in this case the declarations cannot with any propriety be considered part of the *res gestæ*."

1898, *Field, J.*, in *Vicksburg R. Co. v. O'Brien*, 119 U. S. 96, 7 Sup. 118, 179: "As the declaration was made between ten and thirty minutes after the accident, we may well conclude that it was made in sight of the wrecked train, and in presence of the injured parties, and whilst surrounded by excited passengers. . . . The modern doctrine has relaxed the ancient rule that declarations, to be admissible as part of the *res gestæ*, must be strictly contemporaneous with the main transaction. It now allows evidence of them, when they appear to have been made under the immediate influence of the principal transaction, and are so connected with it as to characterize or explain it. . . . An accident happening to a railway train, by which a car is wrecked, would naturally lead to a great deal of excitement among the passengers on the train, and the character and cause of the accident would be the subject of the explanation for a considerable time afterwards by persons connected with the train. . . . The admissibility of a declaration, in connection with evidence of the principal fact, . . . must be determined by the judge according to the degree of its relation to that fact, and in the exercise of a sound discretion; it being extremely difficult, if not impossible, to bring this class of cases within the limits of a more particular description."

1888, *Black, J.*, in *Leahy v. R. Co.*, 97 Mo. 172, 10 S. W. 58: "The better reasoning is that the declaration, to be a part of the *res gestæ*, need not be coincident in point of time with the main fact to be proved. It is enough that the two are so clearly connected that the declaration can, in the ordinary course of affairs, be said to be the spontaneous explanation of the real cause."

§ 1750. Same: Requirements: (a) a Startling Occasion; (b) a Statement made before Time to Fabricate; (c) Relating to the Circumstances of the Occurrence. From the judicial expositions the following limitations, and these only, may legitimately be deduced:

(a) *Nature of the occasion.* There must be some *shock, startling enough* to produce this nervous excitement and render the utterance spontaneous and unreflecting. Such a limitation does not appear to be in terms expressly required in the judicial definitions; but it is a necessary implication from their language. Moreover, in practically all of the instances—involving statements after corporal injury by violence—such conditions are in fact present, and this requirement is fulfilled. There is, however, in some Courts, a limitation which practically takes the place of the present one,—the limitation that there must be a "main" or "principal fact." This limitation (noticed *post*, § 1753) is mistakenly borrowed from the Verbal Act doctrine, and improperly enlarges the scope of the present Exception.

(b) *Time of the utterance.* The utterance must have been *before there has been time to contrive and misrepresent*, i. e. while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance. This limitation is in practice the subject of most of the rulings.

¹ Compare also the following, in which the idea of spontaneity is emphasized: 1893, *Ryan, C.*, in *Missouri P. R. Co. v. Baier*, 37 Nebr. 234, 245, 55 N. W. 918 (the declaration must be "a spontaneous explanation of the real cause");

1900, *Baker, C. J.*, in *Green v. State*, 184 Ind. 485, 57 N. E. 637 (the declarant must "appear to be the spontaneous spokesman of the act and not the deliberate utterer of an afterthought").

It is to be observed that the statements need not be strictly contemporaneous with the exciting cause; they may be subsequent to it, provided there has not been time for the exciting influence to lose its sway and to be dissipated. The fallacy, formerly entertained by a few Courts, that the utterance must be strictly contemporaneous (*post*, § 1756), owes its origin to a mistaken application of the Verbal Act doctrine:

1882, *Nisbet, J.*, in *Mitchum v. State*, 11 Ga. 686: "Where the books say, when this Court has said, that the declarations must be contemporaneous with the act. . . . [It is a question] which must depend upon the application of the principle upon which the rule is founded. . . . If the declarations appear to spring out of the transaction, if they elucidate it, if they are voluntary and spontaneous, and if they are made at a time so near to it as reasonably to preclude the idea of deliberate design, then they are to be regarded as contemporaneous."¹

1884, *Smith, J.*, in *Carr v. State*, 48 Ark. 104: "Nor need any such declarations be strictly coincident as to time, if they are generated by an excited feeling which extends without break or let-down from the moment of the event they illustrate."

1889, *Stinson, J.*, in *State v. Murphy*, 16 R. I. 528, 17 Atl. 988: "The second statement . . . was later in time by several minutes; but we do not think this is decisive, since the controlling element of admissibility is not the interval of time, but the real and illustrative connection with the thing done, in which the interval of time is a factor. . . . That which is recognized by common experience as the instinctive outcome of an act is for this reason deemed to be a part of it, whether the time of expression be five or fifteen minutes after."

1890, *Bleckley, C. J.*, in *Travelers' Ins. Co. v. Sheppard*, 88 Ga. 751, 775, 776, 12 S. E. 18: "What the law altogether distrusts is not after-speech but after-thought. . . . That the declarations shall be or appear to be spontaneous is indispensable, and it is for this reason alone that they are required to be speedy."²

Furthermore, there can be no definite and fixed limit of time. Each case must depend upon its own circumstances:

1891, *Forster, J.*, in *Kennedy v. R. Co.*, 130 N. Y. 664, 90 N. E. 141: "There is no imaginary line somewhere between a few hours and a few days or a few weeks, on one side of which declarations in favor of a party are admissible in evidence, while on the other they are inadmissible. Unless such complaints form a part of the *res gestæ* they are inadmissible; and if they are so far detached from the occurrence as to admit of the deliberate design and be the product of a calculating policy on the part of the actors, then they cannot be regarded as a part of the *res gestæ*."

1902, *Shelby*, in *Jack v. Mutual R. F. Life Ass'n*, 51 C. C. A. 86, 118 Fed. 49 (admitting statements made by an insured after being poisoned and just before his death): "While it is said that the declarations must be contemporaneous with the main fact, no rule can be formulated by which to determine how near, in point of time, they must be. No two cases are exactly alike, and the determination of this question is always inseparable from the circumstances of the case at bar. The transaction in question may be such that the *res gestæ* would extend over a day, or a week, or a month. In this case the fatal capsule was handed to the victim in the afternoon, but not taken till bedtime. If Lipscomb, instead of giving him the capsule and prescription on the streets in the afternoon, had called at his house, and given it to him, and left a minute before it was swallowed,

¹ The language of this opinion has been often reproduced, in one form or another; examples of almost exact reproductions are found in *Landy v. Humphries*, 85 Ala. 624 (1890); *People v. Vernon*, 85 Cal. 49 (1890).

² See similar passages quoted *supra*, and *ante*, § 1749, from *Vicksburg R. Co. v. O'Brien*, *State v. Ah Loi*, *Mitchum v. State*, and *Hill's Case*; and *State v. Ramsey*, 46 La. An. 1407, 30 So. 204.

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the declarations would have been brought nearer in point of time to the moment that Lipscomb had handed Stewart the medicine; but we cannot see that the rule as to the admissibility of Stewart's declarations would have been different. If one threw a bomb, which immediately exploded, and killed another, the declaration of the dying man as to who threw it would be a part of the *res gestæ*. If the assailant, instead of throwing the bomb, had placed it concealed, and fixed to explode in an hour or in ten hours, when it exploded, the involuntary exclamation of the fatally wounded man, naming the person who had placed the bomb near him, would be, we think, a part of the *res gestæ*. So we do not think that these objections gain any weight from the length of time which elapsed between Lipscomb's act of handing the capsule to Stewart and his declarations."

Since the application of the principle thus depends entirely on the circumstances of each case, it is therefore impossible to regard rulings upon this limitation as having in strictness the force of precedents. To argue from one case to another on this question of "time to devise or contrive" is to trifle with principle and to cumber the records with unnecessary and unprofitable quibbles. There is a lamentable waste of time by Supreme Courts in here attempting either to create or to respect precedents. Instead of struggling weakly for the impossible, they should decisively insist that every case be treated upon its own circumstances. They should, if they are able, lift themselves sensibly to the even greater height of leaving the application of the principle absolutely to the determination of the trial Court. Until such a beneficent result is reached, their lucubrations over the details of each case will continue to multiply the tedious reading of the profession.³

³ No attempt will here be made to state in detail the rulings of the various Courts upon cases wholly unavailable as precedents. To the cases quoted *supra*, add the following: *England*: 1829, *The Schwenke*, Swab. 231 (in a collision, evidence was admitted that, as the defendant was backing clear of the plaintiff brig, the pilot of the steamer, who was on the bridge, stamped his foot and said: "The damned helm is still starboarded"); *Ireland*: 1854, *R. v. Lacey*, 6 Cox Cr. 477 (deceased's statements on the arrival of help, admitted); *Canada*: 1863, *Small v. Belyan*, 24 N. Br. 16 (master of a vessel, at the time of grounding); 1901, *Rainnie v. St. John C. R. Co.*, 31 Id. 563 (street car driver); 1901, *Armstrong v. Canada A. R. Co.*, 2 Ont. L. R. 219 (railway injury); *Alabama*: 1907, *Hall v. State*, 40 Ala. 696, 700, 706 (accused's statements after a homicide); 1878, *Wesley v. State*, 53 Id. 187; 1883, *Alabama*, G. S. R. Co. v. Hawk, 72 Id. 113; 1890, *Richmond & D. R. Co. v. Hammond*, 98 Id. 185, 9 So. 577; 1898, *Burton v. State*, 118 Id. 108, 23 So. 729; 1899, *Blankhead v. State*, 124 Id. 14, 26 So. 979 (affray); 1901, *Hall v. State*, 130 Id. 48, 39 So. 422; 1901, *Nelson v. State*, ib. 83, 30 So. 728 (deceased's declarations when assaulted); 1902, *Campbell v. State*, 133 Id. 81, 31 So. 803 (accused's statements during a quarrel); 1903, *Collins v. State*, 137 Id. 56, 34 So. 403 (third person as a murmur); 1903, *Jones v. State*, ib. 12, 34 So. 601 (by the deceased); *Arkansas*: 1884, *Flynn v. State*, 43 Ark. 293; 1896, *Little Rock M. R. & T. R. Co. v. Leverett*, 48 Id. 338, 339, 3 S. W. 50 (by a person injured in a railroad accident); 1903,

Fort Smith Oil Co. v. Glover, 53 Id. 166, 179, 34 S. W. 106 (by a person injured in an explosion); 1909, *Little Rock T. & R. Co. v. Nelson*, 66 Id. 494, 32 S. W. 7 (by a motorman after an injury); 1901, *Blair v. State*, 60 Id. 550, 64 S. W. 348 (by defendant, after a killing); 1901, *Elder v. State*, ib. 648, 65 S. W. 398 (by a participant, after an affray); *California*: C. C. P. 1872, § 1830 ("Where, also, the declaration, act, or omission forms part of a transaction which is itself the fact in dispute, or evidence of that fact, such declaration, act, or omission is evidence, as part of the transaction"); 1868, *People v. Vernon*, 25 Cal. 49; 1892, *People v. Ah Lee*, 60 Id. 86; 1896, *Durkee v. R. Co.*, 69 Id. 532, 11 Pac. 139; 1907, *Linnak v. Crocker Est. Co.*, 119 Id. 442, 51 Pac. 608 (fall of an elevator; statement of the servant in charge, made after the fall); 1899, *Heckle v. R. Co.*, 123 Id. 441, 26 Pac. 56 (railroad injury); 1901, *Williams v. Southern P. Co.*, 133 Id. 550, 65 Pac. 1100 (railroad collision); 1903, *Boone v. Oakland T. Co.*, 139 Id. 490, 73 Pac. 243 (street-car injury); *Colorado*: 1873, *Bolander v. People*, 2 Colo. 48, 63 (abortion); *Columbia (District)*: 1897, *Washington & G. R. Co. v. McLane*, 11 D. C. App. 230 (railroad accident); *Connecticut*: 1897, *State v. Bradneck*, 69 Conn. 212, 37 Atl. 493 (statements by an adulterer, running away); 1898, *McCarrick v. Kealy*, 70 Id. 642, 40 Atl. 608; 1901, *State v. Yans*, 54 Id. 177, 50 Atl. 37 (murder); *Florida*: 1898, *Lambright v. State*, 24 Fla. 564, 16 So. 582; *Georgia*: Code 1896, § 5179, Cr. C. § 998 (admitting statements "accompanying an act, or so nearly connected therewith in time as to

(c) *Subject of the utterance.* The utterance must relate to the circumstances of the occurrence preceding it. This is perhaps a cautionary rather than a

be free from all suspicion of device or afterthought"; 1873, *Hall v. State*, 48 Ga. 607; 1878, *Burns v. State*, 61 id. 194; 1880, *Johnson v. State*, 68 id. 92; 1884, *Augusta Factory v. Barnes*, 72 id. 226; 1887, *State v. Driscoll*, ib. 584; 1887, *State v. Schmidt*, 73 id. 478; 1887, *Augusta & S. R. Co. v. Randall*, 79 id. 311, 4 S. E. 674; 1888, *Savannah F. & W. R. Co. v. Holland*, 82 id. 267, 10 S. E. 200; 1890, *Travelers' Ins. Co. v. Sheppard*, 85 id. 751, 769, 776, 12 S. E. 18 (whether S. accidentally fell overboard or committed suicide by shooting or was alive; declarations of a companion, after hearing a shot, and upon meeting a second companion, admitted; quoted *supra*); 1893, *Von Pollnitz v. State*, 92 id. 16, 17, 18 S. E. 301 (by the deceased, at the door of the room where assaulted); 1894, *Boston v. State*, 94 id. 590, 21 S. E. 603 (accused's explanations that he shot by accident, made after arrest, excluded; but similar statements made on voluntarily surrendering himself shortly after the shooting, admitted); 1896, *Electric R. Co. v. Carson*, 98 id. 652, 27 S. E. 156; 1897, *Sullivan v. State*, 101 id. 500, 29 S. E. 16 (defendant's declarations to a policeman, a few minutes after a homicide); 1899, *Dill v. State*, 106 id. 683, 32 S. E. 640 (deceased in an affray); 1899, *Thornton v. State*, 107 id. 683, 33 S. E. 673 (by defendant, after killing his wife); 1899, *Weinkle v. R. Co.*, 107 id. 367, 33 S. E. 471 (by the engineer of a train, after killing mules); 1899, *Milam v. State*, 108 id. 29, 33 S. E. 218 (by deceased, after being shot); 1899, *Gaines v. State*, ib. 772, 33 S. E. 632 (by a wounded person, made immediately after); 1901, *Western & A. R. Co. v. Beason*, 112 id. 558, 37 S. E. 863; *Illinois*: 1841, *Gardner v. People*, 4 Ill. 90 (a statement made after a killing was rejected, because "the length of time which must have elapsed in travelling the three-quarters of a mile was sufficient to enable the prisoner to become cool and deliberate and even to invent an ingenious account of the hurried transaction"); 1855, *Galena & C. U. R. Co. v. Fay*, 16 id. 548; 1889, *Chicago W. D. R. Co. v. Becker*, 128 id. 546, 21 N. E. 524; 1891, *Quincy Horse R. & C. Co. v. Gnase*, 137 Ill. 264, 269, 27 N. E. 190 (by a car-driver, after an accident); 1895, *Springfield R. Co. v. Welch*, 155 id. 511, 40 N. E. 1034 (by a motorman just after the car had stopped); 1896, *Globe Accident Ins. Co. v. Gerisch*, 163 id. 625, 45 N. E. 563 (statements from several hours to three days later, excluded); 1902, *Springfield C. R. Co. v. Puntzenney*, 200 id. 2, 65 N. E. 442; *Indiana*: 1851, *Bland v. State*, 3 Ind. 608, 610 (deceased's statement after a homicide); 1880, *Jones v. State*, 71 id. 83; 1894, *Farker v. State*, 136 id. 284, 290, 35 N. E. 1105 (by the deceased, shortly after a shooting); 1900, *Green v. State*, 154 id. 635, 37 N. E. 637 (murdered person); 1903, *Indianapolis St. R. Co. v. Whitaker*, 160 id. 123, 66 N. E. 433; *Iowa*: 1871, *State v. Porter*, 24 Ia. 137; 1886, *Armist v. R. Co.*, 70 id. 131, 30 N. W. 42; 1894, *Smith v. Dawley*, 93 id. 312, 60 N. W. 625; 1899, *Keyes v. Cedar Falls*, 107 id. 509, 78 N. W. 227 (injured person after

a fall); 1902, *Alsever v. Minneapolis & S. L. R. Co.*, 115 id. 338, 58 N. W. 841 (engineer's statement after an injury); 1903, *Butcliffe v. Iowa, S. F. M. Ass'n*, 119 id. 230, 93 N. W. 90 (suicide); *Kansas*: 1871, *State v. Montgomery*, 8 Kan. 360; 1881, *State v. Pomeroy*, 25 id. 350; 1891, *Tennile v. R. Co.*, 45 id. 509, 25 Pac. 876; 1898, *Walker v. O'Connell*, 59 id. 306, 52 Pac. 894 (by an engineer, two or three hours after an accident); 1902, *State v. Morrison*, 84 id. 649, 68 Pac. 48 (deceased's declaration after a stabbing); 1902, *Atchison T. & S. F. R. Co. v. Logan*, 65 id. 748, 70 Pac. 878 (railroad injury to employee); *Kentucky*, 1896, *Norfleet v. Com.*, — Ky. —, 33 S. W. 938 (by a person shot, immediately after the shooting); 1896, *Jackson v. Com.*, — id. —, 37 S. W. 847; 1897, *Hughes v. Com.*, — id. —, 41 S. W. 294; 1898, *Hughes v. R. Co.*, — id. —, 48 S. W. 671 (brakeman's injury); 1899, *Brown v. R. Co.*, — id. —, 53 S. W. 1041 (injured person falling off a street-car); 1899, *Louisville & N. R. Co. v. Shaw*, ib. —, 53 S. W. 1048 (injured person put off a steam-car); 1900, *Louisville & C. P. Co. v. Samuels*, — id. —, 59 S. W. 3; 1901, *Johnson v. Com.*, — id. —, 61 S. W. 1006 (assaulted woman's complaint); 1901, *Floyd v. R. Co.*, — id. —, 64 S. W. 653 (by a motorman after an accident); *Louisiana*: 1885, *State v. Melton*, 37 La. An. 77, 79; 1886, *State v. Molissa*, 36 id. 381, 384; 1887, *State v. Escoup*, 39 id. 219, 1 So. 448 (by a murdered person); 1896, *State v. Ramsey*, 48 id. 1407, 20 So. 904; 1899, *State v. Sadler*, 51 id. 1397, 26 So. 390 (by a person shot); 1900, *State v. Robinson*, 52 id. 541, 27 So. 129 (by the deceased, in an affray); 1900, *Marler v. R. Co.*, ib. 727, 27 So. 176 (railway injury); 1902, *State v. Maxey*, 107 La. 799, 33 So. 206 (injured person); 1902, *State v. Blanchard*, 108 id. 110, 32 So. 397 (accused); *Maine*: 1899, *State v. Maddox*, 92 Me. 348, 42 Atl. 788 (assault); 1902, *Barnes v. Rumford*, 96 id. 315, 52 Atl. 644 (highway accident); *Maryland*: 1898, *Wright v. State*, 88 Md. 705, 41 Atl. 1060 (statements by the accused after an affray); 1900, *Baltimore C. P. R. Co. v. Tanner*, 90 id. 315, 45 Atl. 186 (by an injured person while having his injuries dressed); *Massachusetts*: 1896, *Eastman v. R. C.*, 165 Mass. 349, 43 N. E. 115 (injured person); *Michigan*: 1877, *Mobley v. Kittleberger*, 37 Mich. 362; 1901, *Edwards v. Foote*, — id. —, 68 N. W. 404 (street-car collision); 1903, *Enaley v. R. Co.*, — id. —, 96 N. W. 34 (railroad passenger); *Minnesota*: 1895, *Firkins v. R. Co.*, 61 Minn. 31, 63 N. W. 173; 1903, *State v. Gallehugh*, — id. —, 94 N. W. 723 (murder); *Mississippi*: 1883, *Kramer v. State*, 61 Miss. 161; 1896, *Mobile & C. R. Co. v. Stinson*, 74 id. 453, 21 So. 14 (statements while extinguishing a fire); *Missouri*: 1880, *State v. Dominique*, 30 Mo. 586; 1871, *State v. Sloan*, 47 id. 610 (deceased's remarks while his wound was being dressed); 1877, *State v. Brown*, 64 id. 370; 1883, *State v. Walker*, 78 id. 386; 1894, *State v. Martin*, 124 id. 514, 38 S. W. 12; 1896, *State v. Thompson*, 133 id. 301, 34 S. W. 31 (statements by the deceased while eating a poisoned

logically necessary restriction. If, for example, after an assault, the injured person exclaims that in the previous week the attacking party had tried to

lunch); 1897, *State v. Thompson*, 141 id. 408, 42 S. W. 949; 1898, *State v. Sexton*, 147 id. 89, 48 S. W. 453 (murder); 1900, *State v. Hudspeth*, 159 id. 178, 60 S. W. 136 (injured person); 1900, *Raschenberg v. So. Electric Co.*, 161 id. 70, 61 S. W. 626 (motorman after an accident); 1902, *State v. Lockett*, 168 id. 480, 68 S. W. 565; 1903, *State v. Hendricks*, 173 id. 654, 73 S. W. 194 (victim of an assault); 1903, *State v. Pollard*, 174 id. 607, 74 S. W. 969 (rape); *Montana*: C. C. P. 1895, § 3126 (like Cal. C. C. P. § 1850); 1895, *State v. Pugh*, 16 Mont. 343, 40 Pac. 861; 1903, *State v. Tighe*, 37 id. 327, 71 Pac. 3; *Nebraska*: 1893, *Missouri P. R. Co. v. Baier*, 37 Nebr. 236, 341, 55 N. W. 913 (injured person); 1895, *Collins v. State*, 46 Nebr. 37, 64 N. W. 432 (by a person found wounded and unconscious and carried to a hotel; statements made more than two hours after regaining consciousness, excluded); 1896, *Friend v. Burleigh*, 53 id. 674, 74 N. W. 50 (injured person); 1898, *Union P. R. Co. v. Elliott*, 54 id. 299, 74 N. W. 627 (by an engineer and the injured person, just after the injury); 1899, *Sullivan v. State*, 58 id. 796, 79 N. W. 721 (defendant's remarks after an affray); 1903, *Id. v. R. Co.*, — id., — 95 N. W. 1057 (railroad injury); *New Hampshire*: 1903, *Murray v. R. Co.*, — N. H., — 54 Atl. 239; *New Jersey*: 1889, *Estell v. State*, 51 N. J. L. 183, 17 Atl. 116 (apparently refusing to recognize any time allowance at all); 1897, *Trenton P. R. Co. v. Cooper*, 60 id. 219, 221, 37 Atl. 730 (a driver's exclamations when his horse was hurt); *New York*: 1874, *People v. Davis*, 56 N. Y. 102; *North Carolina*: 1843, *State v. Tilly*, 3 Ired. 424, 435 (defendant's declarations after a homicide, as to the mode of its occurrence); 1903, *Bumgardner v. R. Co.*, 132 N. C. 438, 43 S. E. 948 (brakeman, at a railroad accident); *North Dakota*: 1903, *Balding v. Andrews*, — N. D., — 96 N. W. 305; *Ohio*: 1852, *Wetmore v. Mell*, 1 Oh. St. 26; 1871, *Forrest v. State*, 21 id. 641 (accused after a homicide); 1875, *Cleveland C. & C. R. Co. v. Marx*, 26 id. 185, 190; *Oklahoma*: 1902, *Smith v. Terr.*, 11 Okl. 669, 69 Pac. 806 (accused, after a homicide); *Oregon*: C. C. P. 1892, § 686 (like Cal. C. C. P. § 1850); 1903, *State v. McCann*, — Or., — 73 Pac. 137 (assault); *Pennsylvania*: 1867, *Hanover R. Co. v. Coyle*, 55 Pa. 403; 1875, *Elkins v. McKean*, 79 id. 493, 501 (by deceased, after an explosion); 1899, *Pennsylvania R. Co. v. Lyons*, 129 id. 121, 18 Atl. 759; 1898, *Com. v. Van Horn*, 180 id. 143, 41 Atl. 469 (murder); 1903, *Keefer v. Pacific M. L. Ins. Co.*, 201 id. 448, 51 Atl. 366 (declarations 15 or 30 minutes after a fall, excluded); *Mitchell, J. diss.*; *Rhode Island*: 1899, *State v. Murphy*, 16 R. I. 528, 17 Atl. 998 (deceased); 1903, *State v. Epstein*, — id., — 55 Atl. 204 (injured person); *South Carolina*: 1890, *State v. Belche*, 13 S. C. 459, 463; 1894, *State v. Talbert*, 41 id. 536, 530, 19 S. E. 852 (by the deceased, on crawling into a store after being shot); 1896, *State v. Arnold*, 47 id. 9, 34 S. E. 926 (a deceased person, a few minutes after being shot); 1903, *Goss v. Southern R. Co.*, — id., — 45 S. E. 610 (railroad accident); *Tennessee*: 1851, *Denton v. State*, 1 Swan 281; 1852, *Nelson v. State*, 2 id. 237, 260 (statements by an accused, about the blood on him, made shortly after the affray); 1869, *Riggs v. State*, 6 Coldw. 518 (declarations after a homicide); *Texas*: 1870, *Colquitt v. State*, 34 Tex. 550 (statements of the assaulted person); 1868, *Railway v. Crowder*, 70 id. 226, 7 S. W. 709; 1891, *International & G. N. R. Co. v. Anderson*, 82 id. 519, 17 S. W. 1039; 1891, *Texas & P. R. Co. v. Robertson*, ib. 660, 17 S. W. 1041; 1898, *Freeman v. State*, 40 Tex. Cr. 545, 46 S. W. 641 (murdered person); 1903, *San Antonio & A. P. R. Co. v. Gray*, 95 Tex. 424, 67 S. W. 763 (railroad accident); *United States*: 1873, *Newton v. Ins. Co.*, 3 Dill. 154; 1894, *Delaware L. & W. R. Co. v. Ashley*, 14 C. C. A. 368, 67 Fed. 209; 1895, *North American Acc. Ass'n v. Woodson*, 12 id. 392, 64 Fed. 689; 1896, *National Masonic Acc. Ass'n v. Shryock*, 20 id. 3, 73 Fed. 774, 776 (by the deceased, after falling on the sidewalk); 1896, *Gowen v. Bush*, 22 id. 196, 76 Fed. 349 (by one injured in a mine, when taken out, three-quarters of an hour afterwards); 1896, *St. Louis I. M. & S. R. Co. v. Greenthal*, 23 id. 100, 77 Fed. 150 (conductor of a train); 1897, *Cross L. L. Co. v. Joyce*, 28 id. 250, 63 Fed. 989 (injured person's remark, immediately after the injury); 1900, *Travelers' Protective Ass'n v. West*, 42 id. 224, 102 Fed. 226 (statements after an injury); 1902, *Westall v. Osborne*, 53 id. 74, 115 Fed. 252 (fellow-employees on a vessel); 1903, *Mirande v. R. Co.*, 59 id. 562, 124 Fed. 42 (fire); *Utah*: 1896, *People v. Kessler*, 13 Utah 69, 44 Pac. 97 (statements of the deceased, 45 minutes after being shot, excluded; disapproving *Linderberg v. Mining Co.*, 9 id. 163, 33 Pac. 692); 1896, *Wilson v. S. P. Co.*, 13 id. 352, 44 Pac. 1040 (switchman after an accident); *Vermont*: 1825, *Ross v. Bank*, 1 Ark. 43, 52 (issue as to the loss of bank bills said to have been delivered in a package to a steamboat captain; the shipper's declarations, before delivery, as to the contents of the package, admitted as trustworthy); 1896, *State v. Badger*, 69 Vt. 216, 37 Atl. 293 (affray); *Virginia*: 1874, *Com. v. Little*, 25 Gratt. 926; 1863, *Kirby v. Com.*, 77 Va. 689; 1903, *Andrews v. Com.*, 100 id. 801, 40 S. E. 935 (injured person's cries); *Washington*: 1903, *Roberts v. Port Blakeley Mill Co.*, 30 Wash. 25, 70 Pac. 111 (railroad accident); 1903, *State v. Ripley*, 32 id. 182, 73 Pac. 1036 (statements just after regaining consciousness, admitted); *West Virginia*: 1871, *Crookham v. State*, 5 W. Va. 510; 1901, *Sample v. Consol. L. & R. Co.*, 50 id. 472, 40 S. E. 597 (child run over by a car, motorman's declaration, immediately after, while the body was under the car, as to his having seen the child, admitted); *Wisconsin*: 1877, *Felt v. Amidon*, 43 Wis. 470; 1890, *Hooker v. R. Co.*, 76 id. 542, 547, 44 N. W. 1085 (by an engineer, after an accident); 1891, *Hermes v. R. Co.*, 80 id. 590, 50 N. W. 584 (similar); 1893, *Reed v. Madison*, 85 id. 667, 674, 55 N. W. 182 (pointing out the place of an accident); 1894, *Schilling v. Verona*, 88 id. 317,

shoot him, there is perhaps no less reason for trusting the part of his utterance than any other part. Nevertheless, it is possible to argue that such utterances imply to some extent a process of reflection or deliberate reasoning; and practically there is not the same necessity for employing them. It seems clear, on the precedents, that utterances thus relating to some distinct prior circumstance would not be received. But this result is usually reached by invoking the language of "*res gestæ*"; and the authorities are more conveniently considered under that head (*post*, § 1754).

§ 1751. **Knowledge Qualifications.** (a) Upon the ordinary principle applicable to all testimonial evidence (*ante*, § 656), the declarant must appear to have had an opportunity to observe personally the matter of which he speaks. This requirement is in practice usually fulfilled in the case of all declarations otherwise admissible; for they are made by injured persons or others present and concern the circumstances of the injury as observed by them; and thus no occasion arises for calling attention to the requirement. Nevertheless, in an appropriate case, it would without doubt be enforced; for example, if a passenger in a railroad collision should exclaim, "The engineer did not reverse the lever," or "The conductor did not read the train-despatcher's orders."

(b) Any one possessing such qualifications would be a competent speaker. In particular, a bystander's declarations would be admissible. In a few Courts, such declarations are excluded, upon a mistaken application of the Verbal Act doctrine (*post*, § 1755).

§ 1752. (II) **Certain Spurious Limitations borrowed from the Verbal Act Doctrine.** Owing to the mistaken application of the Verbal Act doctrine to cases falling properly under the present Exception, certain limitations have by some Courts been added to the foregoing legitimate ones. These may now be considered. Yet it is to be noted, once for all, that none of these have legitimately any place in the present Exception; they are improperly borrowed, by reason of a failure to perceive that the present Exception, and the Verbal Act doctrine (as already noticed in §§ 1747, 1746) are distinct domains in the law of Evidence. Before examining these limitations, a summary survey of the scope of the Verbal Act doctrine (*post*, §§ 1772-1786) is desirable:

The Verbal Act doctrine presupposes that there is an act, relevant in some way under the issue, which needs for its full purport to be construed together with the words of the actor. For example, in cases of acquisition of title by adverse possession, the mere fact of occupation is in itself colorless and indecisive, and the other conduct and the words accompanying the occupation must be considered. Thus, if Roe has said, during his occupation, "This is my own land, not Doe's; I have a deed to it," the complexion of the act of

60 N. W. 272; 1896, *Steinhofel v. R. Co.*, 92 *id.* 123, 65 N. W. 352 (injured person); 1898, *Christianson v. Furniture Co.*, *ib.* 649, 66 N. W. 699 (person injured in a factory); 1903, *Bliss v. State*, 117 *id.* 596, 94 N. W. 325; 1908, *Hapfer*

v. National D. Co., — *id.* —, 96 N. W. 809 (death in a vat); *Wyoming*: 1899, *Johnson v. State*, 2 Wyo. 494, 56 Pac. 761 (by deceased, after being shot).

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occupation appears to be adverse. The utterance is not offered testimonially, i. e. as an assertion evidencing the existence of the deed asserted, but as a verbal part of the act of occupation, giving definite significance to it irrespective of the assertion's truth. Thus, certain limitations are to be deduced in using such verbal parts of acts: (1) There must be a main or principal act, relevant under the issue, the significance of which needs to be made definite; (2) The words must genuinely elucidate or give character to this act; (3) The words must be by the actor himself, not by another person; and (4) the words must be precisely contemporaneous with the act. Now all four of these limitations, though entirely peculiar to the Verbal Act doctrine, have been by some Courts misapplied more or less extensively to the present Exception for Spontaneous Exclamations. That it is a case of misapplication is clear; for here the concern is with a hearsay or testimonial use of the words, while there no such function is attributed to them. The history of this transfer of language and of ideas is obscure, in so far that no precise case or point of time can be fixed upon as exhibiting it. But it is easily accounted for by the superficial resemblance of the two doctrines in some instances and by their undeveloped forms at the time of the confusion. The practical effect of this misapplication of the above four limitations may now be considered.

§ 1753. Same: (1) There must be a Main or Principal Act. The limitation is sometimes mentioned, for cases under the Exception, that there must be a "main" or "principal act," already relevant in the case to which the declarations relate:

1867, *O'Brien, J., in Gresham v. Manning, Jr.* R. 1 C. L. 125 (action for obscuring lights; guests of the hotel had objected, in leaving, to take the rooms alleged to be darkened, and asserted the darkness as their reason): "The act which they [the declarations] accompany should be one that would be evidence in the cause without any such declarations. . . . The statements and declarations of opinion received in evidence in this case were made by parties not examined upon oath or subject to cross-examination; and though they were accompanied by acts tending to show that those parties really entertained the opinion they so expressed, still their statements would not on that account be exempted from the general rule excluding hearsay evidence, where the acts which they accompanied would not be evidence *per se*."¹

This form of expression is frequent enough. But there seems to be in the United States no ruling turning directly upon the supposed limitation, and it is perhaps not too much to hope that the language hitherto employed with only nominal effect may yet be discarded. Practically the requirement is satisfied in every case where declarations are offered under this Exception, i. e. in cases of affrays and accidents; and where it would be in strictness not satisfied, a loose interpretation of the phrase seems to hold it satisfied. But such a limitation has no place in this Exception. What is required here is merely

¹ In the following case, however, no attention was paid to this rule: 1872, *R. v. Edwards*, 12 Cox Cr. 230 (Quinn, J., admitted remarks of the deceased wife, a week before being killed, and upon taking an axe and a knife to her neighbor, that her husband often threatened her with

them and "she wished to get them out of the way"). It may be added that the declarations in *Gresham v. Manning, supra*, so far as evidencing the mental effect produced upon the guests, were admissible under § 1729, *ante*.

that there shall be some startling occurrence calculated to produce nervous excitement and spontaneous utterance (*ante*, § 1749). It is immaterial whether or not that startling occurrence is itself relevant under the issue; though in the ordinary case it does happen to be relevant.

§ 1754. *Same*: (2) *Declaration must elucidate the Act*. In the genuine Verbal Act doctrine, the admissibility of the actor's utterances is based on the assumption that the main act itself was colorless, and required to be made more definite in one respect or another; the test is whether the act was "equivocal," and whether the utterance tends to remove this equivocality and give definite effect. Now the language of this limitation is also found borrowed for the present Exception. But in this spurious use of it there is found no requirement that the act itself shall have been equivocal, but merely the requirement that the declaration shall tend to "illustrate" it, to "elucidate" it, to "throw light" upon it, to "explain" it, or to "characterize" or "give character to" it.¹ In other words, merely the general phrases from the Verbal Act doctrine are used without the fundamental reason for them. Practically, this language amounts usually to little or nothing as a limitation; declarations which do not in some way or other "elucidate" or "explain" the occurrence are naturally not likely to be offered, and it is therefore easy enough to find that they do furnish this required elucidation.²

There is, however, one aspect in which the limitation becomes a real one; for the matter to be "elucidated" is, by hypothesis, the *occurrence* or *act which has led to the utterance*, and not some distinctly separate and prior matter. Suppose, for example, an injured passenger in a railway collision, thinking of his family's condition, exclaims, "I hope that my insurance-premium, which I mailed yesterday, has reached the company," referring to premium-money alleged by the insurance-company not to have been received. Such an utterance would by the present spurious limitation clearly be inadmissible. On principle, however, it would seem also inadmissible under the legitimate principles of the Exception, as already noted (*ante*, § 1749, par. c). Apparently the Courts are disposed, on one theory or another, to enforce this restriction:

1805, *Ellenborough*, L. C. J., in *Assen v. Kinnaird*, 6 East 193 (admitting declarations of a wife upon elopement, charging the husband with misconduct causing it): "[I should not admit it] if it were a collateral declaration of some matter which happened at another time."

1873, *Agassiz v. Tramway Co.*, 21 W. R. 199 (after an accident the conductor mentioned that the driver "has been off the line five or six times to-day"); *Kelly*, C. B.: "The conductor's remark had no relation to the accident in question, but referred to the conduct of the driver at another time or times"; *Bramwell*, B.: "It tends to criminate the driver on account of conduct displayed on a perfectly different occasion."

¹ The instances are innumerable; illustrations are found in *Chicago W. D. R. Co. v. Becker*, 129 Ill. 545, 21 N. E. 534; *Baker v. Gausin*, 71 Ind. 319; *Castner v. Slicker*, 33 N. J. L. 97; *State v. Balcher*, 13 N. C. 463.

² For illustrations of this mode of using such language, see *Scagg v. State*, *Mitchum v. State*, quoted *ante*, §§ 1747, 1749.

³ Nevertheless, here too may be found extremely liberal interpretation of this limitation:

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§ 1755. Same: (3) Declaration must be by the Actor himself; Bystander's utterances. Under the genuine Verbal Act doctrine, the object being to give definite legal effect to a certain act, by means of ascertaining its total purport as intended by the actor (*post*, § 1775), it is obvious that the conduct and the verbal utterances must be by the same person. For example, in ascertaining adverse possession, it is only the occupant's utterances that can give significance to the quality of his occupation as adverse. But, under the present Exception, that nervous excitement which renders an utterance admissible may exist equally for a mere bystander as well as for the injured or injuring person, and therefore the utterances of either, concerning what they observed, are equally admissible:

1862, *Pollock, C. B.*, in *Milne v. Leisler*, 7 H. & N. 786, 796: "Courts, so far as they can, are disposed to receive in evidence whatever can throw any light on the matter in issue and advance the search after truth. No doubt, for that reason, in the case of an exclamation by any one in a crowd, when an accident occurs, and the conduct of a particular person is in question, it may be asked whether some one did not call out 'shame!'; for it is part of the *res gestæ*."

Fortunately, there has been little inclination towards the error of fixing upon the present Exception the inappropriate limitation of the Verbal Act doctrine. In a few courts, the declarations of a mere bystander have been excluded.¹ But, in the greater number, no such discrimination is made.²—

1862, *Lander v. People*, 104 Ill. 255 (admitting evidence of exclamations recognising an alleged violator on the day after; "The spontaneous exclamation, 'There goes the man,' with the response, 'Yes, there he goes,' is highly characteristic of the fact of the recognition"); 1902, *Jack v. Mutual R. F. Life Ass'n*, 51 C. C. A. 36, 115 Fed. 49 (statements by the deceased insured, that "J. had his life insured, that he had hired L. to kill him," admitted; quoted *ante*, § 1750).
¹ Note that in Louisiana these later cases deviate from the original orthodox rule as found in the cases in the next note: 1887, *R. v. Gibson*, L. R. 18 Q. B. D. 537, 541 (assault; immediately after the stone was thrown, "a lady going past, pointing to the prisoner's door, said, 'The person who threw the stone went in there'"; excluded); 1884, *Flynn v. State*, 43 Ark. 293; 1892, *Stroud v. Com.*, — Ky. —, 19 S. W. 976; 1887, *State v. Oliver*, 39 La. 470, 472, 2 So. 194 (citing only the *Moore* case, *infra*, note 2, and that erroneously); 1890, *State v. Riley*, 42 id. 995, 8 So. 469 (citing the *Oliver* case only); 1896, *State v. Ramsey*, 48 id. 1407, 20 So. 904 (expressing no opinion as to actual participants or parties present; but here excluding the statement of a mere "observer," who expressed an opinion only, "R. shot M. and shot him down for nothing"); 1898, *State v. Bellard*, 50 id. 594, 23 So. 504 (murder; exclamations of bystanders, excluded); 1894, *Butler v. R. Co.*, 143 N. Y. 417, 422, 38 N. E. 454 (brakeman's remark after an injury, not admitted; "declarations of third persons not in their nature a part of the fact," inadmissible); 1897, *Felska v. R. Co.*, 152 id. 339, 46 N. E. 613 (remark by one of a crowd assembling after an accident); 1898, *Ganaway*

v. Dramatic Ass'n, 17 Utah 37, 53 Pac. 830 (battery).

§ 1862, *Milne v. Leisler*, 7 H. & N. 786, 796 (quoted *supra*); 1872, *Mobile & M. R. Co. v. Ashcraft*, 48 Ala. 31; 1896, *Appleton v. State*, 61 Ark. 590, 33 S. W. 1066 (admitting exclamations by the defendant's wife during the affray); 1893, *Metropolitan R. Co. v. Collins*, 1 D. C. App. 383, 386 (bystander, at a railroad accident); 1902, *Louisville and N. R. Co. v. Carothers*, — Ky. —, 65 S. W. 833, 66 S. W. 385 (the fact of outcries by other passengers in a collision, but not the details of them, held admissible; the opinion in *Louisville & N. R. Co. v. Simpson*, 111 id. 754, 64 S. W. 733, qualified); 1881, *State v. Horton*, 33 La. An. 289; 1886, *State v. Moore*, 38 id. 66; 1886, *State v. Corcoran*, id. 949; 1896, *State v. Desroches*, 48 id. 428, 19 So. 250 (utterance of a bystander during a robbery, identifying the defendant, admitted); 1897, *Hartnett v. McMahan*, 168 Mass. 3, 46 N. E. 392 (remarks of a bystander during an affray, telling the plaintiff to let the defendant alone, admitted as "a kind of blue-light without which the picture would be incomplete"); 1878, *Hitchcock v. Burgett*, 38 Mich. 505; 1883, *State v. Walker*, 78 Mo. 386; 1886, *State v. Gabriel*, 88 id. 631, 639; 1893, *State v. Duncan*, 116 id. 288, 292, 310, 22 S. W. 699 (by a bystander to an arresting officer, "There is the man that did it," admitted); 1894, *State v. Kaiser*, 124 id. 651, 28 S. W. 182; 1896, *State v. Biggerstaff*, 17 Mont. 510, 43 Pac. 709 (deceased and others exclaimed as the defendant approached, "There he comes with a gun"; admitted); 1848, *Castner v. Sliker*, 33 N. J. L. 97; 1901, *State v. McCourry*, 128 N. C. 594, 38 S. E. 888; 1903, *Seawell v. R. Co.*,

assuming, of course (*ante*, § 1750), that the bystander's declarations relate only to that which has come under his observation.

§ 1756. *Same*: (4) Declaration must be Contemporaneous. Under the genuine Verbal Act doctrine, it is necessary that the actor's utterance accompany the act, and thus be precisely contemporaneous with it (*post*, § 1776); otherwise it does not make a part of the act itself, but is merely an ordinary testimonial assertion of a past fact. Thus, if after the occupation of land has ceased, the former occupant declares "The land was mine, for I had a deed of it," this utterance, not having been made during occupation, leaves the act of occupation as equivocal and indefinite as before, and has therefore no significance as a verbal act; its only possible use could be as an ordinary hearsay assertion, and as such it is inadmissible. But under the present Exception an utterance is, by hypothesis, offered as an assertion to evidence the fact asserted (for example, that a car-brake was set or not set), and the only condition is that it shall have been made spontaneously, i. e. as the natural effusion of a state of excitement (*ante*, § 1749). Now this state of excitement may well continue to exist after the exciting fact has ended. The declaration, therefore, may be admissible even though subsequent to the occurrence, provided it is near enough in time to allow the assumption that the exciting influence continued.

It is therefore an error to apply to the present Exception the Verbal Act rule that the utterance must be precisely contemporaneous with the act or occurrence. There was in the beginning a tendency to commit this error. But at the present day this error seems to have been almost everywhere repudiated. This is sufficiently shown in the quotations already set forth (*ante*, § 1749, par. b).¹ It remains here to note a few persisting traces of this early and spurious limitation to strict contemporaneity.

(a) First, in the quotations already set forth (*ante*, § 1749), a constant effort is noticeable to answer the argument that the utterance must be exactly contemporaneous. This is merely the result of the earlier prevalence of the spurious doctrine, which had to be met and disposed of.

(b) Secondly, the early Massachusetts cases of *Com. v. McPike*² and *Com. v. Hackett*,³ which were in this country the landmarks of the

— *Id.* —; 45 S. E. 850 (mob at a railroad station); 1897, *Coll v. Transit Co.*, 180 Pa. 618, 37 Atl. 63 (admitting declarations of a bystander, who had run up to help the plaintiff); 1884, *Missouri P. R. Co. v. Collier*, 63 Tex. 330; 1893, *Reed v. Madison*, 85 Wis. 667, 673.

¹ The authorities there cited show the general state of the law to-day.

Distinguish also the application of the phrase *res gestæ* to the declarations of an agent or conspirator, during the agency or conspiracy; e. g.: 1903, *Koenig v. Union D. R. Co.*, 173 Mo. 698, 73 S. W. 637; 1903, *Balding v. Andrews*, — N. D. —, 96 N. W. 306; 1902, *Lambert v. La Conner T. & T. Co.*, 30 Wash. 346, 70 Pac. 960; and cases cited *ante*, §§ 1078, 1079.

² 1849, 3 Cush. 184.

³ 1861, 3 All. 136 (Bigelow, C. J., treats the

words "I'm stabbed — I'm gone — Dan Hackett has stabbed me," as "not an abstract or narrative statement of a past occurrence, . . . but an exclamation or statement contemporaneous with the main transaction, forming a natural and material part of it, and competent as being original evidence in the nature of *res gestæ*"); so also the following: 1857, *Lane v. Bryant*, 9 Gray 245; 1871, *Brownell v. R. Co.*, 47 Mo. 289; 1874, *Rockwell v. Taylor*, 41 Conn. 59. The hybrid effect of the two principles blended is seen in the language of the Georgia Code (§ 5179) on this subject, which admits declarations accompanying an act (the Verbal Act doctrine) or so nearly connected therewith in time as to be free from all suspicion of device or afterthought (the present Spontaneous Declarations exception).

borrowed doctrine, are still occasionally quoted or cited, even in opinions accepting the modern and correct doctrine; and these cases are still capable of misleading. It is to be noted that they are unsound and obsolete. They and their followers are distinguishable by the fact that they borrow almost literally the language of the Verbal Act doctrine (*post*, §§ 1770, 1776).

(c) Thirdly, in the Courts where this borrowed doctrine of strict contemporaneity still appears, the inclination is to stigmatize an excluded declaration as "narrative;" this term being used as meaning an assertion of a past fact.⁴ This test for exclusion is of course unsound, because practically all the utterances offered under the present Exception are "narrative," in the sense of an assertion of a past fact. The statements, constantly admitted, of the circumstances of a homicidal quarrel or of a railroad collision, are commonly of facts occurring prior in time to the utterance; and wherever such are admitted, it must be in spite of their being "narrative." Moreover, a "narrative" may in strictness be of events occurring at the moment of speaking (as, "I am bleeding"), and its application to past events alone is a misuse of words. The term "narrative" serves merely to mislead, and should be discarded.

(d) Fourthly, the confusion between the Verbal Act doctrine of strict contemporaneity and the liberal time-allowance of the present Exception (*ante*, § 1749, par. b) left its mark, in England, in the shape of a long and somewhat acrimonious controversy over the ruling in *R. v. Bedingfield*.⁵ This ruling was as follows:

1879, *R. v. Bedingfield*, 14 Cox Cr. 341: "The prisoner had relations with the deceased, . . . and had distinctly threatened to kill her by cutting her throat. She carried on the business of a laundress, with two women as assistants, the prisoner living a little distance from her. . . . They were together in a room [in her house] some time. He went out, and she was found by one of the assistants lying senseless on the floor, her head resting on a foot-stool. He went to a spirit-shop and bought some spirits, which he took to the house, and went again into the room where she was, both the assistants being at that time in the yard. In a minute or two the deceased came suddenly out of the house towards the women with her throat cut, and on meeting one of them she said something, pointing backwards towards the house. In a few minutes she was dead. In the course of the opening speech on the part of the prosecution it was proposed to state what she said. It was objected to on the part of the prisoner that it was not admissible, and Cockburn, C. J., said: He had carefully considered the question and was clear that it could not be admitted. . . . Could it be admissible, having been made in the absence of the prisoner, as part of the *res gestæ*? But it is not so admissible, for it was not part of anything done, or something said while something was being done, but something said after something done. It was not as if, while being in the room, and while the act was being done, she had said something which was heard. . . . When the witness was called, . . . she was

narrative as if a greater length of time had elapsed").

⁵ The controversy will be found abbreviated by Professor Thayer in his article on *Bedingfield's Case*, in 14 *Amer. L. Rev.* 817, continued in 15 *id.* 1. The controversial articles appeared in full in pamphlets by the eminent Chief Justice and by the learned Mr. (later Justice) Wm. Pitt Taylor, author of *Taylor on Evidence*.

⁴ See *Com. v. Hackett*, quoted *supra*; *Williamson v. R. Co.*, 144 *Mass.* 150, 10 *N. E.* 790; *McKinnon v. Norcross*, 143 *id.* 538, 22 *N. E.* 183. In the following case this logic was carried to extremes: 1880, *Jones v. State*, 71 *Ind.* 83 (Warden, J.: "The deceased is supposed to have said a few minutes after the shooting, 'Prince Jones shot me.' This is as clearly

first asked as to the circumstances, and stated that the deceased came out of the house bleeding very much at the throat, and seeming very much frightened, and then said something, and died in ten minutes. It was then proposed to prove what she said, but Cockburn, C. J., said it was not admissible. Anything, he said, uttered by the deceased at the time the act was being done would be admissible, as for instance if she had been heard to say something, as 'Don't, Harry.' But here it was something stated by her after it was all over, whatever it was, and after the act was completed." *

§ 1757. (III) *Certain Spurious Enlargements, borrowed from the Res Gestæ phrase; all Declarations which are "Part of the Transaction" are admissible.* The true scope and application (so far as there can be any) of the *res gestæ* phrase is later examined in detail (§§ 1770, 1795). It is proper here, however, to endeavor to ascertain what influence it has had practically in shaping the rules for the present Exception. The phrase *res gestæ*, so far as it has a legitimate use, implies that when we are disputing about a particular occurrence, evidence relating to any part of the occurrence is admissible. This is a mere truism; it is the converse of the fundamental proposition that evidence can be offered only of facts in issue or relevant to the issue (*ante*, § 2). Thus nothing is added in the way either of limitation or of enlightenment. We are told merely that evidence may be offered on a certain point because that point is part of the matter we are disputing about.

(1) *Origin of the phrase.* How then did the phrase come to be applied in the present class of cases? First, it had already been much used in expressing the Verbal Act doctrine (*post*, § 1772); the declaration accompanying and making definite an equivocal act was seen to be not really testimonial in effect and therefore not subject to the Hearsay rule, and this distinction was expressed by saying that it was admissible as "a part of the *res gestæ*," i.e. a part of the act in question, — as it undoubtedly was. Next, this phrase, "a part of the *res gestæ*," in itself conveniently and enticingly obscure, was given an independent and self-sufficient force, and all sorts of spoken words, not genuinely verbal parts of the act, were admitted as "part of the *res gestæ*" or details of the affair. Thus the phrase "part of the *res gestæ*" came to be the

* Of this ruling it may be said: (1) From the Verbal Act point of view, the declaration did not accompany the fatal deed, was not contemporaneous, and therefore was rightly excluded; from the same point of view, moreover, a declaration by one person about the deed of another could not possibly be received; (2) as involving a question under the present Exception for Spontaneous Exclamations, the ruling in *Bedingfield's Case* is plainly erroneous, and would almost certainly not be followed in this country; the facts of the case, in respect to the controlling influence of the woman's situation and the recency of the shock, make it one of the strongest in judicial annals. The arguments of the ensuing controversy between Chief Justice Cockburn and Mr. Taylor dealt indiscriminately with the Verbal Act precedents, as well as with others more germane; but, without attempting to examine the merits of these arguments, it is sufficient to say that the

general practice in England up to that time — the practice which did not lead to rulings published in the law-reports — seems to have been as liberal as that which has since obtained in this country. In the *Palmer poisoning trial* (*Annual Register*, 1856, p. 425), some of the most damaging evidence, admitted without question by any one, is supportable only on the liberal principle of Spontaneous Declarations; for example, when the deceased was asked, after recovering from one of his attacks of convulsions: "What do you think was the cause of that, Mr. Cook?" he replied, "The pills that Palmer gave me at half-past ten o'clock." It may be thought that the case of *R. v. Bedingfield* will not be observed in England as a precedent (1902, *Phipsen. Evidence*, 3d ed., London, p. 49: "In *R. v. Bedingfield*, it has generally been thought that Cockburn, C. J., applied the rule too strictly").

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shibboleth for admitting anything in the shape of words which could not be brought under one of the standard exceptions to the Hearsay rule. This loose usage was materially assisted, if not originally propagated, by a paragraph of Professor Greenleaf's (as well as by his indiscriminate use of *res gestæ* for sundry kinds of hearsay evidence):

1842, Professor *Simon Greenleaf*, *Evidence*, § 108: "There are other declarations which are admitted as original evidence, being distinguished from hearsay by their connection with the principal fact under investigation. The affairs of men consist of a complication of circumstances so intimately interwoven as to be hardly separable from each other. Each owes its birth to some preceding circumstance, and in its turn becomes the prolific parent of others; and each, during its existence, has its inseparable attributes and its kindred facts, materially affecting its character, and essential to be known in order to a right understanding of its nature. These surrounding circumstances, constituting parts of the *res gestæ*, may always be shown to the jury along with the principal fact, and their admissibility is determined by the judge according to the degree of their relation to that fact, and in the exercise of his sound discretion; it being extremely difficult, if not impossible, to bring this class of cases within the limits of a more particular description."

This passage, and the structure of decisions resting on it, have no basis of principle. They commit the fallacy of confusing the details of an occurrence with human assertions about those details. No doubt, in genuine cases of Verbal Acts — such as claims of ownership by one in possession, — where the words are not taken assertively or testimonially, they may be properly described as verbal parts of the act, of the "principal fact," of the *res gestæ*. But where (for example) in a marine collision the pilot exclaims, "The helm is hard a-starboard, and the steering-gear does not work," or in a railway accident a passenger exclaims, "The cars are off the track and the coupling is broken," we are using these utterances in a purely assertive and testimonial manner. The fact (if a fact) that the cars were off the track, or that the helm was hard a-starboard, is one of the external items of the tortious act, — a "part of the *res gestæ*," if the phrase pleases us. But the statement of the pilot or the passenger that this was what happened is just as plainly a human assertion and testimony as if it were said on the stand, and is therefore clear hearsay, and must be brought under some definite Hearsay Exception before it can be received. Calling an assertion "a part of the transaction" cannot make it any the less hearsay testimony, when it is used assertively and testimonially, no matter how "inseparable from" or "intimately interwoven with" the affair it may be:

1888, *Parnell Commission's Proceedings*, 11th, 18th, 17th, 18th days, *Times' Rep.* pt. 3, pp. 154, 170, pt. 4, p. 3, pt. 5, p. 103, 179; the Irish Land League and its leaders being charged with a conspiracy to encourage outrage and agrarian violence, and the general state of the country as to disquiet and apprehension being a part of the issue, it was conceded that the fact of repeated complaints being made to the police and to employers by tenants and others was provable; in this process, testimony was proposed of employers as to reports made to them by herdsmen and others of injuries to cattle, etc., the reports being offered in verbal detail; to this Sir Charles Russell objected, for Mr. Parnell, as hearsay; the Attorney-General, in reply: "I would respectfully submit that my learned friend has forgotten the rule that the *res gestæ* may be proved, and if in the course of the

proof of the facts it is shown that servants have made inquiries with regard to them and reported the result, these reports form part of the *res gestæ* for the purpose of ascertaining under what circumstances the occurrences took place." Sir C. Russell: "As regards the *res gestæ*, what is the *res*? That certain cattle were injured. How can it be part of the *res gestæ* that a man who was present, and saw the injury, afterwards made a statement to a third person of what he had seen? To say that this is part of the *res gestæ* is an entire misapprehension of the rule." . . . President Hannon: "The fact that a particular report had been made by a person in discharge of his duty was admissible in evidence, — not that the contents of that report should be taken as evidence of the facts to which it related. If the matter rested there, without there being any other evidence of the facts except that contained in the report, that could not be regarded as evidence of the facts by the Court. . . . There is a broad distinction between a thing being merely admissible in evidence and its being taken as proof of the facts alleged."¹

It is important to observe this vital distinction between the testimonial and the non-testimonial use of language, for its neglect has been the root of the fallacy and the source of the whole confusion. To admit hearsay testimony simply because it was uttered at the time something else was going on is to introduce an arbitrary and unreasoned test, and to remove all limits of principle; and this has been the result.

(2) *Enlargement of the rule.* The effect of the employment of this phrase, "part of the *res gestæ*," "part of the transaction," on the present Exception for Spontaneous Exclamations has been the opposite of that of the Verbal Act doctrine just noticed (*ante*, §§ 1752-1756). It has enlarged rather than limited the rule, though the effect has been none the less confusing. Instead of narrow restrictions, excluding that which ought to be admitted, we have here broad and almost meaningless phrases, admitting testimonial utterances pell-mell, and making havoc with principle. What specific effects may be detected in the present Exception?

First, there are a few cases, typified by *State v. Wagner* and *U. S. v. King* (quoted *ante*, § 1747), in which the Spontaneous Exclamations exception is found practically unadulterated by this *res gestæ* phrasing.

Secondly, there are many cases, typically *Hill's Case* and *Merkle v. Bennington* (quoted *ante*, 1749), in which the *res gestæ* language appears, but as a mere flavoring. The words are used ("part of the transaction," and the like), but they have no force and no practical significance, and the genuine principle of Spontaneous Exclamations is the essential doctrine.²

Thirdly, there are numerous cases in which the *res gestæ* phrasing is given a more than nominal force. There is an effort to work it out in application, and, while the Spontaneous Exclamations principle actually controls and the result is the same as in the preceding class, it appears in the form of a development of the *res gestæ* doctrine. There is said to be a "causal connection" between the accident or the affray and the declaration; the latter is an "emanation" of the former, or "springs from" it; there are "connecting

¹ See another good illustration in *Milne v. Leisler*, quoted *post*, § 1768.

² Another example: 1855, *Scates, C. J.*, in *Galena & C. U. R. Co. v. Fay*, 16 Ill. 568 ("The conduct and exclamations of passengers in the

cars were not improperly admitted. . . . Such general conduct, with the exclamations involuntarily thrown out by appearances of imminent peril, may be regarded as a part of the *res gestæ* for this purpose").

circumstances"; and thus the declaration is construed as "a part of the transaction."³

Fourthly, there are cases, mainly earlier ones, in which the two doctrines are applied side by side, the *res gestæ* language expressing the main principle, and the Spontaneous Exclamations doctrine (in the form of a pointing out that the statements are apparently sincere and natural) appearing subordinated, rather as corroborating and justifying the other than as an independent or self-sufficient principle.⁴

Fifthly, there are many cases in which the *res gestæ* phraseology is applied in its pure and arbitrary form; i. e. there is no attempt to discover a circumstantial guarantee of sincerity (whether there was time to concoct a story, whether the excitement of the moment dominated), and the decision turns merely upon the question whether the declaration can be regarded as "a part of the transaction," or "a part of the *res gestæ*." This sort of case is common. Probably in recent times, however, its numbers are greatly in the minority. It may be said to have two varieties, one representing a tendency to stricter construction, the other a tendency to liberal and looser construction. Of the former, *R. v. Beddingfield* (quoted *supra*) is typical; in a mixed phraseology of Verbal Act and *res gestæ* language, the Court argue out the arbitrary and insoluble question whether the declaration is "a part of the transaction" and "contemporaneous with it," adopting the strictest view of what constitutes the "transaction" and of what may be said to be "contemporaneous." Of the latter sort are dozens of American cases in which the Courts stretch the idea of a "transaction" to the most liberal and unjustifiable extent.⁵

³ No doubt these phrases also, to some extent, serve to express (unconsciously on the part of the judges) the same idea described in § 1745, *par. 3, ante*, — the idea that the declaration must have been caused by some exciting influence startling enough to produce it and make it natural. The thought that the declaration must "spring from" or be "an emanation of" the occasion is the same in practical effect as the thought that there must be an occasion startling enough to cause them naturally; but the former and correct notion is veiled in the borrowed and meaningless phraseology of *res gestæ*. Clear examples of this attitude are found in *Little Rock R. Co. v. Leverett* and *Louisville N. A. & C. R. Co. v. Buck*, quoted *ante*, § 1747. The following passage illustrates a more elusive form: 1875, *Brickell, C. J.*, in *Weasley v. State*, 52 Ala. 187: "The exclamation of the deceased, 'Jake, what are you doing here?' was coincident in point of time with the main fact, — the violence producing his death. . . . It sprang from the very character of the facts, — was natural, voluntary, spontaneous, and was not the result of design."

⁴ The following passages illustrate this, *Pool v. Bridges* being often cited: 1826, *Parsons, C. J.*, in *Pool v. Bridges*, 4 Pick. 378 (declarations were offered of an absconded debtor, to show the ownership of goods; the declarations being made

while the debtor was sorting the goods of different creditors; they were held admissible "as a part of the transaction"; "It gives some importance to such declarations that they are made in the ordinary course of transactions, without reference to any controversy or any counter claim of property, and also that the declarations are against the interest of the party. Now the declarations of *Schofield* have these circumstantial supports"); 1883, *Mulkey, J.*, in *Lander v. People*, 104 Ill. 256 (the fact of recognition of a violator on the day after was admitted, with an accompanying declaration: "The spontaneous exclamation, 'There goes the man,' with the response, 'Yea, there he goes,' is highly characteristic of the fact of their recognition. The true test . . . is, the act, declaration, or exclamation must be so intimately interwoven or connected with the principal fact or event which it characterizes as to be regarded as a part of the transaction itself, and also to clearly negative any premeditation or purpose to manufacture testimony").

⁵ The following passages will serve as an instance: 1890, *Avery, J.*, in *Boyer v. Teague*, 106 N. C. 623, 11 S. E. 665: ("The declarations of a voter as to his qualifications generally, if made at the time of voting, are competent as a part of the *res gestæ*"); 1883, *Niblack, J.*, in *Dyer v. Dyer*, 87 Ind. 20 ("As regards the execution of the will,

The important line to be drawn is between the first four and the fifth sort. In the first four classes, we are dealing with a genuine Hearsay Exception of Spontaneous Exclamations, more or less tainted by spurious phraseology and ideas from the *res gestæ* doctrine. But in the fifth sort we are not dealing with any doctrine of Spontaneous Exclamations at all; we have simply an unmeaning and useless form of words—possibly not a Hearsay Exception, certainly not anything definite—usurping the place of the principle truly applicable.

Sixthly, it must be added, a few rulings show a hopeless conglomeration of ideas, invoking the *res gestæ* phrase for various kinds of utterances not akin either to Spontaneous Exclamations or to Verbal Acts, and even applying it to evidence not consisting in verbal utterances; this and other uses of the phrase, not affecting cases coming under the present Exception, are elsewhere analysed (*post*, §§ 1796, 1797).

B. SPECIAL FORMS OF THE EXCEPTION.

§ 1760. *Woman's Complaint of Rape*; (1) *History of its Use in England*. The use in evidence of a woman's complaint of rape, either as a simple fact or in its detailed statements, to corroborate her testimony on the stand or to rebut the inference from her supposed failure to complain, has already been treated in dealing with the Corroboration of Witnesses (*ante*, §§ 1134–1140). It has, however, by some Courts been believed that such utterances, including their details of statement, could be received on the footing of genuine hearsay assertions, apparently under the present Exception. The practical difference would be that the limitations necessary in using such evidence merely in testimonial corroboration¹ would not apply, and the evidence could be more freely received. It remains, therefore, to ascertain how far such a complaint is receivable as a direct Exception to the Hearsay rule. If it is so receivable, its proper place would seem to be under the present head.

In England, the evidential use of those outcries and explanations came down to us in the 1700s as a traditional relic of the old law of hue and cry. Not only in such cases, but in all charges of violence, the accuser must show, to sustain his charge, that he made hue and cry, alarming the neighborhood, freshly after the occurrence.² The application of this principle to rape cases is seen in the following passage:

1258 (7), *H. de Bracton*, f. 147: "When therefore a virgin has been so deflowered and overpowered, against the peace of the lord the king, forthwith and while the act is fresh she ought to repair with hue and cry to the neighboring vills and there display to honest men the injury done to her, the blood and her dress stained with blood, and the tearing of her dress; and so she ought to go to the provost of the hundred and to the serjeant of

... everything which occurred the day before, in connection with the execution of the first will, was under the circumstances part of the *res gestæ* ").

It must be added that it is possible in this view to use previous decisions to some extent as precedents determining what shall be taken as

"a part of the transaction"; while, as already pointed out (*ante*, § 1749 b) under the pure Spontaneous Exclamations doctrine each case would rest upon its own circumstances.

¹ As noted *ante*, §§ 1134–1140.

² Pollock and Maitland, *History of English Law*, II, 576.

the lord the king and to the countess and to the viscount and make her appeal at the first county court."

This practice seems not to have been seriously questioned until towards the end of the 1700s. Then, in *Brasier's Case*, the use of these complaints, not merely as a formal prerequisite nor yet as corroborative, but assertively as evidence of the details related, was perceived; and it was seen to be necessary to use them, if at all, as a Hearsay exception. If the female was an infant and incompetent to testify, there would be some reason for doing this, on the principle of necessity (*ante*, § 1421). But the judges in this case finally decided that the infant would have been competent, and therefore that the extrajudicial evidence could not be used:

1770, *Brasier's Case*, *East's Pleas of the Crown*, I, 448; a child of five years, after the rape, made statements to the mother on reaching home; and on the next day identified the prisoner; "All the judges, except Gould and Willen, J., held that this evidence of the information of the child ought not to have been received, as she herself was not heard on oath. . . . Gould and Willen, J., held that, it being recently after the fact, so that it excluded a possibility of practicing on her, it was a part of the fact or transaction itself and therefore admissible; and Buller, J., held 'he same, if by law the child could not be examined on oath. But as to what happened the next day, Gould, J., thought it not admissible, by reason of the danger of her being influenced in the interval. But on the 29th April all the judges being assembled, unanimously agreed that a child of any age, if she were capable of distinguishing between good and evil, might be examined upon oath, and consequently that evidence of what she had said ought not to have been received."

This laid the foundation for a subsequent course of rulings in England by which it was settled that the *details of the woman's statement* could not be received, i. e. that the statement could not be used testimonially and as a hearsay exception. The settlement was reached only through a series of *Nisi Prius* rulings, and the matter may be said to have remained long in doubt. The doubt apparently came chiefly from a failure to appreciate clearly why the Courts should be willing to receive the fact of the complaint, i. e. corroboratively (*ante*, § 1134), but should reject the details stated; and the judges seemed singularly unwilling or unable to elucidate the reason (as it has been elucidated in later times in this country). But the rule of thumb was settled,⁴ though not without some misgivings, as the following language of Baron Parke shows:

1830, *Parke, B.*, in *R. v. Walker*, 2 Moo. & Rob. 212: "The sense of the thing certainly is that the jury should in the first instance know the nature of the complaint made by the prosecutrix and all that she then said. But, for reasons which I never could understand, the usage has obtained that the prosecutrix's counsel should only inquire generally whether a complaint was made by the prosecutrix of the prisoner's conduct towards her, leaving the counsel of the latter to bring before the jury the particulars of that complaint by cross-examination."

³ See also *id.* § 121; *Hale, Pleas of the Crown*, I, 634, II, 279, 284.

⁴ 1817, *R. v. Clarke*, 2 Stark. 242; 1839, *R. v. Walker*, 2 Moo. & Rob. 212; 1840, *R. v. Megson*, 9 C. & P. 430; 1841, *R. v. Alexander*, 3

Craw. & D. 126, *same*; 1842, *R. v. Osborne*, 1 Car. & M. 622; 1846, *R. v. Nicholas*, 2 C. & K. 246; 1860, *R. v. Eyre*, 2 F. & F. 579; 1877, *R. v. Wood*, 14 Cox Cr. 46; 1896, *R. v. Lillyman*, 2 Q. B. 167, 170.

§ 1761. *Same: American doctrine.* In the United States, the general consensus of decision has accepted this result, and does not receive the complaints as testimony under a hearsay exception; although practically the effect of this exclusion has been undermined in some instances by a liberal employment of the complaint-details as corroborative of the woman's testimony.¹

But by a few Courts the complaints have been received testimonially, on the case in chief; to prove the facts asserted, and thus as an exception to the Hearsay rule. There is some use of the *res gestæ* phraseology; but the clear idea of the Spontaneous Exclamations exception seems to have dominated the result:

1876, *Park, C. J.*, in *State v. Kinney*, 44 Conn. 186: "Her natural impulses would prompt her to tell all the details of the transaction. Why, on the same principle, ought not her statement of the details to be evidence?"

1890, *Robinson, J.*, in *McMurrin v. Rigby*, 80 Ia. 325, 45 N. W. 877 (citing *Ins. Co. v. Moeley, supra*, § 1747): "Moreover, we think the declaration was admissible as a part of the *res gestæ*. It was made but a few moments after the alleged ravishment had been accomplished, and while declarant was under the influence of the mental excitement which it produced. It was made within such time after the act to which it referred and under such circumstances as to preclude the element of premeditation."²

This heterodox result seems in policy a satisfactory one. If there is any situation in which the Spontaneous Exclamations principle finds typical application, it is to be found in the circumstances evoking these outcries and complaints. Why not discard the indirect method of securing their use and freely accept them under the present hearsay exception? There is, however, an apparent flaw in this argument, which seems to nullify it. For example, in a railroad collision, we have the exciting causes known by other evidence; and under other Exceptions to the Hearsay rule—for example, regular entries, we first prove the regularity of the entries by other evidence. Now in the present case, if we accept the complaint testimonially, do we not admit it in advance as evidence of these very circumstances which should first be proved to make it admissible?

The solution seems to be as follows: If there is no other evidence of an assault, or where there is evidence merely of intercourse but not neces-

¹ The cases are collected *ante*, §§ 1134-1140, under that rule.

² *Accord: Ala.*: 1871, *Lacy v. State*, 45 Ala. 80 (conceding the application of the theory, where "the accounts were so connected in point of time with the injuries inflicted on the victim as to constitute a part of the *res gestæ*"); 1884, *Griffin v. State*, 76 Id. 29, 31 (hinting at the same); *Conn.*: 1876, *State v. Kinney*, 44 Conn. 186 (quoted *supra*); *D. C.*: 1893, *Snowden v. U. S.*, 2 D. C. App. 89 (the girl's statements on the same day, when found by her grandmother, admitted on the *res gestæ* theory); *Ge.*: 1875, *McMuth v. State*, 55 Ga. 303, 307; *Ia.*: 1890, *McMurrin v. Rigby*, 80 Ia. 325, 45 N. W. 877 (quoted *supra*); *Mick.*: 1874, *People v. Lynch*, 29 Mich. 379; 1884, *People v. Brown*, 53 Id. 531, 534, 19 N. W. 172 (suggesting *obiter*

the application of the present principle); 1886, *People v. Gage*, 63 Id. 271, 273, 28 N. W. 835 (allowing it exceptionally; but confusing this principle with that of § 1134, *ante*, and therefore admitting a complaint made long after, because the silence has been accounted for); 1888, *People v. Glover*, 71 Id. 303, 306, 38 N. W. 874 (approving the preceding); 1893, *People v. Hicks*, 98 Id. 88, 89, 56 N. W. 1102 (treating the Gage case as going to the extreme, and refusing to apply its principle here under the circumstances); 1895, *People v. Duncan*, 104 Id. 460, 62 N. W. 586 (same); *R. I.*: 1893, *State v. Fitzsimon*, 18 R. I. 236, 241, 37 Atl. 446 ("what the prosecutrix said," admitted).

For the cases in other jurisdictions, excluding the details of the complaint, and thus repudiating the Exception, see *ante*, §§ 1134-1140.

early against the woman's consent, we are in truth committing the error of accepting her statement as itself evidence of the very facts which should first be otherwise shown in order to make the declarations spontaneous. But if there is already other evidence of a violent assault, and the statement is useful as disclosing the identity of the assailant or the further circumstances of the assault, we are not reasoning in a circle, and there is no objection to admitting the statement.

§ 1762. **Owner's Complaint after Robbery or Larceny.** The complaint of an owner or possessor of goods, made speedily after an alleged robbery or larceny, is by some Courts regarded as receivable upon the present theory. It may, however, also be treated as a prior consistent statement, receivable to repel the suggestion of recent contrivance, upon a general principle applicable to all witnesses.¹

§ 1763. **Charge made in Travail by Mother in Bastardy Case.** The charge uttered by the mother of a bastard in her travail, naming the defendant as the father, is by long tradition regarded as admissible, in some of the older States. Such a situation would seem to present genuinely and completely the circumstances which render a spontaneous exclamation admissible under the present principle (*supra*, § 1749). Nevertheless, the Courts have seemed to treat the subject wholly from the point of view of consistent statements corroborating a witness.¹

§ 1764. **Statements as to Private Boundary.** The Massachusetts doctrine admitting declarations about private boundary, by the owner in possession, made while on the land and pointing them out (*ante*, § 1567), is in the judicial language applied with some invocation of the *res gestæ* phraseology. The circumstantial guarantee of its trustworthiness (*ante*, § 1422) resembles to some extent that required by the principle of the present Exception. But there is a vital distinction, namely, that under that doctrine the declarant must be shown to be deceased, — a requirement never made for the present Exception. The Massachusetts doctrine seems therefore to be widely separated from the present Exception.

§ 1765. **"Self-Serving" Statements by an Accused Person.** There is no principle of evidence especially excluding "self-serving" statements by an accused or by any one else. The Hearsay rule excludes *all* extrajudicial assertions; and therefore the only inquiry need be whether such assertions are covered by some Exception to that rule, or whether utterances amenable to it are evidential in any indirect way apart from their assertive value. There are one or two instances in which such a use of an accused's utterances partakes somewhat of the reasons for the present exception.¹

¹ The cases have been placed under that head, *ante*, § 1142.

² The cases have been placed *ante*, § 1141.

³ The various uses are analyzed, with cross-references, *ante*, § 1732.

**SUB-TITLE III: HEARSAY RULE NOT APPLICABLE
(VERBAL ACTS, RES GESTÆ, ETC.).**

CHAPTER LVIII

§ 1768. General Principle; Nature of the Hearsay Rule and *Res Gestæ*.

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§ 1770. Utterances of Contract, Marriage-Promise, Notice, Insurance "Proofs," Defamation, etc.

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§ 1790. Utterances as indicating Circumstantially the Speaker's Own State of Mind.

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§ 1792. Witness' Statements used in Impeachment.

4. The "*Res Gestæ*" Phrase.

§ 1795. History and Meaning of the Phrase.

§ 1796. Doctrines of Evidence to which the Phrase is applied.

§ 1797. Other Applications of the Phrase; Agent's and Conspirator's Admissions.

§ 1768. General Principle; Nature of the Hearsay Rule and *Res Gestæ*. The true nature of the Hearsay rule is nowhere better illustrated and emphasized than in those cases which fall without the scope of its prohibition. The essence of the Hearsay rule is the distinction between the testimonial (or assertive) use of human utterances and their non-testimonial use. The theory of the Hearsay rule (*ante*, § 1361) is that, when a human utterance is offered as evidence of the truth of the fact asserted in it, the credit of the assertor becomes the basis of our inference, and therefore the assertion can be received only when made upon the stand and subject to the test of cross-examination. If, therefore, an extrajudicial utterance is offered, not as an assertion to evidence the matter asserted, but without reference to the truth of the matter asserted, the Hearsay rule does not apply. The utterance is then merely not obnoxious to that rule. It may or may not be received, according as it has any relevancy in the case; but if it is not received, this is in no way

due to the Hearsay rule. For example, in a prosecution against a defaulting embezzler Doe, it is desired to show that, after leaving his employment, he concealed himself and passed under a false name; here his statements that his name was Roe are not offered to evidence that his name was in truth Roe; on the contrary, it will be shown that his name was Doe; and the statement is not used as hearsay. Or, on an issue of insanity, it is offered to show that the party said, "I am the Emperor of Africa"; here the utterance is not offered as evidence that he was in truth the Emperor, but, on the contrary, as circumstantially indicating his mental aberration. Again, in an action upon a warranty of a horse, it is offered to show that the defendant at the time of the bargain asserted that the horse was only four years old; here the plaintiff will immediately proceed to prove that the horse is nevertheless twelve years old; he has not offered the defendant's statement with any view to using it as evidence of its truth, but with just the contrary purpose. Or (to take an illustration of Lord Abinger's¹) suppose, on an issue of mitigation of damages in an action for battery, the defendant offers to prove that the plaintiff, just before the assault, provoked the defendant by asserting that he was a liar; here the defendant by no means desires the jury to take this utterance as evidence of the truth of the fact asserted; he would be much disappointed if they should accept it in that aspect; his purpose is merely by this utterance to evidence the anger which he naturally felt upon hearing it.

The prohibition of the Hearsay rule, then, *does not apply to all words or utterances merely as such*. If this fundamental principle is clearly realized, its application is a comparatively simple matter. The Hearsay rule excludes extrajudicial utterances only when offered for a special purpose, namely, as assertions to evidence the truth of the matter asserted.

1808, *Washington, J.*, in *Blight v. Ashley*, 1 Pet. C. C. 15, 21: "There are certainly some cases where the declarations or letters of an agent are proper evidence; and others where he must be examined and his letters are not evidence, if he be alive. . . . If the object is to prove a fact, the agent is the proper person to prove it, and his evidence [in court] is better than his declarations. . . . But if the object is to prove what were the motives or inducements for a man to contract with the agent, what were the statements made by him, his letters or conversations are proper evidence, — not of the facts stated in them, but that such statements and inducements were made. . . . Upon this principle, many letters from Peter Blight to the defendant were read, not as evidence of a single fact mentioned in them, but that they communicated certain information to the defendants; [the truth of] which, however, if important to be established, it would have been incumbent on the plaintiff to establish by other evidence."

1823, *Mr. Gaston* (afterwards Judge), in *Cherry v. Slade*, 2 Hawks 400, 404, arguing *pro querente* against declarations of residence: "It is sometimes said that there is an exception when words are the *res gestæ* or part of the *res gestæ*. But this seems not to be accurate. The words are then received, not as evidence of the *truth* of what was declared, but because the speaking of the words is the fact, or part of the fact, to be investigated. There may be a controversy whether A. B. at a certain time spoke certain words, and those who heard him are of course received to prove the fact. The words spoken con-

¹ In *Fraser v. Berkeley*, 7 C. & P. 685.

currently with an act done are often a part of the act, and give it a precise and peculiar character, and therefore must be testified, — not to show that the words spoken are true, but to show that they were in fact spoken. For example: Did A commit an assault on B? What he said when he laid his hands on B will show whether it was an angry or friendly act. Did the agent of defendant make a certain representation in the course of a bargain? If so, that representation was an ingredient in the bargain."

1858, *Eastman, J.*, in *State v. Wentworth*, 37 N. H. 217: "It does not follow that, because the words in question are those of a third person, they are necessarily hearsay. On the contrary, it happens in many cases that the very fact in controversy is whether such things were spoken, and not whether they are true."

1858, *Erle, J.*, in *Shilling v. Ins. Co.*, 1 F. & F. 116, 120 (admitting statements of T., on an issue whether the insurance of J. was in reality J.'s act for his own benefit or T.'s act in J.'s name): "Everything is admissible which was done by T.; and words are often acts. The question is not open to the objection against hearsay. It is not hearsay. It is a question as to an act done. One asks another to attest a document or to advance a sum of money; those are not merely words, but acts."

1862, *Milne v. Leisler*, 7 H. & N. 786, 796; the defendant having applied for and purchased goods from the plaintiff, and referred the plaintiff to a third person, the plaintiff, to show on whose credit the goods were sold, was allowed to put in a letter of inquiry to the party referred to, stating the sale to the defendant; *Pollock, C. B.*: "If a man on leaving his counting-house said to his servant 'I have just sold so and so,' that would not be evidence of the sale. Here, however, . . . this letter, being part of the transaction of a reference made in pursuance of the direction of the party purchasing, was admissible"; *Wilde, B.*: "If the evidence were admissible on that ground, [namely, as a trustworthy assertion,] everything a man said on the day when he made a bargain, and still more, everything he did, would be admissible. It seems to me that would be very dangerous ground. . . . The real ground is that this was an inquiry made by the direction of the plaintiff in pursuance of an authority from Atkin [the defendant's agent], and therefore was part of the *res gesta*."

1892, *Harrison, J.*, in *Smith v. Whittier*, 95 Cal. 279, 293, 30 Pac. 529 (admitting the directions given to an elevator-owner for the proper mode of using it, as showing his knowledge): "Whether in fact such information was or was not correct is immaterial for the purpose of determining its admissibility; and hence it is no objection to its admission that it was not given under the sanction of an oath or that the opposite party had no opportunity of cross-examining the informant. The truth of the information is a distinct issue, and must be established by competent evidence; but, upon the theory that the information was correct, the plaintiff in the present instance had the right to show that the defendant had received such information. . . . Such evidence is admitted for the purpose of establishing merely the utterance of the words, and not their truth."

1900, *Doster, C. J.*, in *State Bank v. Hutchinson*, 62 Kan. 9, 61 Pac. 443 (action on a homestead mortgage; defence, duress of the wife by threats to prosecute the husband, communicated by the latter to the former): "A daughter of the Hutchinsons testified that she overheard the conversation between her father and mother, in which the former disclosed to the latter the threats which Morris had made. Counsel for plaintiff in error also contend against the admissibility of this testimony, upon the ground that it was hearsay in character. . . . Neither of these contentions is sound. There were three substantive litigated questions in the case — First, were threats made? And, if so, secondly, were they communicated to Mrs. Hutchinson? And, if so, thirdly, did they produce the claimed effect? As to the second of these as well as the first, the meritorious question was, had a verbal act been done? That is, had a communication been made? That act, if done, was not incidental or collateral in nature. It was one of the three principal litigated matters in the case, and, being such, the performance of the act was provable by the testimony of any one who, if competent, was a witness to it. The question was not whether Hutchinson's communication to his wife was truthful, but it was whether the

communication had been in fact made. The rule is general that, where a substantive litigated fact is the speech of a person, one who heard the utterance is admitted to testify to it, and the testimony so received is not hearsay."

What here remains, then, is to distinguish and mark off the various classes of utterances which legally pass the gauntlet of the Hearsay rule because it does not apply to them. The classes of utterances thus exempt may be grouped under three heads:

1. Utterances material to the case as a *part of the issue*;
2. Utterances accompanying an ambiguous or equivocal act, itself material, and serving to complete the act and give it definite legal significance; *i. e. verbal parts of an act*;
3. Utterances used *circumstantially*, as giving rise to indirect inferences, but not as assertions to prove the matter asserted.

1. Utterances constituting a Part of the Issue.

§ 1770. Utterances of Contract, Marriage-Promise, Notice, Insurance "Proofs," Defamation, etc. Where the *utterance of specific words* is itself a *part of the details of the issue under the substantive law and the pleadings*, their utterance may be proved without violation of the Hearsay rule, because they are not offered to evidence the truth of the matter that may be asserted therein.

(1) In issues of *contract* in general, this use of utterances is of course common. In particular:

(a) The *making of the contract* necessarily involves utterances by conversation, letter, telegram, and the like; and these are admissible under the issue.¹

(b) The consent which in Scotland and in the United States generally suffices to constitute the *marriage-contract* is thus to be learned from the utterances of the cohabiting persons. Utterances *during the time of cohabitation* would be receivable, so far as the present doctrine is concerned, only when they are in effect acts of consent forming a contract; yet in fact they are further admissible, though not *per se* acts of consent, being construable as conduct ("habit") evidencing circumstantially the fact of past marriage consent (*ante*, § 268, *post*, § 2083). Utterances made *after cohabitation ended* would ordinarily be inadmissible, because they cannot be construed as circumstantial conduct of marriage, nor yet as acts of consent,

¹ The following will serve as illustrations: 1837, *Stoudenmeier v. Wilson*, 29 Ala. 564; 1890, *Nave v. Tucker*, 70 Ind. 17 (the action involved a contract employing the defendant as attorney, and the plaintiff called a witness to the conversation in which the plaintiff engaged the defendant; Worden, J.: "The evidence of the witness did not go to prove a mere declaration or statement of the plaintiff, but a fact, viz. that the plaintiff employed the witness to bring the action mentioned and authorized him to employ assistance"); 1896, *Fredin v.*

Richards, 66 Minn. 46, 68 N. W. 401 (defendant's ownership of notes in issue; correspondence between the defendant and a third person, the payee, admitted, as constituting the transaction determining the defendant's title); 1897, *Long-Bell L. Co. v. Thomas*, 1 I. T. 225, 40 S. W. 773. So of a *representation* alleged to be *false*: 1847, *Howard v. Ins. Co.*, 4 Den. 508 (the affidavit of an insured, read by the insurer as a foundation for showing its falsity and thus proving the right to forfeit the policy).

and their only service therefore can be as hearsay assertions of past marriage.² Nevertheless, such statements, if the person making them is a party-opponent, would be receivable as admissions (*ante*, § 1055, *post*, § 2086), or, if the person is deceased, as assertions of family history admissible under that Exception (*ante*, § 1500). Moreover, a letter by one to the other, expressly consenting to be husband or wife, would apparently be receivable under the present principle as an act of consent, even though written before or after cohabitation.

(c) A *promise to marry* is to be ascertained similarly from utterances of consent. Nevertheless, to render them admissible under the present principle, it would seem (a) that they can in any case be regarded only as unilateral acts of consent, and thus are mere hearsay assertions so far as they state a *promise by the other party*; (b) that therefore they must be made *before negotiations or courtship broken off*; and (c) that they must be made to the promisor himself, or, *if to a third person*, that they can be received only on the theory that they state a present mental condition (*ante*, § 1714), which itself is evidence (*ante*, §§ 242, 267, 272) of a past act of consent expressed to the promisor; upon this principle most Courts seem to proceed. The precedents are in an uncertain condition.³

² 1898, *Moore v. Heineke*, 119 Ala. 627, 24 So. 374 (declarations after separation, not admissible).

³ *Eng.*: 1706, *Hutton v. Mansell*, 6 Mod. 172 (Holt, C. J.: "If there be an express promise by the man, and that it appear the woman countenanced it, and by her actions at the time behaved herself so as if she agreed to the matter, tho' there be no actual promise, yet that shall be sufficient evidence of a promise on her side"); *Cal.*: 1873, *Reed v. Clark*, 47 Cal. 194, 196 (plaintiff's public announcement of the engagement, admissible as an element of damages); 1901, *Lehrandt v. Sorg*, 133 id. 571, 65 Pac. 1098 (woman's declarations to third persons, as to a promise, inadmissible; distinguishing *Reed v. Clark*); *Ill.*: 1872, *Walmley v. Robinson*, 63 Ill. 41 (plaintiff's preparations, the family's reception, etc., not admissible to show the promise); *Ind.*: 1830, *King v. Kersey*, 2 Ind. 402 (woman's declarations of the contract to a sister, during the alleged engagement, admissible as "explanatory of her conduct and intention in receiving those visits," and "as tending to show a promise on her part, not upon his"); 1874, *Cates v. McKinney*, 48 id. 562, 566 (the woman's "declarations while receiving his visits," admissible as "evidence of a promise on her part," but not upon the defendant's; declarations to other persons in the absence of the defendant, not admissible); 1878, *Graham v. Martin*, 64 id. 567, 573 (plaintiff's preparations, not admitted to show the plaintiff's assent); 1889, *Jones v. Layman*, 123 id. 569, 573, 34 N. E. 363 (declarations two days after estrangement, excluded; "such evidence is only allowed to prove her consent to the alleged marriage contract, and must relate to [i. e. be made at] a time prior to the alleged estrangement, or to the time when

first informed that her anticipated husband will not marry her"); 1895, *Wilson v. Smelser*, 13 Ind. App. 31, 41 N. E. 76 (declarations to parents, etc., of the fact of contract, during the alleged engagement, excluded); *Ia.*: 1859, *Thurston v. Cavenor*, 8 Ia. 155, 161 ("where the defendant's promise is once shown," then the plaintiff's demeanor of approval, to "establish the promise on her part," is admissible, "and this whether the defendant is present or not at the time of her conduct"); *Ky.*: 1855, *Barnham v. Cornwell*, 16 B. Monr. 284 (statements of plaintiff to a third person as to her willingness to marry defendant, excluded, apparently because no sufficient evidence of defendant's offer was given); *Mass.*: 1860, *Russell v. Cowles*, 15 Gray 582 (plaintiff's conduct in buying goods for the wedding and for housekeeping, held admissible, after evidence of a "contract to marry," as "an act done by the plaintiff toward the execution of the contract"; yet, since the plaintiff's assent to the offer must on general principles of contract "have been communicated to the party by whom the offer was made," the plaintiff's conduct "in the absence of the defendant, and not in any way connected with him," was held not to be admissible as evidence "that the plaintiff assented"; "the cases from Pennsylvania, Ohio, and New Jersey" are said to have gone too far through ignoring this distinction; yet the learned judge here himself ignores the principle upon which the plaintiff's subsequent assenting state of mind could be used for inferring a prior act of assent to the defendant himself; see *ante*, §§ 267, 272); *Mich.*: 1886, *McPherson v. Ryan*, 59 Mich. 33, 37 (plaintiff's announcement of her engagement, and preparations for marriage, excluded, following *Russell v. Cowles*, *Mass.*; good opinion by *Morse, J.*); *N. J.*: 1797, *Pe-*

(d) The *performance of a contract* may involve an utterance, written or oral, which therefore becomes receivable under the present principle;⁴ in particular, the documents known as "*proofs of loss*," commonly required in insurance-contracts as a condition precedent to the accruing of the insurer's liability, are receivable, because the fact that they were duly furnished must be shown.⁵

(2) In *defamation*, the utterance charged as a libel or a slander is admissible, naturally, under the present principle. Whether a repetition of it is relevant as evidence of malice involves additional considerations (*ante*, § 403); as does also the question whether like rumors or reports against the plaintiff are admissible to mitigate damages (*ante*, § 74).

(3) The fact of *sending a notice* is often essential as a part of the issue, — for example, a notice to an indorser, a notice of rescission, a notice of rejection of defective goods, a notice of injury by municipal negligence. In such cases the terms of the notice are receivable under the present principle, without regard to the truth of any assertion that may be contained in it.⁶

(4) *Reputation* may be in issue,⁷ either in a civil case or as part of a crim-

pinger v. Low, 1 Halst. 384 (declarations of the plaintiff to third persons, as to her willingness to marry the defendant, admitted, on the theory that it is difficult "to make out by direct evidence the assent of the woman," and that expressions to other persons of her willingness to marry him "would be *prima facie* evidence that she had assented to his proposals"); *Oh.*: 1852, *Wetmore v. Mell*, 1 Oh. St. 26 (plaintiff's declarations to her sister, in defendant's absence, admitted as declarations of her state of mind as to acceptance of the defendant's promise); *Or.*: 1894, *Osmun v. Winters*, 25 Or. 260, 35 Pac. 250 (plaintiff's announcement of her engagement, made to relatives the day after, excluded: good opinion by Bean, J.); *Pa.*: 1850, *M'Night v. Blescker*, 13 Pa. 331, 334 (plaintiff's request to her brother to take her to buy wedding clothes and to a sister to be bridesmaid, admitted, on the theory that "her assent, however proved, is by her own act and her own declarations," "solely for the purpose of showing the readiness of the plaintiff to comply with her engagement"); 1855, *Leckey v. Blosser*, 24 id. 401, 406 (plaintiff's declarations to third persons that she was engaged to be married to defendant, admitted).

⁴ 1896, *Ross v. Brusie*, 70 Cal. 446, 11 Pac. 760 (an entry in an account-book, used simply to show that a credit had been given as agreed); 1896, *Ellis v. Thompson*, 1 App. Div. 606, 37 N. Y. Suppl. 466 (breach of a contract to produce a play and "to play it continuously if there was a reasonable success attending its production"; as a part of the issue of "reasonable success" i. e. favorable treatment by the public, the audiences' applause or silence, the critics' comment, and the like, were allowed to be shown).

⁵ The theory of this is generally conceded, but Courts differ as to allowing the documents to be read or made known to the jury; consid-

ering the purposes of entrapment to which these documents are often put by the insurer, there is no need of judicial scruple in excluding them: 1890, *Travelers' Ins. Co. v. Sheppard*, 85 Ga. 751, 761, 765, 12 S. E. 18 (admissible only as a fact of performance, and not admissible to prove bad faith in the insurer in not paying; good faith not being in issue); 1893, *Railway P. & F. C. Ass. v. Robinson*, 147 Ill. 138, 157, 35 N. E. 168 (doctor's certificate among proofs of death, admitted not to prove the facts asserted therein, but as an act of compliance with rules as to proof of death); 1811, *Thurston v. Murray*, 3 Binn. 326, 328 (excluded; "the distinction of being evidence for one purpose and not for another is too subtle for the jury"; yet compare the citations *ante*, § 13, which dispose of this reasoning); 1863, *Lycoming Co. M. I. Co. v. Schreffler*, 44 Pa. 269, 273 (similar); 1865, *Kittanning Ins. Co. v. O'Neill*, 110 id. 548, 553, 1 Atl. 592; 1899, *Cummins v. Ins. Co.*, 192 id. 359, 43 Atl. 1016; 1898, *Foster v. F. & C. Co.*, 99 Wis. 447, 75 N. W. 69 (letters and affidavits admitted to show that sufficient proofs of death had been furnished to an insurer, but not as testimony to the fact of death).

For the use of "proofs of loss" as admissions by the beneficiary, see *ante*, § 1073.

For the use of a coroner's verdict in "proofs of loss," as an official statement admissible under the Hearsay Exception, see *ante*, § 1671.

⁶ 1830, *Whitehead v. Scott*, 1 Moo. & Rob. 2 (a letter sent to notify the defendant to produce a document); 1896, *Com. v. Robinson*, 165 Mass. 426, 43 N. E. 121 (the statement of a policeman to the arrested person, naming the charge against him, as required by statute).

For notice, as evidence that knowledge was received by the person notified, see *post*, § 1789.

⁷ For reputation as evidence of knowledge or belief by a person acquainted with the reputation, see *post*, § 1789.

inal offence (*ante*, §§ 70-79). But it is also receivable evidentially, under a special Exception to the Hearsay rule (*ante*, § 1580).

(5) In sundry other instances, not presenting any misleading or complicated features, a variety of issues may involve the fact and terms of an utterance as a part of the case, and the present principle declares all such utterances not obnoxious to the Hearsay rule, so long as they are not sought to be used as assertions evidencing the matter asserted.⁵

2. Utterances constituting a Verbal Part of an Act.

§ 1772. **General Principle.** A second kind of situation in which utterances are not offered testimonially arises when the utterance *accompanies conduct to which it is desired to attach some legal effect*. The conduct or act has intrinsically no definite significance, or only an ambiguous one, and its whole legal purport or tenor is to be more precisely ascertained by considering the words accompanying it. The utterance thus enters merely as a verbal part of the act, or, in the common phrase, a "verbal act."¹ Perhaps the most part of our acts to which legal effect is to be attached in creating, transferring, modifying, or extinguishing rights, consists in part of words. There are some legal acts which consist solely of words, — as, a notice to an indorser.² There are others in which it consists solely of wordless conduct, — as, where title is acquired by the confusion of goods. But, in the vast majority of instances, whether of contract, property, or torts, words uttered may play a part, along with conduct, in determining the total significance of any legal act. For example, the consideration for a promise of a reward may be furnished in part by a search for the criminal and in part by communicating his identity to the promisor; the delivery of goods sold may consist in part of a manual transfer and in part of words stating its purpose; the revocation of a will may consist in part of a tearing of it, in part of the words then used; the eviction from premises may consist in part of the corporal expulsion, in part of the words stating the reason for it; the making of an arrest may consist in part of a manual touching, in part of utterances then made. In these, and countless other instances, the uttered words are a verbal part of the act. Without the words, the act as a whole

¹ *E.g.*: 1840, Philadelphia & T. R. Co. v. Simpson, 14 Pet. 462 (Story, J.): "The conversations and declarations of a patentee merely affirming that at some former period he invented that particular machine, might well be objected to. But his conversations and declarations . . . are properly to be deemed an assertion of his right at that time . . . and legitimate evidence that the invention was then known to and claimed by him, and thus its origin may be fixed at least as early as that period."

In *bankruptcy*, the answer "not at home," given by a servant or other person to a creditor inquiring at the house of the debtor, may under the substantive law constitute a refusal or denial to his creditors and thus amount to an act of bankruptcy. But whether the bankrupt's

statements *after absconding* may be used involves the Verbal Act doctrine, treated *post*, § 1783.

² Perhaps first used by Mr. J. Clifford, in the opinion quoted *post*, § 1775.

Of course the conduct which the words accompany is not properly "the act." The total of words plus other conduct is "the act" to which the law affixes or refuses to affix legal consequences. The words are as much a part of "the act" as is the delivery or occupation or other conduct. Nevertheless, in common usage, the word "act" is usually appropriated to the other conduct which the words accompany. This loose usage may be followed, provided one keeps in mind the true nature of the situation.

⁵ These form the subject of § 1770, *ante*.

may be incomplete; and, until the words are taken into consideration, the desired significance cannot be attributed to the wordless conduct.

Thus the words are used in no sense testimonially, i. e. as assertions to evidence the truth of a fact asserted in them. On the one hand, therefore, the Hearsay rule interposes no objection to the use of such utterances, because they are not offered as assertions (*ante*, § 1768). On the other hand, so far as they may contain assertions, these are not to be used or argued about testimonially, nor believed by the jury; for this would be to use them in violation of the Hearsay rule. In short, the utterances enter *irrespective of the truth of any assertion they may contain*; and they neither profit nor suffer by virtue thereof. For example, when an act of adverse possession is to be proved as the foundation of title, and the adverseness consists in a claim of ownership, the occupier's statement, "This land is mine; for I have a deed from Doe," is admissible as giving his occupation the significance of an adverse claim, but not as evidence that he has, as asserted, a deed from Doe.

These considerations point out the four simple limitations which attend this use of utterances as verbal acts; namely: (1) The conduct to be characterized by the words must be *independently material to the issue*; (2) the conduct must be *equivocal*; (3) the words must merely aid in *giving legal significance to the conduct*; (4) the words must *accompany the conduct*. These limitations may now be considered in general, and afterwards, the chief specific classes of cases calling for their application.

§ 1773. (1) Conduct to be characterized by the Words must be *Independently Material to the Case*. As a necessary deduction from the above principle, the conduct that is to be made definite must be *independently material and provable under the issues*, either as a fact directly in issue or as incidentally or evidentially relevant to the issue. The use of the words is wholly subsidiary and appurtenant to the use of the conduct. The former without the latter have no place in the case, and could only serve as a hearsay assertion in direct violation of the rule:

1837, *Colman, J.*, in *Wright v. Tatham*, 7 A. & E. 361: "Where an act done is evidence *per se*, a declaration accompanying that act may well be evidence, if it reflects light upon or qualifies the act. But I am not aware of any case where the act done is in its own nature irrelevant to the issue and where the declaration *per se* is inadmissible, in which it has been held that the union of the two has rendered them admissible."

1847, *Parker, C. J.*, in *Patten v. Ferguson*, 18 N. H. 528: "Here it is admitted that neither the fact nor the declaration, standing alone, are evidence; and when put together it is the declaration which is significant, and not the fact. The fact was of no importance standing alone; and the declaration, standing alone, was incompetent. When they are united, the unimportant fact is [improperly desired to be] used as a vehicle to introduce the important declaration."¹

¹ *Accord*: 1838, *Coleridge, J.*, in *Wright v. Tatham*, 5 Cl. & F. 689; 1834, *Finney v. Jones*, 4 Conn. 543, 550, 30 Atl. 763 (on an issue of payment, to prove that the defendant had the means of payment, her declarations, while showing a place in her cellar, that she had money

concealed there, excluded, because "the act of Mrs. J., irrespective of the accompanying statement, was not in itself admissible"); 1847, *Patten v. Ferguson*, 18 N. H. 528 (declaration, by one burning wood on disputed land, that he was doing it for P., not admitted; because the

This limitation is a distinguishing mark for utterances used under this Verbal Act doctrine, as differing from utterances used assertively under the Exception for Spontaneous Exclamations; the improper use of the limitation in that Exception has been already noted (*ante*, § 1753).

§ 1774. (2) *Conduct must be Equivocal.* The utterance serves merely to assist in completing and giving legal significance to the conduct. Hence it is not needed when the conduct is already complete and definite in itself. The conduct must be *equivocal* or incomplete as a legal act, before the utterances can be admissible:

1806, Mr. W. D. Evans, Notes to Pothier, II, 342: "Speech is a mode of action; . . . and I conceive that the distinction between the cases in which the immediate action of speech furnishes a material indication with respect to the object of the inquiry, and those in which it is a mere act of narration, will in most cases furnish the proper principle. . . . Many acts are in themselves of an equivocal nature, and the effect of them depends upon the intention or disposition from which they proceed, which is in general best determined by the expressions accompanying them. Wherever, therefore, the demeanor of a person at a given time becomes the object of inquiry, his expressions, as constituting a part of that demeanor, and as indicating his present intent and disposition, cannot properly be rejected in evidence as irrelevant. . . . This proposition [that a declaration accompanied by an act is admissible] is only correct where the expressions are demonstrative of the nature of the act itself."

1864, Hall, J., in *Shuck v. Vanderveer*, 4 Ia. 364 (action for suing out an attachment without cause; the defendant's declarations, made when applying for the attachment, were not admitted for him): "How can he by his words give character to his acts, the propriety or impropriety of which depends upon facts that have transpired and exist independent of anything that he can say or do? . . . The defendant could say nothing that could give it character or qualify in his favor the true force of facts."

1870, Manning, J., in *Cooper v. State*, 63 A.A. 30: "What a person says that is explanatory of an equivocal or ambiguous act which he is then doing or situation which he is then occupying — as that of a person in possession of property — may be proved as *res gestæ*, a part of the thing then going on, to elucidate and define the character of such equivocal act or situation. Words so connected with and illustrative of it are considered as appertaining to the act or situation, and, like expression on the human face, as indicating character, — the character of the act or situation which they are related to and are blended with. This is the central idea of the doctrine respecting what is called *res gestæ*."

1884, Elliott, C. J., in *Creighton v. Hoppis*, 99 Ind. 309, 370: "Possession by the person who has executed an instrument purporting on its face to be an absolute conveyance of title is in its nature equivocal; for it may be that he was in possession as tenant or as mortgagor or by the mere sufferance of the grantee. As the possession may be equivocal, it becomes material to show its true character; and, in order to show this, what was done by the person in possession may be proved. The character of the possession may be determined in part from the acts of the person in possession."

1895, Searls, C., in *Lewis v. Burns*, 106 Cal. 381, 39 Pac. 778: "'The declarations of a party while engaged in the performance of an act, and illustrating the object and intent

wood-burning was itself not in issue or material to be illustrated). The following ruling is therefore erroneous: 1888, Card v. Foot, 56 Conn. 369, 371, 15 Atl. 371 (action for the price of bonds said to have been given to the defendant to sell for the plaintiff; in proving that the plaintiff had deposited a package with one L. for safe keeping, the plaintiff's declaration at the

time that "they were my bonds" was admitted, "not as a declaration purporting to be truthful, but as a natural act in the circumstances"; this is unsound; the deposit with L. was immaterial; her statement was a mere hearsay assertion that she had bonds, and directly introduced her credit).

of its performance, are admissible in evidence.' It would be more accurate to say that, where the act may have been prompted by one of two or more motives or objects, the declarations of the actor made at the time, and illustrative of the motive or object, are admissible in evidence."

1889, *Holmes, C. J.*, in *Com. v. Chace*, 174 Mass. 245, 250, 54 N. E. 551 (murder of R.; the fact that one Mrs. O'B. during a quarrel with her husband took two bullets from a closet and said, "The third one killed R.," was excluded): "The act of taking out the bullets needed no explanation; it is not the law that any and all conversation which happens to be going on at the time of an act can be proved if the act can be proved."

In the great majority of accepted instances of the principle (as illustrated in the ensuing sections), this limitation is satisfied, and thus no special mention of it is called for in the judicial opinions. But if it is not attended to, the utterance comes in with the practical effect of a hearsay assertion, and the present principle becomes merely a pretext for using hearsay. Such a misuse of the principle is often found in the rulings; and this result is to be attributed to certain judicial expressions, often quoted in this connection, which omit to notice the present limitation:

1837, 1838, *Colman, J.*, in *Wright v. Tatham*, 7 A. & E. 351: "When an act done is evidence *per se*, a declaration accompanying that act may well be evidence if it reflects light upon or qualifies that act"; *Coleridge, J.*, in *s. c.*, 5 Cl. & F. 670, 693: "The act itself being admissible, whatever accompanies it and serves to explain its character is relevant and admissible also."

1851, *Fletcher, J.*, in *Lund v. Tyngsborough*, 9 Cush. 42: "If a declaration has its force by itself, as an abstract statement, detached from any particular fact in question, depending for its effect on the credit of the person making it, it is not admissible in evidence. . . . But when the act of a party may be given in evidence, his declarations made at the time, and calculated to elucidate and explain the character and quality of the act, and so connected with it as to constitute one transaction, and so as to derive credit from the act itself, are admissible in evidence. . . . Such a declaration derives credit and importance as forming a part of the transaction itself."¹

In these passages the requirement that the act shall be an equivocal one, or shall in some respect be incomplete and indefinite in legal significance, is ignored; though it was probably not intended to be denied by the authors of these opinions. The result has been a frequent looseness in the application of the principle. This tendency may be noted here and there in the rulings of every Court; it is sufficient to observe that it is unsound. It has in one way, to be sure, led to good results; for it has served gradually to allow the building up of the Exception for Spontaneous Exclamations (*ante*, § 1745); the absence of any such limitation for that Exception is a marked feature of distinction for utterances thereunder admissible.

§ 1775. (3) **Words must merely Aid in Completing the Conduct.** It follows also, as a necessary deduction, that the utterances must be such as serve the assumed purpose, namely, give *definite significance to the equivocal or indefinite conduct*, by adding a missing part. They must be such as do merely this, and not more. The common phraseology, however, is here so loose and

¹ This case has furnished the language for in the next section, may be called leading cases many later opinions. This and *Enos v. Tuttle*, on the subject.

inclusive that utterances may be held admissible which do not merely complete and define the very act by serving as a part of it, but make assertions about its preceding facts, and are in effect given credit as hearsay testimony of any other matter that may happen to be connected with the act in time and place. This phraseology goes back to the broad language of certain earlier opinions, chiefly that in *Lund v. Tyngsborough*,¹ and the following:

1830, *Hosmer, C. J.*, in *Essex v. Tuttle*, 3 Conn. 280 (referring to declarations as to the purpose of giving a note): "[They were] well calculated to unfold the nature and quality of the facts they were intended to explain, and so to harmonize with them as obviously to constitute one transaction."²

1869, *Clifford, J.*, in *Insurance Co. v. Mosley*, 8 Wall. 411: "Declarations of a party to a transaction, though he was not under oath, if they were made at the time any act was done which is material as evidence in any issue before the court, and if they were made to explain the act or to unfold its nature and quality, and were of a character to have that effect, are treated, in the law of evidence, as verbal acts, and, as such, are not hearsay, but may be introduced, with the principal act which they accompany and to which they relate, as original evidence, because they are regarded as a part of the principal act, and their introduction in evidence is deemed necessary to define that act and unfold its true nature and quality."

These phrases about "unfolding," "elucidating," and "explaining" the nature of the act, while not inaccurate in themselves, have served, in the hands of many later judges, as an open-sesame for utterances used purely in an assertive or testimonial way. "Elucidation" and "explanation," taken literally, are broad enough to include mere narrations of preceding matters; and such has been the service to which these classical terms have frequently been put. It must be noted that this application of them is unsound on principle. "It is not the law that any and all conversation which happens to be going on at the time of an act can be proved if the act can be proved."³ In the following colloquy the correct application of the principle is illustrated:

1875, *Tilton v. Beecher*, Abbott's Rep., I, 800; with reference to the plaintiff's having made inconsistent statements or admissions of the falsity of his claim, by stifling the matter when first publicly investigated, it was desired to show the true significance of his conduct in handing to his agent, Mr. Moulton, a statement to be given by the agent to the investigating committee; Mr. Fullerton, for the plaintiff, to the witness, Mr. Moulton: "What did he say in regard to it at the time he gave it to you? [Objected to.] . . . If I hand your Honor a certain paper, with a request to do a certain thing with it, for a certain purpose, is not that direction evidence?" Mr. Beach, for the plaintiff: "Let me put an illustration to your Honor. . . . Suppose Mr. Evans comes to me and delivers a blow in my face, and at the instant of delivering that blow he accuses me of having injured him in some form; he gives the motives and the purpose with which he delivers that act; can that act be proved against Mr. Evans, without permitting him to give the declaration accompanying the act?" Mr. Evans, for the defendant: "That is a spoken act. That is not hearsay. It is a part of the blow; it is a spoken act. Some confusion, no doubt, arises in lawyers' discussions about hearsay evidence that comes by word of mouth in connection with that act; but your Honor is familiar with the distinction that our learned friend has given. . . . Now if he [Mr. Tilton] gave instructions to take that

¹ Quoted *supra*, § 1774.

² This is perhaps the most widely quoted passage in the precedents upon this general topic.

³ *Holmes, C. J.*, in *Conn. v. Chance*, quoted *supra*, § 1774.

paper and lay it before the council, or carry it to Mr. Beecher, that is a part of the act of delivering it to him. But this question is large enough to draw out, and so I suppose is intended to draw out, a larger line of hearsay evidence, to wit, conversations between Mr. Moulton and Mr. Tilton with which Mr. Beecher cannot be affected"; Judge Neilson: "That distinction must be observed."

§ 1776. (4) Words must Accompany the Conduct in Time. Since the words are used only as verbal parts of the whole act, filling out and giving legal significance to the conduct, it is obvious that the words must be contemporaneous with the conduct, or, in the usual phrase, must accompany the act. This requirement does not allow any flexibility or extension of time such as is allowable in using statements under the Exception for Spontaneous Exclamations (*ante*, § 1749, par. b); for the principle is an entirely different one. Here the utterance is used irrespective of its trustworthiness as an assertion, and only as a verbal part of an entire act. The utterance must therefore exactly accompany the other conduct, for otherwise it is no part of the act and can serve merely as an ordinary hearsay assertion of what has been already done. It is true that the conduct which the words must accompany may itself extend over a long period of time—as in the case of prescriptive occupation—and therefore an utterance at any moment during that period does in fact accompany the conduct. Nevertheless, even then, the utterance is in strictness still contemporaneous with the conduct; and whenever that conduct has come to an end, any subsequent utterance, however near in time, is inadmissible. Courts are more or less liberal in applying this requirement, and the duration of the main conduct is often over-generously interpreted; but no Court seems to question in theory the existence of the limitation. The following passage illustrates it:

1865, *Park, J.*, in *Ford v. Haskell*, 32 Conn. 489 (excluding declarations by the defendant's intestate, while buying clothing for the plaintiff, as to the terms of an existing contract with the plaintiff): "The term *res gestæ* includes a declaration that explains or characterizes some act that is then being performed by the declarant. . . . The defendant's intestate is purchasing an article of clothing. She says she is doing it in fulfillment of her contract with him in relation to carrying on her farm. This fully explains her act. The other terms of the contract [mentioned by her] could give no additional explanation. Her contract required her to furnish clothing. She is fulfilling that part of it."

§ 1777. Sundry Applications of the General Principle, in Acts of Payment, Sale, Loan, Gift, Advancement, Consideration, Dedication of Land, Entry on Land, Conversion, Larceny, etc. The application of the Verbal Act doctrine is illustrated in a great variety of instances. Some of these, presenting special complications, may be taken up separately. In this place may be noticed sundry classes of cases not usually complicated by other questions.

(1) The act of *handing over* or of *receiving money* may have a varied legal

¹ Accord: 1844, *Noonan v. State*, 1 Sm. & M. 542, 571 (the statement must be "by one connected with the act in question and during its progress").

Other cases applying this limitation will be found under the various rulings classed according to subject-matter, *post*, §§ 1777-1788.

significance, and words accompanying the receipt or delivery may therefore serve to make definite the effect of the act:

1780, Mr. *Jeremy Bentham*, *Principles of Morals and Legislation*, c. XVIII, par. xxxv, note: "What is meant by payment is always an act of investitive power, as above explained,—an expression of an act of the will, and not a physical act; it is an act exercised with relation indeed to the thing said to be paid, but not in a physical manner exercised upon it. A man who owes you ten pounds takes up a handful of silver to that amount and lays it down at a table on which you are sitting. If then, by words or gestures or any means whatever, addressing himself to you, he intimates it to be his will that you should take up the money and do with it as you please, he is said to have paid you. But if the case was that he laid it down, not for that purpose but for some other—for instance, to count and examine it, meaning to take it up again himself or leave it for somebody else—he has not paid you. Yet the physical acts exercised upon the pieces of money in question are in both cases the same. Till he does express a will to that purport, . . . [there is no payment]."

1810, Chief Justice *Swift*, *Evidence*, 130: "The declarations of a party . . . when they tend to explain the fact and are necessary for that purpose, they may be given in evidence. . . . As in the case of a tender, the declaration of the party of the purpose for which the money is offered is part of the *res geste* and must be proved; otherwise the transaction cannot be understood."

1853, *Roache, J.*, in *Strange v. Donohoe*, 4 Ind. 328 (payment was made to a sheriff holding an execution, the payor stating that he paid "not in satisfaction of the judgment, but merely to prevent a sale" by staying execution): "It frequently becomes material, as in the present case, to ascertain with what motive an act was done. The declarations made by the party himself, while doing the act, and explanatory of it, are admitted as being a part of the transaction and as serving to explain its real character."

Declarations accompanying a delivery of money may therefore be admissible,¹ in order to determine whether a loan or a payment was made, whether one debt or another was paid, whether it was accepted in full or in part payment, or whether any other specific significance is to be attributed to the act. Declarations by either party are receivable, except so far as a declaration by one could not legally affect the significance of the act done by the other.

(2) In the same way, when money is loaned or goods sold or services rendered, and issue is whether the other party acted *as agent or for himself*, declarations of the transactors at the time are admissible to make clear the

¹ 1873, *Clewer v. Samuel*, 15 N. Br. 58 (instructions how to apply money sent therewith, admitted); 1853, *Mims v. Sturtevant*, 23 Ala. 644 (issue whether B. or J. owned a slave; B.'s declarations, when counting out money, that it was intended for the slave's purchase, not admitted in his favor); 1860, *Dillard v. Scruggs*, 36 Id. 372; 1863, *North Stonington v. Stonington*, 31 Conn. 413, 416 (pauper settlement; the pauper's statement when refusing to pay taxes to the plaintiff, that a selectman had told him they did not want him to pay, excluded, because the motive of refusal was immaterial and the fact that the selectmen had not demanded in good faith was the real issue, of which the declaration was merely hearsay evidence); 1894, *Hood v. French*, 37 Fla. 117, 19 So. 165 (statements when making a payment, admitted); 1840, *McFarland v. Lewis*, 3 Ill. 344, 347

(debtor's application of a payment, admitted); 1847, *Rigg v. Cook*, 9 Id. 356; 1872, *Richerson v. Sternburg*, 65 Id. 272, 274 (like *McFarland v. Lewis*); 1886, *Brown v. Kenyon*, 108 Ind. 283, 9 N. E. 263; 1901, *Golden v. Vyse*, 115 Ia. 726, 87 N. W. 991 (delivery of a note to plaintiff; deliverer's declaration admitted); 1863, *Beaver v. Taylor*, 1 Wall. 637, 642 (issue as to payment of taxes; receipts being admitted letters accompanying them and entries made on their arrival were also admitted); 1853, *Bank v. Clark*, 35 Vt. 310; 1886, *Barber v. Bennett*, 58 Id. 476, 484, 4 Atl. 231 (declarations as to the purpose of payment, admitted); 1893, *Wheeler v. Campbell*, 63 Id. 98, 34 Atl. 35 (the remark of parties when paying money, "That makes up the \$600," admitted as showing that a *bona fide* transaction was occurring).

meaning of the act and determine to whom credit was given or by whom liability was undertaken:

1831, *Shaw, C. J.*, in *Allen v. Duncan*, 11 Pick. 310: "It became a material question whether the goods were procured from G. by A. in his individual or partnership capacity. . . . It is therefore left uncertain in which capacity he acted. . . . It was undoubtedly competent for A. to declare, at the time of making the contract, whether he did it on the one or the other account, and such declaration would have been conclusive."

1870, *Paine, J.*, in *Roebke v. Andrews*, 26 Wis. 311, 321: "[The evidence was properly admitted] that S. and S., in negotiating the purchase, professed to act as agents of the defendant. Such statements by them were not proof of the fact of agency. It would be necessary to prove that fact in some other way, or to connect the defendant with the consummation of the bargain. But it is still true that whatever bargain was made, if any, was negotiated by those parties. What that bargain was, with whom and by whom it was made, could only be proved by showing what was done and said in its actual negotiation. If they professed to act for the defendant, that fact entered into and formed a part of the negotiation itself, and gave it character. It was a part of the *res gestæ*, and was admissible as such; though without something further it would have no binding effect upon the defendant."

(3) Declarations accompanying the *delivery of a chattel* or a *deed* may help to show whether it is an act of *gift*, *advancement*, or otherwise; here the Courts seem to interpret liberally the rule of contemporaneity:

1885, *W. Allen, J.*, in *Scott v. Bank*, 140 Mass. 165, 2 N. E. 925: "Mrs. F., the claimant's intestate, deposited her money in a savings bank in the names of the plaintiffs. . . . The intention of the donor to make a gift is open to inquiry. . . . Upon the question of Mrs. F.'s intention in holding the book before the gift was perfected — whether she held

* The rulings are not harmonious: 1849, *Tomkins v. Reynolds*, 17 Ala. 118 (declarations made by H., when handing notes of the plaintiff to the witness, showing that H. was merely agent for his partner in handing the notes over for collection; the issue being whether H. and his partner had originally received the note as a loan from the plaintiff, or merely as agents to collect; held inadmissible; but if the issue had involved the purpose of H. in handing the notes to the witness, apparently the declarations would have been admitted); 1862, *Gordon v. Clapp*, 38 id. 387 (labor performed; laborer's declaration that he would work for A, not for B, not admitted against A); 1873, *Marx v. Bell*, 48 id. 497, 506 (money advanced by plaintiff to H., but on defendant's credit; plaintiff's entry, in his books at the time, that defendant was responsible, excluded); 1895, *Lewis v. Burns*, 106 Cal. 381, 39 Pac. 778 (declarations as to a purchase as agent, admitted); 1849, *Frank v. Phelps*, 5 Ill. 556, 558 (daughters' declarations, when buying, whether they bought for the father, admitted); 1860, *Hurd v. Haggerty*, 24 id. 171, 174 (partnership note; declarations of the executing partner, as entries upon the books, admitted to show to whom credit was given); 1890, *Jefferts v. Alvard*, 151 Mass. 94, 23 N. E. 784 (husband's declarations when purchasing, admitted; "his state of mind at the moment of buying determined whether the purchase was made for his wife or not"); 1891, *Tolbert v. Burke*, 80 Mich. 132, 141, 50

N. W. 806 (declarations as to whom credit was given on an order for goods, not admitted on the facts); 1844, *Simonds v. Clapp*, 16 N. H. 222, 233 (action for a reward earned by the plaintiff in the capture of an escaped prisoner; the issue being whether his acts had been done on his own behalf or only as H.'s agent, his declarations while acting were received); 1872, *Bank v. Kennedy*, 17 Wall. 20, 25 (whether a loan was made to a bank or to the cashier personally; statements made when advancing the money, admitted); 1848, *Elkins v. Hamilton*, 20 Vt. 430; 1857, *Eastman v. Bennett*, 6 Wis. 237.

It would seem that declarations by the payor or vendor are here admissible no less than those of the alleged agent receiving the money or goods; because the act could not have effect as (for example) a sale to an agent unless the seller as well as the buyer willed to treat it so; the tenor of the seller's act in that respect must equally be made definite; and his declarations should be received for that purpose, though of course not as evidence of the existence of the agent's conduct nor of his authority from the alleged principal. Some Courts, in actions against the alleged principal, seem to suppose that the seller's declarations can only be considered as hearsay offered to prove the agent's authority; and therefore, ignoring the above considerations, improperly exclude such declarations.

It as owner or as the agent or depositary for the plaintiff — her declarations and acts while holding it, showing the character of the act, are competent. . . . The declarations of the donor, in relation to making her will, were after the gift was completed, if it ever was completed, and were either incompetent or immaterial."³

In the same way, declarations accompanying the delivery of money, notes, or chattels, may indicate whether it was *delivered as a consideration*.⁴

(4) Declarations accompanying the erection or removal of a fence, or the like, may disclose the total effect of the act as amounting to a *dedication of the land for highway purposes*:

1883, *Skelden, C. J.*, in *Quinn v. Eagleton*, 106 Ill. 254: "The planting the hedge in from the line of the land was an equivocal act. It might be interpreted as a dedication to the public or as setting the hedge on the true line. The declarations of E. [as to his reason for doing it] when he was the owner and in possession of the land, explanatory of his intention in leaving the strip of land open, we think were properly admitted as a part of the *res gestæ*, as accompanying the acts of throwing the land open and keeping it open."⁵

³ Accompanying declarations were admitted, except as otherwise noted: *Ala.*: 1845, *Olds v. Powell*, 7 Ala. 652; 1846, *Powell v. Olds*, 9 id. 584; 1856, *Gillespie v. Barleson*, 23 id. 551, 563 (whether a gift was to a wife during coverture only); 1861, *Bragg v. Massie*, 38 id. 89, 106 (whether a delivery was a gift); *Conn.*: 1898, *Gairan's Appeal*, 70 Conn. 342, 39 Atl. 432 (declarations at the time of delivering bank-book, received to show intent of gift); *Ga.*: 1847, *Carter v. Bachannon*, 3 Kelly 513 (declarations made by B. as to a gift by him of a negro slave, excluded; the declarations not being made at the time of an act of gift so that they "would serve to characterize it, would be expressive of the motive or object of the donor"); *Ill.*: 1801, *Scott v. Scott*, 191 Ill. 636, 61 N. E. 415 (advancement to a son; testator's declarations, at the time of executing the will, that he had a note of the son, not admitted, no possession of the note appearing otherwise; nor could they be used to interpret the will-clause "whatever notes I may hold at the time of my death against my son W."); *Ind.*: 1868, *Woolery v. Woolery*, 29 Ind. 249, 254 (declarations by a father, a few days prior and twenty or thirty days subsequent to the conveyance, admitted); 1888, *Durham v. Shannon*, 116 id. 403, 407, 19 N. E. 190 (alleged gift to the plaintiff of a horse bought by S.; S.'s declarations of intent to buy for the plaintiff, made "a day or two before he purchased," admitted as contemporaneous); 1894, *Thistlewaite v. Thistlewaite*, 132 id. 355, 31 N. E. 946 (whether sums were advancements; subsequent statements excluded); *Ia.*: 1870, *Middleton v. Middleton*, 31 Ia. 151, 153 (father's declarations at the time of a sale to the son, that the latter had paid in full, held receivable, either as admissions or as a deceased's statements against interest); 1908, *Ellis v. Newell*, 120 id. 71, 94 N. W. 463 (by a father, after a transfer to his son, that it was a gift and not an advancement, excluded); *Ky.*: 1901, *Bailey v. Barclay*, 100 Ky. 636, 60 S. W. 377 (subsequent declarations of the alleged donor, excluded); *Mass.*: 1870, *Kingsford v. Hood*, 105

Mass. 495, 497 (declarations of a grantor, not at time of delivery, but at time of drafting, not admitted to show which person was meant by a grantee's name equally describing two persons); 1885, *Scott v. Bank*, 140 id. 165, 2 N. E. 925 (quoted *supra*); 1889, *Brooks v. Duggan*, 149 id. 306, 21 N. E. 381; 1896, *Young v. Power*, 41 Miss. 197, 304 (testatrix's declarations of intention to collect a claim against the defendant, alleged to have been forgiven to him by her, admitted as declarations of intent consummating the gift); *N. J.*: 1897, *Parrot v. Craig*, 56 N. J. Eq. 280, 36 Atl. 305 (declarations accompanying a delivery, admitted); *N. C.*: 1837, *Collier v. Pos*, 1 Dev. Eq. 55 (declarations of a father, just before sending slaves to a married daughter, as to his intent to give or lend them, admitted); 1844, *Moore v. Gwyn*, 4 Ired. 275, 278 (similar; "the declaration was made with a view of qualifying the act . . . whenever it should be done"); *Tenn.*: 1832, *Stewart v. Cheatham*, 3 Yerg. 66 (owner's declaration preceding a delivery of negroes, admitted as negating an intent to give); 1900, *Garner v. Taylor*, — *Tenn.* —, 56 S. W. 758 (note given by son to father for money; subsequent declarations, excluded); 1902, *Lord v. Ins. Co.*, 35 Tex. 216, 66 S. W. 290 (gift of an insurance policy; declarations accompanying, admitted).

When the declarations are subsequent to a deed, they may still be receivable, if made in possession, as affecting the presumption of ownership (*post*, § 1779).

⁴ 1847, *Blood v. Rideout*, 13 Metc. 241 (controversy as to the existence of a consideration; the fact was admitted of the giving of a note and of declarations accompanying it; *Shaw, C. J.*: "The occasion was the one at which the note was completed as the parties intended to have it, and the declarations . . . showing the purpose for which it was given, qualified the act of executing and delivering it"); 1838, *Sessions v. Little*, 9 N. H. 376.

⁵ 1886, *Tait v. Hall*, 71 Cal. 153, 13 Pac. 391; 1893, *Chicago v. Drexel*, 141 Ill. 69, 105, 30 N. E. 774; 1900, *Woodburn v. Sterling*, 184 id.

(5) The act of *entering upon land* is open to a variety of legal effects, and the accompanying declarations will frequently serve to determine its significance; so also the declarations of a grantee may serve to indicate whether his conduct amounts to an *acceptance of the grant*.⁶

(6) Whether a *taking of personalty* was made with such claim of title or intent to exercise dominion as amounted to a *conversion* may depend upon the accompanying declarations.⁷ So, also, the declarations, while in possession, of one charged with *larceny* or the like, may indicate whether he exercised dominion by appropriation to himself, or dealt only as a borrower, in recognition of the true owner's title; for in the latter case the act would not be criminal. There should be no doubt as to the admissibility of such declarations; but they are often affected by the rule for *explanations* by one found in *possession of stolen goods*, and the distinction is examined elsewhere (*post*, § 1781).

(7) In *sundry other instances*, not calling for further generalizations, the Verbal Act doctrine finds frequent exemplification.⁸

§ 1778. *Possessor's Declarations on an Issue of Prescription by Adverse Possession.* Where a title is rested on a prescriptive possession for a period of years sufficient to extinguish former rights and create title in the possessor, it is essential, under the rule of substantive law, that the occupation thus relied upon shall have been "*adversus*" to other claimants, i. e. the occupation must have purported to be hostile to and exclusive of other claimants. This

303, 56 N. E. 378; 1897, *Pittsburg C. C. & St. L. R. Co. v. Nottager*, 148 Ind. 101, 47 N. E. 333 (words accompanying the removal of a fence, admitted to show a dedication).

⁶ 1628, Co. Litt. 45, b ("To a livery of seisin of land, words are necessary, as taking in his hand the deed and the ring of the doore (if it be of an house) or a turffe or twigge (if it be of land), and the feoffee laying his hand on it, the feoffor says to the feoffee, Here I deliver to you seisin of this house, or of this land"); 1856, *Croff v. Ballinger*, 18 Ill. 301, 303 (forcible entry; the occupant B's declarations at the time of the entry, admitted to show "whether the entry was made against the will of B."); 1866, *Rowley v. Hughes*, 40 id. 316, 319 (forcible entry; declarations of defendant's predecessor, when entering, admitted to show the character of his occupation as constituting possession); 1894, *Thompson v. Stewart*, 5 Litt. 5 (forcible entry; on the issue of possession, the plaintiff's declarations, after temporary removal from the land, were admitted as indicating his continuing intent to possess it); 1870, *Kingsford v. Hood*, 105 Mass. 495, 497 (grantee described by a name equally applicable to two persons; declarations of claim by one of them, admitted to show the nature of his occupation); 1886, *Stevens v. Miles*, 143 id. 572, 8 N. E. 436 (Gardner, J.: "It became material to determine whether the defendant accepted the lease. . . . This act of taking and reading the instrument. . . was relied on by the plaintiff in support of her case. What the defendant said may have given char-

acter to the act and given it a different meaning from that claimed by the plaintiff. . . . It was a part of the act of taking and reading it"); 1901, *O'Connell v. Cox*, 179 id. 250, 60 N. E. 580 (declarations of a grantor while in occupation, admitted to show seisin); 1864, *Duffey v. Presbyterian Congregation*, 48 Pa. 46, 51 (whether a wife went into possession under a certain deed or a certain will; her declarations in possession admitted).

For *adversus possession*, see *post*, § 1778.

⁷ 1888, *Dunbar v. McGill*, 69 Mich. 297, 37 N. W. 285; 1883, *Frome v. Dennis*, 45 N. J. L. 530; 1883, *Ross v. White*, 60 Vt. 560.

⁸ 1848, *Russell v. Frisbie*, 19 Conn. 390 (declarations made at the time of depositing ship's papers with the witness, indicating a revocation of the authority of F., then in possession of the ship, admitted); 1893, *Lambe v. Manning*, 171 Ill. 612, 49 N. E. 509 (unsigned license-paper waivered to a deed; declarations of the grantor in attaching it, received to show whether it was executed as a part of the deed); 1874, *Nourse v. Nourse*, 116 Mass. 101, 104 (declarations by a mortgagor, two months after making it, as to his purpose in doing so, excluded); 1839, *Boswell v. Davis*, 10 N. H. 413, 423 (attachment in fraud of creditors; declarations of the attachor at the time of obtaining the writ, as to past facts forming his reason, excluded); 1848, *Holbrook v. Murray*, 20 Vt. 525, 528 (declarations as to notes, before taking possession under a mortgage, excluded).

adverseness of occupation most commonly appears when the occupation is under a claim of title by the occupant himself, for this by implication denies and opposes other titles. Accordingly, it has never been doubted that all declarations by the occupant, importing a claim of title in himself, are admissible as verbal parts of his act of occupation, serving to give it an adverse color; while his declarations of *disclaim*, conceding another's title, are equally receivable as giving it the contrary color. Such declarations of claim are in no sense testimony to the deed or other source of title that may be thus asserted; for in that aspect they clearly violate the Hearsay rule. They are merely verbal parts going to make up the whole act of occupation, and are not given any testimonial force as credible assertions:

1845, *Collier, C. J.*, in *McBride v. Thompson*, 8 Ala. 650, 653: "It is not to be understood that such declarations are admissible to every conceivable extent. True, the affirmation of the party in possession that he held in his own right or under another is proper evidence as part of the *res gesta*, which *res gesta* is his continuous possession. But his declarations beyond this are no part of the subject-matter, or 'thing done,' and cannot be received as such. While it is allowable to prove statements of one in possession and explanatory thereof, it is not permissible to show everything that may have been said by him in respect to the title, — as, that it was acquired by him *bona fide* and for a valuable consideration, was paid for by the money of a third person or his own, etc. This, we have seen, instead of being a part of the *res gesta*, would be something beyond and independent of it."

1860, *Peck, J.*, in *Webb v. Richardson*, 42 Vt. 465, 472: "The Court properly admitted proof of the declarations of Reuben Hawkins, made while working on lot sixty-four, to the effect that he called it his 'possession lot,' and that he was claiming and getting it by possession. But the Court was in error in excluding 'evidence to show that at other times, prior to 1822, the said Hawkins said the same things when not on lot sixty-four, but at his house and in sight of it, and pointing it out.' To constitute a continuous possession it is not necessary that the occupant should be actually upon the premises continually. The mere fact that time intervenes between successive acts of occupancy does not necessarily destroy the continuity of the possession. The kind and frequency of the acts of occupancy, necessary to constitute a continuous possession, depend somewhat on the condition of the property, and the uses to which it is adapted in reference to the circumstances and situation of the possessor, and partly on his intention. If, in the intermediate time between the different acts of occupancy, there is no existing intention to continue the possession, or to return to the enjoyment of the premises, the possession, if it has not ripened into a title, terminates, and cannot afterwards be connected with a subsequent occupation so as to be made available toward gaining title; while such continual intention might, and generally would, preserve the possession unbroken. This principle is tersely stated in the civil law, thus: a man may retain possession by intention alone, yet this is not sufficient for the acquisition of possession. . . . If the admissibility of such declarations is put on the ground of declarations constituting part of the *res gesta*, they are admissible, as the *res gesta* is not confined to a particular act of occupancy done upon the premises, but is the continual possession, which includes the successive acts of occupancy. Since a party who has once commenced a possession of land, by actual entry and acts of occupancy upon it, may continue to possess it during intervals when not upon it, he may claim it during such intervals as well as when actually upon the land doing acts of possession; and the fact of his making such claim is provable by evidence of his declarations made at the time, in the same manner and to the same effect as if made while on the land, doing an act of possession. Such declarations to show the adverse character of the possession are quite as much in the nature of facts as in the nature of a medium of proof."

1873, *Day, J.*, in *Stephens v. McCloy*, 36 Ia. 681: "It is the intent [to possess] with which the acts are done that gives them their character. . . . The question rejected seeks to elicit the declarations made by the plaintiff, at the time of making the survey, respecting the object for which the survey was being made. . . . Such declarations are those made at the time of the act done and which are calculated to unfold its nature and quality."

The limitations of this doctrine must, however, be observed. It assumes that adverse possession is in some way *material* under the issues of the case¹ (forcible entry, prescriptive title, or otherwise), and that the declarations were made when in *possession*,² and that they are not offered except as *coloring the occupation*.³ Subject to these limitations, the use of such declarations for this purpose is never disputed.⁴ It is apparent, moreover, that they may be

¹ 1894, *McCloud v. Bishop*, 110 Ala. 440, 30 So. 130. For cases of *forcible entry*, see also ante, § 1777.

² 1851, *Comins v. Comins*, 31 Conn. 413, 418 (declarations "made while he was absent from the premises and which accompanied no act" were held inadmissible; this seems unsound; compare *Webb v. Richardson*, quoted *supra*); 1833, *May v. Jones*, 4 Litt. 21, 24 (declarations after possession ended, excluded); 1897, *Ward v. Edge*, 100 Ky. 757, 39 S. W. 440; 1869, *Webb v. Richardson*, 42 Va. 465, 472 (quoted *supra*); 1897, *Hugh v. Paschke*, 42 W. Va. 502, 26 S. E. 554.

The practical distinction between this and other rules is more particularly examined later (*post*, § 1780). But note here that the present rule may be sometimes more, sometimes less favorable than the rule for a *party's admissions*. For example, the declarations, if made after possession ended, might be excluded under this rule, but still receivable against the claimant as a party's admissions: 1839, *Church v. Burghardt*, 3 Pick. 337. Conversely, the declarations made during possession might be receivable against him under the present rule, though not receivable under the rule for admissions: 1901, *Todd v. Wood*, 84 Minn. 4, 86 N. W. 756 (statements of disclaimer, made after expiration of the statutory period, receivable as affecting the intent of occupation, but not as oral admissions divesting title).

³ 1847, *Rigg v. Cook*, 9 Ill. 336, 343, 350 (defendant claimed under R.; plaintiff claimed under a mortgage foreclosed against R.; for the defendant, R.'s statements when paying rent for the land, while in possession after foreclosure, admitted to color his claim of adverse possession; but not his statements as to having paid the mortgage and as to the former owners' title).

⁴ In the following list, when not otherwise noted, the case is one of *prescriptive possession*; some of these declarations might have been excluded or admitted on other grounds (summarized *post*, § 1780); in particular, distinguish the rules for a party's *consistent claims in corroboration* (ante, § 1133), for a party's *admissions* (ante, § 1082), for a deceased's declarations against proprietary interest (ante, § 1473), and for a deceased's *boundary-declarations* (ante, § 1563); Ala.: 1842, *Oden v. Stablesfield*, 4 Ala. 40, 42

(slave); 1845, *McBride v. Thompson*, 8 id. 650, 652 (slave); 1858, *Nelson v. Svenson*, 24 id. 9, 16 (slave); 1855, *Johnson v. Boyles*, 26 id. 576, 581 (slave); 1856, *Gillespie v. Burleson*, 28 id. 551, 563 (slave); Conn.: 1828, *Reading v. Weston*, 7 Conn. 143, 148 (pauper settlement; on an issue whether D. occupied premises in her own right and as a whole, her declarations during occupancy were admitted); Ga.: 1896, *Ogden v. Dodge Co.*, 97 Ga. 461, 25 S. E. 321 (the ordinary of the county, in official possession); 1903, *Perkins v. Brinkley*, — id. —, 45 S. E. 633 (declarations of an agent in possession, excluded; here, of a husband); 1879, *James v. R. Co.*, 91 Ill. 554, 557 (declarations of a railroad over land claimed); 1887, *James v. Murphy*, 110 id. 271, 277 (declaration of a disputed boundary); 1888, *Illinois C. R. Co. v. Houghton*, 126 id. 233, 239, 18 N. E. 301 (disputed boundary); 1889, *Shaw v. Schoonover*, 130 id. 448, 453, 23 N. E. 569 (declarations by a married woman claiming her father's land by adverse possession); 1899, *Knight v. Knight*, 178 id. 553, 63 N. E. 306 (declarations of ancestor during general time of possession); 1899, *Kots v. Belt*, 178 id. 434, 53 N. E. 367 (similar); 1898, *Smith v. Morrow*, 7 T. B. Monr. 234, 237; 1896, *Rand v. Huff*, 59 Kan. 777, 53 Pac. 483 (predecessor in claim); 1899, *Crawford v. Crawford*, 60 id. 126, 55 Pac. 842 (excluded on the facts); 1859, *Niles v. Patch*, 13 Gray 254, 256; Mich.: 1869, *Bower v. Earl*, 18 Mich. 367, 376 (extent of possession); Mo.: 1876, *Martin v. Bonasack*, 61 Mo. 556, 559; 1890, *Mississippi Co. v. Vowels*, 101 id. 225, 238, 14 S. W. 293; 1891, *Meier v. Meier*, 105 id. 411, 423, 430, 16 S. W. 233; N. H.: 1821, *Claremont v. Carlton*, 2 N. H. 369, 372 (declarations to show the bounds of an occupation, held admissible; distinguishing the improper attempt to contradict a deed's description of boundaries, forbidden by the parol evidence rule, *post*, § 2442); 1826, *Downs v. Lyman*, 3 id. 486 (plaintiff claimed a locus M. under a grant to H., and to identify it showed an occupation of a certain locus by H.'s grantees; to rebut this, defendant was allowed to show declarations of H.'s grantees, when abandoning this locus, indicating that they did not claim it under H.'s grant); 1849, *Chiley v. Bartlett*, 19 id. 312, 322 (general principle applied); 1863, *Hodgdon v. Shannon*, 44 id. 572, 577 (same); 1862, *Smith v. Putnam*, 62 id. 346,

used either for or against the prescriptive claimant, according as they give to the occupation one or the other purport, and irrespective of the rule for admissions (*post*, § 1780). Finally, it does not matter whether the property be real or personal, provided only it is of a sort to which title may be gained by prescription.

Certain varieties in the application of the rule may now be noted:

(a) Suppose that the occupier of the land was not the present claimant, nor a predecessor under whose adverse possession he claims, but was a third person concededly only a *lessee*; may the declarations of this lessee-occupier, professing to hold as *tenant under the present claimant* or his predecessor, be received? It seems clear that they may. Such declarations signify that the declarant's acts of occupation were done on behalf of his alleged landlord, and such acts will therefore be acts of possession for that landlord, provided only that the latter adopted them, and his then claim of title would suffice as such an adoption. It is generally conceded that such declarations of a lessee are as admissible, *for the now claimant*, as his own would have been;¹

373 (same); *N. J.*: 1867, *Miller v. Fecano*, 50 *N. J. L.* 32, 11 *Ast.* 136; *N. Y.*: 1865, *Jackson v. Vredenburg*, 1 *John.* 159 (plaintiff claimed as heir of C. Y.; defendant claimed by deed from the wife of D. Y., elder brother of C. Y.; the wife having been in possession, her declarations were admitted for the defendant to show the possession to be adverse and under claim of title, and not as guardian for her son); 1867, *Abel v. Van Gelder*, 36 *N. Y.* 513, 515; 1872, *Morris v. Salisbury*, 48 *id.* 636, 642; *N. C.*: 1841, *Davis v. Campbell*, 1 *Ired.* 423; 1858, *State v. Emory*, 5 *Jones L.* 133 (forcible ouster; the tenant's declaration, after leaving, that he had consented, excluded); 1868, *Hedrick v. Gobble*, 63 *N. C.* 48 (issue as to boundary; plaintiff's ancestor's statements while in possession pointing out the boundary, excluded, as not explanatory of possession); *Okla.*: 1897, *Meyers v. U. S.*, 5 *Okla.* 173, 48 *Pac.* 186 (a declaration of possession and claim, not admitted where the declarant was charged with perjury in falsely swearing to possession); *Pa.*: 1843, *Sailor v. Hartsogg*, 2 *Pa. St.* 182 (plaintiff claimed under S.; defendant claimed under L.'s title by adverse possession; L.'s declarations in possession, conceding S.'s title and possession, admitted against defendant); *S. C.*: 1825, *Turpin v. Brannon*, 3 *McCord* 261 (predecessor's declarations, apparently admitted on this principle); 1827, *Martin v. Simpson*, 4 *id.* 262 (predecessor's declarations of claim while in possession, admitted expressly on this principle); 1881, *Ellen v. Ellen*, 16 *S. C.* 132, 135 (similar; good opinion); *s. c.*, 13 *id.* 489, 494 (prior rulings approved); 1887, *Booser v. Teague*, 27 *id.* 348, 347, 3 *S. E.* 551 (similar); 1891, *Wingo v. Caldwell*, 38 *id.* 598, 15 *S. E.* 382 (similar); 1897, *Mets v. Mets*, 48 *id.* 472, 26 *S. E.* 787 (received; but here the Court laboriously justifies the use of declarations of claim by a predecessor as admissible in rebuttal of admissions, under the principle of § 1183, *ante*; the claim being by adverse possession, they were receivable in any case); *Tenn.*: 1852, *Carnahan*

v. Wood, 2 *Swan* 500, 508; *U. S.*: 1822, *Ricard v. Williams*, 7 *Wheat.* 80, 105; *Vi.*: 1863, *Perkins v. Blood*, 36 *Vt.* 273, 282 (on an issue of abandonment); 1869, *Hollister v. Young*, 42 *id.* 403, 407; 1868, *Webb v. Richardson*, *ib.* 445, 472 (quoted *supra*); 1870, *Kimball v. Ladd*, *ib.* 747, 755. *Contra*: *Mass.*: 1861, *Osgood v. Coates*, 1 *All.* 77, 79 (no authority cited); 1864, *Morrill v. Titcomb*, 8 *id.* 100 (evidently confusing the rule about boundary declarations, *ante*, § 1563).

¹ *England*: 1772, *Holloway v. Rakes*, cited in 2 *T. R.* 55 (possession by a deviser being in issue, the "declarations of the tenant in possession at that time that he held as tenant to the deviser" were admitted); 1777, *Doe v. Williams*, *Cowp.* 681 (to prove the defendant's predecessor G. in possession at the time of levying a fine, a conversation was admitted in which the actual possessor-tenant P. stated the payment of rent to G. as landlord and the latter stated its receipt from P. as tenant; "the possession of the tenant was connected with that of the landlord, which was adverse"; here P. was living, but disqualified); 1787, *Davies v. Pierce*, 2 *T. R.* 53 (the issue being whether a *locus*, where cattle had been impounded, "had been immemorially part and parcel of a certain tenement of land called B.", as claimed by the defendant in replevin, evidence was admitted for the plaintiff of the declarations of various occupiers of the *locus* that they held under one E. and paid rent to him; E. being otherwise shown not to be owner of the tenement B.; the preceding two cases cited by Baile, J., as precedents; in the present case two of the declarants were deceased, but no mention of this was made in the opinion); 1811, *Peaceable v. Watson*, 4 *Taunt.* 16 (to prove seisin in the plaintiff's ancestor, the declarations of a deceased tenant in possession, as to holding under the ancestor, were held admissible for the plaintiff; but apparently not on the present principle); 1820, *Doe v. Green*, *Gow* 228 (similar ruling, but made on the authority of *Davies v. Pierce*); 1835, *Carme v. Nicoll*, 1 *Bing. N.C.*

but they would seem to be also receivable *against him*.⁶ Some of the rulings, however, in admitting them for the former purpose, have mistakenly proceeded upon precedents dealing with a wholly distinct principle, namely, the Exception for Statements of Facts Against Interest (*ante*, § 1458). It is obvious that if the lessee were deceased, his statements of tenancy would be admissible under that Exception, and a few earlier English cases, which apparently proceed under the Exception,⁷ have commonly been cited as precedents for the present doctrine; the practical distinctions between the two are elsewhere noted (*post*, § 1780).

(b) When an act of possession has been shown for the above purpose, the accompanying declarations of claim are also admissible to fix the *extent in area of the land constructively in possession*. Upon this principle the *deeds*, tax-lists, and other documents under which the occupier holds are admissible as representing the area and boundaries claimed.⁸ It is merely the tenor of the document that is thus significant; and therefore it is unnecessary to prove their execution,⁹ and it is immaterial that they are void as sources of title by grant.¹⁰ The principle here involved is that of the substantive law which within certain limits allows the physical occupation of a small space of land to serve as constructive possession of a much larger area. For exam-

other, makes most strongly therefore against his own interest, and consequently is admissible"; 1833, *Doe v. Arkwright*, 5 C. & P. 576, 577 (plaintiff claimed as tenant in tail under the will of S.; to prove S. seized, evidence was offered for the plaintiff of the declaration of B., now deceased, made while cutting timber on the land; Parke, J.: "He exercised an act of ownership, and he is therefore *prima facie* owner; and what he says as to any one else being the owner is a declaration to cut down his title"; Counsel: "Your lordship will only hear what he said at the time"; Parke, J.: "Yes; what he said at any time"). Compare the rule for presumption of ownership, *post*, § 1779.

⁸ The rule of evidence is not doubted; the controversies arise under the substantive law; and multiplication of citations is unnecessary: 1898, *Postal Tel. Cable Co. v. Brantley*, 107 Ala. 683, 18 So. 320 (deeds); 1863, *Hardisty v. Glenn*, 33 Ill. 62, 64; 1899, *Burr v. Smith*, 152 Ind. 469, 33 N. E. 468 (declarations as to boundaries); 1896, *Pauley v. Richardson*, 119 N. C. 449, 26 S. E. 33 (tax-lists of the land in the name of the possessor); 1811, *Garwood v. Dennis*, 4 Binn. 314, 329 (recitals in an old deed of another old deed, receivable to show "the *quo animo* the land was held"); 1893, *Dunn v. Eaton*, 92 Tenn. 743, 751, 23 S. W. 163 (deeds); 1897, *Sulphur Mines Co. v. Thompson*, 33 Va. 293, 25 S. E. 232.

⁹ *Post*, § 2132 (authentication of documents); *ante*, §§ 1653, 1655 (record of deeds).

¹⁰ 1828, *Waldron v. Tuttle*, 4 N. H. 371, 375 (deed void); 1872, *Bounds v. Bounds*, 11 Heisk. 318, 324 (deed unrecorded). *Contra*, but erroneous: 1804, *Gittings v. Hall*, 1 H. & J. 527, 533 (a will of 1737, excluded because not attested by three witnesses).

690 (like *Peaceable v. Watson*); *Canada*: 1859, *White v. Smith*, 4 All. N. Br. 335 (*Peaceable v. Watson* cited; but here the declarations of claim of one not in possession were excluded); *United States*: 1840, *Bliss v. Winston*, 1 Ala. 344, 348 (forcible entry; here the declarant was deceased); 1829, *West v. Price*, 2 J. J. Marsh. 300, 303 (admitted, so far as they affected the nature and extent of possession); 1847, *Spence v. Smith*, 18 N. H. 567 (plaintiff in a writ of entry relied on a descent from T.; defendant disputed T.'s title; but plaintiff relied on T.'s possession claiming a fee; declarations of a former tenant admitting T.'s title were received for the plaintiff); 1785, *Andrew v. Fleming*, 2 Dall. 93 (plaintiff allowed to show declarations by defendant's lessor of a tenancy under plaintiff's lease, to prove the latter's possession). *Contra*: 1821, *Calvert v. Fitzgerald*, Litt. Sel. Cas. 386; 1800, *Carrier v. Gale*, 14 Gray 504.

⁶ 1867, *Meade v. Black*, 23 Wis. 241 (plaintiff claimed by possession of O. as his tenant; O.'s answer, claiming title, in an action of ejectment by the plaintiff, admitted as tending "to illustrate and explain the character of O.'s possession").

Distinguish the rule about *disputing a landlord's title*: 1866, *Hogsett v. Ellis*, 17 Mich. 351, 372 (tenant's declarations of claim, not made to the landlord, excluded, because, having entered as lessee, his "mere words" could not make his occupation adverse).

⁷ Notably the following: 1811, *Peaceable v. Watson*, 4 Taunt. 16 (to show seisin in the plaintiff's ancestor, declarations were held admissible of C., a deceased lessee of the premises, naming the ancestor as his lessor; Mansfield, C.J.: "Possession is *prima facie* evidence of seisin in fee simple; the declaration of the possessor [i. e. the lessee], that he is tenant to an-

ple, the cultivation of one acre in a group of six hundred and forty acres of farm-land might be treated as constructive possession of the whole; while the occupation of a city block on one side of a street might not be allowed to serve as constructive possession of a block on the other side of the street. But within these limits set by the substantive law the occupation of a small part may serve as constructive possession of as much more as the occupant may by his acts express the will to control; and thus the deeds and other documents by which he has "color of title" may, as representing the extent of his claim, serve to fix the extent of his constructive possession.¹¹

(c) It is also a necessary feature of the possession which establishes a prescriptive title that it shall have been *uninterrupted*. Hence, if another person has during the time been upon the land, the latter's presence may or may not constitute an interruption of the former's possession according as it has or has not been hostile to the former's. Accordingly, *declarations of the other claimant*, while on the land, may serve, as verbal parts of his act, to indicate his presence or occupation to be hostile to the former's claim, and not subordinate to it, and may thus constitute an interruption:

1870, *Carpenter, J.*, in *Sears v. Hoyt*, 87 Conn. 408 (admitting declarations of the titular owner, when plowing up the place over which the defendant claimed a right of way, that the defendant had no right of way there): "The act of plowing and cultivating the ground over which the alleged way passed was an important fact in the case. Unexplained it constituted an interruption of the use, and was evidence tending to prevent the acquisition of a right [by the defendant]. It was . . . impliedly a denial of the right of the defendant. . . . The declaration as received only tended to give effect to that act, and to that extent only did it characterize or qualify it."¹²

In the same way, such an interrupting occupation may be in turn negated by the occupation of a third person; and thus the *third person's declarations in possession, repelling the opponent's claim* and acquiescing in the proponent's claim, may become admissible;¹³ though this is usually merely another aspect of an application of the rule already noted (par. a, *supra*).

(d) By an analogous application of the same rule, the party engaged in repelling a claim of adverse possession (though himself not resting on such a title) may rely upon a possession by *his own lessee* as interrupting or negating the claimant's possession; and for this purpose the declarations of a lessee in possession that he held as lessee for the proponent of the evidence are admissible against the claimant by prescription.¹⁴

¹¹ From this doctrine, distinguish the principle of relevancy (ante, § 378) by which actual occupation of a part of a tract of land may be evidence of the actual occupation of the whole of it.

¹² 1866, *Lepout v. Todd*, 33 N. J. L. 124, 128; 1867, *Outcalt v. Ludlow*, ib. 239, 244 (analogous); 1867, *Mende v. Black*, 23 Wis. 241, 243; 1887, *Lamoreux v. Huntley*, 68 id. 24, 23, 31 N. W. 331.

¹³ 1811, *Smalley v. White*, 14 East 332, 334, 339, 341 (adverse occupation of timber-land; declarations of the defendant's predecessor's tenant in possession, acquiescing in the plaintiff's claim to the timber-land in issue, admitted

for the plaintiff, as "declarations accompanying acts of forbearance of the owners in not cutting trees within the belt"); 1831, *Doe v. Pettitt*, 6 B. & Ald. 323 (defendant claimed through a widow's adverse possession, and plaintiff claimed as heir of the husband; the widow's declarations that she held as life-tenant only were received for the plaintiff, "not to show the quantum of her estate, but only to explain the nature of her possession"); 1830, *Betts v. Davenport*, 3 Conn. 406 (defendant's predecessor's agreement negating adverse possession, admitted for plaintiff); 1861, *Hale v. Siloway*, 1 All. 21.

¹⁴ 1828, *Williams v. Ensign*, 4 Conn. 44

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§ 1779. *Possessor's Declarations as aiding the Presumption of Ownership from Possession.* One in possession of property is presumed to be the owner of it (post, § 2515). As making more definite and significant the nature of the person's custody or occupation, and as giving it the significance of an exclusive control and of a possession in the fullest sense, the acts and declarations of claim of title by the person may be decisive, and should therefore be considered for that purpose; without, however, conceding to them any force as hearsay assertions.

Such is the simple and plausible theory of a rule now firmly established in many jurisdictions. The result has often been reached, especially in some early rulings, without any apparent working-out of this theory, but merely by a loose and inaccurate reading of the precedents applying the doctrine of the foregoing section and that of the Exception for Statements Against Proprietary Interest (ante, § 1455). Of the opposing rulings, also, some have taken no notice of the present theory, and have merely pointed out that neither of the two doctrines just mentioned can serve to admit declarations of claim by a living person, especially a party, in his own interest, where the title is not founded upon adverse possession. In a few of the opposing rulings the present theory is distinctly faced, and is rejected as both incorrect in principle and dangerous in practice. In the following passages the theory is well expounded:

1847, *Storrs, J.*, in *Avery v. Clemens*, 18 Conn. 300, 309 (admitting declarations of S., in an action of trover between S.'s creditor and A., claiming as bailor of S.): "The possession of personal property is, unexplained, *prima facie* evidence of ownership in the possessor; but, as it is consistent with ownership in another, it is not conclusive; and whether the person in possession is the owner, depends, not upon the mere fact that he is in possession of it, but upon the nature and character of that possession. These are properly evinced by his conduct with regard to it; and the nature of that conduct can only be understood by the declarations accompanying it. Declarations in such cases are not, as claimed by the plaintiff, obnoxious to the objection which ordinarily applies to hearsay testimony. They are not received as declarations of third persons, to prove the truth of what is asserted; but as being of themselves acts or things done by them, and which explain or characterize the acts which they accompany, and show their true character."

1870, *Paine, J.*, in *Rechts v. Andrews*, 26 Wis. 311, 317 (dealing with the trial Court's refusal to rule for the defendant that "mere statements of the plaintiff as to the ownership of those cattle is no evidence of title"): "The law gives to the possession of either real or personal property under a claim of title the effect of being *prima facie* evidence of title. It is sometimes briefly stated that 'possession is *prima facie* evidence of title.'

(plaintiff claimed by adverse possession, and defendant by record title; to disprove the adverse possession, defendant offered declarations of C. while in occupation, as to his holding under the record owner, C. being deceased; *Hosmer, C. J.*, held them admissible as "part of the *res gestae*," "to ascertain the character of an act or the intention with which it was done"; adding, "I have cautiously abstained from citing cases in which the declarations were against the interest of the person making them, or where the

party to be affected by the testimony claimed title under the person who made the declarations"); 1867, *Sheaffer v. Eakman*, 24 Pa. 144, 151.

The following seems analogous, though the offer was for another purpose: 1885, *Jacobs v. Callaghan*, 57 Mich. 11, 23 N. W. 454 (use and occupation as tenant; defence, surrender and re-lease to M. as tenant; M.'s declarations in possession that he held under defendant were admitted for plaintiff).

But, when so stated, it is always implied that the possession is under a claim of title. It is that fact which gives to it its character and legal effect. . . . It is thus seen that, wherever title is sought to be proved by possession, the claim of title accompanying that possession is not only proper but material and necessary to be known. And inasmuch as every person whose title is in issue is permitted to make out a *prima facie* case by proving what title he claimed in connection with it. The immediate point of inquiry is, what title was claimed, and not what really existed; and, that being so, inasmuch as what a man claims consists of what he asserts and declares in respect to his rights, his declarations are original evidence of the fact. And to allow him to prove them for that purpose is no more liable to the objection of allowing him to manufacture evidence for himself by his own statements than it would be, where it became material to prove a particular demand or notice, to allow him to prove his own declarations containing such notice or demand. The very nature and object of the inquiry establish the limit to the effect of his declarations as evidence. They are evidence only to show to what extent he claimed title; and, so far as they go beyond that and assert any facts in regard to the title, they are not evidence of any such facts. . . . It may be that, on proof of possession merely, the law in the absence of any further proof would presume that the party claimed a perfect title; . . . [but] if there is any such legal presumption, it would seem to furnish a sufficient answer to any apprehended danger from allowing a party to prove [expressly] that he claimed title; for such proof would show nothing more than the law would presume without it. . . . [The defendant was thus not entitled to the instruction that the plaintiff's] assertions of ownership were not 'evidence of title.' It is true they were not direct evidence. His statements that he had bought the cattle were not evidence of that fact. But it was in its nature explanatory of his possession and of the title which he claimed. It was equivalent to a direct assertion of ownership; and such assertion the law allows to be given in evidence accompanied with evidence of possession, and to both [together] it gives the effect of *prima facie* evidence of title. I think, therefore, the Court were not bound to say that the plaintiff's assertions of ownership were no evidence of title. They were evidence to prove the fact of such assertion; which fact, in connection with another, warranted an inference of title. They had therefore an ultimate bearing upon that question; and were proper to be considered by the jury to prove the fact of a claim of title."

1873, *Breece, C. J.*, in *Amick v. Young*, 66 Ill. 542, 544: "It has always been held that one strong indication of ownership of personal property . . . is exercising acts of ownership over it, having it in actual possession, making and paying for repairs upon it, offering to sell it, etc., which furnish presumptive evidence of actual ownership; subject, however, to be rebutted by an adverse claimant. Acts and declarations of a party in actual possession are not admitted on the theory that any peculiar credit is due to such party, but because they give character to the facts to be investigated."

All that can be said in opposition to the theory is found in the following forceful dissenting opinion:

1870, *Dixon, C. J.*, in *Reckle v. Andrews*, 26 Wis. 311, 394: "[In the first place,] it is something new to me in the law of evidence, if a party can thus make title to property in himself by first declaring to third persons that he owns it and then bringing such third persons into court to testify to his declarations. . . . If I lend another my horse for a month or three months, and he takes him and keeps him, and in the meantime he tells his family and neighbors and acquaintances that the horse is his, that he has bought, paid for, and owns him, or that I have given him the horse, and if at the end of the time he refuses to surrender the horse and I bring suit, as I am compelled to, all those declarations become evidence of title in his favor against me, and the jury may find that the horse is not mine after all, but is his. He and I, being the only witnesses to the transaction, may testify, I to the lending and he to the purchase; or the number of witnesses may be

otherwise equally divided; and he brings in the declarations to turn the scale in his favor. He being in possession of the horse, his declarations that he bought and owned him are admitted; but, I not being in possession, my declarations to the contrary, and that I only lent the horse, though never so frequently made, are excluded. The advantage which he has over me is very manifest, and the great injustice of such advantage equally so. . . . [2] In saying this, I do not, of course, mean to say that there may not be circumstances under which the declarations of the party should be received. . . . Such are cases where the nature of the possession (as adverse) becomes a material point of inquiry and the declarations are admitted in explanation of it. . . . But the present is not a case of that kind, and not one falling within any of the exceptions. The nature of the plaintiff's possession . . . was wholly immaterial. There was no question under the state of limitations and no legal right or proposition of law dependent upon it. The sole question in issue was the question of title, and that was a direct one, wholly disconnected with any collateral fact or circumstance growing out of the nature of the plaintiff's possession or what he may have said or claimed with respect to it. In such a case, the possession, or *prima facie* evidence of title afforded by possession, is a circumstance of no weight; it signifies nothing at all as against the direct evidence of title by which the rights of the parties must be tested. . . . [3] As to the opinion intimated (by the majority of this Court) that possession is not *prima facie* evidence of title, and that to become such a claim of title evidenced by the declarations of the party that the property is his (is needed,) . . . If this be so, then what is to become of the possession of the party who is so unfortunate as never to have made any such declarations? . . . It is something entirely new to me if the possession of such persons is to be regarded as less evidence of the title than the same kind of possession by the noisy, garrulous individual who can bring many witnesses to testify to his declarations. . . . [The rule is in truth] that upon bare possession being shown, with nothing to qualify or rebut its effect, the law presumes that the person having it holds under claim of title, and is the owner, until something to the contrary be shown. . . . [4] But it may be said, after all, that the difference between myself and my brethren is more imaginary than real, inasmuch as they hold that the declarations were admissible only to show that title was claimed. . . . [But,] in affirming the refusal to instruct, my brethren necessarily affirm this proposition, not merely that the statements of a person in possession of property are evidence of the claim of title made by him, but also some evidence of the title itself; and the question as to how much or what evidence of title they shall be, or what weight or influence they shall have in determining the fact of title, is also necessarily left to the uncontrolled discretion of the jury. It being determined that the statements are admissible and that they are some evidence of title in favor of the party making them, it will be found quite impossible, I think, by any instruction which can be given, to guard against the dangerous tendency of such testimony or to restrain or prevent the improper and injurious influence which it may have upon the minds of the jury. . . . The mischiefs which must result from this course of decision to my mind are manifest."

As to these opposing arguments, perhaps all that need be said is this: In the first place, the theoretical soundness of Mr. Justice Paine's exposition remains untouched. In the second place, the danger in practice of using such declarations is overestimated; it is not likely that a jury would allow an opposing claimant's direct evidence of title to be overthrown by the possessor's mere assertions; and, if there is no such direct evidence, then no great harm is likely to be done in allowing the possessor to strengthen the conceded presumption in his favor by exhibiting the positiveness and completeness of his claim. Both in theory and in policy the admission of such declarations seems proper.

The state of the precedents is as follows:

(1) In miscellaneous instances, involving *cum gratia* disputes of title, the use of such declarations has by some Courts been sanctioned.¹ In others, such declarations have been excluded; some Courts (as usually in the earlier rulings) not noticing the present theory,² others distinctly repudiating it.³ Wherever such declarations of claim are regarded as admissible, declara-

¹ *Ala.*: (cases cited *infra*, notes 2, 3, 4); *Ark.*: 1889, *Yarborough v. Arnold*, 20 Ark. 592, 597 (issue as to the identity of a slave claimed by plaintiff under a deed of trust; grantor's declarations, while in possession after the grant, identifying the slave, admitted for the plaintiff); *Cal.*: 1861, *Gill v. Strozier*, 22 Cal. 646, 666 (issue whether slaves in the plaintiff's intestate's possession were loaned or given to him by his father-in-law; the intestate's declarations of claim, admitted as assisting the "presumption of ownership arising from possession"); *Ill.*: 1890, *Martin v. Martin*, 174 Ill. 571, 51 N. E. 691 (notes of testator in possession of defendant; defendant's claims of ownership, admissible to show the nature of the possession raising a presumption of ownership); *Ind.*: 1882, *Bunwell v. Studebaker*, 20 Ind. 339 (trover for a horse; issue as to H.'s ownership; H.'s declarations while in possession, admitted); 1883, *Kuhns v. Gates*, 22 Ind. 66 (replevin; declarations of claimant's grantor in possession, admitted); 1884, *McConnell v. Hannah*, 26 Ind. 102, 104 (admitted for possessor's administrator against his daughter, claiming under a purchase at a sheriff's sale); 1884, *Crichton v. Hopple*, 20 Ind. 369 (whether a deed was intended as a mortgage only; the grantor's acts and declarations, while remaining in possession, admissible to strengthen the presumption of ownership); *Ia.*: 1872, *Willson v. Patrick*, 34 Ia. 362, 371 (admissible only where the declarant was in possession); 1886, *Darrett v. Donnelly*, 38 Mo. 492, 494 (declarations of a possessor "explanatory of his possession, as that he held in his own right or as a tenant or trustee of another," held admissible; but not declarations as to the terms of a contract of sale already made); 1878, *Hannibal & St. J. R. Co. v. Clark*, 68 Id. 371, 374 (issue as to title between plaintiff and defendant's intestate; the intestate's claim of title while in possession, admitted, but not his statement as to having got a certificate, etc.); 1882, *Lemmon v. Hartmark*, 20 Id. 12, 22 (similar, the issue being as to boundary; preceding case ignored; the opinion confuses this question and the rule as to boundary statements by deceased persons, *ante*, § 1363); 1818, *Sampson v. Sampson*, 4 S. & R. 329, 330 (whether a land-warrant, paid for by the father J. but taken in his son's name, was intended as an advancement; the father's declarations, accompanying acts of ownership, admitted); *N.*: 1827, *Moon v. Hawke*, 3 Ark. 290 (issue whether a mare was the property of plaintiff or of R., as his donee; R.'s long possession of the mare, and his acts and claim of ownership, held admissible; "with respect to personal chattels, possession alone is presumptive evidence of property"); 1827, *Bull*:

as to the ownership of a wagon, the issue being whether the delivery of it was by pledge or by sale); *Wis.*: 1870, *Ruebke v. Andrews*, 26 Wis. 311 (action for price of cattle sold, the defendant alleging that the plaintiff's father was the owner; plaintiff's declarations of title while in possession, admitted, *Dixon, C. J.*, *dis.*; quoted *supra*); 1900, *Cuddy v. Foreman*, 107 Id. 519, 93 N. W. 1108 (approving *Ruebke v. Andrews*).

² 1874, *Fischer v. Bergman*, 49 Cal. 284, 297 (declarations by K. in possession, that a deed by him to B. was made as a mortgage only, and admitted for K.'s administrator); 1903, *Imbler v. McWhorter*, 117 Ga. 796, 48 S. E. 61 (whether an execution lien was the property of D. personally or as executor; his declarations of claim, not received on behalf of his estate, partly because he was not in possession of the *fi. fa.*); 1852, *Travis v. Berkham*, 4 Ind. 171, 172; 1853, *Ware v. Brookhouse*, 7 Gray, 434, *semble*; 1848, *Turner v. Belden*, 9 Mo. 787, 790 (T. sent a slave to his daughter; P. married the daughter; plaintiff claimed under P. the issue being whether the gift to the daughter by T. was absolute or conditional; P.'s declarations of absolute title while in possession were not admitted for the plaintiff; Napton, J., found no authority for "the position that the squatter or trespasser can by his own declarations elevate his title into a fee simple, or that the bailee or trespasser of personal chattels can by his own declarations convert his bailment into an absolute interest"); 1804, *Waring v. Warren*, 1 John. 340 (woman's declarations, after marriage to defendant, and while in possession, not admitted for defendant against a purchaser from the woman's first husband, before present marriage); 1869, *Devries v. Phillips*, 43 N. C. 207 (the issue being as to J.'s title, J.'s claim of ownership while storing the goods was excluded).

³ 1865, *Holmes v. Sawtelle*, 53 Mo. 179 (plaintiff's testator's declarations of claim, while in possession, not admitted for the plaintiff against one claiming under a donee by an alleged prior gift from the testator); 1855, *Criddle v. Criddle*, 31 Mo. 322 (similar ruling to *Turner v. Belden*, *supra*; Scott, J.: "When a person is in possession of property, whether real or personal, and nothing more appears, the law presumes that he is the owner of it; he cannot, whilst thus possessed, make a title for himself by his own declarations or assertions"); 1868, *Watson v. Bissell*, 27 Id. 220, 223 (similar); 1866, *Darrett v. Quimby*, 38 Id. 492, 494 (confused statements); 1864, *Kyle v. Kyle*, 15 Oh. St. 15, 20 (issue as to K.'s being bailee or donee of a mare from the defendant; K.'s declarations of claim, while in possession, not admitted for his representative).

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tions of disclaimer would also be admissible in favor of the opponent, as repelling the presumption; but as these would usually also be receivable as admissions (*ante*, § 1082) the question is not often a practical one.⁶

(2) A special situation arises where the parties opposed are, on the one side, creditors *levying upon property*, as that of *their debtor* Doe, and, on the other side, a party claiming the property as belonging to him and not to Doe. Here the possessor making the offered declarations of claim may have been either the now claimant himself or the debtor Doe; and the two cases must be considered separately:

(a) When the possessor-declarant was *the now claimant* against Doe's creditor, his declarations of claim, under the present principle, ought to be admissible *for himself*.⁶ His declarations of disclaimer would equally be receivable for the creditor (as in par. 1, *supra*); but they would also always be usable to this end as admissions, and thus the question does not seem to have arisen.

(b) When the possessor-declarant was the *debtor* Doe, his declarations of claim will of course favor the creditor's case, as against the now claimant's, and upon the present principle ought to be admitted *for the creditor*. In the case where the claimant sets up a title *prior and superior* to that of the debtor Doe, the situation is simple; for on no other principle than the present could such declarations by Doe be receivable.⁶ But where the now claim-

⁶ 1862, *Boone Co. Bank v. Wallace*, 18 Ind. 82, 86 (declarations disclaiming title, offered by a robbed person against one claiming under a thief; not decided); 1888, *Durham v. Shannon*, 116 Id. 403, 407, 19 N. E. 190 (admitted against purchaser under administrator's sale, in favor of declarant's prior donee); 1889, *Taylor v. Lusk*, 9 Ia. 440, *error*; 1897, *Elwood v. Saterlin*, 68 Minn. 173, 71 N. W. 13 (action by indorsee of note given to G. to pay for horses sold; defence, fraudulent representations, G. being not the owner of the horses, but agent for the plaintiff; G.'s declarations, while in possession, of plaintiff's ownership admitted); 1898, *Nease v. Schneider*, 38 Mo. 525, 536 (issue as to title to timber between B. and C.; B.'s declarations of title in C., while cutting the timber, admitted for C. to show that B. obtained possession as agent and not as vendee); 1898, *Darrett v. Durnelly*, 38 Id. 493 (see citation *supra*, note 1); 1883, *Auderson v. McPike*, 66 Id. 398, 399 (declarations, disclaiming title, by a stranger in possession, admitted); opinion confused, and no precedents cited; 1891, *Meier v. Meier*, 105 Id. 411, 422, 430 (preceding case approved, in a confused opinion); 1909, *Gross v. Smith*, 133 N. C. 604, 44 S. E. 111 (the plaintiff's daughter lived with her father, and a cow was kept in her father's pasture; the father's declarations, while the cow was there, that it was hers by gift from him, admitted, in an action against a purchaser from the father's administrator).

⁶ 1890, *Thompson v. Mawhinney*, 17 Ala. 382, 386 (admissible; here excluding assertions as to the contract by which title was claimed); 1893, *Larkin v. Basy*, 111 Id. 303, 18 So. 646 (wife's declarations while in possession of a cow, admitted for her against husband's creditor;

in this case the doctrine is loosely dated back to *McBride v. Thompson*, cited *supra*, § 1778, note 4; but that case seems not to have proceeded on the present theory, though the facts would have admitted of it); 1867, *Whitaker v. Wheeler*, 44 Ill. 440, 442 (trover against a sheriff levying; possessor's declarations admitted for himself); 1881, *Boyden v. Moore*, 11 Pick. 363, 365 (vendee's declarations, directing the goods to be cared for at his expense, held admissible "to show that the possession and acts of the son [vendor] were those of an agent" and "to repel the suggestion of secrecy"). *Contra*: 1868, *Murray v. Cowe*, 26 Ia. 376; 1890, *Swindell v. Warden*, 7 Jones L. 575 (possessor's declarations, not admitted against the vendor's creditors; Manly, J.: "If he claim in his own right, no declaration of his can rightfully be used to prove more than the presumption arising from possession; and if that be a party's position, it would seem that his declaration cannot be used for any legitimate object; . . . [otherwise, it] would be introducing the party as a witness at large, under shelter of explaining a possession").

⁶ The rulings are not consistent: *Ala.*: 1842, *Oden v. Stubblefield*, 4 Ala. 40 (see citation *infra*, note 8); 1846, *Gary v. Terrill*, 9 Id. 306 (see citation *infra*, note 8); *Conn.*: 1847, *Avery v. Clemons*, 18 Conn. 306, 309 (trover for a wagon attached by defendant as the property of B.; plaintiff claimed the wagon as bailor to S.; defendant alleged that S. had obtained it by exchange from B.; S.'s declarations in possession, claiming it as his own, were admitted for the defendant; quoted *supra*); *Mass.*: 1862, *McGough v. Wellington*, 4 All. 502 (excluded); 1881, *Fellows v. Smith*, 130 Mass. 378 (same); *Miss.*: 1881, *King v. Frost*, 28 Miss. 417, 10

ant derives title by *purchase* (or *attachment*) under the debtor Doe, and Doe (by hypothesis) has retained possession after the sale, Doe is in the position of an assignor to the claimant; hence, although the present principle would suffice to admit Doe's declarations, yet the further question arises whether, as *admissions* of an assignor or grantor, Doe's declarations can be used to affect his assignee. His declarations, it must be remembered, are made in possession, after transfer; they claim title in himself, and are offered by the creditor; and they practically amount to a statement that the transfer was made in form only, without intent to pass title. Now as admissions, several possible theories may be invoked for these declarations; either they may be absolutely rejected as admissions made after formal divestment of title; or they may be received as declarations of intent, showing the debtor's fraudulent intent; or they may be received provided there appears a conspiracy to defraud creditors, so as to charge the purchaser with the admissions of his co-conspirator; the judicial conflict upon these theories has been already examined (*ante*, § 1086). The important thing to notice in this place is that, upon the present theory of verbal acts corroborating the presumption from possession, none of the above limitations stand in the way; by abandoning the use of these declarations as admissions, and by using them as verbal acts, we leave ourselves with only one restriction, namely, that the declarations must have been made by one in possession. Such is the important difference in practical effect between treating them as admissions and treating them as verbal acts to aid the presumption from possession. This theory, in its present application, is well expounded in the following passage:⁷

1875, *Sherwood, J.*, in *Burgert v. Berchert*, 50 Mo. 80, 86 (admitting a debtor's declarations, while in possession, against the vendee): "In investigations of the character involved in the case at bar, there are two prominent questions presented: First, were the parties to the transaction actuated by a motive to hinder, delay, or defraud the creditors of the vendor? Second, was possession of the goods alleged to have been sold, accompanied by delivery in a reasonable time (regard being had to situation of the property) and was the alleged sale followed by an actual and continued change of the possession of the things said to have been sold? Any evidence, therefore, tending to shed light, even remotely, on the subject of these inquiries, is admissible. And if the first question is answered in the affirmative, or the second in the negative, the result must be in favor of those attacking the sale. For this reason testimony must be elicited, as to the possession of the goods; as to the character of that possession; as to whether it and the delivery of the articles sold was open, notorious, and unequivocal; as to the declarations of the party in, or apparently in, possession, as to the quantity and value, or apparent quantity and value of the goods at or about the time the alleged sale was effected; as to whether the

N. W. 428 (issue whether H. was owner or plaintiff's bailee; H.'s declarations of claim in possession, not admitted for H.'s creditor); 1890, *Dalley v. Linnehan*, 43 Id. 277, 44 N. W. 50 (similar; declarations admitted; preceding case not cited); 1893, *Olson v. Swenson*, 53 Id. 516, 519, 55 N. W. 596 (similar; *King v. Frost* followed); 1901, *Whitney v. Wagener*, 64 Id. 211, 57 N. W. 603 (creditor's suit to recover assets of S.; plea alleging them to be corporate assets; S.'s declarations, as agent of a corporation, as to

his ownership of a note, held not receivable unless the note was in his individual possession); Or.: 1902, *Noblitt v. Durbin*, 41 Or. 555, 69 Pac. 686 (whether N. or his wife was owner of personality; his declarations of claim, in possession and while hiring out the property, held admissible for his creditor against the wife; but here the declarations in fact offered were not assertions of claim and were excluded).

⁷ Another exposition will be found in *Askew v. Reynolds*, 1 Dev. & B. 267, quoted *ante*, § 1086.

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sale was secretly and knowingly made, or made in the usual and ordinary course of business upon an adequate consideration. . . . Testimony of the kind mentioned, or of a like nature, is always receivable to establish or to overthrow thereon the *bona fides* or the validity of the given transaction. The rule is familiar, that the declarations of a party in possession of property are verbal acts, and are admitted as explanatory of the nature of that possession."⁵

⁵ The extent to which the present principle is favored by the different Courts may be seen by comparing the cases below with those collected *ante*, § 1086 (fraudulent assignor's admissions); but for Alabama, Missouri, and North Carolina, all the rulings are placed here, because in the first State they are hopelessly confused, and in other two there has been a shifting of theories; note also that the declarations may sometimes (as in *Foster v. Nowlin*, *Wilson v. Woodruff*, *Me.*) come in as self-contradictions discrediting a party-witness: *England*: 1838, *Willies v. Farley*, 3 C. & P. 395 (plaintiff had bought W.'s goods on execution for his own claim; W. remained in possession; defendant seized the goods on another creditor's execution; W.'s statements in possession were offered by the defendant to prove "the plaintiff's execution was merely colorable"; *Vaughan, B.*: "What J. W. said as to whose the goods were, he being then in possession of the goods, is evidence"; no theory stated; *Alabama*: 1842, *Oden v. Stubblefield*, 4 Ala. 40 (issue whether S. or his son was owner, the son's vendee claiming by gift from plaintiff to the son; the son's declarations of claim while in possession, admitted for the vendee); 1845, *Borland v. Mayo*, 8 id. 103, 113, 114 ("the declarations of the vendor were only admissible upon the hypothesis that he retained the possession, or hims. If and vendee were co-workers in the purpose to defraud," i. e. the theory of conspiracy); 1846, *Gary v. Terrill*, 9 id. 306 (issue as to the title of a slave in possession of T., claimed by defendant as T.'s bailor; T.'s claim of title while in possession, admitted for his vendee at a sheriff's sale); 1846, *Webster v. Smith*, 10 id. 439 ("while it is allowable to prove the statements of one in possession, in explanation of the possession, it is not permissible to show everything that may have been said by him in respect to the title, as, that it was acquired *bona fide* and for a valuable consideration"); 1846, *Abney v. Kingsland*, 10 id. 356, 360 (debtor's declarations of intent to defraud, after sale and during possession, held admissible for the creditor if there is other evidence of a combination to defraud; such declarations distinguished from mere declarations of claim "explanatory of possession"); 1848, *Beall v. Ledlow*, 14 id. 523, 526 (debtor's declarations in possession, admitting that his father was owner, received against the son's creditor); 1848, *Degraffenreid v. Thomas*, 16 id. 681, 684 (like *Thomas v. Degraffenreid*, *infra*, with other declarations; opinion not clear); 1849, *Parker v. Goldsmith*, 16 id. 526 (declarations of a defendant who had taken goods from the plaintiff's possession, claiming as his own when called upon for surrender, not admitted for himself); 1849, *Darling v. Bryant*, 17 id. 10 (issue as to the plaintiff's joint ownership of a boat; the statement of B., the captain and joint owner, while in possession, that W. was also

owner, admitted; "as they qualify the possession they constitute the *res gestæ*, and tend to establish the possession of both B. and W.; this being established, the legal presumption of ownership arising from such joint possession attaches, and *prima facie* entitles them to a joint action"); 1850, *Nelson v. Iverson*, 16 id. 216, 223 (declarations of plaintiff's donor, made after the date of the alleged gift, but while still in possession, admitted against the plaintiff so far as they merely claimed possession as owner, but not so far as they recited past occurrences); 1850, *Thompson v. Mawhinney*, 16 id. 342, 346 (issue as to the title to a cotton crop; the plaintiff's declarations while in possession of the land, admitted in their favor so far as they claimed an interest, but not so far as they recited the terms of the contract between the plaintiffs and the owner of the land); 1850, *Thomas v. Degraffenreid*, 16 id. 602, 603, 27 id. 651, 656, 659 (declarations of the claimant's vendor's donor, after the alleged gift and while still in possession, conceding the title to be in the donee, admitted for the claimant); 1850, *Strong v. Brewer*, 16 id. 706, 713 (debtor's declarations after title and possession gone, excluded); 1850, *Mobley v. Bilberry*, 16 id. 423 (debtor's declarations of ownership while in possession after the sale, admitted for the creditor "as explanatory of his possession"); 1851, *Foot v. Cobb*, 18 id. 585, 586 (declarations of a debtor, after title and possession gone, excluded); 1851, *Perry v. Graham*, 16 id. 823, 825 (declarations of the plaintiff's wife, the alleged donee, while in possession, claiming title, admitted for the plaintiff; but not her declaration of the past fact of the gift); 1850, *Hadden v. Powell*, 16 id. 314 (declarations of a debtor in possession that he had, sold to the claimant, not admitted for the claimant, because reciting a past fact); 1851, *Nelson v. Iverson*, 16 id. 225, 229, 24 id. 9, 16 (declarations of a mother, said to be in possession as bailor for her infant son, admitted on the facts); 1851, *Fontaine v. Beers*, 19 id. 722, 726 (debtor's agent's declarations of claim, while in possession, admitted for the creditor against an alleged prior purchaser); 1855, *Martin v. Hardesty*, 27 id. 456 (like *Mobley v. Bilberry*); 1856, *Upson v. Raiford*, 29 id. 188, 194 (declarations by a debtor in possession that the property belonged to him, admitted on the authority of *Darling v. Bryant* and ensuing cases); 1860, *Kirkland v. Trotti*, 66 id. 417, 420 (defendant's tenant's declaration, when taking possession, that he did so for defendant, admitted against defendant on an issue as to his wrongful possession); *Florida*: 1908, *Volusia Co. Bank v. Bigelow*, — Fla. —, 33 So. 704 (declarations of a husband-debtor in possession, admitted for the creditors against the wife-mortgagee); *Illinois*: 1873, *Amick v. Young*, 69 Ill. 542, 544 (debtor-possessor's declarations, admitted for the attaching creditor); *Indiana*: 1889, *Mans v. Bume*, 128 Ind. 522, 24

(35) Here also (on the same principle as in par. a, *supra*) the debtor's declarations of disclaim are receivable. Who will wish to use them? Where the claimant alleges a title prior and superior to that of the debtor, the latter's

N. E. 245 (debtor-possessor's declarations, admitted for the attachment creditor against a purchaser); *Iowa*: admitted, except as otherwise noted: 1851, *Ross v. Hayne*, 5 G. Gr. 211, 214 (cattle); 1865, *Blake v. Graves*, 10 Ia. 312, 314 (horses); 1877, *Stephens v. Williams*, 44 id. 540, 543 (piano); 1881, *Sweet v. Spencer*, 37 id. 510, 512, 10 N. W. 370 (stock of goods; here narratives of the terms of a contract were excluded); 1882, *Hardy v. Moore*, 63 id. 65, 69, 17 N. W. 300 (stock of goods); 1899, *Nodle v. Hawthorne*, 107 id. 280, 77 N. W. 1043 (declarations by A in possession of personality, as to his ownership, admitted for a creditor of A claiming against B); 1899, *Walkley v. Clarke*, 107 id. 451, 78 N. W. 70 (obscure); *Massachusetts*: 1832, *Roberts v. Medberry*, 130 Mass. 100 (possession being presumptive evidence of title to a chattel, the declarations of a debtor, while in possession, even after the time of an alleged fraudulent sale, are receivable in favor of the creditor); 1896, *Parry v. Libbey*, 166 id. 112, 44 N. E. 124 (similar); *Minnesota*: 1899, *Rollohon v. Nash*, 76 Minn. 237, 77 N. W. 954 (title to personality; the predecessor's possession being shown to raise a presumption of title, his declarations, while in possession, as to its character were admitted; here for the father's creditors against sons claiming title); *Montana*: 1899, *Gallick v. Bordeaux*, 22 Mont. 470, 86 Pac. 961 (declarations of debtor in possession, admissible as "explaining the character of his possession"); *Missouri*: here compare also the cases cited *ante*, § 1778: 1830, *Foster v. Wallace*, 2 Mo. 231, 236 (debtor's declarations of ownership, denying the alleged vendee's title, made after the date of the alleged conveyance and while still in possession, held inadmissible "unless the privity of the F. [vendee] had been proved"); 1835, *Foster v. Nowlin*, 4 id. 12, 22 (same general litigation; debtor's declarations now received, "as going to show the nature of the possession he had"; preceding ruling not referred to); 1837, *Wilson v. Woodruff*, 5 id. 40 (preceding case repudiated on that point; declarations held inadmissible); 1865, *Langsdorf v. Field*, 36 id. 440, 445 (declarations excluded; no authority cited); 1865, *Howell v. Howell*, 37 id. 125 (obscure as to the facts); 1871, *Weinrich v. Porter*, 47 id. 293, 294 (debtor's declarations after delivering possession to the vendee, excluded); 1878, *Burgert v. Borchert*, 59 id. 86, 88 (debtor's declarations held admissible as explanatory of possession; quoted *supra*); 1875, *Boyd v. Jones*, 60 id. 454, 470 (declarations held admissible on the theory of conspiracy only (*ante*, § 1086); "in such case, the common object and purpose having been clearly made out, the declarations of one while engaged in the prosecution of the common object may be received against another"; *Burgert v. Borchert* wholly ignored); 1898, *Danlap v. Griffith*, 146 id. 263, 47 S. W. 917 (*Burgert v. Borchert* approved and followed, on an issue of title to realty); 1901, *Wall v. Beady*, 161 id. 623, 61 S. W. 264 (admissible only on the theory of

conspiracy); *North Carolina*: 1796, *Arnold v. Bell*, 1 Hayw. 204, 207 (debtor's declarations, after the sale, tending to show it fraudulent, excluded; "a man's confession may be given in evidence to affect himself, but not to affect any other person"); 1801, *Robinson v. Devoue*, 2 id. 184 (declarations after an alleged gift, excluded; "after declarations of the party shall not be taken to explain his former transactions"); 1804, *Gray v. Harrison*, ib. 293 (similar, for a sale); 1804, *Edbank v. Burt*, ib. 330 (similar, for a gift; but declarations at the time of the property being taken away would have been received); 1831, *Den v. Pickett*, 3 Dev. 6 (declarations excluded, because the declarant's possession was not shown); 1835, *Askew v. Reynolds*, 1 Dev. & B. 367 (declarations after the sale and during possession, claiming the goods as his own, admitted on the *res gesta* theory; quoted *ante*, § 1086); 1850, *Patton v. Dyke*, 11 Ired. 237, 239 (preceding case cited with approval); 1850, *Foster v. Woodfin*, ib. 339 (*Askew v. Reynolds* followed on similar facts); 1874, *Kirby v. Masten*, 70 N. C. 540 (debtor's declarations after assignment during possession with vendee's assent, received "to qualify the extent and purpose of the possession"; *Askew v. Reynolds* not cited); 1878, *Gidney v. Logan*, 79 id. 214 (like *Askew v. Reynolds*; *Kirby v. Masten* approved); 1893, *Blair v. Brown*, 116 id. 431, 639, 31 N. E. 434 (debtor's declarations after assignment, excluded, the conspiracy-theory being applied; the Court wholly ignores all its own foregoing precedents and palpably contents itself with citing a treatise on Assignments); 1901, *City National Bank v. Bridgers*, 123 id. 322, 36 S. E. 238 (preceding case followed); *Pennsylvania*: 1814, *Johnson v. Kerr*, 1 N. & H. 25 (admitted; but here the debtor-grantor was the nominal plaintiff, and thus the declarations were a party's admissions); 1823, *Babb v. Clemson*, 10 id. 419, 426, 12 id. 238 (declarations of debtor-grantor, as to a hiring of the custodian, and the custodian's declarations, admitted as affecting the "character of the possession" after transfer of title, no apparent change of custody having occurred); *Tennessee*: 1899, *Brooks v. Lowenstein*, 95 Tenn. 242, 25 S. W. 89 (debtor in possession before and after the plaintiff's attachment, the defendant being a later attaching creditor, alleging that goods had been secretly removed before the first attachment; the debtor's declarations, admitted for defendant to prove the fact of removal; unsound, for here they had merely testimonial force; but they were admissible under § 1086, *ante*).

It may be added that in the present class of cases it would be possible to receive the declarations while rejecting them for the foregoing cases (par. a and b, *supra*); since here the creditor may lay hold, not only of the presumption of ownership from possession, but also of the presumption of fraud from continued possession by the assignor.

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declarations of disclaim will be useful to the claimant against the creditor; yet, since they could always be used against the creditor as admissions of his debtor, to whom he is privy in title, there is no necessity of resorting to the present theory. Where, on the other hand, the now claimant derives title *under the debtor*, the latter's declarations of disclaim would be desirable for neither party, if they disclosed some original defect of title (e. g. that he had stolen the property); while if they disclaimed merely by asserting the sale to the claimant, they would of course be always receivable as admissions against the creditor; so that no occasion would arise for resorting to the present principle of verbal acts. Nevertheless, it is logically applicable, and has received some recognition for the present purpose.*

§ 1780. *Same: Distinction between the Forgoing and Other Declarations about Land-Title or Land-Possession.* Declarations about land-title or land-possession form the subject of numerous rules, resting on distinct principles. It is worth while, at this point, to compare them and to summarize the practical points of contrast:

(1) *Possessor's declarations as verbal acts of adverse possession (ante, § 1778).* Here the question is whether they violate the Hearsay rule; it has been noticed that they do not. The conditions are merely that there shall be an issue of adverse possession, and that the declarant shall have been in occupation at the time. Thus it is immaterial whether he is deceased or not, whether he is a party or not, and whether the fact stated was at the time against interest or not.

(2) *Possessor's declarations to support the presumption of title from possession (ante, § 1779).* Here the question is also whether they violate the Hearsay rule; it has been seen that by the better opinion they do not.

* *Ala.*: 1846, *Webster v. Smith*, 10 Ala. 429 (see citation *supra*); 1848, *Beall v. Ledlow*, 14 id. 123 (see citation *supra*); 1850, *Thomas v. De Grafford*, 17 id. 602 (see citation *supra*); *Ga.*: 1867, *Myers v. Bernstein*, 103 Ga. 579, 27 S. E. 681 (declarations on delivery of cotton to a warehouseman, that it was the declarant's wife's, admitted, in an issue between the wife and the declarant's creditors); *Mich.*: 1896, *Coldwater N. Bank v. Baggie*, 117 Mich. 416, 75 N. W. 1067 (declarations by the husband of the defendant as to her ownership of goods in his possession, excluded, the title or possession not being directly involved); *Minn.*: 1897, *Lehmann v. Chapel*, 70 Minn. 496, 73 N. W. 403 (wife claiming as owner of property bought by her and put in possession of husband as agent; the husband's declarations while in possession, received, on the theory of *res gestæ*, though the wife did not claim title through him; the two principles are confused in the opinion); *Mo.*: compare the cases *supra*, note 8; 1833, *Foster v. Nowlin*, 4 Mo. 18, 22 (declarations held admissible); 1837, *Wilson v. Woodruff*, 3 id. 40, 43 (declarations "in affirmation of the vendee's title," held inadmissible, "unless indeed" the possession by the debtor "forms a just reason"); 1871, *Thomas v. Wheeler*,

47 id. 263 (declarations of J., in possession, admitting the property to be held of C. as bailor, received for C. against J.'s creditor); *N. H.*: 1850, *Walcott v. Keith*, 23 N. H. 196, 212 (debtor's declarations, after a sale but during possession, held admissible for the buyer, as calculated to characterize C.'s [the debtor's] possession and to rebut the presumption of ownership in him arising out of the fact of possession, and indirectly to show the right of the plaintiff [buyer]); 1851, *Bradley v. Spofford*, 23 id. 444 (declarations of the debtor that he was only bailor for the plaintiff, admitted against the creditor, as rebutting the presumption from possession); 1908, *Fletcher v. Wakefield*, 75 Vt. 287, 84 Atl. 1012 (wife's action for a piano, acquired by gift from her husband, against her husband's creditors; the fact of its insurance in her name with his agent, admitted). *Contra*: 1867, *Karnshaw v. Tomlinson*, 26 U. C. Q. B. 610 (a debtor's statement, while in possession, that property claimed by the plaintiff against the creditor belonged to a third person, not the plaintiff, excluded); 1903, *Grader v. Bowles*, 1 Brev. 266 (debtor's declarations at the time of the transfer, not admitted for the donee).

They differ from the foregoing sort in that no issue of adverse possession is necessary.¹

(3) *Statements of facts against proprietary interest* (*ante*, § 1458). For these an Exception to the Hearsay rule is conceded. The marked limitations are that the declarant must be deceased (or otherwise unavailable), and that the declaration must be in disparagement of title. On the other hand, whether the declarant was at the time in possession or not, and whether he is a party or privy or not, is immaterial.

(4) *Statements concerning private boundaries* (*ante*, §§ 1563-1570). In these is involved another Exception to the Hearsay rule, having two forms. By the one are received statements as to private boundaries by a deceased person having no interest to misrepresent. By the other are received similar statements made by a deceased owner in possession while on the land pointing out the boundaries. The marked differences between the foregoing Exception and this one are that in the latter the fact need not be against interest, but it must be solely a boundary-fact.

(5) *Admissions as to title-defects* (*ante*, §§ 1082-1087). Here there is no requirement of the decease of the declarant; nor need the fact stated have been against interest; nor is possession at the time a necessary circumstance. But the declarant must be a party-opponent or a predecessor of his in title, and the statement must have been made during the continuance of title. Whether this principle admits statements made after title divested but while keeping possession is a question; and whether a vendor is a predecessor whose admissions are usable is a question. Moreover, the rule about producing the original title-documents may apply (*ante*, §§ 1255-1257) to exclude these admissions of an *existing* documentary title.

(6) *Recitals in old deeds* (*ante*, § 1573). An Exception to the Hearsay rule allows recitals in old deeds to be used as hearsay assertions for limited purposes. No limitations as to parties, possession, or disparagement of title, here obtain.

(7) *Old leases and deeds as circumstantial evidence of possession* (*ante*, § 157). Under the principle of verbal acts, a lease or a deed by one in possession is an act of claim showing the adverse character of his occupation. But suppose that such a lease is offered, by one claiming under the lessor, without direct testimony to the accompanying possession; may not the execution of such a document be itself sufficient circumstantial evidence of such possession by the maker? With certain limitations this is conceded, when the deed is ancient; the inference being one of circumstantial evidence.

(8) *Authentication of ancient deeds* (*post*, § 2137). Even without direct evidence of execution, the age and custody of a deed may suffice to authenticate it as genuine. But a main question is, whether possession of the land, by the grantee in the deed, is also an essential circumstance. This differs from the foregoing question, first, in that the objects of the proof are just the

¹ The differences between them and admissions have been noted in § 1779.

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reverse of each other, and, secondly, in that the possession involved is in the one case that of the grantor, but in the other case that of the grantee.

All these principles are simple enough in themselves, and distinct enough from each other as general principles; but it is easy to see, in a comparative survey of them, how it has happened that Courts in applying them to superficially similar pieces of evidence have sometimes interchanged and misapplied the respective limitations of principle.

§ 1781. *Declarations by Accused found with Stolen Goods.* On a charge of larceny or robbery, when the accused is found in possession of the stolen goods, and this circumstance is offered against him, the accused's use of his own declarations in exoneration, may be treated from the point of view of several principles. Some uncertainty in the precedents has thus naturally resulted.

(1) The silence of the accused, or his failure to repel the charge and make explanation, when found with goods and charged, would be a circumstance or conduct available against him, either as an indication of consciousness of guilt (*ante*, § 273) or as an admission (*ante*, § 1071). Hence, this inference may properly be avoided in advance by showing that he was not silent but did repel the charge and claim his innocence. But, upon this principle, as in the case of rape (*ante*, § 1136), merely the fact of making such a claim would be receivable, for this would suffice to dispose of the argument that he was silent. The details of his statement would thus not be admissible.¹

(2) On the theory of using prior consistent statements to corroborate a witness by repelling the suggestion of recent contrivance (*ante*, § 1129), the accused's consistent explanations, made before or upon arrest or charge made or goods found in his possession, would be receivable, provided he were a witness. The foundation of this theory has already been examined (*ante*, § 1143). It is enough here to note that it satisfies most of the cases, though it does not seem to be explicitly employed by the Courts.¹

(3) The Hearsay Exception for Spontaneous Exclamations (*ante*, § 1741) might perhaps be sufficient to admit statements made directly upon arrest, but the Courts seem not to invoke it.

(4) Recent possession of stolen goods raises a presumption (*post*, § 2513) that the possessor is the thief or robber or knowing receiver (as the charge may be). Even though the strict effect of this fact as raising a presumption and casting on the defendant the duty of producing evidence (*post*, § 2490) may be removed by his producing some evidence to the contrary, still the fact of possession remains for the jury's consideration as capable of the inference of guilt. Now the inference from the fact of possession will be stronger or weaker, according as the possession was not or was in good faith; if a possession in good faith can be made to appear, the inference that the possessor was himself the robber or the thief or the knowing receiver can hardly be strong. Thus, the total significance of the act of possession becomes material; and upon the principle of verbal acts (*ante*, § 1772), the utterances

¹ The cases are placed *infra*, note 4.

of the person while in possession may be received as verbal acts (or, in the common judicial phrase, as "explanatory of possession"); though not as hearsay assertions to evidence the fact asserted.² On this principle, it would be immaterial what the tenor of the utterance was, — whether a claim or a disclaimer of ownership, or an explanation of finding or of purchase or of borrowing, provided only it indicated the intent of the possession. It would also be immaterial that it was made before arrest, or discovery of the goods, or claim made, or suspicion raised, or that it was made after arrest or discovery or claim or suspicion, provided only that it was made during possession. On the latter point, this theory might seem to allow greater latitude of time than the second principle (par. 2, *supra*); but since possession is seldom retained after claim by the owner or after arrest, the rules would in practice coincide. Still, if the defendant does retain possession, repeating his own claim of ownership, after claim made by another, it seems proper enough to consider his utterances upon the issue of good faith. Most of the precedents proceed upon this Verbal Act theory, yet decline to receive declarations made more than a short time after arrest or discovery, on the theory that the opportunity to fabricate had intervened; and they thus seem to proceed in part upon the other principle (par. 2, *supra*), in part upon this one (par. 4); yet, in the ordinary case, the practical result, as above noted, would not differ under either principle. Of these two theories, in general, it would seem that both are sound, and that declarations conforming to either the one or the other should be received.

(5) A narrow class of declarations of this sort are unquestionably receivable in another aspect of the same principle of verbal acts (*ante*, § 1777). When merely the intent to appropriate is in issue, and the defendant is said not to have exercised dominion at all over the goods (i. e. irrespective of his good faith in the possession), his utterances at the time of having them (for example, when taking a borrowed article to a pawnshop) will indicate the nature of his act. This use (which is rare enough) is a proper one, whatever the theory or the limitations may be in the ordinary case, where the act of appropriation is clear and the only question is as to good faith.³

Few Courts have laid down any principle with sufficient definiteness. All that can be said, as regards the state of the precedents, is that to-day in apparently all Courts declarations of the present sort are received on certain conditions, and that the rulings are altogether too strict for exclusion.⁴

² The cases are placed *infra*, note 4.

³ Of this sort are the following cases in the next note: *Comfort v. People*, Ill.; *State v. Waters*, Mo.; *McPhail v. State*, Tex.

Distinguish (1) the use of statements by a vendor to the defendant, as evidence of the latter's good faith in purchasing stolen goods (*ante*, §§ 234, 239), and (2) the use of exculpatory statements in general by accused persons (*ante*, §§ 293, 1144, 1732, *post*, § 2115).

⁴ As to this strictness, compare what is said *ante*, § 1732, par. 3. The cases are as follows: *Eng.*: 1845, *R. v. Abraham*, 3 Cox Cr. 430 (burglary;

the defendant had said, before suspicion excited, that he had found them in a field; *Alderson, B.*, said that if he "had given such an account of his possession of the stolen property to his neighbors, before suspicion existed or search made, he had not the slightest doubt" of its admissibility); 1844, *R. v. Crowhurst*, 1 C. & K. 370 (larceny; statement, on being found in possession by a constable, as to buying the article, admitted without question); 1845, *R. v. Smith*, 2 Id. 307 (same principle recognized); 1847, *R. v. Evans*, 2 Cox Cr. 270 (same); 1842, *R. v. Wilson*, 2 F. & F. 163 (an ex-

§ 1782. Declarations affecting a Revocation of a Will. The equivocal act of tearing, burning, or cancelling a testamentary paper may or may not

plaintiff volunteered by an accused on arrest for stealing, admitted); 1844, R. v. Exall, 4 id. 922, 929 (same as R. v. Evans); Can.: 1878, R. v. Ferguson, 16 N. Br. 612 (defendant's statement, on the night of the larceny, before being charged with stealing, as to where he got the goods, admitted); Ala.: 1839, State v. Wisdom, 8 Port. 511, 513, 517 (claim of title and production of bill of sale, when arrested with the goods, excluded, on "the general rule that one shall not be permitted to make evidence for himself"; "it must be asserted before or at the taking"); 1865, Spivey v. State, 26 Ala. 90, 92, 103 (larceny; defendant's open offers for sale, statements of his sources of title, and conversation with the supposed vendor's agent, excluded); 1868, Taylor v. State, 42 id. 529 (larceny; statement, when arrested, of purchase from V., excluded); 1870, Crawford v. State, 44 id. 45, 47 (burglary; statements of purchase, when found with the goods, admitted); 1871, Maynard v. State, 46 id. 85 (larceny; defendant's "explanation as to his possession" excluded); 1879, Atwell v. State, 63 id. 61, 65 (fraudulently removing mortgaged oxen; declarations at the time of removing and selling, that the mortgagees had permitted it, excluded); 1879, Cooper v. State, 1b. 80 (larceny; allegations of gift from S., made some time after arrest, excluded); 1881, Henderson v. State, 70 id. 23, 25 (burglary; "if the party, at the time he is found in possession of the stolen property, and before he has had the opportunity to connect evidence exculpatory of himself, give a reasonable and probable account" of his possession, it is admissible; some of the preceding cases, but not Crawford's and Cooper's, repudiated); 1881, Allen v. State, 73 id. 5 (larceny; defendant's statements as to title while openly possessing the goods, excluded); 1882, Allen v. State, 73 id. 23 (larceny; declarations "explanatory of possession," admissible, but not "respecting the source of title, or the contract under which he claims"); 1893, Smith v. State, 103 id. 40, 43, 16 So. 12 (larceny; statements while in possession, as to finding the article, admitted); 1896, Bryant v. State, 116 id. 445, 23 So. 40 (declarations, while in possession before arrest, as to the article being loaned to defendant by S., admitted as "explanatory of her possession"); Ark.: 1853, Golden v. State, 19 Ark. 590, 600 (horse-stealing; declaration, when arrested, that "it was strange, for he had swapped a mule for a horse on the morning before," excluded; following State v. Wisdom, Ala.); Ill.: 1870, Comfort v. People, 54 Ill. 406 (remarks of the accused when pledging X's watch, admitted to indicate whether or not he was exercising ownership at the time); 1880, Bennett v. People, 56 id. 602, 607 ("what explanation a person makes while in possession of stolen property, at the time of the finding it in his possession, is admissible in evidence as explanatory of the character of his possession"); Ky.: 1868, Tipper v. Com., 2 Metc. 8, 11, *semble* (approving R. v. Abraham); La.: 1878, State v.

Thomas, 30 La. An. 603 (in a charge of larceny, the defence being a taking under claim of ownership, previous claims of ownership were held admissible); Me.: 1879, State v. Pettis, 63 Me. 124 (larceny; declarations while in possession, that he had found the article in the street, not admitted; Appleton, C. J., and Barrows, J., diss., thought them admissible "as tending to disprove any felonious intent"); Mass.: 1870, Com. v. Rowe, 105 Mass. 590 (larceny; defendant's declarations to the shop-clerk, while holding the goods, that they had dropped out of a shawl which another woman had just given her to hold, admitted "to explain and qualify that possession and to disprove the inference of guilt"); Miss.: 1879, Payne v. State, 37 Miss. 348 (larceny of a cow; defendant's statements, after selling it, to the buyer from him, that he had taken it by mistake for one of his own, and his warning not to slaughter it; "explanations offered by the party to account for his possession, if contemporaneous with it, or offered at a time when he is first called upon by the circumstances of the case to make such explanation," are admissible to rebut the presumption); Mo.: 1897, State v. Waters, 129 Mo. 589, 41 S. W. 221 (declarations during possession disclaiming ownership and stating a borrowing only, excluded); N. C.: 1838, State v. Jones, 3 Dev. & B. 122 (larceny of pigs; declarations as to losing pigs and going in search of them, made before the owner's claim advanced, admitted without dispute); 1870, State v. Worthington, 64 N. C. 504 (statement when charged with stealing, admitted; quoted ante, § 1144, note 3); Oh.: 1846, Leggett v. State, 15 Oh. 263 (larceny of a horse; defendant's conversations when buying the horse from one D., admitted to "explain the inference of guilt the law raises from possession of the goods"); Okl.: 1898, Mitchell v. Terr., 7 Okl. 537, 54 Pac. 762 (explanations at the time of arrest, admissible); Pa.: 1844, Rhodes v. Com., 46 Pa. 396, 400 (murder and robbery; defendant's statements, when money was found upon him, as to its source, admitted; "had he refused to explain, it would have been evidence against him"); Tex.: 1879, Hampton v. State, 5 Tex. App. 463, 467 (larceny; declarations when "his right to the ownership of said property is first questioned by some one else," admissible, but not declarations "before any adverse claim to the property is set up and before any suspicion rests upon him"; a singular confusion of rules; no authority cited); 1890, McPhail v. State, 9 id. 164 (larceny of cattle by shooting; declarations at the time, indicating an intent to prevent trespass, not an intent to appropriate, admitted); 1883, Sittler v. State, 13 id. 587, 593 ("any explanation which the party in whose possession the property is found may give at the time," admissible); 1893, Martin v. State, 23 Tex. Cr. 441, 443, 24 S. W. 512 (the explanation must be made when first called upon to explain); 1895, Goans v. State, 36 id. 73, 31 S. W. 636 (similar to Sittler's case); U. S.:

be in legal effect a revocation; just as the handing over of money may or may not be a loan, a payment, or a deposit for safe-keeping. The total effect of the act can be ascertained only by considering its intent as expressed in the accompanying words or other conduct. Such accompanying utterances are therefore plainly receivable (*ante*, § 1772) as verbal parts of the act:

1888, *Wilde, J.*, in *Powell v. Powell*, L. R. 1 P. & D. 212: "All acts by which a testator may physically destroy or mutilate a testamentary instrument are in their nature equivocal. They may be the result of accident, or, if intentional, of various intentions. It is therefore necessary in each case to study the act done by the light of the circumstances in which it occurred, and the declarations of the testator with which it may have been accompanied; for unless it be done *animo revocandi* it is no revocation."

1893, *Woodworth, J.*, in *Dan v. Brown*, 4 Cow. 490: "The declarations of the testator are in such cases [as where, by mistake, the will is torn or thrown into the fire] evidence, where they show the *quo animo*. The act of cancelling is, in itself, equivocal, and will be governed by the intent."

1883, *C. Allen, J.*, in *Pickens v. Davis*, 134 Mass. 257 (declarations being offered to show that a testatrix, by cancellation of a second will, did not intend to revive the first): "Such declarations were admissible for the purpose of showing the intent with which the act was done. The act itself was consistent with an intention to revive or not to revive the earlier will. Whether it had the one effect or the other depended upon what was in the mind of the testatrix."¹

It follows that declarations of intent made *after* the act of tearing or the like are not verbal parts of the act, and are mere hearsay assertions:

1854, *Selden, J.*, in *Waterman v. Whitney*, 11 N. Y. 157: "[Statutes concerning revocation] require . . . some act amounting to a virtual destruction of the will. . . . Mere words alone will in no case amount to a revocation. Under these statutes, therefore, the only possible purpose for which evidence of the declarations of the testator can be given upon a question of revocation is to establish the *animo revocandi*. In other words, to show the intent with which the act relied upon as a revocation was done. . . . The fact to be proved in such cases is the act claimed as a revocation, together with the intent with which it is done; and all declarations of the testator which do not accompany the act are to be regarded as mere hearsay."

If, then, such declarations after the act are to be receivable at all, it cannot be under the present principle as verbal parts of the act, but under some other principle. By some Courts their admission is thus sanctioned:²

1837, *U. S. v. Craig*, 4 Wash. C. C. 729, 730 (declarations when found in a room with counterfeiting tools, explaining his presence, admitted "not to prove the truth of these declarations, but to repel any unfavorable conclusion from the silence of the prisoner and his declining to give some explanation of the situation in which he was found"); 1901, *Kansas City Star Co. v. Carlisle*, 113 C. C. A. 384, 108 Fed. 344, 360 (accused's explanations at the time of cattle being found in his possession, admitted); *Pl.*: 1901, *State v. Daley*, 53 Vt. 442 (larceny of a hofler; defendant's declarations, when taking it, as to believing it to be one lost by him, admitted both as verbal acts and as rebutting the inference

otherwise to be drawn from his failure to search for his own).

² 1899, *Thompson v. Updegraff*, 3 W. Va. 689, 692.

The following ruling seems to fall under this principle: 1897, *Smith v. Holden*, 58 Kan. 535, 90 Pac. 447 (circumstances at the time of executing a paper not called a will, admitted, the question being whether it was to go into effect upon death or was a gift *inter vivos*).

³ The cases are considered *ante*, §§ 1726-1737. Compare also the cases cited *ante*, § 1777 (declarations of gift), where a testator's declarations as to an advancement are sometimes involved.

§ 1763. *Declarations of a Bankrupt.* Perhaps the earliest, and in England the chief field, for the application of the Verbal Act doctrine has been the declarations of a debtor in connection with an alleged act of bankruptcy. Whether or not such conduct as departure from the jurisdiction, refusal to appear when a creditor calls to demand payment, or the like, amounts to an attempt to evade creditors and thus to an act justifying the judicial pronouncement of bankruptcy, depends for its total significance more or less on all the circumstances of the debtor's behavior. His declarations, therefore, at the time of this other conduct may go to define the general nature of the conduct, and thus become verbal parts of the act. There is, to be sure, some ground for arguing that an essential ingredient of the act of bankruptcy, as defined by the statutes, is a fraudulent intent, an intent to evade creditors, and that therefore the declaration is of a state of mind (as in the case of criminal intent), and is admissible (*ante*, § 1728) as a genuine Exception to the Hearsay rule. The effect, however, would be practically the same; because this intent would always accompany some alleged act of bankruptcy, and hence the declaration of intent would equally accompany the act. But, apart from the wording of the statutes, it seems legitimate to treat the declarations as "elucidating" and giving significance to an otherwise equivocal act (*ante*, § 1774). This has been the attitude of the Courts, uniformly in England, generally in the United States. The following classical cases illustrate the judicial mode of treatment:

1802, *Ellenborough*, L. C. J., in *Rehson v. Kemp*, 4 Esp. 263: "Where the declaration of the bankrupt is part of the *res geste*, though it may show the intention of the act and thereby constitute an act of bankruptcy, it may be evidence."

1824, *Best*, C. J., in *Renson v. Haigh*, 9 Moore 217 (letters of the bankrupt were offered, including some from Calais and Paris): "Wilkinson's going abroad was of itself an equivocal act, and requiring explanation, and, if so, we must endeavor to discover the motive with which it was accompanied, and this is generally, if not always, effected by the declarations of the party himself."

1832, *Tindal*, C. J., in *Ridley v. Gyle*, 9 Bing. 349: "When a bankrupt has done an equivocal act, his declarations accompanying that act are admissible to explain his intentions; as where he has left his dwelling-house, which he may have done either in furtherance of his business or to avoid payment of a debt." *Beesly*, J.: "The question here is whether the security in question was given by way of fraudulent preference. . . . To establish this, the declarations of the bankrupt must be admitted, not so much as declarations, but as a part of his conduct from which the inference is to be drawn that the security was given without *pretext*."

1841, *Denman*, L. C. J., in *Rouch v. R. Co.*, 1 Q. B. 51: "The act and the intention were both necessary to be proved. . . . The substantive act proved *aliunde* is the departure from home; that is equivocal; the declaration made during the continuance of that act shows the intention with which it was done."

1829, *Parker*, C. J., in *Carter v. Gregory*, 3 Pick. 168: "The exception to this rule [of hearsay] is that when declarations accompany an act and have a tendency to show the motive and intention of the act, they are sometimes admissible. Such was the case of the bankrupt, who having committed an act equivocal in its nature, his declaration made at the time showing his intention was admitted."¹

¹ Accord: 1835, *Smith v. Cramer*, 1 Bing. N. C. 586; 1838, *Thomas v. Connell*, 4 M. & W. 267; 1861, *Brady v. Parker*, 67 Ga. 687.

Since the declaration is received as a verbal part of the act, it must of course be contemporaneous with the alleged act of bankruptcy. Anything said before or after that conduct could have a purely assertive force only and could not be receivable on the present principle. This limitation has caused some apparent judicial uncertainty, — for example, in cases where the declaration was made after the debtor had absconded and while he was staying in a foreign country. There is, however, no difficulty of principle in receiving such declarations; the difficulty is merely one of fact, in determining the duration of the conduct constituting the alleged act of bankruptcy. The limitation is strict and inflexible, that the declaration must be contemporaneous with the alleged act (*ante*, § 1776). But as the conduct constituting the alleged act of bankruptcy may extend over a considerable period of time — as where a debtor absconds and stays abroad and then returns —, there may be a considerable interval between the mere beginning of the conduct, *i. e.* the original departure or closing of the house, and the actual time of the declaration. Thus, though the declarations, as always under the present principle, must be contemporaneous with the alleged act of bankruptcy, the conduct constituting that act may allow for them a wide range of time. This result, after some temporary misunderstanding, was finally reached and solidly established in the English cases, and may be taken as sound and accepted:

1812, *Mr. Christian, Bankruptcy*, I, 379, 380: "What a bankrupt declares at the time of committing an act of bankruptcy is always received in evidence, when proved by another person. . . . But these declarations have been greatly, I conceive, misunderstood or misrepresented. They must accompany the act; for where words and actions are contemporaneous, they constitute one transaction, they are together one *res gesta*, and the words are evidence of the reason of the act or the intention of the actor. . . . What Lord Kenyon and the Court said in the case of *Bateman v. Bailey*^a has, I conceive, led many into error on this subject. . . . If the Court intended to say that what he declared after his return was complete, and when he was doing no act connected with it [is admissible], it is presumed the decision cannot be supported. Whilst he is preparing to go, or in the act of going, and during his absence from home, and whilst he is returning or unpacking his portmanteau, etc., what he says is part of the act of bankruptcy; but when he is only meditating a future act, or speaking of a past one completely finished, his words surely can have no more legal operation than those of any other man."

1834, *Bent, C. J.*, in *Rawson v. Haigh*, 9 Moore 327, 2 Bing. 90: "In order to render such declarations or letters admissible, they must be made or written at the time, or during the continuance of the act or urgency of the circumstances under which they are elicited, or sent; and here, as the act of bankruptcy was a continuous act from the time of Wilkinson's departure from this country for France, . . . they may be considered as forming part of one and the same continuing act"; *Parke, J.*: "It is impossible to tie down to time the rule as to the declarations. . . . If, as in the present case, there are connecting circumstances, it may, even at that time [a month after] form part of the whole *res gesta*."

1832, *Parke, J.*, in *Ridley v. Gyle*, 9 Bing. 349: "I adhere therefore to what I said in *Rawson v. Haigh*. It is not necessary to lay down the precise time within which such declarations shall be admissible or excluded; but . . . it must always be considered whether there are any and what connecting circumstances between the declaration and the act. Here . . . those circumstances are all connected together as part of the same transaction."

^a 5 T. R. 512.

§ 1784. *Declarations as to Domicil.* In Massachusetts, declarations of intention of residence, made by one removing to another place, were originally, and in a long line of decisions, regarded as governed by a principle representing in its main aspects the Verbal Act doctrine. That such declarations in the ordinary case (that is, when made not prior to removal, but during removal or resettling) cannot conceivably be governed by the Verbal Act doctrine, is more than ought to be asserted. But, having regard to the element of intent as treated in the law of domicil, it may better be regarded as a separate and independent element, material for its own sake and not merely as appurtenant to an act, and therefore may be shown by declarations admissible under the Exception for Statements of a Mental Condition (*ante*, § 1727). Certainly this is the only aspect in which declarations made prior to removal can legitimately be received; for they would be inadmissible as verbal parts of the act. In the case of *Viles v. Waltham*, in 1893,¹ the Supreme Court of Massachusetts apparently gave up its former view and transferred its adherence to the Exception for Statements of a Mental Condition, as being the true governing principle. Nevertheless, its former line of decisions has served to furnish precedents and phrasings for other Courts; and the fact that these declarations are often treated under the Verbal Act doctrine therefore cannot be ignored. There is of course a strictness more or less unsatisfactory in applying the limitation of contemporaneousness (*ante*, § 1776); and this contributes to show that the Verbal Act doctrine is here really out of place. Its application is exhibited in the following passages:

1841, *Wilde, J.*, in *Kilburn v. Bennett*, 3 Mete. 188 (admitting declarations as to a contemplated moving): "They were made in the ordinary course of business, and in relation to the defendant's removal; and they were made to the owner of the house in which he was at the time residing. This giving notice of his intended removal is to be considered as an act which he might prove in any case in which it became material; and, if so, all that he said explanatory of his intention in relation to his removal, seems to us to be admissible in evidence."

1864, *Thomas, J.*, in *Cole v. Cheek*, 1 Gray 444: "It was not difficult to prove that he was in Lancaster before the first of May, that he came there with his horse and trunk, and made a contract for board and lodging. But the effect of these acts depended upon the intent and purpose with which they were done. . . . Qualified by such intent and purpose, they were perfectly consistent with the intention of retaining his domicil in Cheekshire. . . . That intent is manifested by what he does and by what he says when doing, and sometimes as significantly by what he omits to do or to say."

¹ Quoted *ante*, § 1727.

² The following cases in Massachusetts and Maine proceed on this principle: *Mass.*: 1840, *Thordike v. Boston*, 1 Mete. 342; 1847, *Salam v. Lynn*, 13 id. 544 (statements after a return, rejected); 1844, *Wilson v. Terry*, 11 All. 214; 1864, *Monson v. Palmer*, 3 id. 552; 1870, *Reeder v. Holcomb*, 105 Mass. 94; 1879, *Wright v. Boston*, 126 id. 164 (statements made during a study residence, and not on removal, rejected); 1879, *Weld v. Boston*, ib. 166; 1880, *Brookfield v. Warren*, 128 id. 288; 1887, *Pickering v. Cambridge*, 144 id. 248, 10 N. E. 327 (directions

for work to be done on the place removed to, rejected); *Me.*: 1833, *Gorham v. Canton*, 5 Greenl. 267; 1834, *Richmond v. Thomaston*, 20 Me. 234 (made before moving; rejected); 1863, *Cornville v. Brighton*, 29 id. 334; 1886, *Etna v. Brewer*, 78 id. 377, 5 Atl. 384; 1890, *Belmont v. Vinalhaven*, 83 Me. 524, 20 Atl. 9. Rulings in other jurisdictions are as follows: 1863, *Kreiss v. Behrensmeier*, 125 Ill. 141, 194, 17 N. E. 283 (admissible "although not accompanying act"); 1903, *Matsonbaugh v. People*, 194 id. 106, 68 N. E. 546 (declarations of intent, "so connected with the act of going from Illinois to

§ 1785. *Declarations of Intent or Motive by an Accused.* Where in a criminal charge the intent with which the act was done becomes material, declarations accompanying the act may perhaps be thought of as admissible under the present principle. But, since the criminal intent is itself an independent ingredient of the crime, and is not merely a subordinate means of ascertaining the total complexion of the outward conduct, the present principle seems hardly to be applicable. It seems more correct in such cases to use declarations of intent or motive as receivable under the Hearsay Exception for Statements of a Mental Condition (*ante*, § 1782, par. 4). Practically the result is the same under either principle, for declarations at the time of the act. But under the above Exception declarations after the act, asserting an existing state of mind, would also be receivable, and in that respect the two principles lead to different results.

§ 1786. *Complementary Utterances; Putting in the Whole of a Conversation, Correspondence, etc.* Upon the principle of Completeness (*post*, § 2094) a party for or against whom a statement, oral or written, has been properly introduced, is entitled to introduce complementary statements, i. e. the remainder of a conversation, letter, or other utterance, of which the former was but a part. This use of the remainder of the utterance is not prevented by the Hearsay rule, for the complementary utterance is received not as an assertion to prove a fact asserted in it, but as making plain the correct tenor of the first and fragmentary utterance. For example, where a statement by the opponent was received as an admission, "I have lied to you about this," the postal-card to which he referred when speaking was received, though written by a third person, because it formed a part of the defendant's admission;¹ i. e. not on the credit of the writer, but as complementing the defendant's oral statement. This class of cases is closely analogous to those already noticed (*ante*, § 1770) in which verbal parts of acts are received; here another part of the same entire utterance is received, solely in order to ascertain the exact tenor of another fragment. The application of this principle of Completeness is elsewhere examined in detail (*post*, §§ 2113-2124); here it is only to be noted that the employment of such complementary utterances does not violate the Hearsay rule.

3. Utterances used as Circumstantial Evidence.

§ 1788. *General Principle.* The Hearsay rule forbids merely the use of an extrajudicial utterance as an assertion to evidence the fact asserted (*ante*, § 1768). Such a use would be testimonial, i. e. we should be asked to believe the fact because Doe asserted it to be true, precisely as we should be asked to believe Doe's similar assertion if made on the stand. What the Hearsay

¹ *Texas* that they should have been regarded as qualifying or characterizing the act," are receivable); 1902, *Bigelow v. Bear*, 64 Kan. 287, 88 Pac. 73; 1904, *Baker v. Kelly*, 41 Miss. 694, 702 (attachment against a debtor about to remove from the State; the debtor's declarations

of intent before attachment sued out, admitted for the debtor); 1891, *Chase v. Chase*, 44 N. H. 532, 531, 23 Atl. 335; 1894, *Chambers v. Prince*, 78 Fed. 178.

² *Ames v. State*, 125 Ala. 50, 26 So. 524.

rule forbids (*ante*, § 1361) is the use of testimonial evidence — i. e. assertions — uttered not under cross-examination. If, then, an utterance can be used, as circumstantial evidence, i. e. without inferring from it as an assertion to the fact asserted (*ante*, §§ 25, 529), the Hearsay rule does not oppose any barrier, because it is not applicable. For example, when it is material to show that Doe knew of a sale by Roe, the letter of notification by Roe to Doe, "Take notice that I have this day sold a carload of iron to J. S.," is receivable, not as a testimonial assertion by Roe to prove the fact of sale, but as indicating circumstantially (i. e. indirectly) that Doe obtained knowledge of the sale, the fact of sale being proved by other evidence.

It now remains to survey the various ways in which utterances may thus be indirectly evidential. As some definite principle of Relevancy usually governs their use as circumstantial evidence, the precedents for the various classes of utterances can in most instances best be collected under appropriate heads of Relevancy; but it is proper here to examine some of the ways in which they escape the ban of the Hearsay rule, and to summarize the different varieties.

§ 1780. Knowledge, Belief, Good Faith, Reasonableness, Diligence, Motive, Sanity, etc., as evidenced by Receipt of Information or by Reputation. Wherever an utterance is offered to evidence the *state of mind* which ensued in another person in consequence of the utterance, it is obvious that no assertive or testimonial use is sought to be made of it, and the utterance is therefore admissible, so far as the Hearsay rule is concerned. In the following passages this distinction is expounded:

1775, *Fabrigas v. Mostyn*, 30 How. St. Tr. 137; action for false imprisonment by the Governor of Minorca; defense, that the plaintiff excited sedition and riot; the reasonableness of the governor's apprehension of riot came into issue; the aid-de-camp to the governor testified that a native magistrate came to him to report that "Fabrigas said he would come with a mob . . . and they would see better days to-morrow"; Mr. Peckham, for the defense: "You need not mention what the mustastaph told you; that is not regular"; Mr. J. Gould: "I should be glad to know how the Governor can be apprised of any danger unless it is by one or other of his officers informing him there is likely to be such and such a thing happen?" Mr. Peckham: "Hearsay is no evidence"; Mr. J. Gould: "We do not take it for granted that it is really so; only that this gentleman, hearing of this, tells the Governor"; Mr. Lee, for the defense: "It is no evidence of the fact; if you mean it only as a report, we do not object."

1836, *Abinger, L. C. B.*, in *Fraser v. Berkeley*, 7 C. & P. 625: "If a man called another a liar, and was knocked down, the plaintiff [suing for this battery] would not be allowed to prove, on the trial of the assault, that the defendant [as asserted by the plaintiff] was really and in point of fact a liar, because evidence of provocation is admitted for the purpose of showing that the feelings of the party [thus charged] were excited, and a man is not stung the less by a libel because it happens to be true."

1849, *Erie, J.*, in *R. v. Williams*, 4 Cox Cr. 92 (the constable, who apprehended the accused, spoke of "tracing" them from place to place; it was objected that this involved the hearsay statements of others as to the accused's doings); "Half the transactions of life are done by means of words. There is a distinction, which it appears to me is not sufficiently attended to, between mere statements made by and to witnesses, that are not receivable in evidence, and directions given and acts done by words, which are evi-

dence. The witness, in this case, may say that he made inquiries, and, in consequence of directions given to him in answer to those inquiries, he followed the prisoners from place to place until he apprehended them."

1870, *Miller, J.*, in *Friend v. Hamill*, 24 Md. 296, 306: "Where the question is whether a party has acted prudently, wisely, or in good faith, the information on which he acted, whether true or false, is original and material evidence, and not hearsay."

1892, *Harrison, J.*, in *Smith v. Whittier*, 95 Cal. 203, 20 Pac. 539 (a witness who ran an elevator, which had caused the injury in issue, testified that he had been told that harm would come if he did not follow certain instructions, which he described): "Whenever the knowledge or information of the party charged to have been negligent is a factor in determining such question [of negligence], it is proper, for the purpose of showing such knowledge or information, to show that notice was given to him, and that he was informed of the facts which would constitute negligence. . . . Whether in fact such information was or was not correct is immaterial for the purpose of determining its admissibility; and hence it is no objection to its admission that it was not given under the sanction of an oath or that the opposite party had not the opportunity of cross-examining the informant. The truth of the information is a distinct issue, and must be established by competent evidence; but upon the theory that the information was correct, the plaintiff in the present instance had the right to show that the defendant had received such information. . . . Such evidence is admitted for the purpose of establishing merely the utterance of the words and not their truth."

On this principle, the Hearsay rule interposes no obstacle to the use of letters, notices, oral informations, reputation, or any other form of verbal utterances by one person, as circumstantial evidence that another person had knowledge or belief as to the *violent character or intentions* of the deceased in a homicide case (*ante*, §§ 247, 248), the *incompetence of an employee* (§ 249), the *vicious nature of an animal* (§ 251), the *dangerous condition* of a place or a machine (§ 252), the *insolvency or lunacy* of a vendor (§ 253), the character of *stolen goods bought* (§§ 255, 259), the *falsity of representations made* (§ 256), the *guilt of an arrested person* or the *dangerous intentions of a mob or riotous assemblage* (§ 258). In the same way, when a person's *failure to complain* of a robbery (*ante*, § 1142) or of a rape (*ante*, § 1134) is taken as evidence of a false claim, the motives for the silence may serve to explain it away, and thus it may become proper to learn whatever direction or information was relied upon as inducing the silence. So also where *silence*, when a denial would be natural, is treated as equivalent to an *admission* (*ante*, § 1071), the reason for the silence may serve to explain away its import, and thus the information giving rise to the silence may become admissible. Departure after a charge made may evidence consciousness of guilt, but the prior receipt of a pressing telegram may repel this inference (*ante*, § 281). An emotion of *anger or malice* may be caused by information received (*ante*, § 369), and thus the communicated utterances may become admissible. *Insanity* may be indicated by the mode of conduct upon information received (*ante*, § 231), and the communication thus becomes admissible. *Good faith and diligence in a search*, either for a document said to be lost (*ante*, § 1196) or for a witness said to be absent (*ante*, § 1313), may be evidenced by the replies made to inquiries which thus appear to be fruitless; and the information thus given becomes admissible for its circumstantial value. So also *good*

faith in destroying a document may excuse its non-production (*ante*, § 1198), and the information which induced the destruction may thus be receivable. Whether the fact that a person alleged to be dead has or has not been heard from, as affecting the *presumption of death from absence* is a different question, so far as the principle of Relevancy is concerned (*ante*, § 158, *post*, § 2531); but the fact of receiving or not receiving a letter or other news is here also a circumstantial, not a testimonial use of the evidence, which thus becomes admissible.

There may be other instances of a similar use of one person's utterances to show another's mental condition; but all are left equally scatheless so far as the Hearsay rule is concerned.

§ 1790. *Utterances as indicating Circumstantially the Speaker's Own State of Mind.* The condition of a speaker's mind, as to knowledge, belief, rationality, emotion, or the like, may be evidenced by his utterances, either used testimonially as assertions to be believed, or used circumstantially as affording indirect inferences. Utterances of the former sort may be received under the Exception for Statements of a Mental Condition (*ante*, § 1714). Yet such direct assertions of a mental condition as, "I know that Doe is insolvent," or "I dislike Roe," are relatively less common as a source of proof. The usual resort is to utterances which circumstantially indicate a specific state of mind causing them.

To such a use, then, the Hearsay rule makes no opposition, because the utterance is not used for the sake of inducing belief in any assertion it may contain. The assertion, if in form there is one, is to be disregarded, and the indirect inference alone regarded. This discrimination, though well accepted in the law, is easy to be ignored, and it needs perhaps to be emphasized. Suppose, for example, a witness J. S. to have testified to seeing Doe in January in a house on Cedar Street, Doe's presence at the time being material. The opponent wishes to show that J. S. is mistaken and that the person seen was not Doe. He offers the testimony of one who in February met J. S. and asked him if he had seen Doe lately, J. S. then replying, "Yes, I talked with him this morning at the bank"; the opponent being ready to prove that the person whom J. S. talked with at the bank was Roe and not Doe. Now J. S.'s utterance is here not offered assertively, to prove that J. S. did talk with Doe; on the contrary, the opponent even desires it to be understood that the assertion is incorrect; and he offers the utterance for its indirect value as indicating that J. S. believed the person Roe to be the person Doe; in other words, as evidencing J. S.'s ignorance of Doe's personality. Here, then, J. S.'s utterance has two possible uses,—its testimonial and its circumstantial use; so far as the former is concerned, the Hearsay rule applies, but to the latter the Hearsay rule has no application. Again, in evidencing sanity or insanity, a testator's statement, "I am the King of Dahomey," or "I have a million dollars in the bank," may be treated either testimonially or circumstantially; so far as it is offered circumstantially, as indicating a delusion in the testator's mind, it is not obnoxious to the Hear-

say rule. It is immaterial whether or not, in the case in hand, the assertive or testimonial use might be improperly made by the jury; the judge's instructions are the corrective against this. On the principle of multiple admissibility (*ante*, § 13), if there is any relevant circumstantial use, the utterance is admissible for that purpose. The discrimination between the two is pointed out in the following passages:

1854, *Selden, J.*, in *Waterman v. Whitney*, 11 N. Y. 157: "The difference is certainly very obvious between receiving declarations of a testator to prove a distinct external fact, such as duress or fraud, for instance, and as evidence merely of the mental condition of the testator. In the former case, it is mere hearsay, . . . while in the latter it is the most direct and appropriate species of evidence, . . . and the same evidence is admissible in every such case as in cases where insanity or absolute incompetency of the testator is alleged. . . . The difference between the two cases consists in the different nature of the inquiries involved. One relates to a voluntary and conscious act of the mind; the other to its involuntary state or condition."

1868, *Coll, J.*, in *Sheller v. Bumstead*, 90 Mass. 112: "The previous declarations of the testator, offered to prove the mental facts involved [competency to will], are competent. Intention, purpose, mental peculiarity and condition, are mainly ascertainable through the medium afforded by the power of language. Statements and declarations, when the state of mind is the fact to be shown, are therefore received as mental acts or conduct. The truth or falsity of the statement is of no consequence. As a narration, it is not received as evidence of the fact stated. It is only to be used as showing what manner of man he is who makes it."

It is worth while to emphasize the legitimacy of this circumstantial aspect of such evidence, because it incurs the risk of being ignored, through a judicial disposition in part to account for it by the unmeaning shibboleth of *res gestæ* (*post*, § 1796), or by the Exception for Statements of a Mental Condition (*ante*, § 1715). The evidence is circumstantial, not testimonial; and it is therefore not obnoxious to the Hearsay rule, nor needs for its admission any Exception to that rule. No doubt, in given instances, it may be difficult to distinguish a genuine circumstantial use of utterances for this purpose; and this difficulty has already been considered (*ante*, § 285); but isolated instances of difficulty need not prevent us from recognizing the plain principle in its ordinary unquestioned uses.

These various circumstantial uses have already been examined in dealing with the different kinds of circumstantial evidence; and the precedents are collected under those respective heads. It remains here merely to note briefly the chief kinds:

(1) Utterances are receivable as evidencing indirectly insanity or other organic mental condition (*ante*, § 228) or as evidencing physical condition as to illness or the like (*ante*, § 223).

(2) Utterances indirectly evidencing knowledge, belief, consciousness, and the like, are equally admissible (*ante*, § 266). Some difficulty may here arise when the fact of belief or consciousness is itself of doubtful relevancy. The question of the propriety of such an inference arises for a parent's declarations of legitimacy (*ante*, § 269), a husband's or wife's declarations of mar-

rials (*ante*, § 268), a testator's declarations as to the execution or contents of an existing will (*ante*, §§ 271, 1739), and a few other instances (*ante*, § 272).

(3) Utterances indirectly indicating *fear*, *ill-will*, *excitement*, or *other emotion* on the part of the speaker are also admissible, whether the person be one whose state of mind is in issue (*ante*, § 394), or be a witness whose bias is to be ascertained (*ante*, § 950). A peculiar case is that of a *testator's utterances* as indicating *undue influence* (*ante*, § 1738). Utterances connected with a *mob* or *riotous assemblage* have several aspects: (a) As indicating the reasonable apprehensions of the magistrate or other officer, defending himself on a charge of unlawful arrest or battery, the information given to him of the mob's doings is admissible (*ante*, § 248). (b) As indicating whether there was in fact an alarm and fear of danger in the community, this alarm being not only in a civil case a justification for the magistrate but also on a criminal charge a part of the notion of the crime of creating a riot, the expressions of alarm of various persons in the community are admissible to show their fear, either as circumstantial evidence (*ante*, § 394), or as hearsay assertions of a mental state (*ante*, § 1730). (c) As indicating the intent of the mob, whether seditious, violent, or otherwise, the expressions of intention by the persons composing it are clearly receivable, either as indirect evidence (*ante*, § 254), or as assertions of a mental state (*ante*, § 1729). But usually the only question of difficulty here is whether the accused may be made responsible for the doings of the mob as a joint actor with them (*ante*, § 1079).

§ 1791. *Utterances serving to Identify Time, Place, or Person.* Utterances serving to *identify* are admissible as any other circumstance of identification would be (*ante*, §§ 410-415). Utterances serving to mark a time or a place are the commonest instances of this sort, and are admissible so far as they have a real service for that purpose and are not used merely as a pretext for introducing a hearsay assertion (*ante*, § 416). Utterances by a person as to his name, birthplace, family, or the like, are available for this purpose; but their more common use is to furnish an inference that the person was born or related as he claimed to be (*ante*, §§ 270, 1494). Utterances that have served to *induce the observation* of a particular fact (*ante*, § 655), or to *fix the recollection* of it (*ante*, § 730), are also receivable, without regard to their assertive value, as not obnoxious to the Hearsay rule.

§ 1792. *Witness' Statements used in Impeachment.* The utterances of a witness indicating *bias* are receivable to impeach him (*ante*, § 950) on the principles noted in the preceding section. Statements offered as *self-contradictions* are admitted not as assertions to be credited, but merely as constituting an inconsistency which indicates the witness to be in error in one or the other statement; their use as hearsay assertions is uniformly prohibited by the Courts (*ante*, § 1018). Such an apparently inconsistent statement may be explained away by other utterances (*ante*, § 1044). Consistent statements to *corroborate* a witness are admitted in certain cases only, but are never conceded to have any testimonial force (*ante*, § 1132). In all of the

foregoing instances the utterance is used otherwise than as an assertion to be credited, and therefore the Hearsay rule is not applicable.

4. The "*Res Gestæ*" Phrase.

§ 1795. *History and Meaning of the Phrase.* The discussion of some of the foregoing doctrines is commonly carried on, in judicial opinion, with more or less use of the phrase "*res gestæ*," as the name of the doctrine under which certain kinds of evidence receive sanction. This phrase, it is conceded on all hands, is inexact and indefinite in its scope, and is ambiguous in its suggestion of reasons for the doctrine. If it were possible to say that it is properly applicable, in etymology or in usage, to any particular doctrine, it would be simple enough to ascertain this doctrine and to urge the restriction of the phrase to the one meaning. Or if the phrase genuinely indicated some independent principle of evidence, existing in its own right and not otherwise named or namable, nor attributable to any other place in our system of evidence, it would be allowable to preserve the name for that principle.

But neither of these things is true. The phrase has nothing to entitle itself on either ground to preservation. It has had various uses. But it is ambiguous and unmanageable in all of them. The doctrines to which it has been applied possess, all of them, a right to existence under well-recognized preëxisting principles and can be explained without a resort to this phrase. No more can be said for it than that it has been much used in the course of the development of some important aspects of two of these doctrines. The elusive history of its usage has been set forth in the following passage:

1881, Professor James Bradley Thayer, *American Law Review*, XV, 5, 81: "This phrase in one or another form,—*res gesta*, *res acta*, *res gestæ*,—was familiar in classical Latin literature, as one may see by any dictionary. It is found, also, in the *Corpus Juris*. . . . The meaning of the term seems to have been quite untechnical; it imported simply a fact, a transaction, an event. The plural sometimes indicated not so much the plural of the English equivalent—facts, transactions—as the details or particulars of which a single fact or transaction might be composed. It would seem that either form was quite legitimately used as meaning what we should express by the singular form,—an occurrence, a transaction. Now, how came this term into our law? The first instance of the use of it, which the writer has observed, is in a brief discussion over a point of evidence in *Herne Tooke's* trial for high treason, 25 Howell's State Trials, 449 (1794). A letter from a certain society had been sent to an association with which Tooke was connected, declining a previous proposal from the latter, . . . [and Mr. Garrow alluded to its admission as probably upon the ground that] 'it is fit to be received as a part of the *res gesta* upon the subject.' . . . The phrase is not found again until 1801, *Meare v. Allen*, 3 Esp. 276, where in an action for seduction of the plaintiff's wife [her statement of her reason for leaving him was admitted by Lord Kenyon as 'a part of the *res gesta*']. This was one of Lord Kenyon's latest rulings. In one of the early cases of his successor we find the same phrase; in *Robson v. Kemp*, 4 Esp. 293 (1800), . . . Lord Ellenborough said, 'When the declaration of the bankrupt is part of the *res gesta*, . . . it may be evidence.' In 1801 *Parker's* 'Law of Evidence' was published; the phrase does not occur in that, nor is it in *Boilar*, or *Gilbert*, or any of the other few books, before this century, in which the subject of evidence is dealt with. The

first treatise in which it is found, so far as the writer has observed, is Evans' Appendix to Pothier on Obligations, printed in 1806; in vol. II, p. 217, Evans says: 'In questions of fraud or *bona fides*, an adequate judgment can, in general, only be formed by having a perfect view of the whole transaction, which of course includes the conversation which forms a part of it; and, according to the phrase usually applied to this subject, the language which is used on any occasion forms a part of the *res gesta*.' This passage is interesting as indicating that the phrase was in common use in 1806. . . . [The case of *Aveson v. Kinnaird*] decided in February, 1806, is found in 6 East 188, and here the phrase, in the plural form, *res gesta*, is freely used by counsel; Lord Ellenborough also, in addressing counsel, uses it once. It was not long before this case had crossed the water and appeared in our courts, bringing with it the Latin term, in *Bartlett v. Delprat*, 4 Mass. 702 (1806). . . . This is the first appearance of it in Massachusetts. In Swift's 'Digest of the Law of Evidence in Civil and Criminal Cases,' — the earliest American treatise, — printed in 1810, the phrase occurs, at p. 127, in stating when the admission of an agent is receivable as against his principal: 'What is said by the agent relating to such transaction, while acting under such authority, will be received as evidence against the principal, as part of the *res gesta*.' The phrase, then, was fairly afloat in the law of evidence soon after the beginning of this century; but there are signs that it was not altogether regarded with favor. Phillippe's excellent treatise on evidence — a great advance on anything that had preceded it — was published in 1814; in it (vol. I, p. 202) he said: 'Hearsay is often admitted in evidence as part of the *res gesta*.' . . . But, having thus introduced the phrase, he struck it out in the fourth edition (1819), and substituted for it the English word 'transaction'; this word he retained through three other editions, and until he associated Mr. Ames with himself in getting out the eighth edition, in 1838. . . . Starkie published his book in 1824, and then and always used the phrase *res gesta*. As to the later leading treatises of Greenleaf, Taylor, and Wharton, it is unnecessary to say that they faithfully reflect the cases in using this term. . . . If it be true, as it seems to be, that the phrase first came into use in evidence near the end of the last century, one would like to know what started the use of it just then. That is matter for conjecture rather than opinion. It would seem probable that it was called into use mainly on account of its 'convenient obscurity.' . . . The law of hearsay at that time was quite unsettled; lawyers and judges seem to have caught at the term *res gesta*, — . . . which was a foreign term, a little vague in its application, and yet in some applications of it precise, — they seem to have caught at this expression as one that gave them relief at a pinch. They could not, in the stress of business, stop to analyze minutely; this valuable phrase did for them what the limbo of the theologians did for them, what a 'catch-all' does for a busy housekeeper or an untidy one, — some things belonged there, other things might for purposes of present convenience be put there. We have seen that the singular form of phrase soon began to give place to the plural; this made it considerably more convenient; whatever multiplied its ambiguity, multiplied its capacity; it was a larger 'catch-all.' To be sure, this was a dangerous way of finding relief, and judges, text-writers, and students have found themselves sadly embarrassed by the growing and intolerable vagueness of the expression."

The phrase *res gesta* is, in the present state of the law, not only entirely useless, but even positively harmful. It is useless, because every rule of evidence to which it has ever been applied exists as a part of some other well-established principle and can be explained in the terms of that principle. It is harmful, because by its ambiguity it invites the confusion of one rule with another, and thus creates uncertainty as to the limitations of both. It ought therefore wholly to be repudiated, as a vicious element in our legal phraseology. It should never be mentioned. No rule of evidence can be created or ap-

plied by the mere muttering of a shibboleth. There are words enough to describe the rules of evidence. Even if there were no accepted name for one or another doctrine, any name would be preferable to an empty phrase so encouraging to looseness of thinking and uncertainty of decision.

It therefore remains only to note here the various doctrines with which the phrase *res gesta* has been with any frequency associated, and, so far as they are doctrines of evidence, to refer to the heads under which they are properly determined.

§ 1796. *Doctrines of Evidence to which the Phrase is applied.* (1) The most frequent application of the phrase is to the Hearsay Exception for *Spontaneous Exclamations* (*ante*, § 1745), i. e. statements made during or after an affray, a collision, or the like, used to prove the facts asserted in the statement. This Exception has its earliest illustration in Lord Holt's ruling in *Thompson v. Trevanion*, in 1693; so that the doctrine may be said to have been recognized before the phrase *res gesta* came into use. Nevertheless, the development of this doctrine did not begin until after *Aveson v. Kinnaird*, in 1805, when the phrase in question had begun to be freely used in connection with it; and only since the middle of the 1800s has it been possible to say that this Exception was firmly established. Its application has almost invariably been made in terms of *res gesta*; but this does not mean that there is any anomalous doctrine which must be recognized by that name. What is actually done by the Courts, and not what name they use, is always the important consideration in dealing with a rule of evidence; and since what they do in this instance is to admit extrajudicial assertions as testimony to the fact asserted, the plain truth is that they have recognized a separate Exception to the Hearsay rule.

(2) An almost equally frequent subject for the application of the phrase, and a more plausible and nearly legitimate one, is the *Verbal Act* doctrine (*ante*, §§ 1772-1786). Here the utterance is admitted as a verbal part of an act, i. e. of a *res gesta*. Had there been no other and confusing associations of the phrase, it might suffice as a name for this Verbal Act doctrine. In the development of that doctrine, the phrase has been constantly used. But here, again, the rule of evidence exists (and in some of its aspects was actually evolved) without any help from the phrase "*res gesta*." It follows from the very nature of the Hearsay rule that utterances used not assertively but as a part of some otherwise relevant act are receivable as not obnoxious to the rule; this is inevitably true on principles otherwise fixed, and would have been equally true had no mention of the Latin words ever been made in our courts or our books.

(3) The phrase is also found sometimes employed for utterances admissible as a part of the issue under the pleadings (*ante*, § 1779). This use also is not inappropriate, so far as the mere translation of the words is concerned. But the material feature here is that the utterance of the words is a fact in issue. To speak of them as *res gesta* is at least half correct, for all matters in issue are things done. But not all things done are things in issue. The admit-

ling circumstance is that the utterance is part of the issue, and the "*res gestæ*" phrase, in omitting this element, condemns itself as inaccurate in its suggestion and misleading in its name.

(4) The phrase has also been much used in dealing with the Hearsay Exception for *Statements of a Mental Condition* (*ante*, § 1714). This is historically due to its use in *Aveson v. Kinnaird*, which in part concerned such declarations. Here there is least plausibility in its employment. A statement of a mental condition is not received because it is part of a "thing done," but because there is a degree of trustworthiness in such assertions and a necessity for resorting to them. Some Courts, for some classes of cases, require the statement to accompany an act by the declarant; but, as this feature would not necessarily contribute to the trustworthiness of the assertion (which is the real objective), it can be only an arbitrary limitation.

(5) There is, besides, an occasional employment of the phrase in all sorts of cases where utterances are relevant under any principle of evidence whatever. It then serves merely to aid, in the case in hand, the judicial disinclination to ascertain and state specifically the reason for admission.¹

§ 1797. *Other Applications of the Phrase; Agent's and Conspirator's Admissions.* The phrase "*res gestæ*" has been so convenient a term for judicial conjuring that it is sometimes found applied without the domain of the rules of evidence proper, and even to facts not involving the utterance of words. In an action, for example, for injuries received by driving into a defect in the highway, the gentleness of the horse has been allowed to be proved as "part of the *res gestæ*."² Or, in an action for injuries received at a defective street-crossing, the absence of street-lamps at the place is "part of the *res gestæ*."³ Or, in a prosecution for homicide, a quarrel occurring long before is not to be considered as provocation reducing the degree of homicide, because it is "not part of the *res gestæ*."⁴ When the phrase is put to such uses, nothing can be done but ignore them. The law declared in such decisions is to be treated wherever it belongs by its own nature. It cannot be forced, in procrustean fashion, into the law of evidence merely through the improper invocation of the term "*res gestæ*."

In two departments of substantive law this use of "*res gestæ*" has been very common, namely, in the law determining liability for the acts of an *agent* and for the acts of a *co-conspirator*. The acts and admissions of an agent are available to charge the principal when they occurred in the course of his employment; and of a co-conspirator, when they occurred in the duration of the conspiracy. It is often attempted to designate this course of action, which thus limits the range of chargeable acts, as "*res gestæ*." But the scope of it is to be ascertained wholly from the substantive law on those topics, not from any rule of evidence. So far as any reference to these doc-

¹ For one example only, the use of a certificate of marriage is treated under this name in *State v. Isenhart*, 32 Or. 170, 33 Pac. 509.

² *Smith v. Taggart*, 21 Ill. App. 330.

³ *Jefferson v. Chapman*, 127 Ill. 404, 20 N. E.

⁴ *Rosenbaum v. State*, 30 Ala. 361.

trines is necessary in dealing with the law of evidence, it has been already made in dealing with Admissions (*ante*, §§ 1078, 1079). It is enough here to note the fallacy, and to quote the following plain exposition of it:

1881, Professor James Bradley Thayer, *American Law Review*, XV, 80: "The term *res gestæ* is freely used in another class of cases where the specific question is whether a party to the suit shall be affected with responsibility for the declaration of another; not merely whether it may be used as evidence against him, but whether it shall be so used as having been brought home to him, and whether he shall be chargeable with it as if it were his own. When the inquiry is whether the utterance of an agent, or a co-conspirator, is receivable against a party, and it is said, in the case of the agent, that it must have been made in and about the business on which the agent was employed, and while actually engaged in that business; and, of a co-conspirator, that he must have made his declaration while engaged in the common enterprise and regarding that, — in such cases it is common to express this idea by saying that the declaration must be made as a part of the *res gestæ*; and if it is not so made, it is deemed to be *res inter alios gestæ*. Now it is obvious, on a little reflection, that to settle this question adversely to the admissibility of that which is offered in evidence, is really to settle a question in the law of agency or in the law regulating conspiracy, — a question in substantive law. . . . Observe, then, that the rule which says that a man shall be chargeable with the acts and declarations of his agent or fellow-conspirator is not a rule of evidence; and when in stating and applying this rule it is said that the agent's declaration must have been made in and about his principal's business, while actually engaged in it, and as a part of the *res gestæ*; or, again, when it is said of a conspirator's declaration, offered against his fellow-conspirator, that it must have been made while he was actually engaged in the common enterprise, about the affairs of it, and as a part of the *res gestæ*; the Latin phrase adds nothing; it is used as a compact expression for *the business*, as regards which the law for certain purposes identifies the two conspirators or the principal and agent. In such cases, evidently, the declaration may be about a past fact as well as a present one, so long as it comes up to the above-named requirements."

**SUB-TITLE IV: HEARSAY RULE AS APPLICABLE TO
COURT OFFICERS
(JUROR, JUDGE, COUNSEL, INTERPRETER).**

CHAPTER LIX.

1. Juror.

§ 1800. Juror having Previous Private Knowledge must Testify as Witness.

§ 1801. Same: Other Principles discriminated: (1) Judicial Notice; (2) Juror's Incompetency.

§ 1802. Jurors not to receive Evidence out of Court; Witnesses at a View.

§ 1803. Defendant's Presence at a View in Criminal Case.

2. Judge.

§ 1804. Judge having Personal Knowledge must take the Stand.

3. Counsel.

§ 1805. Improper Statements of Fact in Argument to the Jury; in General.

§ 1807. Same: Application of the Principle to Various Kinds of Assertions.

§ 1808. Improper Statements in Offering Evidence to the Judge or Putting Questions to a Witness.

4. Interpreter.

§ 1810. Hearsay Rule applicable to Interpreter.

1. Juror.

§ 1800. Juror having Previous Private Knowledge must testify as Witness. The jury, in its original function, was a body of witnesses drawn from the vicinage. They were assumed to have knowledge of their own upon the subject of the cause, and were allowed and expected to apply it in reaching a verdict. This function persisted for centuries, and its scope is seen as late as the 1600s:

1670, Vaughan, C. J., in *Buckley's Case*, 6 How. St. Tr. 909, 1010, Vaughan 185: "It is true, if the jury were to have no other evidence for the fact but what is deposed in court, the judge might know their evidence. . . . But the evidence which the jury have of the fact is much other than that, for, 1, Being returned of the vicinage whence the cause of action ariseth, the law supposeth them thence to have sufficient knowledge to try the matter in issue (and so they must), though no evidence were given on either side in court, but to this evidence the judge is a stranger; 2, They may have evidence from their own personal knowledge, by which they may be assured and sometimes are that what is deposed in court is absolutely false; . . . 3, The jury may know the witnesses to be criminal and infamous."

In the meantime, however, the function of the jury as mere triers, upon evidence furnished by others, had become more and more emphasized, and ended by becoming the sole one. The course of this development has been once for all described in the following passage:

1808, Professor James Bradley Thayer, *Preliminary Treatise on Evidence*, 187, 188: "We have seen how the ways of adding to their knowledge were gradually increased, until at last witnesses called in by the parties were regularly admitted to testify publicly to these other witnesses, summoned by the sheriff, whom we call the jury. This mounting witness upon witnesses was a remarkable result and teamed with great consequences. The

contrast between the functions of these two classes became always greater and more marked. The peculiar function of the jury—as being triers—grew to be their chief, and finally, as centuries passed, their only one; while that of the other witnesses was more and more defined, refined upon, and hedged about with rules. It is surprising to see how slowly these results came about. . . . Two things stand out prominently in Vaughan's opinion in *Bushel's Case*: 1. The jury are judges of evidence. 2. They act upon evidence of which the Court knows nothing; and may rightfully decide a case without any evidence publicly given for or against either party. It was now two hundred years since Fortescue wrote his book and showed witnesses testifying in open court to the jury; and as we see, not yet has the jury lost its old character, as being in itself a body of witnesses. . . . As things stood after *Bushel's Case*, how should the jury be controlled? The attainder was obsolete, and fines and imprisonment were no longer possible. In no way could they be punished for giving verdicts against law or evidence. The Courts found a remedy by a simple extension of their very ancient jurisdiction of granting new trials in case of misconduct. . . . [This] was going beyond anything that had formerly been done. Moreover, how should the Court know that the jury's verdict was against evidence? And how should they know what the law was until they knew what the facts were, since the law, as applicable to the case, was inextricably bound up with some definite supposition of fact? . . . In order to make it effective it was necessary to accompany this practice by an endeavor to make the jury declare publicly their private knowledge about the cause. This effort prospered but slowly. The old function of the jury was too deeply ingrained to give way in any short time; the judges long contented themselves with advice, with laying it down as a moral duty that the jury should publicly declare what they knew. . . . In 1598, we see it recognized that a jurymen may communicate to his associates privately any oral or written information that he has, if not induced thereto by either of the parties. But in 1650, in *Bennett v. Hartford*, it was laid down that a juror ought to state publicly in court on oath any such information, and not to give it in private to his companions. . . . Half a century later, in 1702, the same duty is reported to have been laid down in general terms for the whole jury: "If a jury give a verdict on their own knowledge, they ought to tell the Court so, that they may be sworn as witnesses. And the fair way is to tell the Court before they are sworn that they have evidence to give." And so our modern doctrine grew up."

This result seems to have become a settled maxim of the law not before the middle of the 1700s;¹ but since that time it has never been doubted. This comparative recency in its acceptance accounts perhaps for the frequent statutory declaration of the principle in the legislation of the 1800s in this country.

Though historically the motives leading to this result in the 1600s rested on the necessity of controlling the jury in some further way under the changed conditions, yet, in theory at least, as a part of our system of evidential principles, the rule is sufficiently accounted for to-day as a necessary deduction from the Hearsay rule. To allow the juror to contribute his private knowledge to the other jurymen would be to allow testimony to go to them unsubjected to the searching analysis of cross-examination. This reason was early perceived, and has been repeatedly laid down:

¹ 1710. *Lilly's Practical Register*, I, 522; 1791, *Smith v. Hollings*, 6 How. St. Tr. 1012, note, per Buller, J. (a juror should not give his knowledge privily, but "be examined and subjected to cross-examination as a witness"); 1840, *Manley v. Shaw*, Car. & M. 261. The case of

E. v. Sutton, 4 M. & S. 522 (1816), sometimes referred to as marking the recognition of this doctrine, seems not to concern it. Compare the history of the Hearsay rule in general (ante, § 1364).

1804, *Tilghman, C. J.*, in *Allen v. Estlin*, 11 S. & R. 368, 374: "Although it was once held that a juror might determine upon facts within his own knowledge, not proved by his oath, yet that opinion has been long reprobated, in consequence of the confusion and injustice that would result from it. The parties have a right to hear the evidence, that they may have an opportunity of cross-examining the witness, and contradicting him, if necessary, by other evidence."

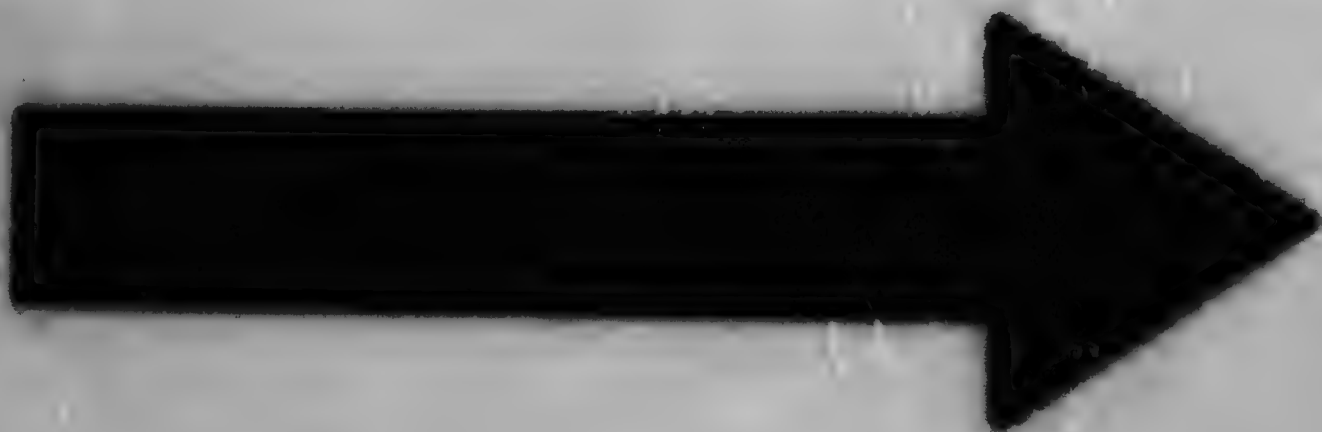
1820, *Stam, C. J.*, in *Murdock v. Sumner*, 22 Pick. 156: "If any juror know any fact bearing upon the subject, such as the state and condition of the particular parcel of goods [here alleged to have been converted], especially if it differed from the facts testified, he should have stated it and testified to it in open court, that the Court may judge of the competency of the evidence, that the parties might fully examine the witness, and that the counsel and Court might have under their consideration the whole of the evidence upon which the verdict is formed."

1834, *Lyon, J.*, in *Washburn v. R. Co.*, 50 Wm. 384, 370, 18 N. W. 828: "To allow jurors to make up their verdict on their individual knowledge of disputed facts material to the case, not testified to by them in court, or upon their private opinions, would be most dangerous and unjust. It would deprive the losing party of the right of cross-examination and the benefit of all the tests of credibility which the law affords."

The rule is now universally accepted, in statute and precedent; though its phrasings differ in minor details.¹

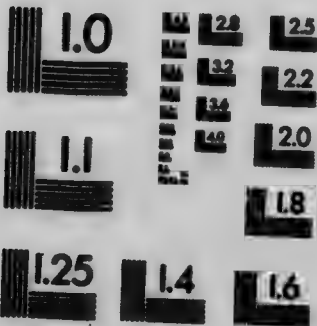
¹ *Ala. Code 1897, § 3099* (substantially like *Ala. Code 1897, § 3091*); *Aris. P. C. 1897, § 1670* (like *Cal. P. C. § 1150*); *Cal. P. C. 1872, § 1150* ("If a juror has any personal knowledge respecting a fact in controversy in a cause, he must declare the same in open court during the trial. If during the retirement of the jury, a juror declare a fact which could be evidence in the cause, as of his own knowledge, the jury must return into court. In either of these cases, the juror making the statement must be sworn as a witness and examined in the presence of the parties"); *Ga. Code 1895, § 5387* (a juror is not to "act on private knowledge," unless sworn and examined as a witness in the case); *Ida. Rev. St. 1897, § 7879* (like *Cal. P. C. § 1150*); *Ind. Rev. St. 1897, § 1916* (criminal cases; like *Cal. P. C. § 1150*); *Ida. Code 1897, § 5391* ("If a juror have personal knowledge respecting a fact in controversy in a cause, he must declare the same in open court during the trial; and if, during the retirement of the jury, a juror declares any fact which could be evidence in the cause, as of his own knowledge, the jury must return into court, and the juror must be sworn as a witness and examined in the presence of the parties, if his evidence be admissible"); *Kan. Gen. St. 1897, c. 102, § 211* (a criminal case, "if any juror shall know anything relative to the matter in issue, he shall disclose the same in open court"); § 209 ("If a juror has personal knowledge of any fact material to the cause, he must declare it to the court, and not to his fellow-jurors out of court"); *Ky. Stats. 1899, § 2255* ("Jurors knowing any fact material to the issue shall disclose the same in open court, upon oath, as evidence"); *Mass. 1834, Parks v. Boston*, 15 Pick. 199, 209; 1839, *Murdock v. Sumner*, 22 id. 156 (quoted *supra*); 1854, *Schmidt v. Ins. Co.*, 1 Gray 529, 536; *Miss. Gen. St. 1894, § 7229* (like *Cal. P. C. § 1150*); *Mo. Rev. St.*

1899, § 2615 (in criminal cases, "if any juror shall know anything relative to the matter in issue, he shall disclose the same in open court"); *Mont. P. C. 1895, § 2098* (like *Cal. P. C. § 1150*); *Nebr. 1898, Falls City v. Sperry*, — Nebr. —, 94 N. W. 529; *Nebr. Gen. St. 1898, § 4320* (like *Cal. P. C. § 1150*); *N. J. Gen. St. 1896, Practice § 188* (jurors who "know anything" relevant must be called as witnesses and disclose in open court); *St. 1908, c. 247, § 158* (re-enacts the foregoing); *N. Y. C. Cr. P. 1901, § 418* (substantially like *Cal. P. C. § 1150*); *N. D. Rev. C. 1895, § 2210* (like *Cal. P. C. § 1150*); *Ohio Stats. 1899, § 3230* (criminal cases; like *Cal. P. C. § 1150*); *Or. C. C. P. 1899, § 301* (a juror, if not examined, "shall not communicate any private knowledge or information that he may have of the matter in controversy to his fellow-jurors, nor be governed by the same in giving his verdict"); *Pa. St. 1894, Pub. L. 228, § 160* (a juror "who shall know anything relative to the matter in controversy" shall disclose the same in open court before retiring); *S. D. Stats. 1899, § 2667* (like *Cal. P. C. § 1150*); *Tenn. 1833, Booby v. State*, 4 Yerg. 111, 114 (receiving stolen goods; one of the jurors stated to the others, "which they regarded as evidence, that the defendant had stolen a hog in the county"); 1843, *Donston v. State*, 6 Humph. 275 (statements as to a witness); 1851, *Sam v. State*, 1 Swan 51, 62 (statement as to a county line); 1872, *Wade v. Ordway*, 1 Baxt. 229, 230; 1873, *Morton v. State*, 1 Lea 496; 1882, *Whitmore v. Ball*, 9 id. 35; 1883, *Nile v. State*, 11 id. 694; 1894, *Ryan v. State*, 97 Tenn. 263, 36 S. W. 390; 1897, *Citizens' R. Co. v. Burke*, 96 id. 650, 40 S. W. 1033; *Utah Rev. St. 1898, § 4969* (like *Cal. P. C. § 1150*); *Va. Code, 1887, § 3160* (a juror "knowing anything relative to a fact in issue" must disclose it in open court); *Wash. C. & Stats. 1897, § 5001* (a juror, unless examined as a witness, "shall not communicate



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§ 1801. *Same: Other Principles Discriminated; (1) Judicial Notice; (2) Juror's Incompetency.* (1) Where a matter is too notorious to need evidence of it, the judge may "notice" it; and, upon this principle, certain things are assumed, for jurors also, to be so well known and undoubted that the jurors may take them into consideration without evidence of them. Thus a line has to be drawn between these matters of *judicial notice* as applied to jurors and the matters of mere private interest; for the latter there must be evidence, and if a juror can give evidence, he must (under the present principle) present it as a witness in court. This distinction between matters of private knowledge and public knowledge is dealt with under the head of *judicial notice* (*post*, § 2570). The relative bearing of the two principles is this: (a) By the doctrine of Judicial Notice, the jurors cannot assume to be true any matters of mere private interest, not publicly notorious and unquestioned; they must require evidence; (b) By the Hearsay rule, they cannot take that evidence from the lips of a fellow-juror informing them privately after retirement; they must listen to him only as a witness upon the stand.

(2) Is there a rule of *policy forbidding a juror publicly to testify* before his own fellow-jurors, by reason of the danger of prejudicing him as a juror in his criticism of testimony? This involves a different principle, and is elsewhere considered (*post*, § 1910).¹

§ 1802. *Jurors not to receive Evidence out of Court; Witnesses at a View.*

(1) If a juror listen to the statements of a person made to him *not in the open court-room* and not on the witness-stand, the Hearsay rule is clearly violated:

1680, *Hale*, L. C. J., *Pleas of the Crown*, II, 307: "If after the jury sworn and gone from the bar, they send for a witness to repeat his evidence that he gave openly in court, who doth it accordingly, this, appearing by examination in court and indorsed upon the record or *postea*, will avoid the verdict; because not done openly in court nor in the presence of the parties concerned."

1845, *Turley*, J., in *Douston v. State*, 6 *Humph.* 275, 276: "It has always been held that testimony given to a jury after it has left the presence of the court vitiates a verdict, because it is not given on oath, and is given without the knowledge of those to be affected by it and who have therefore no opportunity of meeting and repelling it."

This application of the rule has never been doubted.² The only matter of controversy is whether a violation of the rule in this manner is sufficient ground for setting aside the verdict and granting a new trial, — a subject not within the present purview.³

any private knowledge or information that he may have of the matter in controversy to his fellow-jurors, nor be governed by the same in giving his verdict"; *W. Va. Code* 1891, c. 116, § 31 (a juror "knowing anything relative to a fact in issue shall disclose the same in open court, but not to the jury out of court").

² For a juror as an interpreter, see *ante*, § 811.

³ At least, since the Hearsay rule existed: *ante*, § 1364.

² The following cases may serve as a few illustrations: 1860, *State v. Andrews*, 29 *Conn.* 100, 104 (one juror listening to private statements, held improper); 1896, *Conrad v. State*, 144 *Ind.* 390, 43 *N. E.* 221 (the jurors went to a jail-chamber, where the defendant was said to have attempted suicide, examined it, tested the wire said to have been used, and talked with the witnesses; judgment reversed, since "it was the privilege of the accused to meet the witnesses

(2) Upon the same principle, the making of statements by a witness at a view, or even the pointing out of the places by a witness or other unauthorized person at a view (which amounts to giving testimony), is a violation of the rule. Here, also, the only question can be whether the impropriety is upon the circumstances sufficient ground for setting aside the verdict.³

(3) But the pointing out by *judicially appointed showers* is no violation of the rule. The theory of showers is that they are agents of each party, familiar with the issues of the case, and appointed by the Court (or by consent of parties) to identify provisionally beforehand the places to which the testimony will relate. They are sworn to do this properly, and to say nothing more.⁴ Thus their position is analogous to that of a witness; their oath is the oath of a witness so far as their functions make them such; and by examination it can be ascertained in court whether they have truly fulfilled it. There is therefore that opportunity of testing by cross-examination which is required by the Hearsay rule. The presence at the view of a shower representing each side affords a further opportunity of ascertaining the propriety of each other's doings. The employment of duly appointed showers, there-

face to face"; cases cited); 1867, *Heffron v. Gallupe*, 55 Mo. 563 (a jurymen obtained from defendant a pamphlet containing the evidence at the former trial; held improper); 1873, *Bowler v. Washington*, 69 Id. 302 (one juror receiving private testimony, held improper).

But the testimony may be read over to the jurors in open court, on their request: 1900, *State v. Hunt*, 112 Ia. 509, 84 N. W. 525.

³ The following cases may serve as illustrations: 1872, *R. v. Martin*, 12 Cox Cr. 204, L. R. 1 C. C. R. 378 (pointing out by a witness; undecided); 1867, *Erwin v. Bulla*, 39 Ind. 96 (statute enforced forbidding testimony at a view); 1876, *Stockwell v. R. Co.*, 43 Ia. 470, 473 (fire attributed to a locomotive; by consent a view of the place was taken; the plaintiff's counsel was absent, and a witness present spoke to a juror as to a fact undisputed in the testimony; held, no substantial prejudice); 1891, *People v. Hull*, 86 Mich. 449, 465, 49 N. W. 268; 1875, *Hayward v. Knapp*, 23 Minn. 5 (new trial granted, for reception of testimony at the view); 1880, *State v. Lopez*, 15 Nev. 407, 411 (pointing out places by a person neither officer nor witness, held improper); 1863, *Sanderson v. Nashua*, 44 N. H. 493, 494; 1888, *People v. Johnson*, 110 N. Y. 134, 143, 17 N. E. 684 (trial Court's ruling refusing a new trial for alleged reception of testimony, sustained); 1896, *People v. Gallo*, 149 Ill. 106, 115, 43 N. E. 899 (the jury visited the premises with two sworn officers and one person unsworn but appointed by the Court, and a witness explained the premises; neither defendant nor his attorney was present; held improper); 1897, *State v. Perry*, 121 N. C. 353, 27 S. E. 997 (a passer-by was interrogated by the jury as to the identity of a house, materially in question; held improper); 1898, *Hays v. Terr.*, 7 Okl. 15, 54 Pac. 300 (no testimony to be taken at a view; under C. Cr. P. §§ 5222, 5269); 1887, *Kane v. State*, 68 Wis. 530, 536, 32 N. W. 849 (that accompanying counsel should call attention

to various spots by identifying them, held improper). For the statutes, which sometimes expressly declare this rule, see the citations already given ante, § 1162.

But distinguish an adjournment of trial to an exterior place: 1902, *Board v. Moore*, — Ky. —, 66 S. W. 417 (jury allowed to see a horse and phaeton in the court-house yard, and to listen to testimony, not as if taking a view, but as if adjourning the place of trial).

⁴ The customary order for a view ran (1 Burr. 252, 258): "And that R. R. on the part of the plaintiff and T. W. on the part of the defendant shall attend on the same day and show the matters in question to the said, etc., . . . and no evidence shall be given on either side at the time of taking thereof." A modern case shows the traditional form of oath: 1847, *R. v. Whalley*, 2 Cox Cr. 331 (the sheriff, "having a knowledge of the locality," was appointed to show the places referred to by the witnesses, and took the plans produced for the prosecution and the defence, to assist in the view; the oath administered to the shower was: "You swear you will attend this jury and well and truly point out to them the place in which the offence for which the prisoner T. W. stands charged is alleged to have been committed; you shall not speak to them touching the supposed offence whereof the said T. W. is so charged, only so far as relates to describing the place aforesaid"; and to the bailiffs: "You shall [etc., as above . . .] committed; you shall not allow any one to speak to them touching the offence whereof the said T. W. is so charged, except the person sworn and appointed to show the said jury the place aforesaid; neither shall you speak to them yourselves (unless it be to request them to return with you into court), without leave of the Court").

For the statutes governing views, which usually mention expressly the appointment of showers, see ante, § 1162.

fore, is in no sense an exception to the ordinary rule of evidence; and this has long been recognized:

1747, *Goodtitle v. Clark*, Barnes 457; motion to set aside a verdict because "the plaintiff's shower at a view . . . had misbehaved himself by telling the viewers, 'This place is called Abraham's Yat, and this Conygree Hill,' which were not the places in question, and saying, 'These cottages pay Mr. Symons 5d. or 6d. a year rent'; defendant insisting that nothing more than the place in question, which was one single cottage, should have been shown to the viewers"; "The Court discharged the rule, being of opinion, that on a view the showers may show marks, boundaries, etc., to enlighten the viewers, and may say to them, 'These are the places which on the trial we shall adapt our evidence to.' The jury could have no light from looking at the cottage only; the question to be tried was, whether it stood within Mr. Symons's manor or not. Had an ancient man been produced to the viewers, and he had acquainted them that he had known the place many years, and had given an account of the boundary, etc., this would have been improper, because it is giving evidence before the trial."

It follows that the same practice is proper in criminal cases,⁵ because the constitutional provision requiring confrontation of witnesses is nothing more than the common-law rule requiring an opportunity of cross-examination (*ante*, § 1398). It is, moreover, immaterial that the shower is a party or one who will be an ordinary witness; indeed his familiarity with the place is assumed to be a special qualification;⁶ it is only the pointing out by an unauthorized witness that is improper (*supra*, par. 2).

(4) The obtaining by the jury of evidence of any other sort, out of court and without authority — either of the evidence furnished by an *unauthorized view* of premises⁷ or of other objects in issue,⁸ or of circumstantial evidence⁹ — is also improper. The reason is partly that the procedure of jury trial is violated, partly that the juror thus becomes a witness having personal knowledge and should therefore (*ante*, § 1800) take the stand as a witness.

(5) Distinguish (a) the rules relating to the taking of *documents into the jury-room*; here it is assumed that the documents are relevant and have been admitted in evidence, and the question is whether their further perusal is to be allowed, — a question of the procedure of jury trial;¹⁰ (b) the question whether it is a jury's duty *not to repudiate the testimony* given in court

⁵ 1887, *People v. Bush*, 71 Cal. 602, 606, 12 Pac. 781 (pointing out by the official shower, held proper); 1898, *People v. Milner*, 122 id. 171, 54 Pac. 833 (same); 1894, *Garcia v. State*, 34 Fla. 311, 332, 16 So. 223 (testimony is not to be taken, even by order of Court, at a view; but some person, agreed upon or appointed, may be sent to point out the premises).

⁶ 1814, *Gage v. Smith*, Godb. 209 ("Although the place wanted be showed to the jury by the plaintiff's servants, yet if it be by the commandment of the sheriffe, it is as sufficient as if the same had been showed unto them by the sheriffe himself"). *Contra,semble*: 1878, *People v. Green*, 53 Cal. 60 (the sending of witness to a view, to point out places, held improper).

The following rulings belong here: 1847, *Doe v. Murray*, 3 Kerr N. Br. 335, 339 (the shower should not read writings to the jury); 1901,

Colorado F. & I. Co. v. R. Co., 29 Colo. 90, 66 Pac. 902 (eminent domain; statute enforced as to placing a sworn bailiff in charge).

⁷ *Ante*, § 1160.

⁸ *Ante*, § 1163.

⁹ 1896, *People v. Conkling*, 111 Cal. 616, 44 Pac. 314 (two jurors had experimented with rifles, out of court and by themselves, to see how near powder-stains were produced; held improper); for analogous instances see *ante*, § 1160. But it was certainly a culpable scrupulosity which led the Court, in *State v. Sanders*, 68 Mo. 202, 206 (1878), to set aside a verdict for such experimentation by the jury (with shoe-tracks) where the defendant's counsel had himself in his address invited and urged the jury to do this and see for themselves, informing them that they had a right to do so.

¹⁰ *Post*, § 1918.

by allowing their knowledge obtained from a view to override it; this also is a question of the sworn duty of the jury, not of the law of evidence;¹¹ (c) the question whether the jury may take into consideration the knowledge derived from a view; this involves the theory of real evidence;¹² (d) the reception of testimony by a jury of inquest for damages caused by taking under eminent domain; this involves the procedure of a special tribunal not within the present purview.

§ 1803. *Defendant's Presence at a View in a Criminal Case.* A view is allowable in criminal as well as in civil cases (*ante*, § 1163). But is it necessary, under the Hearsay rule and the constitutional provision sanctioning it for criminal cases (*ante*, § 1397), that the accused be present at the view? This question has been answered by some Courts in the affirmative, chiefly on the theory that otherwise the accused is deprived of the right to be confronted by the witnesses against him:

1875, *English, C. J.*, in *Benton v. State*, 30 Ark. 329, 346: "[1] By the bill of rights the accused must be confronted with the witnesses against him; but the statute authorizing a view does not contemplate or permit the examination of witnesses at the view. . . . But, though no witnesses are examined at the view, yet the jurors, from their observation of the place and its surroundings, may receive a kind of evidence from mute things, which cannot be brought into court to confront the accused and are in their nature incapable of cross-examination. [2] But [furthermore] in prosecutions for felony the defendant must be present during the trial. . . . The view of the place where the crime is alleged to have been committed, by the jury, is part of the trial, and may be an important step in the trial; and the presence of the prisoner at the view, in a case involving life or liberty, that he may have an opportunity to observe the conduct of the jury and whatever occurs there, might be of the utmost consequence to him."

1893, *Woods, J.*, in *Foster v. State*, 70 Miss. 755, 765, 12 So. 822: "[1] Was it the right of the accused to be present when the jury visited and inspected the car? The answer to this inquiry will be found in ascertaining and determining what the purpose and object of this view was. . . . [The jury's visit] becomes proper in one of two views: the jury may be better able to understand and apply the evidence by examining the ground or scene of the offence, or the jury may receive from inanimate witnesses which otherwise it would not have. . . . The reported cases in which some Courts of last resort have held that the prisoner was not entitled to be present at a view of the premises on which the offence was alleged to have been committed, for the reason that in such inspection the jury is not taking or receiving evidence in the absence of the accused, but is during a suspension of the trial and while absent and separated from the court merely receiving impressions from silent inanimate objects that will enable it better to comprehend and apply the testimony in the case, are inconsistent and beg the question. They assume that the Court is composed of the judge, the clerk, the sheriff, and overlook the fact that the jury is the right arm of the law in the administration of law. They assert that the jury is not receiving evidence, because it is absent from the Court and cannot take testimony in the absence of the accused; overlooking the painful fact that illegal evidence may be taken and unlawful methods may be employed for its introduction. They declare that only impressions are received by jurors on such inspections which will enable them to understand and apply the testimony offered. But this concedes the proposition in dispute. Impressions are made on the mind of jurors by dumb witnesses. They do have evidence of inanimate things. They are receiving impressions, evidence, enlightenment,

¹¹ This is dealt with in some of the cases cited *ante*, § 1163.

¹² Treated *ante*, § 1163.

from voiceless things, call it by whatever name you will; and they are themselves being thus made silent witnesses for or against the accused. They return to the court-room with impressions formed by an examination of dumb inanimate witnesses; and if erroneous impressions and opinions have been made and formed, their hurt is beyond all cure; for the jurors may not speak out what may weigh on their minds, but are become themselves dumb passive witnesses. To say the jury cannot receive evidence by simply viewing the scene is to insult common sense. The most convincing evidence is made by the sense of sight. The juror on the view sees, and thinks he knows what he thus sees, with all the conclusions flowing therefrom. He sees, or may see, more than a mere railway-car or a naked room or a piece of senseless earth; and no matter what he sees, or falsely sees, he cannot speak and have his mistaken conclusions corrected or removed. . . . The constitutional right guaranteed to every person charged with crime to be confronted by the witnesses against him will require the production of all evidence from all witnesses, animate and inanimate, in his presence. [2] But not alone must all evidence be had in the presence of the accused, but it must likewise be had and taken in the presence of the Court trying the case. . . . A trial conducted in part away from the place appointed for the holding of the Court, in the absence of the judge and of the accused, is not that trial to which every man accused is constitutionally entitled."

These arguments are specious, but unsound: (1) As to the argument that the jury are receiving evidence, it is in substance sound; to view the thing itself in issue — i. e. the premises — is undoubtedly to consult a source of proof (*ante*, § 1168). But it by no means follows that the right of cross-examination is infringed. That rule applies solely to testimonial evidence only (*ante*, §§ 1362, 1395), and no testimony is taken at a view. The premises themselves are not witnesses; to term them "dumb witnesses" (as in the passage above quoted) is merely to misuse words. The function of cross-examination, as a requirement for testimonial evidence, is to ascertain in detail the elements of weakness that detract from the trustworthiness of a person's statement. Where human credit is not involved, cross-examination has no place. The constitutional sanction of that principle applies solely to testimonial evidence, to "witnesses"; no one supposes that it applies to circumstantial evidence, and no one should suppose that it applies to that third source of proof, namely, autoptic preference, real evidence, or the tribunal's observation of the thing itself (*ante*, § 1150). How could the place viewed be cross-examined? What human credit does it have, that makes cross-examination necessary? The Hearsay rule simply has no application to that source of proof. (2) As to the argument that the jury's view is a part of the trial and that the accused is entitled to be present at every part of the trial, the answer is that the accused might equally well claim to be present at the jury's deliberations over their verdict, for that is equally a part of the trial; if there is no inherent and invariable necessity for that part, neither is there for this. As for the related suggestion that the holding of a view in the absence of the defendant is the holding of a part of the trial "away from the place appointed for the holding of the court," it would follow from this that the judge and other court officers should be present also; but no one has ever supposed this necessary. It would be, on the contrary, much easier to question the propriety of the Court's adjourning and travelling in a body to the

place of a view, for such a proceeding would be more open to the criticism that it took the trial "away from the place appointed for the holding of the Court." It is impossible to argue in the same moment both that the Court must be held at the place appointed and that it must be held in part somewhere else. (3) As to the suggestion, based on mere general considerations of fairness and policy, that the defendant's presence is necessary because "the jurors may receive erroneous impressions" which "cannot be corrected or removed" and therefore the defendant should have "an opportunity to observe the conduct of the jury and whatever occurs there," there are two answers. First, the defendant, though present, could not lawfully ask questions or make statements;¹ so that the sole value of his presence would lie in the opportunity to see that nothing irregular was done and to obtain such a knowledge of what was done as would assist him in the subsequent conduct of the trial. Secondly, this very opportunity he already fully possesses; for he is represented at the view by a shower, selected by himself and formally approved by the Court; this shower points out such parts as the accused has directed, and does so with reference to the forthcoming testimony for that party; and this shower is in a position not only to observe all that is done but to make all of his observations useful later to his party as may be needed. Every practical advantage to be gained from the accused's presence is already his, by virtue of the ordinary proceedings at a view; and if, in any Court's practice to-day, the defendant is not allowed to have one shower appointed as his representative, then the unfairness and disadvantage in such a Court arises from the improper procedure observed in the view, and not from inherent defects in the orthodox method of view. There is therefore no ground, either upon legal principle or upon practical fairness, for holding the presence of the accused himself to be essential. (4) There remains only, as a reason for allowing it, the natural desire which any accused person might have to attend the proceeding. Ordinarily, no judge (it must be supposed) could wish to disappoint such a desire, if duly expressed to him; but conceivably he might refuse to satisfy it for prudence' sake; perhaps because of the danger of escape or of mob violence. Certainly no legal rule granting the right of attendance can be founded on such a consideration.

In some jurisdictions, it is properly maintained that the defendant is not entitled to be present at the view; but the opposite rule has been accepted in other jurisdictions.²

¹ As pointed out by Baldwin, J., in *People v. Bonney*, cited *infra*.

² The cases on both sides are as follows: 1890, *R. v. Petrie*, 20 Ont. 317, 323 (view by the magistrate, sitting without a jury, in the absence of the accused or his representative, held improper); 1875, *Benton v. State*, 30 Ark. 338, 345 (defendant must be present; quoted *supra*); 1861, *People v. Bonney*, 19 Cal. 426, 445 ("We do not see what good the presence of the prisoner would do, as he could neither ask nor answer questions, nor in any way interfere with the acts, observations, or conclusions of the jury";

defendant's presence not necessary); 1886, *People v. Bush*, 68 id. 623, 630, 10 Pac. 169 (view without defendant's presence and against his consent, held improper; "it is often most important for the defendant and his counsel to be able to perceive exactly what impression is being made upon the jury by any portion of the evidence given in on his trial"; *Myrick and McKee, JJ., diss.*); 1903, *People v. Mathews (Edwards)*, 139 id. 527, 73 Pac. 416 (defendant's voluntary absence is a waiver); 1899, *Price v. U. S.*, 14 D. C. App. 391, 405 (not decided; but doubting); 1894, *State v. Reed*, 3 Ida. 754, 35

2. Judge.

§ 1805. Judge having Personal Knowledge must take the Stand. It is equally clear for the case of the judge, as for that of the jurymen (*ante*, § 1800), and upon the same principle, that the judge may not lawfully contribute any information for the jury's consideration unless he take the stand as a witness;¹ otherwise the opportunity of cross-examination is lost and the Hearsay rule is violated. This seems not to be questioned. The chief doubt that arises for this case of personal knowledge by the judge involves usually other principles. On distinct grounds of policy noticed under another head (*post*, § 1909), it is generally held in modern times that a trial judge cannot properly become a witness without abandoning the bench for the remainder of the trial. Consequently, his testimony would ordinarily not be available for the jury, — not from his lips on the bench, because of the present rule, and not from the witness-stand, because of the other rule just mentioned. It would remain, then, to ask whether he can *as judge* make use of it to direct an acquittal or in any other way. This involves the doctrine of judicial notice (*post*, § 2565).

Pac. 706 ("No such right as is contended for by defendant is guaranteed by the constitution of Idaho"; though it is "advisable" to permit his presence on request; here it did not appear that he had made a request); 1885, *Shular v. State*, 105 Ind. 289, 293, 4 N. E. 870 (defendant need not be present at a view, because it is not the "taking of evidence"; a statute allowing views by consent of parties is constitutional); 1878, *State v. Adams*, 30 Kan. 311, 323 (view without defendant's presence, defendant making no request to attend; not improper under either statute or constitution); 1890, *Rutherford v. Com.*, 78 Ky. 639, 640 (defendant must be present; "the simple act of pointing out to the jury the place . . . is the giving of evidence in the absence of the accused"); Ky. C. Cr. P. 1898, § 318 (prisoner and both counsel are to accompany jury to view); 1872, *State v. Bertin*, 24 La. An. 46 (view at which a State witness was allowed to explain a diagram and the defendant not allowed to be present; held improper, since the defendant did not enjoy the right of confronting his witnesses); 1891, *People v. Hull*, 88 Mich. 449, 465, 48 N. W. 869 (defendant's absence, held not fatal); 1893, *Poster v. State*, 70 Miss. 753, 765, 12 So. 823 (defendant is entitled in a criminal case to be present at a view; see quotation *supra*); Mont. P. C. 1895, § 2097 (defendant is to be present); 1876, *Carroll v. State*, 5 Nebr. 81, 85 (defendant should be present, "unless he decline the privilege"); 1895, *State v. Hartley*, 22 Nev. 358, 40 Pac. 375 (the right, if any, "is statutory, and not constitutional, and may be waived"); 1896, *People v. Thorn*, 156 N. Y. 286, 50 N. E. 947 (view is not the taking of evidence in the sense that the accused must be present or cannot waive attendance; compare *People v. Gallo*, cited *supra*, § 1802, which rests on another principle); 1890, *Blythe v. State*, 47 Oh. St. 234, 24 N. E. 268 (defendant's voluntary refusal to attend, held a waiver); 1896, *Hays v.*

Terr., 7 Okl. 18, 54 Pac. 300 (defendant should accompany, on general principles, but by § 5222, C. Cr. P., he is forbidden); 1880, *State v. Ah Lee*, 8 Or. 214, 217 ("The failure of the accused to be present" is no ground of error; here he failed to ask it); 1887, *State v. Moran*, 15 id. 242, 276, 14 Pac. 419 (same; here the defendant consented to the view); 1899, *State v. Choe Gong*, 17 id. 638, 636, 21 Pac. 882 (defendant has no right to be present); 1893, *Com. v. Sal-yards*, 159 Pa. 501, 507, 37 Atl. 993 (defendant's presence not necessary); 1896, *Com. v. Van Horn*, 188 id. 143, 41 Atl. 469 (same); 1900, *Chicago v. Baker*, 39 C. C. A. 318, 98 Fed. 830 (refusal to permit party's presence, proper in trial Court's discretion); 1903, *State v. Mortensen*, — Utah —, 73 Pac. 563 (defendant need not be present; on the theory that a view does not involve the taking of testimony; careful opinion by Bartch, J.); 1893, *State v. Lee Doon*, 7 Wash. 308, 34 Pac. 1103, *semble* (it is not a "constitutional right" to be present; here there was no request); W. Va. Code 1891, c. 116, § 30 (in a "felony case," accused "shall be taken with the jury"); 1897, *Sasse v. State*, 68 Wis. 530, 536, 538, 33 N. W. 849 (defendant absent, but his counsel present; held "questionable," unless he expressly waived).

¹ 1880, *Anderson's Trial*, 7 How. St. Tr. 811, 874 (Recorder: "It is not the business nor the duty of the Court to give any evidence of any fact that they know of their own knowledge, unless they will be sworn for the purpose; for, though they do know it in their own private consciences to be true, yet they are obliged to conceal their own knowledge, unless they will be sworn as witnesses"); 1878, *Hurpurshad v. Sheo Dyal*, L. R. 3 Ind. App. 259, 286 ("It ought to be known . . . that a judge cannot, without giving evidence as a witness, import into a case his own knowledge of particular facts").

3. Counsel.

§ 1806. *Improper Statements of Fact in Argument to the Jury; in General.* A counsel's argument is in its purpose a connected presentation of the facts supposed to have been proved by the evidence tending in favor of his client. He is not a witness. He may have testified as a witness; but in his argument he has solely the functions and rights of counsel. Any representation of fact, therefore, which is made by him in the argument, must not be an assertion made upon his own credit; it must be based solely upon those matters of fact of which evidence has already been introduced or of which no evidence need ever be introduced because of their notoriety as judicially noticed facts. To bring forward in argument an assertion of fact not of these two sorts is to become a witness; and to be a witness without being subjected to cross-examination is to violate the fundamental principle of the Hearsay rule.

This much is, then, never doubted. The difficulty arises in applying the principle to various kinds of assertions. Before attempting to distinguish these, it is desirable to notice, in some of the most approved passages, the reason for the rule as enunciated by various judges and their different phrasings of the general principle, so difficult and elusive in its concrete application:

1851, *Lumpkin, J.*, in *Berry v. State*, 10 Ga. 511 (commenting on an assertion that the defendant's negro slave had confessed to his master's guilt): "That the practice complained of is highly reprehensible, no one can doubt. It ought in every instance to be promptly repressed. For counsel to undertake by a side wind to get that in as proof which is merely conjecture, and thus to work a prejudice in the mind of the jury cannot be tolerated.¹ . . . I would be the last man living to seek to abridge freedom of speech; and no one witnesses with more unfeigned pride and pleasure than myself the effusions of forensic eloquence daily exhibited in our courts of justice. For the display of intellectual power our bar's speeches are equalled by few, surpassed by none. Why, then, resort to such a subterfuge? Does not history, ancient and modern, nature, art, science, and philosophy, the moral, political, financial, commercial, and legal, — all open to counsel their rich and inexhaustible themes for illustration? Here, under the fullest inspiration of excited genius, they may give vent to their glowing conceptions, in thoughts that breathe and words that burn. Nay more, giving reins to their imagination, they may permit the spirit of their heated enthusiasm to swing and sweep beyond the flaming bounds of space and time — *extra flammantia mœnia mundi*. But let nothing tempt them to pervert the testimony, or surreptitiously array before the jury facts which, whether true or not, have not been proven."

1852, *Nisbet, J.*, in *Mitchum v. State*, 11 Ga. 615, 630: "It is contrary to law for counsel to comment upon facts not proven. He represents his client; he is the substitute of his client; whatever the client may do in the conduct of his cause, therefore, his counsel

¹ In the passage omitted here, the opinion points out that the judge must interfere, and cannot expect the opposing counsel to do so; because the latter's objection is likely enough to be met by the offending counsel with the sarcastic turn, "Yes, gentlemen, I have touched a tender spot, the galled jade will wince." It is a little odd that just forty years later, in *Call-*

foria, in *People v. Ah Lee*, cited *infra*, the interrupted counsel did use precisely this proverb in retort. That it was a mere coincidence is an explanation not more interesting than the only other possible explanation, namely, that the counsel, in planning his trick, had read Judge Lumpkin's opinion beforehand and had there received the hint.

may do. In relation to the liberty of speech, the largest and most liberal freedom is allowed, and the law protects him in it. The right of discussing the merits of his cause, both as to the law and the facts, is indispensable to every party; the same right appertains to his counsel. The range of discussion is wide, very wide. . . . His illustrations may be as various as are the resources of his genius, his argumentation as full and profound as his learning can make it; and he may, if he will, give play to his wit or wing to his imagination. To his freedom of speech, however, there are some limitations. . . . When counsel are permitted to state [unevidenced] facts in argument and to comment upon them, the usage of courts in regulating trials is departed from, the laws of evidence are violated, and the full benefit of trial by jury is therefore denied. It may be said, in answer to these views, that the statements of counsel are not evidence, that the Court is bound so to instruct the jury, and that they are sworn to render a verdict only according to the evidence. Whilst all this is true, yet the effect is to bring the statements of counsel to bear upon the verdict with more or less force according to circumstances. . . . It is not reasonable to believe that the jury will disregard them. They may struggle to disregard them, they may think that they do disregard them, and still be led involuntarily to shape their verdict under their influence. That influence will be greater or less according to the character of counsel, his skill and adroitness in argument, and the naturalness with which the statements stand connected with other facts and circumstances in the case. To an extent not definable, yet to a dangerous extent, they are evidence, not given under oath, without cross-examination, and irrespective of all those precautionary rules by which competency is tested."

1877, *Virgin, J.*, in *Relfe v. Rumford*, 66 Mo. 564, 566: "[The rules of evidence require,] among other things, that the facts shall be material and pertinent to the issue, and that, when not contained in documents, they shall be delivered under the sanctions of an oath and their truthfulness tested by cross-examination. Even a juror's own personal knowledge of pertinent facts cannot be considered by himself and his fellows in making up their verdict, unless it take on the form of testimony by being delivered from the stand by the juror under oath as a witness; otherwise testimony which might influence a verdict would escape the ordeal of cross-examination and discussion. . . . Statements [by counsel] of alleged facts not adduced in evidence, and comments thereon, are irrelevant, not pertinent, and are therefore clearly not within the privilege of counsel."

1878, *Ryan, C. J.*, in *Brown v. Swingsford*, 44 Wis. 288, 291 (commenting on counsel's allusion to the defendant's ability as an officer of a railroad company to pay liberally for the assault in issue): "Enough appears to show not only that the learned counsel commented on facts not in evidence, but in effect testified to the facts himself. It was in effect telling the jury that the appellant's position with the corporation gave him the ability to pay large damages. . . . Amongst other evidence of the appellant's ability to pay, it might undoubtedly have been shown that he received large emoluments from his position in the railroad company, and possibly that the railroad company had assumed the appellant's tort and the payment of the judgment. And it was not the duty or the right of counsel, was not within the proper scope of professional discussion, to assume the facts as proven or state them to the jury as existing, founding his argument *pro tanto* upon them. . . . Doubtless the Circuit Court can, as it did in this case, charge the jury to disregard all statements of facts not in evidence. But it is not so certain that a jury will do so. Verdicts are too often found against evidence and without evidence, to warrant so great a reliance on the discrimination of juries; and, without notice of the evidence, it may often be difficult for juries to discriminate between the statements of fact by counsel following the evidence and outside of it. . . . Forensic strife is but a method, and a mighty one, to ascertain the truth and the law governing the truth. It is the duty of counsel to make the most of the case which his client is able to give him; out counsel is out of his duty and his right, and outside the principle and object of his profession when he travels out of his client's case and assumes to supply its deficiencies. . . . The very fullest freedom of speech within the duty of his profession should be accorded to counsel;

but it is license, not freedom of speech, to travel out of the record, basing his argument on facts not appearing, and appealing to prejudices irrelevant to the case and outside of the proof. It may sometimes be a very difficult and delicate duty to confine counsel to a legitimate course of argument; but, like other difficult and delicate duties, it must be performed by those upon whom the law imposes it. . . . For all that appears in this case, the appellant may be as poor as Job in his downfall. His wealth, if he had it, was legitimate subject of evidence, not legitimate subject of argument without evidence."

1881, *Stone, J.*, in *Cress v. State*, 66 Al. 478, 482: "Every fact the testimony tends to prove, every inference counsel may thin' arise out of the testimony, the credibility of the witnesses as shown by their manner, the reasonableness of their story, their intelligence, means of knowledge, and many other considerations, are legitimate subjects of criticism and discussion. So the conduct of the accused, his conversation (if in evidence), may be made the predicate of inferences favorable or unfavorable. Analogies and illustrations may also be drawn, based on the testimony, on public history, on science, or anything else, provided it does not invade the prohibited domain hereafter considered. The presiding judge, as a rule, will best determine when discussion is legitimate and when it degenerates into abuse and undue license. . . . [What is improper is an assertion of facts not already in evidence.] The statement must be made as of fact; the fact stated must be unsupported by any evidence; must be pertinent to the issue, or its natural tendency must be to influence the finding of the jury; or the case is not brought within the influence of this rule. . . . We would not embarrass free discussion, or regard the many hasty or exaggerated statements counsel often make in the heat of debate, which cannot and are not expected to become factors in the formation of the verdict. Such statements are usually valued at their true worth, and have no tendency to mislead. It is only when the statement is of a substantive, outside fact, stated as a fact, and which manifestly bears on a material inquiry before the jury, that the Court can interfere and arrest discussion."

1890, *Arnold, J.*, in *Martin v. State*, 63 Miss. 505, 508: "Being counsel and witness in the same cause is not prohibited by law, if counsel chooses to testify; but such a union of offices is permissible and tolerable only where counsel is sworn and examined like other witnesses."

1893, *McGrath, J.*, in *Rutter v. Collins*, 96 Mich. 510, 514, 50 N. W. 93: "The jury must get the evidence from the lips of sworn witnesses, and not from the unsworn statements of lawyers in the argument of the case."

§ 1807. **Same: Application of the Principle to Various Kinds of Assertions.** (1) For one class of matters of assertion, the application of the principle is comparatively simple; namely, *facts of which evidence must have been introduced*. This class includes the great mass of relevant facts; though its boundaries are best defined in considering the next class. The following celebrated passage-at-arms illustrates the procedure:

1875, *Tilton v. Beecher*, N. Y., Abbott's Rep. II, 902; criminal conversation; at an early stage of the controversy, before litigation, Mr. Benjamin F. Tracy had been called into consultation, as a friend, between the parties; in the plaintiff's case on the trial, some testimony had reflected on Mr. Tracy's share in the negotiations; and in his opening address for the defendant, Mr. Tracy at a certain point in his speech said: "My name has been dragged into this trial by the plaintiff and his counsel and his main witness, in a manner that leads me to make you a personal statement of my relations to this scandal"; and was proceeding to do so, when the following colloquy ensued: Mr. Beach: "Mr. Tracy, do you propose to be a witness to what you are about to state?" Mr. Tracy: "If necessary I do, sir." Mr. Beach: "I submit to your Honor, that the gentleman has no right to make a long written personal statement in his opening to the

jury, which he does not propose to verify as a witness. It is not the office of an opening." Judge Nelson: "I presume that the counsel proposes to prove what he states in his opening. . . . At the same time he would be at liberty to prove it otherwise." Mr. Porter: "We propose to prove it, sir, as we choose, and by what evidence we will. The counsel cannot call upon us to specify the particular witness by which we propose to prove it; nor can he interrogate the counsel who is engaged in the opening of this case as to whether he is the party by whom the proof is to be made. That will depend upon subsequent developments in the case." Mr. Beach: "My point, sir, cannot be evaded or changed. I have made no objection to the counsel stating any fact which they propose to prove in this case, whether that fact, when proved, will go to his exculpation from the grave imputation which has been cast upon him in the course of this trial or not; if it is announced as a fact that he expects to prove upon the trial, I have no more to say. . . . What I do say is, sir, that when this gentleman, thus situated in this case, departs from the ordinary course of an opening and commences a part of his address with the preface that he will now make a personal explanation to this jury, that it is not in sense or in purpose a statement of facts which he expects to prove; it is the assumption of a right separate from the character of counsel to make a personal explanation and appeal to the jury, which, I submit to your Honor, is improper. That is all I object to, sir; and if this counsel, or any other counsel, will avow that Mr. Tracy or this defense intends to prove the facts or the circumstances which he now proposes to state, of course my voice is silenced, sir." Judge Nelson: "If it is a personal explanation, not to be followed up by proof—perhaps not in its nature susceptible of proof—then it should be omitted. I think we agree about that; the rule is very clear. . . ." Mr. Porter: "I evidently misunderstood my friend, from his last explanation. I unhesitatingly avow that the facts which Gen. Tracy proposes to present are facts which we do propose to prove." Mr. Tracy: "I shall endeavor, gentlemen, to state no fact in what I am about to say which will not be made plain to you by evidence which we shall introduce, or which will not be made sufficiently plain to you without further evidence, by the comments I may make upon the facts already in evidence."

Upon any matter, then, which ought to be evidenced in order to be properly considered at all by the jury, no honorable counsel will knowingly make an assertion in his argument, unless evidence about it has already been introduced. Yet, since misunderstandings constantly arise as to the tenor and effect of evidence, and since in the strain and fervor of argument honest errors of memory may easily occur, improper assertions may come to be made unwittingly. For such contingencies, on the one hand, judicial charity should be shown in excusing the counsel from the guilt of knowing misconduct; and due judicial caution should be exercised in interrupting an argument where the supposed error might be the result of no more than a mere difference of honest opinion between judge and counsel; because the opposing counsel may be trusted to set forth the opposite contention when the time comes for his own argument. But, on the other hand, such charity and caution should not induce the judge to refrain from correcting, as soon as made, a clear and unmistakable error of the present sort, or from duly rebuking it if made palpably with knowledge of its lack of foundation. The occasions for interfering may best be left, as all agree, to the discretion of the trial judge. Moreover (as Mr. J. Lumpkin has pointed out), in a clear case of this sort, the judge is bound himself to interfere; for to leave the burden upon the opposing counsel not only exposes his action to miscon-

struction, but also tends to unseemly and distracting altercations between counsel.¹

¹ In the following list will be found instances of the application of the principle. Most of the rulings depend so much upon the issues and the detailed evidence in each case that they are useless as precedents: *Key*, 1683, Mr. Williams' instructions to his client, Sidney's trial, 9 How. M. Tr. 617, 626 ("Watch the king's counsel in summing or arguing the evidence against you, that they do not offer anything that was not proved, and stop them if they do"); 1833, Stevens v. Webb, 7 C. & P. 60; 1837, Duncombe v. Daniell, 8 id. 223, 227; 1837, R. v. Beard, ib. 142; *Ala.*: 1873, McAdory v. State, 62 Ala. 154, 157, 162; 1880, Sullivan v. State, 64 id. 51; 1883, Wolfe v. Minnie, 74 id. 394, 399; 1897, Danmore v. State, 115 id. 69, 22 So. 541; 1903, Dennis v. State, — id. —, 35 So. 651; *Cal.*: 1899, People v. Bowers, 79 Cal. 415, 21 Pac. 738; 1891, People v. Ah Len, 92 id. 292, 29 Pac. 266; 1899, People v. Valliere, 127 id. 65, 59 Pac. 295; *Cal.*: 1894, Denver S. P. & P. R. Co. v. Moynahan, 8 Colo. 56, 59, 5 Pac. 511; *Fla.*: 1884, Newton v. State, 31 Fla. 53, 94; *Ga.*: 1838, Dickerson v. Burke, 35 Ga. 225, 227; 1878, Forsyth v. Cochran, 61 id. 278; 1890, Augusta & S. R. Co. v. Randall, 85 id. 297, 317, 11 S. E. 704; 1897, Bell v. State, 100 id. 78, 27 S. E. 649; 1902, Western & A. R. Co. v. Cox, 115 id. 715, 43 S. E. 74; *Ill.*: 1868, Yoe v. People, 49 Ill. 410, 412; *Ind.*: 1871, Cluck v. State, 40 Ind. 263, 271 (assertions about the defendant's good character); 1888, Nelson v. Welch, 115 id. 270, 272, 16 N. E. 624, 17 N. E. 569; 1888, Troyer v. State, ib. 331, 17 N. E. 569; 1890, Schlotter v. State, 127 id. 493, 494, 27 N. E. 149; *Ia.*: 1867, Martin v. Orndorff, 22 Ia. 504, 505; *Ky.*: 1896, Davis v. Brown, 98 Ky. 475, 32 S. W. 614, 34 S. W. 584 (the reason why suit had been brought sooner); 1899, Rhodes v. Com., — id. —, 54 S. W. 170; 1901, Statton v. Com., — id. —, 62 S. W. 675; *La.*: 1901, State v. Thompson, 106 La. 342, 30 So. 895; *Mich.*: 1883, Hollywood v. Reed, 57 Mich. 324, 223, 23 N. W. 792; 1894, Donovan v. Richmond, 61 id. 467, 470, 28 N. W. 516; 1887, Ampere v. Fleckenstein, 67 id. 247, 24 N. W. 544; 1888, Hitchcock v. Moore, 70 id. 112, 116, 37 N. W. 914; 1894, Rutter v. Collins, 105 id. 143, 149, 61 N. W. 267; 1897, Pringle v. Miller, 111 id. 663, 70 N. W. 345 (stating what he could have proved by a witness not called); 1898, Britton v. R. Co., 118 id. 491, 76 N. W. 1043; *Miss.*: 1877, Perkins v. Guy, 53 Miss. 153, 183; 1879, Cavanaugh v. State, 56 id. 299, 300; *Mo.*: 1892, Evans v. Trenton, 112 Mo. 390, 20 S. W. 614; 1895, State v. Lingle, 128 id. 520, 31 S. W. 20; *Nebr.*: 1883, Cleveland Paper Co. v. Banks, 15 Nebr. 20, 22, 16 N. W. 833; *N.H.*: 1860, Tucker v. Henniker, 41 N. H. 317, 322 (reproducing without quotation-marks the language of Nisbet, J., quoted *supra*); 1886, Ballard v. R. Co., 64 id. 27, 31, 5 Atl. 636 (in an opinion by Smith, J., the doctrine is well expounded and the opinion in Brown v. Swineford, Wis., is approved); 1899, Heald v. R. Co., 66 id. 49, 44 Atl. 77; 1899, Greenfield v. Ken-

nett, 69 id. 419, 45 Atl. 283; 1900, Concord L. & W. P. Co. v. Clough, 70 id. 427, 47 Atl. 704 (assertion as to the reason for not producing evidence); 1900, Stacy v. R. Co., ib. 364, 46 Atl. 220; 1902, Walker v. R. Co., 71 id. 271, 51 Atl. 918; 1903, State v. Greenleaf, — id. —, 54 Atl. 59; *N. J.*: 1903, Blackman v. West Jersey & S. R. Co., 66 N. J. L. 1, 52 Atl. 370; *N. Y.*: 1899, People v. Fielding, 136 N. Y. 542, 83 N. E. 497 (fraudulent claim against the city; that it cost \$10,000 a year to live as the defendant did, etc., held improper; good opinions for the majority by Vann, J., and for the minority by Haight, J.; the dissent being only as to the materiality of the error); *N. C.*: 1847, State v. O'Neal, 7 Fred. 231, 232; 1858, State v. White, 5 Jones 234, 230; 1871, State v. Williams, 68 N. C. 508; Jenkins v. N. C. O. Dressing Co., ib. 563; 1878, State v. Smith, 75 id. 306; 1878, Coble v. Coble, 79 id. 589 (assertions as to the defendant's character, which had not been impeached, that "he was like the upon tree, shedding pestilence and corruption all around him," held improper); 1902, State v. Tutun, 131 id. 701, 42 S. E. 442; 1903, State v. Goode, 132 id. 982, 43 S. E. 508 (that witnesses had been summoned and were present); 1903, Hopkins v. Hopkins, ib. 25, 43 S. E. 506 (that witnesses had been bribed); *N. D.*: 1898, State v. McGahery, 3 N. D. 233, 30*, 35 N. W. 733; 1896, State v. Kent, 5 id. 516, 67 N. W. 1032; *Ok.*: 1880, Union Central L. I. Co. v. Cheever, 24 Ok. St. 201, 206; 1900, Hayes v. Smith, 62 id. 181, 54 N. E. 579; *Pa.*: 1897, Mullen v. Ins. Co., 182 Pa. 150, 37 Atl. 988 (reading an affidavit of the opponent not offered in evidence); *S. C.*: 1896, State v. Robertson, 26 S. C. 117, 118, 1 S. E. 443 (discretion of trial court); *Tex.*: 1891, Missouri P. R. Co. v. White, 90 Tex. 204, 15 S. W. 808; *U. S.*: 1860, Wightman v. Providence, 1 Cliff. 524, 531; *Vt.*: 1897, Cutler v. Skeels, 69 Vt. 154, 37 Atl. 228; 1896, Re McCabe, 70 id. 135, 40 Atl. 52; *Wash.*: 1896, State v. Boklen, 14 Wash. 403, 44 Pac. 399; *Wis.*: 1901, McCarthy v. Whitcomb, 110 Wis. 113, 65 N. W. 707.

One or two situations only need to be specially noted as not infringing the rule. Where the testimony of an absent witness has been admitted by affidavit to prevent a continuance (*post*, § 2596), it is of course in evidence and may be referred to. Where the existence of a material document or witness has appeared in the course of the testimony and yet the opponent has not produced the witness or document, the failure to produce is in evidence from the very nature of the situation, and therefore, when relevant (*ante*, §§ 285-291, *post*, § 2372), may be referred to. When other pleadings are used as admissions, they must be formally offered, like other evidence, if counsel desire to comment on them in argument (*ante*, §§ 1064, 1067). Scientific treatises are usually held inadmissible, but a few courts anomalously allow them to be read in argument (*ante*, § 1700).

(2) Where the matter is one of which no evidence need ever be introduced because of its notoriety as a subject open to judicial notice (*post*, § 2572), there is obviously no impropriety in a reference to it in argument. The matter is assumed to be known to Court and jury, and hence the assertion of it is not the giving of testimonial evidence but only a reference to that which is already known without testimony. The difficulty lies in discriminating between this and the preceding class of assertions. General and accepted data of morality, history, and natural science may thus be assumed and referred to. But a general truth is sometimes best illustrated and enforced by a concrete instance; and thus the allowable resort to concrete facts for this purpose tends to degenerate into the improper assertion of specific facts which are put forward as indirectly bearing on the case and therefore ought to have been evidenced before being referred to. For example, a reference to celebrated cases of erroneous conviction for murder, where the supposed murdered person has afterwards appeared in life, may properly be made to illustrate the general truth of the possibility of convicting an innocent person where the body of the deceased has not been found; yet a reference to the recent conviction of one of a band of ruffians with whom the defendant has associated, intended to inspire the jury to reach the same result in the present instance, would in effect be urging them to consider the defendant's prior misconduct and bad character, and therefore would be improper unless there had been evidence on this point, which presumably there could not have been. Again, the counsel might refer to the fictitious case of Robinson Crusoe's discovery of the footprint, to illustrate the general truth that circumstantial evidence may produce absolute persuasion in the mind; but a reference to the discovery, near the scene of a homicide charged, of a hat bearing the defendant's initials, no evidence of this having been offered, would be obviously improper. It seems impossible to frame a definition which will accurately draw the line of distinction for such cases. One suggestion, however, may be useful; namely, that a test may often be made by asking if it is immaterial for the case in hand whether the specific fact asserted be true or not; if its truth is thus immaterial, then its force will lie merely in symbolizing or illustrating a general truth, and its employment will be proper.³ Courts have tried in various phrasings to express the necessary distinction, though not with the clearest success; in the following passages are useful attempts at its exposition:

1881, *Elliott, J.*, in *Combs v. State*, 49 Ind. 215, 219: "One of the attorneys for the prosecution, in addressing the jury, said: 'Three or four men have been recently exe-

³ Or, to reach the result in another way, place the word "suppose" before the assertion of the fact stated, and notice whether it equally serves the purpose. For example, counsel asserts, in arguing about the convincing force of circumstantial evidence, that when Robinson Crusoe saw the footprint on the sand he was justly sure that some one else had been there.

Alter this by merely prefixing a word, and let it read: "Suppose a man on a desert island found a human footprint, not his own, on the sand; he would be justified in believing that another human being had been there." Here it is seen that the force of the fact as merely an illustration is in no way diminished by making the assertion hypothetical.

ated at Indianapolis, most of whom set up the plea of insanity'; and of this statement appellant earnestly and bitterly complains. We do not regard such a statement as of sufficient materiality to warrant a reversal. Courts ought not to reverse cases because counsel, in the heat of argument, sometimes make extravagant statements, or wander a little way outside of the record. If a matter of great materiality is brought into the record as a matter of extended comment, then there would be reason for setting aside the verdict. If every immaterial assertion or statement which creeps into an argument were to be held ground for reversal, Courts would be so much occupied in criticising the addresses of advocates as to have little time for anything else. Common fairness requires that Courts should ascribe to jurors ordinary intelligence, and not disregard their verdicts because counsel during the argument may have made some general statements not supported by evidence. . . . It is the duty of the judge who presides at the trial to restrict the argument upon the facts to such as are established by or inferable from the evidence; but, in doing this, it is not his duty to abridge the freedom of debate by preventing counsel from enforcing his argument by illustration or example. It is not always easy to correctly draw the line between what is proper and what is improper. Matters of common, general public information may sometimes be properly referred to, and matters of known and settled history may often be commented upon with entire propriety; but matters of a local nature, or matters not of common and public notoriety, are not properly the subject of comment. To rigidly require counsel to confine themselves directly to the evidence would be a delicate task, both for the trial and the appellate Courts; and it is far better to commit something to the discretion of the trial Court than to attempt to lay down or enforce a general rule defining the precise limits of argument. If counsel make material statements outside of the evidence which are likely to do the accused injury, it should be deemed an abuse of discretion and a cause for reversal; but where the statement is a general one, and of a character not likely to prejudice the cause of the accused in the minds of honest men of fair intelligence, the failure of the Court to check counsel should not be deemed such an abuse of discretion as to require a reversal."

1892, *McGowan, J.*, in *State v. Turner*, 36 S. C. 534, 540, 15 S. E. 602: "It is plain that upon a trial there are certain general rules and regulations which should be observed; as, for instance, that in argument counsel should keep themselves within the record, and in commenting upon the testimony, which they have a right to do, they should scrupulously avoid anything like giving testimony themselves. But beyond such general rules, cases are so different and varying in character that each must depend somewhat upon its own circumstances; and in the conduct of the cause, some freedom in argument, as in suggesting inferences, analogies, probabilities, illustrations, and so forth, must be allowed. As no rigid rule can be fixed in advance as to such matters, it would seem that they have been left largely to the sense of propriety and justice of an honorable profession, under the absolute direction and control of the trial judge."

Some notion of the proper limits of illustration and explanation by this mode of argument may be gathered from the models to be found in the addresses of counsel eminent in their place and generation; their methods may show us both what they were allowed to do and what they thought themselves professionally entitled to do; and in the following passages will be found a few such useful examples:

1875, Mr. Benjamin F. Tracy, for the defendant, in *Tilton v. Beecher*, Abbott's Rep. II, 948 (arguing for the defendant, the Rev. Henry Ward Beecher, sued for criminal conversation with the plaintiff's wife): "Gentlemen, the charge of incontinence which is brought against this defendant is not a new or unfamiliar charge against clergymen. It is the common method of warfare. There is no accusation to which a clergyman is so

much exposed; an enemy that desires to do him a deadly injury has no point from which to strike with such deadly effect as the charge of infidelity in marital relations. That charge, whether there is guilt or not, is almost sufficient to blast the usefulness of any clergyman, however respected and however beloved. But Mr. Beecher is not the first eminent clergyman that has been called upon to face such a persecution as this. It was by means of such an accusation that the enemies of St. Athanasius sought to destroy the great champion of the orthodox faith. It was by such means that the name of St. Francis de Sales was kept under a cloud for four years, during which he maintained the same silence for which my client is so sharply criticized. It was upon such a charge that the ruin of the illustrious Fénelon, Archbishop of Cambrai, was attempted. It was under such an imputation that the 'judicious Hooker,' one of the brightest lights in the English Church, remained 'dumb as the dead,' though innocent as a babe, for six years of bitter anguish. It was such a charge, spread broadcast over England, that John Wesley, the man who of all Protestants most nearly approached to the spirit and labors of the Apostle Paul, suffered to pass without any public reply for twenty years."

1880, Sir Charles Russell, arguing for the defence in the *Parnell Commission's Proceedings*, Macmillan's ed. of the Opening Speech, 215 (the charge against the Irish Land League was of conspiring to encourage agrarian outrage; the League admitted that it had encouraged boycotting in the simple sense; and claimed a distinction between lawful boycotting and unlawful violence): "My lords, in this matter of boycotting, may I be forgiven for using the celebrated exclamation of Dr. Johnson, and say: 'Let us clear our minds of cant.' Boycotting has existed from the earliest times that human society existed. It is only a question of degree. Up to a certain point, boycotting is not only not criminal, but I say is justifiable and is right. For what does boycotting mean? It means the focussing of the opinion of the community in condemnation of the conduct of an individual of that community who offends the general sense of propriety, or offends against its general interests. Is there no boycotting at the bar? Is there no boycotting in the other professions? Is there no boycotting in the Church? Is there no boycotting in politics? Is there no boycotting of tradesmen in election times? What is the meaning of 'Sending a man to Coventry'? I say that boycotting, — I am not justifying intimidation, I am not justifying force, I am not justifying violence in connection with it; those are different things — I am talking of an act of moral reprehension called boycotting, and I say it always has existed and always will exist. My lords, if I were to search ancient records, historical, sacred records, I could point to many instances of boycotting; but I need not go far back. We have had in our days very remarkable instances, not only of boycotting, but of effective and useful boycotting. What was the action of our great colonies when the ill-judged policy of this country sent them the criminal population, the offscouring of the old world, as the rotten seed from which their fresh population was to spring? What did they do? Why, they simply boycotted the Government officials in Australia. The most notable instance of all was in the Cape Colony, where they boycotted the governor, declined to serve him, declined to serve him with horses, declined to supply him with provisions until the objectionable ship which was importing and seeking to land the offscouring of this nation, took its wretched burden to another place."

1898, Mr. (later Attorney-General) H. M. Knollyn, arguing for the prosecution, in *Commonwealth v. Borden*, Mass., 27 American Law Review 837: "What is sometimes called circumstantial evidence is nothing in the world but a presumption of circumstances. It may be one or fifty. There is no chain about it. The word 'chain' is a misnomer, as applied to it. Talk about a chain of circumstances! When that solitary man had lived on this island for twenty years, and believed that he was the only human being there, and that the cannibals and savages that lived around him had not found him and had not come to his island, he walked out one day on the beach, and there he saw the fresh print of a naked foot on the sand. He had no lawyer, to tell him that was nothing but a circumstance! He had no distinguished counsel, to urge upon his fears that there

was no chain about that thing which led him to a conclusion! His heart beat fast; his knees shook beneath him; he fell to the ground in fright, — because Robinson Crusoe knew, when he saw that circumstance, that a man had been there that was not himself! It was circumstantial evidence. It was nothing but circumstantial evidence. But it satisfied him!"

(3) The mere maintenance of the *propriety of a logical inference* from facts in evidence is not the offering of evidence, and is therefore always proper. When proposition A is to be proved, and fact B is introduced as evidence thereof, what remains is the mental process of inference, i. e. persuasion of fact A as following from fact B (*ante*, § 1). Whether that persuasion should follow is the question for the jury, and it is the counsel's function in argu-

* The rulings of the various Courts are often too dependent upon the particular facts to serve as precedents; and no general accepted canon of definition seems to be discernible in them: 1846, *Smith v. Earl Ferrers*, heretofore Rep. 300 (breach of marriage-promise; the plaintiff relied on a long series of letters clearly professing the promise; the defendant claimed that the letters were forged by the plaintiff herself; in arguing for this hypothesis — which the evidence fully substantiated — the defendant's counsel, Sir F. Thesiger, cited the notorious cases of Elizabeth Canning and Maria Glenn to illustrate the possibility of a woman plausibly maintaining a serious charge by persisting in a story purely the fabric of her own imagination); 1851, *Cross v. State*, 68 Ala. 476, 483 (sanctioning a statement that juries are frequently too apt to be merciful, but disapproving a statement of a recent case in the neighborhood in which the defendant had as here shown sympathy for the victim, but had after conviction confessed his guilt); 1888, *Childress v. State*, 86 id. 77, 87, 8 So. 778; 1899, *Cunningham v. R. Co.*, 72 Conn. 244, 43 Atl. 1047 (reading reports of similar cases, forbidden); 1902, *State v. Gannon*, 7 id. 206, 52 Atl. 727; 1884, *Newton v. State*, 21 Fla. 53, 91; 1888, *McDonald v. People*, 126 Ill. 150, 155, 18 N. E. 617 ("They say there is a fabled tree, which grows in some torrid clime; that the birds of the air which fly near its branches, influenced by the aroma of it, fall beneath it and die. That is the influence of M. C. McDonald in this and all matters connected with the administration of justice," the person named not being concerned in the case; this passage was held improper; compare *Coble v. Coble*, N. C., cited *supra*, note 1); 1874, *Ferguson v. State*, 49 Ind. 33 (references to the formation of local vigilance committees, etc., held improper); 1900, *Mackrall v. R. Co.*, 111 Ia. 547, 82 N. W. 975 (assertion that railroad employers discharged employees who did not testify as desired, held improper); 1893, *State v. O'Neil*, 51 Kan. 551, 637, 674, 33 Pac. 267 ("newspaper items," "to be used as argument in exhibiting processes of reasoning," not admitted on the facts); 1900, *Oden v. State*, — Miss. —, 27 So. 992 (reference to other prosecutions); 1895, *State v. Lingle*, 128 Mo. 522, 31 S. W. 20 ("a scientific fact, known and recognized by the consent of

all nations and the experience of common life," "facts within the daily experience and cognizance of all men," may be referred to in argument); 1900, *State v. Jones*, 153 id. 457, 55 S. W. 80 (limits stated of resort to a book's authority for illustrative instances); 1873, *Fanny Hyde's Trial*, N. Y., *Hemstreet's Rep.* 108 ff. (murder of George Watson; Mr Samuel D. Morris, for the defence, stated the details of many cases of homicidal insanity to illustrate its subtle phases); 1873, *Tilton v. Beecher*, N. Y., *Official Report*, III, 932, 934, 944, 1017 (Mr. Beach, for the plaintiff, quoted from Hawthorne's "Scarlet Letter," to illustrate his argument as to the defendant's meaning of the interviews between the defendant and Mrs. Moulton; from Byron's "Glaucour," and David's Psalms and the story of Uriah, to illustrate his argument as to the meaning of the remorseful letters of the defendant; and from Burns' "Epistle to a Young Friend," to illustrate his argument as to the moral effect of adultery in impairing . . . veracity; from Whittier's "Ichabod," to illustrate his argument as to the defendant's fall from greatness); ib. 844 (to answer the argument from the defendant's character and clerical standing, he cited a dozen instances of the licentious misdeeds of eminent divines); 1891, *Williams v. B. E. R. Co.*, 126 N. Y. 96, 102, 26 N. E. 1048 (damage by an elevated road; the reading of a newspaper account of a poor boy killed by an electric wire, held improper; good opinion by Andrews, J.); 1871, *Saunders v. Baxter*, 6 Heisk. 369, 377; 1879, *Turner v. State*, 4 Lea 206, 208; 1884, *Northington v. State*, 14 id. 424, 428 (these three cases are good illustrations; in the last, it was held not improper to cite the supposed facts of Guiteau's case, since they were "only matters of current history, used by way of enforcing an argument").

For the use of dictionaries and literature as authorities, see *ante*, § 1699. For the use of other political utterances as evidence of a standard of conduct, see *ante*, § 461.

For instances of the legitimate use of published works of other authors, in the citation of passages illustrating by comparison the non-libellous nature of a defendant's utterance, see the speeches of Brougham, in his Works, vol. IX, p. 18 (trial of Hunt), p. 220 (trial of Williams).

ment to ask the jury to make or (if opposing) not to make the inference. But the act of producing evidence ends when fact A is introduced; what remains is a mere logical process of belief. Consequently, nothing that the counsel may say as to the desired inference can be the giving of evidence by him; for the evidence is by hypothesis already there. His suggestions are logical, not evidential. Now in this domain of logic, it is conceded, the counsel is free from restraint during argument. His desired inferences may be forced, unnatural, and untenable; but as to this the jury are to judge; that is precisely their function. To declare the desired inference irrational is to beg the question, by prejudging what the jury may believe. If the evidence was irrelevant, in the eye of the law of evidence (i. e. if it was totally destitute of probative value for the purpose in hand), this would have been determined by the judge's ruling when it was offered; the very admission of it at all signifies that it has at least some probative value (*ante*, §§ 9, 28). Hence, the counsel's exposition of its probative potency must be left free for the jury's consideration; subject, no doubt, to judicial correction in case of palpable bad faith or in case of the misuse for one purpose of evidence admissible only for another purpose:

1881, *Elliott, J.*, in *Combs v. State*, 75 Ind. 216, 218 (commenting on counsel's request to the jury to infer from the defendant's going to the town of residence of a witness that therefore the defendant had hired the witness): "The counsel for the State asked the jury to draw their own inferences from certain facts disclosed by the evidence; and, in so doing, the counsel may have asked the jury to violate all logical rules and do violence to all the laws of legitimate inference. But we cannot undertake to correct their logic. If there were any facts at all before the jury, the question as to what conclusions should be drawn was one for argument; and it was not for the Court to determine whether the inference of counsel was a correct or an erroneous one."

1897, *Moore, C. J.*, in *State v. Moore*, 82 Or. 65, 48 Pac. 468: "A Court cannot well supervise the reasoning powers of an attorney in the argument of a cause before it in which he is interested; for to do so would require it constantly to interrupt counsel, and be tantamount to instructing the jury by piecemeal, thereby destroying the force of the argument, and rendering it of but little use in aiding the jury to reach a proper conclusion. An attorney may comment on the testimony given in evidence, and has the right to draw such inferences and conclusions therefrom as his reason may dictate that the facts warrant; but, if he make a wrong deduction, the Court will, upon request therefor, correct it by giving a proper instruction."

* *Accord*: 1890, *Sullivan v. State*, 64 Ala. 81 ("Presiding officers should not be severe in arresting such argument on the ground that to their minds the analogy or inference is forced or unnatural or that the argument employed is illogical"); 1902, *Lide v. State*, 133 Id. 43, 31 So. 959; 1901, *Mitchell v. State*, 43 Fla. 584, 31 So. 242; 1903, *Sylvester v. State*, — Id. —, 35 So. 142; 1902, *Henry v. People*, 196 Ill. 162, 65 N. E. 120; 1883, *Proctor v. DeCamp*, 83 Ind. 559; 1890, *Sage v. State*, 127 Id. 15, 29, 36 N. E. 667; 1890, *State v. Toombs*, 79 Ia. 741, 45 N. W. 300.

Distinguish from this the question how far counsel may by emotional language excite the prejudices of the jury; this may no doubt be restrained, but only in extreme cases: 1903,

Weaver, J., in *State v. Burns*, 119 Ia. 663, 94 N. W. 238: "It is his time-honored privilege to

"Drown the stage in tears,

Make mad the guilty and appal the free,
Confound the ignorant, and amaze, indeed,
The very faculties of eyes and ears."

Stored away in the property room of the profession are moving pictures in infinite variety, from which every lawyer is expected to freely draw on all proper occasions. They give zest and point to the declamation, relieve the tediousness of the juror's duties, and please the audience, but are not often effective in securing unjust verdicts. The 'sorrowing, gray-haired parents,' upon the one hand, and the 'broken-hearted victim of man's duplicity,' upon the

§ 1808. *Improper Statements in Offering Evidence to the Judge or Putting Questions to a Witness.* The general principle that a counsel may not make assertions of fact concerning matters not otherwise properly put in evidence (*ante*, § 1806) may be sought to be violated by indirection; but the prohibition applies with equal strictness. There are two chief ways in which this may occur: first, in a preliminary statement to the judge as to the tenor of evidence which the counsel desire to offer; and, secondly, in the putting of questions to witnesses.

(1) *Stating an offer of evidence.* Where a certain class of evidence is desired to be offered, and the offering counsel knows (either from the very nature of the evidence or from objection made by the opponent at the inception of the offer or upon a previous analogous offer) that its admission will be disputed, and therefore that a judicial ruling will be necessary, a sense of professional honor will tell him that in the ordinary case the details of the offer should not be stated in the jury's hearing; because of the possibility that the statement may be taken by them as true and relevant, even though it be excluded by the judge. In this respect the rule of law enforces the standard of honor, and requires the offering counsel either to present the offer in writing, without reading it aloud, to the Court and the opposing counsel, or, if argument is expected, to afford an opportunity for the jury's retirement before orally stating the offer:

1776, *Mr. Sylvester Douglas, Election Cases*, 2d ed., III, 282: "In truth, almost all the inconvenience which may be apprehended from an improper impression and prejudice occasioned by illegal evidence is in such case already incurred by its being stated as what is to be proved, before it is actually produced and sworn to in the regular form. . . . It has often occurred to me that in trials at *nisi prius*, when evidence is objected to, there is an impropriety in allowing the counsel who offers it to state what he means to prove in the hearing of the jury, and this for the reason already mentioned; especially as jurymen are too apt to infer that evidence so offered must be both true, and fatal to the party who objects to it, merely because it is objected to. Perhaps it would be an improvement, when questions of admissibility are raised, that the jury, as well as the witnesses, should withdraw till the point was argued and determined."

1878, *Marston, J., in Scripps v. Reilly*, 38 Mich. 10, 15: "In this case, after counsel had obtained a clear and distinct ruling of the Court as to the inadmissibility of a certain class of [newspaper] articles, a large number of the same class were offered, and in making each separate offer counsel stated the purport of the article or read the headings. This course was objected to, but permitted by the Court, and the articles offered were all excluded, the objection to their admissibility having been sustained. We think the course adopted was not correct. . . . Everything having a tendency to prejudice or influence a jury in their deliberations, which is not legally admissible in evidence on the trial of the cause, should be so far as possible kept from coming to their knowledge during the trial. An impression once made upon the mind of a juror, no matter how, will have more or less influence upon him when he retires to deliberate upon the verdict to be given; and no matter how honest or conscientious he may be, or how carefully he may have been instructed by the Court not to permit such incompetent matters to influence him or have any bearing in the case, it will be very difficult, if not impossible, for him to separate the

other, have adorned the climax and peroration of legal oratory from a time 'whence the memory of man runneth not to the contrary,' and for us at this late day to brand their use as misconduct would expose us to just censure for interference with ancient landmarks."

competent from the incompetent, or to say to what extent his impressions or convictions may be attributed to that which properly should not have been permitted to come to his knowledge. . . . [Rules of exclusion] would be but slight protection if counsel or witnesses could be permitted to make a statement, but not under oath, of incompetent testimony, or counsel state the same fully to the jury in their argument or otherwise. . . . Where the offer is likely to be of such a character that it would have a tendency to prejudice or influence the jury, the correct practice would be to present the article, if in writing, to the Court and counsel for examination, without stating either the purport or substance of it. The cases are but few where such objectionable articles are likely to come up on the trial; and, when such a case arises, the good sense of Court and counsel will not only see the necessity, but will readily discover and adopt the means requisite to keep them from the reach of the jury."

No doubt much must depend upon the circumstances of each case; and the discretion of the trial Court should control. But it is clear that the judge should interfere *ex mero motu*, and that, so far as feasible, no statement of proposed evidence should be allowed to be made in such a way as to allow the jury to obtain an impression of its truth and relevancy and to place the opposing counsel at the disadvantage of objecting to proposals whose known tenor may be misused against his party.¹

(2) The same general principle governs the *putting of questions to witnesses*. The jury may under certain circumstances obtain an impression, from the mere putting of illegal questions which are either answered in the negative or are not answered because illegal and excluded, that there is some basis of truth for the question. When a counsel puts such a question, believing that it will be excluded for illegality or will be negatived, and also having no reason to believe that there is a foundation of truth for it, he violates professional honor. It is generally agreed that where the counsel has been warned, by a prior successful objection of the opponent to similar evidence, that it is illegal, he will be prevented from again putting questions dealing with the class of facts affected by the same illegality:

1872, *Cooley, J.*, in *Gale v. People*, 28 Mich. 187, 181 (commenting on the repeated putting of questions as to the defendant's past misconduct): "[Had the defendant declined to answer them,] an unfavorable influence upon the minds of the jury must inevitably have been produced, which in this case would have been increased by the exhibition of letters, brought out before the jury for no purpose that we can conceive, unless to convey an impression that they contained damaging disclosures regarding the prisoner, which he must either admit or falsify the facts. If therefore the questions were improper in themselves, the error was a serious one; and we have no doubt of their impropriety. . . . A review of the evidence in this case suggests very forcibly that,

¹ The following cases illustrate the application of this principle: 1860, *Moss v. State*, 36 Ala. 211, 228 (trial Court may remove the jury during evidence as to the admissibility of a confession; compare the citations *ante*, § 861, n. 6); 1899, *Illinois C. R. Co. v. Treat*, 179 Ill. 576, 64 N. E. 390; 1878, *Scripps v. Reilly*, 38 Mich. 10 (quoted *supra*); 1882, *Porter v. Thorpe*, 47 id. 313, 330, 11 N. W. 174 (approving the principle of *Scripps v. Reilly*; good opinion by *Cooley, J.*); 1897, *People v. Abell*, 113 id. 80, 71 N. W. 509; 1903, *State v. Rose*, — Mo. —, 76 S. W. 1008

(offering a prior conviction of crime); 1891, *Leahy v. State*, 31 Nebr. 546, 549, 48 N. W. 390; 1889, *State v. Moore*, 104 N. C. 744, 745, 10 S. E. 163 (trial Court has discretion to send the jury out while a proffer of evidence is being stated).

For the proper limits as to detailed rehearsals of evidence in an opening statement of the case, with reference to the contingency of not evidencing it afterwards, see the remarks of Mr. J. Graves, in *Scripps v. Reilly*, *supra*; and compare the rule of conditional relevancy (*post*, § 1871).

however full may be the explanation, a list of questions which assume the existence of damaging facts may be put in such a manner, and with such persistency and show of proof, as to impress a jury that there must be something wrong, even though the prisoner fully denies it and there is no other evidence."

1893, *McFarland, J.*, in *People v. Wells*, 100 Cal. 459, 462, 34 Pac. 1078 (commenting on repeated questions asked of the defendant as a witness and concerning prior misconduct of various sorts): "It would be an impeachment of the legal learning of the counsel for the People to intimate that he did not know the question to be improper and wholly unjustifiable. Its only purpose, therefore, was to get before the jury a statement, in the guise of a question, that would prejudice them against appellant. If counsel had no reason to believe the truth of the matter insinuated by the question, then the artifice was most flagrant; but if he had any reason to believe in its truth, still he knew that it was a matter which the jury had no right to consider. The prosecuting attorney may well be assumed to be a man of fair standing before the jury; and they may well have thought that he would not have asked the question unless he could have proved what it intimated if he had been allowed to do so. He said plainly to the jury what Hamlet did not want his friends to say: 'Aa, "Well we know"; or "We could, an-if we would"; or "If we list to . . ."; or "There be, an if there might."' This was an entirely unfair way to try the case; and the mischief was not averted because the Court properly sustained the objection (though we think it should have warned counsel against the course which he was taking) and instructed the jury specially on the subject. The wrong and the harm was in the asking of the question. Of course, in trials of criminal cases, questions as to the admissibility of evidence will frequently arise about which lawyers and judges may fairly differ in opinion; and in such cases defendants must be satisfied when Courts sustain their objections. But where the prosecuting attorney asks a defendant questions which he knows and every judge and lawyer knows to be wholly inadmissible and wrong, and where the questions are asked without the expectation of answers, and where the clear purpose is to prejudice the jury against the defendant in a vital matter by the mere asking of the questions, then a judgment against the defendant will be reversed, although objections to the questions were sustained, unless it appears that the questions could not have influenced the verdict."

4. Interpreter.

§ 1810. **Hearsay Rule applicable to Interpreter.** The necessity for resorting to an interpreter, and the mode of interpretation, for witnesses who speak in a foreign language, or speak inaudibly, or are dumb, have been already considered (*ante*, § 811). It remains here to examine the applicability of the Hearsay rule to this process.

(1) Where the testimony is that of a witness now speaking through an interpreter in court, the Hearsay rule is satisfied as to both, because there is an opportunity for the cross-examination of both. But where the testimony is that of a witness at a former trial, there given through an interpreter, then, though there has been for both an opportunity of cross-examination, the rule of confrontation applies, and before the witness' testimony may be received, he must be shown to be deceased, out of the jurisdiction, or otherwise un-

* 1895, *Birmingham Nat'l Bank v. Bradley*, 100 Ala. 205, 206, 19 So. 791; 1890, *People v. Mullings*, 83 Cal. 138, 139, 143, 23 Pac. 229 (repeated questions to defendant as to inadmissible conversations with his wife).

Compare the cases cited *ante*, §§ 963, 967, where an indirect effect of this principle is seen

in the rule of some jurisdictions that all cross-examination of a witness to specific acts of misconduct is forbidden.

Distinguish the rule *ante*, § 783, as to the propriety of repeating the same lawful question in order to compel a dishonest witness to retract.

available (*ante*; § 1402). The same requirement, however, applies to the interpreter, for he is also a witness, i. e. to the words of the principal witness; and hence, either the interpreter must be called to repeat the witness' words or he must be accounted for as deceased or otherwise unavailable.¹

(2) Where a witness on the stand is asked to testify to the words of A (uttered out of court) as translated to him by M interpreting between them, the witness is not qualified by personal knowledge of A's utterances (*ante*, § 668), and may not testify; the interpreter M is the only qualified witness. But if A, whose utterances are to be testified to, is a party opponent, then he may be regarded as having made M his agent to translate, and thus M's translations are admissions (*ante*, § 1078), usable against A.²

¹ 1880, *People v. Lee Fat*, 84 Cal. 569 (where neither the official reporter nor the interpreter was called, but the former's notes were offered; under the statute — *ante*, § 1649 — sanctioning their use, the reporter's presence was apparently not necessary, but the Court held that the interpreter's absence was fatal; implying that if accounted for it would have been enough); 1880, *People v. Ah Yute*, 84 id. 120 (the same facts, except that the reporter read his notes; the Court declared the absence of the interpreter fatal); 1897, *People v. Sierr*, 116 id. 249, 48 Pac. 88 (approving the preceding cases); 1903, *People v. John*, 127 id. 230, 66 Pac. 1063 (both interpreter and stenographer being called to prove former testimony, the one swearing to his correct translation and the other to his correct transcription, the Court nevertheless excluded the testimony as "hearsay"; unsound, because ignoring the direct applicability to it a case of the principle of § 781, *ante*); 1871, *Scheerer v. Harber*, 38 Ind. 341 (the interpreter must be accounted for as "dead or insane, or out of the jurisdiction, or unable to testify, or, having been summoned, appears to have been kept away by the adverse party"); 1809, *Amory v. Fellows*, 5 Mass. 219, 225 (deposition through an interpreter rejected, because

the interpreter was not sworn as such by the commissioners ignorant of the witness' language); 1901, *Com. v. Storti*, 177 id. 339, 58 N. E. 1081 (interpreter translated a confession orally, and stenographer wrote down the translation, both testifying on the trial; held sufficient); 1902, *State v. Terline*, 23 R. I. 530, 51 Atl. 204 (witnesses to the translation by an official interpreter, of a former witness' testimony, excluded, the interpreter not being called; following *People v. Ah Yute*, Cal.); 1909, *State v. Epstein*, — id. —, 85 Atl. 204 (police officers' testimony to a Russian injured person's statements, translated to them by an interpreter, excluded).

By statute in a few jurisdictions an official translation of testimony or documents is receivable as an official statement (*ante*, § 1672).

² 1892, *Com. v. Voss*, 157 Mass. 394, 23 N. E. 355; 1856, *Diener v. Diener*, 5 Wis. 433, 496, 521, 527 ("The circumstances may be such as to make the interpreter an agent so as to bind the parties; but we think he is not necessarily an agent," i. e. to bind them).

Whether an interpreter is sufficiently expert to testify involves a different principle (*ante*, § 871).

TITLE III: PROPHYLACTIC RULES.

CHAPTER LX.

§ 1812. General Nature of these Rules.

SUB-TITLE I: OATH.

§ 1813. History.

A. THE OATH AT COMMON LAW.

1. Nature, Form, and Mode of Administration.

- § 1814. Theory of the Oath.
- § 1817. Nature of the Belief.
- § 1818. Form of the Oath.
- § 1819. Time of Administration and of Objection.

2. Capacity to take the Oath.

- § 1820. Mode of Ascertaining Capacity.
- § 1821. Capacity of Infants.
- § 1822. Capacity of Idiots, Lunatics.
- § 1823. Distinction between Oath-Capacity and Testimonial Qualifications.

3. Persons subjected to the Oath.

- § 1824. Oath required for all Testimony delivered in Court; Interpreters.

§ 1825. Infants, Poets, Accused Persons.

B. THE OATH UNDER STATUTES.

- § 1827. Abolition or Optional Dispensation of the Oath; Policy thereof.
- § 1828. Same: State of the Law in the Various Jurisdictions.
- § 1829. Statutory Changes as to Nature, Form, Capacity, Proof, Persons.

SUB-TITLE II: PERJURY-PENALTY.

- § 1831. Nature of the Secrecy.
- § 1832. Rules of Exclusion depending on this Requirement.

SUB-TITLE III: PUBLICITY.

- § 1834. General Nature of the Secrecy.
- § 1835. Exceptions to the Rule of Publicity: (1) Excluding Persons from the Court-Room.
- § 1836. Same: (2) Preventing Publication of Proceedings.

§ 1813. General Nature of these Rules. Among the different sorts of rules of Auxiliary Probative Policy (*ante*, § 1171) this second class is marked out by the special feature that it operates by applying to the evidence, in advance of its admission, some expedient calculated to supply an antidote or prophylactic for the supposed weakness or danger inherent in the evidence. The several rules of this sort thus are united by this common feature, in contrast with the four other classes of auxiliary rules. This common feature furnishes a just ground for grouping them together, because the proper basis of classification for all these auxiliary rules, as noted already (*ante*, § 1171), is their practical operation or form of application, i.e. the thing actually done by the Court in using them, and not the motive or reason which makes it desirable to do so.

These Prophylactic Rules operate in one or both of two slightly different ways. The expedient which they apply serves either to *eliminate* the supposed danger by counteracting its influence in advance, or to furnish a means by which it can be *discovered* and other measures can be taken to counteract it at the trial. The Oath (*post*, § 1816) operates in the first way only, by setting against the witness' motives to falsify his fear of divine punishment and thus nullifying in advance the influence of the former. The Perjury-Penalty (*post*, § 1831) operates in the same way, merely substituting the fear

of temporal punishment for the fear of divine punishment. The Publicity rule (*post*, § 1834) operates in both of the above ways, first, by subjecting the witness to the fear of the later consequences of public opinion and of a present exposure by interested bystanders, and, next, by providing the means of counteracting his possible falsities through the presence of those who can contradict him. The Sequestration of Witnesses (*post*, § 1838) operates partly in the first way, by preventing collusion, but chiefly in the second way, by furnishing a means of exposing that collusion if it has already taken place. The Notice of Evidence to the Opponent (*post*, § 1845) operates only in the second way, by furnishing the opponent, in advance of the trial, with knowledge of the proposed evidence, and by thus enabling him to prepare to expose false evidence; though perhaps there is also involved an effect of the first sort, in subjectively deterring the opponent from offering that which he knows can be shown false.

Sub-title I: OATH.

§ 1815. *History.* The employment of oaths takes our history back to the origins of Germanic law and custom, where, as in all primitive civilizations, the appeal to the supernatural plays an important part in the administration of justice. But the use of oaths for witnesses appears as only a single and subordinate phase of the general resort to oaths. The early Germanic modes of trial consisted largely in a reference, in one form or another, to the *judicium Dei*. By oaths formally taken one might even establish his claim or his plea beyond attack. It was not a matter of weighing the credibility of a sworn statement; the thought was rather that such an appeal could not be falsely made with impunity. To such an invocation a judicial and determinative effect was attributed by the religious notions of the time.¹ The progress from this notion of the oath at large (which left its traces as late as the 1800s in some of the common modes of procedure) to the second stage of a test or security for credibility was slow and gradual.² In the 1700s came the beginning of a third stage of development, in which legislation sanctioned what the community had come finally to believe, namely, that the inexorable requirement of an oath worked injustice and that theological belief should not obstruct the admission of competent witnesses. In this stage the tendency has been either to make the application of the oath optional with the witness, or to abandon its essential feature by rendering theological belief unnecessary.

It is with the second stage that the common law has to deal; the ideas of the first stage having practically disappeared entirely from the common law

¹ Its history and practice in this earliest stage may be studied in the following works: 1892, Brunner, *Deutsche Rechtsgeschichte*, II, §§ 103 ff.; 1898, Thayer, *Preliminary Treatise on Evidence*, 24, and *The Development of Trial by Jury*, 5 *Harv. Law Rev.* 43, 245, 295, 357; 1897, Pollock and Maitland, *History of English Law*, II, 598, 631; 1878, Lea, *Superstition and Force*, cc. 2 ff.; in Tyler on Oaths (1834) the treatment is not modern. Junkin on Oaths has not been accessible.

² Remnants of the compurgatory oath of the party were found in the 1600s in the statutes of some Southern States dealing with proof of accounts (*ante*, § 1819). On the Continent, the *serment décisoire* was until modern times recognised in France and in Germany: 1899, Garsonnet, *Traité de Procédure*, III, § 878; 1901, Sydow v. Busch, *Deutsche Zivilprozessordnung*, §§ 670, 1035. Wager of law had an influence in the history of parties' disqualification as witnesses (*ante*, § 875).

of the last three centuries. The changes constituting the third stage of abandonment or election have everywhere been made by legislation, and will be later considered (*post*, §§ 1827-1829). The common-law questions are: (1) What was the *nature* and what the *form* of a testimonial oath? (2) What was the *capacity* necessary in order to be able to take the oath? (3) What testimony is required to be *subjected* to it?

A. THE OATH AT COMMON LAW.

1. Nature, Form, and Mode of Administration.

§ 1816. *Theory of the Oath.* The theory of the oath, in modern common law, may be termed a subjective one, in contrast to the earlier one, which may be termed objective. The oath is not a summoning of Divine vengeance upon false swearing, whereby when the spectators see the witness standing unharmed they know that the Divine judgment has pronounced him to be a truth-teller;¹ but a method of reminding the witness strongly of the Divine punishment somewhere in store for false swearing, and thus of putting him in a frame of mind calculated to speak only the truth as he saw it. This essentially subjective nature of the security had by the 1800s come to be thoroughly appreciated and established. It would have been undoubted, had it not been for an occasional expression which tended to obscure the real nature of the security.²

The true modern theory of the oath is set forth in the following passages:

1800, *Per Curiam*, in *Curtiss v. Strong*, 4 Day 58: "There can be no doubt but that the law intended that the fear of offending God should have its influence upon a witness to induce him to speak the truth. But no such influence can be expected from the man who disregards an oath. He is therefore excluded from being a witness."

1877, *Aldburn, J.*, in *Clinton v. State*, 23 Oh. St. 23: "The purpose of the oath is not to call the attention of God to the witness, but the attention of the witness to God; not to call upon Him to punish the false-swearer, but on the witness to remember that He will surely do so. By thus laying hold of the conscience of the witness and appealing to his sense of accountability, the law best insures the utterance of truth."

1882, *Somerville, J.*, in *Blackburn v. State*, 71 Ala. 319: "[The object is] to purge the conscience, and impress the witness with a due sense of religious obligation, so as to secure the purity and truth of his testimony under the influence of its sanctity."

1849, *Mr. W. M. Best*, *Evidence*, §§ 58, 161: "Some eminent authorities in our own law have used language calculated to convey the notion that oaths are necessarily imprecatory. . . . Imprecation is however no part of the essence of an oath, but is a mere adjunct of questionable propriety. . . . The object of the law in requiring an oath is to get at the truth by obtaining a help on the conscience of the witness."

This being the function of the oath, it must, to fulfil its function, involve the calling to mind of some superhuman moral retribution which according to the witness' belief is calculated to induce him to refrain from false state-

¹ 1632-1634, *Coke*, 1 Inst. 16; 4 Inst. 79; upon his head if what he shall afterwards say is false"; 1830, *Abbott, C. J.*, in *The Queen's Case*, 2 B. & B. 265 ("A person renounces the mercy and imprecates the vengeance of Heaven if he do not speak the truth").

1698, *Hale*, Pl. Cr. II, 279; *Anon.*, 1 Vern. 363.

² 1768, *R. v. White*, 1 Leach Cr. L., 4th ed., 420 ("He has imprecated the divine vengeance

ments and thus to avoid the retribution. This fundamental idea determines logically the rules of law to be observed as to the nature of the belief, the form of the oath, and the capacity to take it. The sanction acts preventively by holding out the fear of certain retribution; its efficacy presupposes a belief in this retribution, and therefore a capacity to be influenced thereby; and the influence is to be exerted at the time when the witness is about to testify.

The supposed mental process may be concretely seen in the following exhortation, by a judge whose reputation for brutality need not induce us to doubt the soundness of his law:

1808, *Jaffries, C. J.*, in *Lady Lisle's Trial*, 11 How. St. Tr. 336 (threatening a refractory witness): "Now mark what I say to you, friend. . . . Thou hast a precious immortal soul, and there is nothing in the world equal to it in value. . . . Consider that the Great God of Heaven and Earth, before whose tribunal thou and we and all persons are to stand at the last day, will call thee to an account for the rescinding his truth, and take vengeance of thee for every falsehood thou tellst. I charge thee, therefore, as thou wilt answer it to the Great God, the judge of all the earth, that thou do not dare to waver one tittle from the truth, upon any account or pretence whatsoever; . . . for that God of Heaven may justly strike thee into eternal flames and make thee drop into the bottomless lake of fire and brimstone, if thou offer to deviate the least from the truth and nothing but the truth."

§ 1817. *Nature of the Belief.* (a) The nature of the belief which alone is susceptible to the influence of this stimulus to truth is on principle simple enough. It is a belief in a superhuman (and therefore inevitable) retribution to follow false swearing. The language of the judges in *Omichund v. Barker*¹ (in which the future Lord Mansfield was a leading counsel) has become classical:

1744, *Omichund v. Barker*, 1 Atk. 45; L. C. J. *Willes*: "Though I am of opinion that infidels who believe a God and future rewards and punishments in the other world may be witnesses, yet I am as clearly of opinion that if they do not believe a God or future rewards and punishments, they ought not to be admitted as witnesses"; [in the other report]: "Nothing but the belief in a God, and that he will reward and punish us according to our deserts, is necessary to qualify a man to take an oath"; L. C. J. *Lee*: "An oath is a religious sanction that mankind have universally established. . . . I agree that where the witness . . . is of a religion, it is sufficient; for the foundation of all religion is the belief of a God"; *Hardwicks*, L. C. (approving a passage from Bishop Sanderson): "Juramentum, saith he, est affirmatio religiosa. All that is necessary to an oath is an appeal to the Supreme Being, as thinking him the rewarder of truth and the avenger of falsehood."

1802, *Martin, B.*, in *Miller v. Salmons*, 7 Exch. 545: "The doctrine laid down [in *Omichund v. Barker*] was that the essence of an oath was an appeal to the Supreme Being in whose existence the person taking the oath believed, and whom he also believed to be a rewarder of truth and an avenger of falsehood."

1824, *Walworth, J.*, in *People v. Matteson*, 2 Cow. 433: "I apprehend the true test of the competency of a witness to be this: Has the obligation of an oath any binding tie upon his conscience? Or in other words, does the witness believe in the existence of a

¹ A case of which Burke said in 1794 (*Works*, Little & Brown's ed., XI, 77): "one of the cases the most solemnly argued that has been in man's memory, with the aid of the greatest learning at the bar, and with the aid of all the learning on

the bench, both bench and bar being then supplied with men of the first form." The case is also reported fully in *Willes* 538, and shortly in 1 *Wils.* 64.

God who will punish his perjury? If he swears falsely, does he believe he will be punished by an overruling Providence, either in this world or in the world to come?"

1871, *Freeman, J.*, in *Odell v. Kappes*, 61 Tenn. 91: "[The test of incompetency is] not to believe in a God or any responsibility for his conduct beyond such penalties as human laws may inflict."*

It might have been expected that difficulty would arise over the nature of the punishing power, — whether the belief should relate to a personal God or not; whether any notion of supernatural force was essential; and so on. But, strangely enough, no such doubt seems to have presented itself, and any more definite interpretation of the idea of God, or Supreme Being, than the above passages indicate has been ignored by the judges.

(b) A difficulty did arise, however, as to the place and time of punishment. Would a belief in a punishment in the present life suffice, or must the apprehension be of a punishment in a future life? The language of Chief Justice Willes, in *Omichund v. Barker*, looked both ways, being differently reproduced by the different reports. On principle, no doubt could seem to exist; for a belief, if genuine, of a sure punishment, whether material or spiritual, in the present existence, would be no less efficacious a preventive of falsehood than a belief in a punishment after death. The very nearness of the former sort would be a more vivid and forceful reminder than the distant indefiniteness of the latter; moreover, the deliberate thought necessary to bring one to the former and less usual belief would perhaps indicate a mind more keenly susceptible to conscientious sanctions than that of a person professing the customary and perhaps only half-realized tenets of the unquestioning multitude. After an interval of more or less uncertainty, the English Courts declared the distinction to be immaterial, — i. e. whether the punishment is believed to impend in a future existence or in the present one; and the American courts, particularly in later rulings, have generally reached the same result:

1865, *Brett, M. R.*, in *Attorney-General v. Bradlaugh*, L. R. 14 Q. B. D. 607: "There is no necessity that the person taking the oath should believe that he will be liable to be punished in a future state. If there be any belief in a religion according to which it is supposed that a Supreme Being would punish a man in this world for doing wrong, that is enough."

1866, *Pearson, J.*, in *Shaw v. Moore*, 4 Jones L. 26: "There is no ground for making a distinction between the fear of punishment by the Supreme Being in this world and the fear of punishment in the world to come. Both are based upon the sense of religion. . . . The efficacy of the fear of punishment in either case depends upon the degree of belief as to the certainty of that punishment, so that there can be upon reason no ground for making a distinction. The rule of law which requires a religious sanction is satisfied in either case."*

* Accord: 1897, *State v. Washington*, 49 La. 1602, 23 So. 641 ("the appreciation of a Supreme Being to punish sin and reward virtue").

* Accord: 1861, *Blocher v. Barnes*, 3 Ala. 285; 1893, *Beeson v. Moore*, 132 Id. 391, 31 So. 484; 1822, *Noble v. People*, 1 Ill. 56 (but here the witness believed in a future state of existence); 1856, *Central M. T. R. Co. v. Rockafel-*

low, 17 Id. 553, *semble*; 1861, *Searcy v. Miller*, 57 Ia. 613, 10 N. W. 912; 1816, *Hanscom v. Hanscom*, 15 Mass. 164, *semble*; 1899, *Com. v. Bachelder*, *Thacher's Cr. C.* 190, *Thacher, J.*; 1879, *Free v. Buckingham*, 50 N. H. 225; 1824, *People v. Matteson*, 3 Cow. 435, *Walworth, J.*; 1846, *Brock v. Milligan*, 10 Oh. 121; 1877, *Clin-ton v. State*, 23 Oh. 82, 23; *Cubbsen v.*

In addition to formulating this general definition, the Courts have also frequently been called on to rule upon the sufficiency of individual beliefs, expressed in language more or less inexact and variant. These decisions merely apply the above principles to the facts of each case, and can hardly be treated as precedents.⁴ In regard to children there has always been a proper inclination to avoid ascertaining the test-belief in formal and abstract language.⁵

§ 1818. *Form of the Oath.* Such being the essentials of the belief regarded as a security for trustworthiness, it follows that the *form* of the administration of the oath is *immaterial*, provided that it involves, in the mind of the witness, the bringing to bear of this apprehension of punishment. The oath's efficacy may depend upon both the general name and nature of the witness' faith and the formula of words or ceremonies which he considers as binding, i. e. as subjecting him to the risk of punishment. But it cannot matter what tenets of theological belief or what ecclesiastical organization he adheres to, provided the above essentials are fulfilled; and it cannot matter what words or ceremonies are used in imposing the oath, provided he recognizes them as binding by his belief. This was long ago settled (after some earlier suggestions to the contrary, in favor of the exclusive efficacy of Christian forms) in the great case of *Omichund v. Barker*, and has never since been doubted:

1744, *Omichund v. Barker*, 1 Atk. 45; L. C. J. *Wilkes*: "The form of oaths varies in countries according to different laws and constitution, but the substance is the same in all. . . . It would be absurd for him to swear according to the Christian oath, which he does not believe; and therefore, out of necessity, he must be allowed to swear according to his own notion of an oath"; *Hardwicks*, L. C.: "The next thing . . . is the form of the oath. It is laid down by all writers that the outward act is not essential to the oath. . . . It has been the wisdom of all nations to administer such oaths as are agreeable to the notion of the person taking."

1776, *Mansfield*, L. C. J., in *Atkeson v. Everitt*, Cowp. 380: "I there argued [in *Omichund v. Barker*], and the judges in delivering their opinions agreed, that upon the principles of the common law there is no particular form essential to an oath to be taken by a witness; but as the purpose of it is to bind his conscience, every man of every religion should be bound by that form which he himself thinks will bind his own conscience most."¹

1852, *Alderson*, B., in *Miller v. Salomons*, 7 Exch. 535, 558, 615: "*Omichund v. Barker* has settled that it ought to be taken in that form and upon that sanction which most effectually binds the conscience of the party swearing. Thus, a Jew is to be sworn on the Book of the Law and with his head covered, a Brahmin by the mode prescribed by his peculiar faith, a Chinese by his special ceremonies, and the like"; *Palock*, C. B.: "It

M'Creary, 2 W. & S. 263; 1856, *Blair v. Seaver*, 26 Pa. 276; 1846, *Jones v. Harris*, 1 Strobb. L. 160; 1852, *Bennett v. State*, 1 Swan 411; 1841, *Arnold v. Arnold's Estate*, 13 Vt. 262. *Contra* (declaring belief in future-world punishment essential): 1899, *Bell v. Bell*, 34 N. Br. 615, 624; 1828, *Atwood v. Welton*, 7 Conn. 70 (*Peters, J.*, diss.); 1820, *Jackson v. Gridley*, 18 John. 103, *Spencer, C. J.*; 1823, *Batts v. Swartwood*, 2 Cow. 432, *Sutherland, J.*; 1829, *M'Clure v. Tennessee*, 1 Yerg. 206, *semble*; 1871, *Anderson v. Maberry*, 2 Heisk. 658, *semble*; 1827, *Wakefield v. Ross*,

8 Mason 19, *Story, J.*, *semble*. *Uncertain*: 1897, *State v. Washington*, 49 La. An. 1602, 22 So. 841.

⁴ 1796, *R. v. White*, 1 Leach Cr. L., 4th ed., 430 (rejected); 1845, *R. v. Serva*, 2 C. & K. 36, *Platt, B.* (that the witness was a Christian, accepted); 1842, *Scott v. Hooper*, 14 Vt. 538 (belief in no God; rejected).

⁵ The cases are placed post, § 1821.

¹ See Dr. William Paley's *Principles of Moral and Political Philosophy*, 1785, Book III, Part I, Chapter XVI, "Oaths."

appears to me to have decided merely this, — that the common law of England agrees with the law of nations, that the form of an oath is to be accommodated to the religious persuasion which the swearer entertains."

1822, *Reynolds, C. J.*, in *Gill v. Caldwell*, 1 Ill. 53: "The pure principle of the common law is that oaths are to be administered to all persons according to their own opinions, and as it most affects their consciences."

The usual form of oath at common law in criminal cases was as follows:

1841, *Mr. Joseph Chitty*, Criminal Law, 4th Amer. ed., I, 616: "The form at the assizes or sessions is, for the clerk of arraigns or of the peace to desire the witness to take the book in his hand, and, when that is done, to say to him, 'The evidence you shall give between our sovereign lord the king and the prisoner at the bar shall be the truth, the whole truth, and nothing but the truth, So help you God!'; upon which the witness kisses the book."

The usual form of words in civil cases differed slightly:

"The evidence that you shall give to the Court and jury, touching the matters in question, shall be the truth, the whole truth, and nothing but the truth; So help you God!"

The form of oath is to be that one which binds the specific witness; in other words, its force is to be tested subjectively. It would seem to follow that, if the witness recognizes *degrees of bindingness* in different forms, the

* 1809, *Curtis v. Strong*, 4 Day 55; 1871, *Odell v. State*, 61 Tenn. 91; 1841, *Arnold v. Arnold's Estate*, 13 Vt. 362. This doctrine is often re-declared by statute: *post*, § 1827.

† The following are earlier variants: 1740, *Mas. Revised Laws and Liberties*, "Preamble and Forms," p. 88 ("You swear by the Living God that the evidence you shall give to this Court concerning the cause now in question shall be the truth, the whole truth, and nothing but the truth, So help you God, etc."); 1871, *Duke of Norfolk's Trial*, before the House of Lords, *Jardine's Crim. Tr.* I, 176 (a witness was sworn in the following formula: "The evidence that you shall give before the peers and noblemen here assembled shall be the truth and the whole truth"); for an interpreter: 1786, *Ruston's Case*, 1 Leach Cr. L., 4th ed., 408 (an interpreter for a deaf and dumb person was sworn "well and truly to interpret" to the witness "the questions and demands made by the Court to the said J. R. and his answers made to them"). The custom of kissing the Book is now coming to be generally recognized as both repulsive and unsanitary; celluloid covers are sometimes provided (30 *Montreal Legal News* 274). But it should be clearly understood that the ceremony of kissing is for most persons a wholly unessential feature.

The recognition of sundry unusual forms of oath for unusual theological beliefs is illustrated in the following cases: 1738, *Fachina v. Sabine*, 2 Stra. 1104 (Mahometan); 1764, *R. v. Morgan*, 1 Leach Cr. L., 4th ed., 54 (same); 1768, *Mil-drone's Case*, 1 Leach Cr. L., 4th ed., 412 (local custom of holding up the hand, without touch-

ing or kissing the Book); 1788, *Walker's Case*, ib. 498 (using the Old Testament, by the rite of the Kirk of Scotland); 1791, *Mee v. Reid*, Peake N. P. Cas. 23 (same form); 1824, *Edmonds v. Rowe*, Ry. & Moo. 77 (a Methodist, who preferred swearing on the Old Testament); 1842, *R. v. Entrehman*, C. & M. 248 (Chinese); 1822, *Gill v. Caldwell*, 1 Ill. 53 (swearing without Bible and with uplifted hand); 1810, *Vail v. Nickerson*, 6 Mass. 262 (French); 1834, *Com. v. Buzzell*, 16 Pick. 156 (Roman Catholics, on the Holy Evangelists); 1847, *Newman v. Newman*, 7 N. J. Eq. 26 (Hebrew); 1897, *State v. Gin Pon*, 16 Wash. 425, 47 Pac. 961 (blowing out a candle and praying to be snuffed out likewise if perjured; used for Chinese).

No special form of swearing is necessary, if according to the witness' religion none exists: 1860, *R. v. Pah-Mah-Gay*, 20 U. C. Q. B. 196.

It may be noted that, of the forms of oath hitherto usually reported to our Courts as appropriate for Chinese, namely, breaking the saucer or killing the cock, neither is in strictness a legal form of oath in that nation; in Chinese courts there is no oath; and the forms above noted are merely those employed in certain of the powerful secret societies: 1882, *Giles*, *Historic China*, 384, 397. No doubt the ceremonies may have some efficacy upon the witness (though obviously he must at least come from the district and the society where the particular form is used); but their true place in Chinese practice need not be misunderstood.

For specific statutory forms sanctioned, see *post*, § 1827.

highest efficacy should be secured by administering that which in his opinion is most binding:

1830, Lord Erskine, in *Queen Caroline's Trial*, 2 Hans. Parl. Deb., 2d ser., 911. "When I was counsel in a cause tried in the court of King's Bench, an important witness called against me . . . stated that he would hold up his hand and would swear, but that he would not kiss the Book. . . . He gave a reason, which seemed to me a very absurd one, 'because it is written in the Revelations that the angel standing upon the sea held up his hand.' I said, 'This does not apply to your case; for, in the first place, you are no angel; secondly, you cannot tell how the angel would have sworn if he had stood on dry ground, as you do.' Lord Kenyon sent into the Common Pleas, to consult Lord Chief Justice Eyre, who expressed himself of opinion that, although the witness was not of any particular sect, yet if he stated (whether his reason was a good or a bad one) that there was a particular mode of swearing which was most consistent with his feelings of the obligation of an oath, this mode ought to be adopted. So the witness was sworn in his own fashion."⁴

§ 1819. *Time of Administration, and of Objection.* The desire to save the time required to repeat the oath to each witness has led to a custom of administering it at once to all the witnesses in a group at the opening of the testimony.¹ This practice is not in violation of principle; but it is objectionable, first, because its hurried practicality lessens the solemnity of the occasion; secondly, because the influence upon the witness' mind has somewhat diminished by the time he is called to the stand; and thirdly, because it leads to errors and confusion. This practice should not be allowed to abate the ordinary rule that the failure to make an objection to competency at the proper time is a waiver (*ante*, §§ 18, 486). Hence, if a witness who has not taken the oath is by inadvertence put on the stand, the opponent's subsequent discovery and objection should not avail;² nor should the opponent, after a witness has taken the oath, be allowed to inquire as to its binding effect upon him.³ Whether the omission of the oath, without fault of the objector, is an error material to require a new trial (*ante*, § 21) is a larger question.⁴

⁴ *Accord*: 1906, *Birmingham R. & E. Co. v. Mason*, — Ala. —, 34 So. 207 (question on cross-examination whether a Jewish witness considered an oath binding when taken without the hat on, allowed). *Contra*: 1830, *The Queen's Case*, 2 B. & B. 284; s. c., *Queen Caroline's Trial*, Linn's ed., I, 142 (holding irrelevant a question whether he considered another form more binding). But this ruling has been repudiated by statute in many jurisdictions: *post*, § 1828. Compare the doctrines of § 1830, *par. c*, *post*.

¹ 1897, *Com. v. Jongman*, 181 Pa. 172, 37 Atl. 207 (the clerk need not repeat the oath each time that a foreign witness is called; here the interpreter administered it). The following ruling is of course correct: 1907, *State v. Thompson*, 141 Mo. 408, 49 S. W. 949 (administration to an expert witness before his extrajudicial study of the material is not necessary).

² *Contra*: 1839, *Hawks v. Baker*, 6 Greenl. 73 (on the singular theory that the opponent

"has no concern with the transaction," and therefore does not waive by failing to object); 1898, *Barr v. State*, — Fla. —, 23 So. 628 (following the preceding case).

³ *Contra*: 1830, *The Queen's Case*, 2 B. & B. 284; s. c., *Queen Caroline's Trial*, Linn's ed., I, 142. This ruling has apparently been repudiated by the English statute of 1869: *post*, § 1827.

A different rule should perhaps obtain where the idiocy of one sworn is discovered after his testimony is begun; here he may be examined and rejected if incapable: 1866, *R. v. Whitehead*, L. R. 1 C. C. R. 38.

⁴ 1834, *R. v. Kiddy*, 4 Dowl. & R. 734 ("Swearing him after his examination is taken is a very incorrect mode of proceeding"; 1903, *Langford v. U. S.*, — Ind. T. —, 76 S. W. 111 (citing the precedents); 1872, *Thompson v. State*, 37 Tex. 121; 1900, *Ogden v. State*, — Tex. Cr. —, 55 S. W. 1018; 1901, *State v. Williams*, 49 W. Va. 230, 36 S. E. 495.

2. Capacity to take the Oath.

§ 1820. *Mode of Ascertaining Capacity*: The process of ascertaining the capacity of taking the oath raises two classes of questions: first, the sources to be consulted in ascertaining the capacity; next, the absolute rules, if any, which determine for certain kinds of persons the existence of such capacity. In ascertaining the capacity to take the oath, the inquiry resolves itself into this: Does this proffered witness hold the necessary belief?

(a) In the first place, this inquiry falls to the *party objecting*, i. e. the burden is on the objector to show the witness' lack of the necessary belief.¹ The examination of a *child*, however, is made usually by the judge; though either counsel has of course the right to supplement it by questions tending to bring out whatever may be in favor of his contention.²

(b) As to the evidence to be used in showing this, more or less doubt has prevailed. There are three possible methods,—either exclusively the witness' own answers to interrogations, or exclusively other persons' testimony about his former expressions of opinion, or both of these. The first of these methods, for adults, seems to have been generally discredited; i. e. the witness' own answers are not conclusive as to his belief.³ The second seems to be a purely American doctrine,⁴ growing up early in the 1800s, at a time when, on the one hand, the rules of witness-privilege were not clearly settled, and, on the other, the emphasis of current thought was upon freedom of faith and action, supposed in this country to be peculiarly guaranteed. A tendency thus arose to extend the privilege of witnesses to interrogations about theological belief. The argument was also put forward that it was illogical to receive testimony, even on *voir dire*, from a person whose very capacity to respect the sanctions of all testimony was in issue.⁵ It thus became a widely accepted doctrine that the proffered witness could not be interrogated as to his theological belief, and that the reliance must be upon other sources of evidence, i. e. upon testimony from those who were familiar with his expressed opinions. There was, however, no agreement as to the reasons for this. Some Courts preferred the argument from privilege.⁶ Others, and the ma-

¹ 1892, *Gray v. Macallum*, 2 Br. C. 104 (the trial judge held not bound to examine the witness; the objecting counsel must do so); 1854, *Com. v. Smith*, 2 Gray 516, Shaw, C. J. Compare §§ 486, 487, *ante*.

² It has been ruled that the judge may not examine the child *in private*: 1841, *State v. Moran*, 2 Ala. 278. But this seems unsound, provided counsel are allowed to attend; for in the public court-room it may be impossible to prevent the child from being overcome by fear or diffidence; *accord*: 1890, *McGuire v. People*, 44 Mich. 286, 287, 6 N. W. 669. In *Hughes v. R. Co.*, 65 Mich. 10, 31 N. W. 603 (1897), it was said that the trial Court must himself make the examination, and not leave it to counsel; but this seems unsound.

For statutes as to examination of a child, see *post*, § 1823; also *ante*, § 508, in regard to exam-

ination to learn general testimonial capacity. For instructing the child, see *post*, § 1821.

³ 1820, *The Queen's Case*, 2 B. & R. 264.

⁴ 1861, *Maden v. Catnach*, 7 H. & N. 360 (interrogation held proper; Bramwell, B.: "The invariable practice is to take the evidence of the witness himself"; *born on the voir dire*).

⁵ 1861, *Bramwell, B.*, in *Maden v. Catnach*, 7 H. & N. 360 ("By hypothesis, he is made incredible by a statement which is not to be believed"); 1846, *Scott, J.*, in *Perry v. Com.*, 3 Gratt. 632, 642 ("If, as the objection supposes, he is incapable of telling the truth, he will deny his opinions, and what is the test worth? If he is honest enough to subject himself to the disability rather than tell a lie, why exclude him?"). Compare Bentham's arguments, *post*, § 1827.

⁶ 1829, *Com. v. Batchelder*, *Thacher's Cr. C.*

majority, preferred the argument from logic.⁷ Still others laid down the rule, with a mention of both reasons or of neither.⁸ A number of Courts, and these mostly of later date, have abandoned the doctrine entirely, and employ the third method⁹ (the natural and convenient one) of consulting both sources,—the witness' own answers, as well as the testimony of others. It is enough to say, of the privilege argument, that no such privilege is known to the common law, and that it is inconsistent to hold that an infidel is presumably a falsifier, and, in the next moment, to accept a possible falsifier provided he can succeed in concealing his moral deficiency; as to the logical argument, it must be taken to be in theory unanswerable, but practically of little force in view of the artificial nature of the general principle.

(c) Finally, when such questioning is allowed, it must of course not extend beyond the queries necessary to elicit the essentials of belief; additional inquiries directed to bringing out minor points of belief are not to be allowed.¹⁰ There is here again, perhaps, something of the notion of privilege, and yet on the ground of irrelevancy such evidence should equally be rejected.

§ 1821. *Capacity of Infants.* (a) It was formerly thought that for infants there was an age below which the incapacity to take the oath was beyond doubt and was to be regarded as always wanting.¹ This notion was probably due to the unwarranted transfer into the law of evidence of some principles of substantive law, by which certain ages, especially that of seven years, were thought to mark the beginnings of capacity for various purposes. But this view was finally repudiated in a case of much deliberation:

1779, *R. v. Brasier*, East, Pleas of the Crown, I, 448: "An infant, though under the age of seven years, may be sworn in a criminal prosecution, provided such infant appears on strict examination by the Court to possess a sufficient knowledge of the nature and consequences of an oath. For there is no precise or fixed rule as to the time within which infants are excluded from giving evidence; but their admissibility depends upon the sense and reason they entertain of the danger and impiety of falsehood, which is to be collected from their answers to questions propounded to them by the Court; but if they are found incompetent to take an oath, their testimony cannot be received."²

197; 1854, *Com. v. Smith*, 2 Gray 516; 1879, *Free v. Buckingham*, 59 N. H. 235, *semble*. For a further examination of the privilege not to disclose theological belief, see post, § 2514. For theological belief as discrediting a witness, see ante, § 935. For statutes on the present point, see post, § 1827.

¹ 1808, *Curtiss v. Strong*, 4 Day 55; 1810, *Swift Evidence*, 49; 1836, *Com. v. Wyman*, *Thacher's Cr. C.* 436; 1841, *Smith v. York*, 16 Mo. 159; 1850, *Jackson v. Gridley*, 18 John. 220; 1841, *Cubbison v. McCreary*, 3 W. & S. 263.

² 1828, *Atwood v. Walton*, 7 Conn. 70; 1881, *Searcy v. Miller*, 37 Ia. 613, 10 N. W. 912; 1819, *Den v. Vancleve*, 2 South. N. J. 653.

³ 1854, *Central M. T. R. Co. v. Rockefeller*, 17 Ill. 553 (but the extrinsic testimony is better); 1890, *Hronak v. People*, 134 Id. 139, 150, 24 N. E. 861 (not decided; but "the better practice" forbids questioning the witness); 1879, *Arnd v. Amling*, 58 Md. 197, *semble*; 1858, *Harrel v.*

State, 28 Tenn. 126; 1871, *Odell v. Koppes*, 61 Id. 91, and the cases in the next note.

⁴ 1790, *R. v. Taylor*, Peake, N. P. Cas. 11; 1830, *The Queen's Case*, 2 B. & B. 284; 1794, *Beardley v. Foot*, 2 Root 399; 1871, *Donkle v. Kohn*, 44 Ga. 271, *semble*; 1879, *Free v. Buckingham*, 59 N. H. 235. Compare the doctrine of § 1818, note 4, ante, and of § 935, ante (discrediting by theological belief). For the mode of examining a child, see the next section.

⁵ 1828, *Co. Litt.* 6 b, 247 b; 1680, *Hale*, Pl. Cr. I, 302, 634, II, 379, 283; 1767, *Buller*, Nisi Prius, 293; 1704, *Young v. Slaughterford*, 11 Mod. 228; 1738, *R. v. Travers*, 1 Stra. 700.

⁶ Accord: 1769, *Blackstone*, Comm. IV, 214; 1840, *R. v. Perkins*, 3 Moo. Cr. C. 139, per *Alderson*, B.; s. c., 9 C. & P. 395, 399, per *Parke*, B.; 1880, *McGuff v. State*, 88 Ala. 150, 7 So. 35; 1867, *Flanagan v. State*, 25 Ark. 26; 1869, *Warner v. State*, ib. 447; 1858, *People v. Bernal*, 10 Cal. 66; 1902, *Featherstone v. People*, 194 Ill. 325, 62 N. E. 684 ("The requirement is

Since this decision, the natural rule has been clearly accepted, that there is *no specific age* below which capacity will always be deemed wanting. The capacity of the infant must therefore depend upon the circumstances of its understanding as exhibited in each instance, and is to be determined by the trial Court.³ In a few jurisdictions, however, a trace of the old notion is still preserved in a rule that children under a certain age—usually ten or fourteen years—will not be assumed to be capable, so that their capacity must first be shown.⁴

(b) The nature of the child's belief is in theory to be judged by the same theological tests ordinarily applicable (*ante*, § 1817). For children, however, it is customary to employ simpler language and more concrete tests than are usual with adults. The practice traditionally followed is illustrated in the following colloquies:

1884, *Braddon's Trial*, 9 How. St. Tr. 1127, 1148; *Attorney-General*: "What age are you of?" *Witness*: "I am thirteen, my lord"; *A.-G.*: "Do you know what an oath is?" *W.*: "No"; *L. C. J. Jefferies*: "Suppose you should tell a lie; do you know who is the father of liars?" *W.*: "Yes"; *L. C. J.*: "Who is it?" *W.*: "The devil"; *L. C. J.*: "And if you should tell a lie, do you know what will become of you?" *W.*: "Yes"; *L. C. J.*: "If you should call God to witness to a lie, what would become of you then?" *W.*: "I should go to hell-fire"; *L. C. J.*: "That is a terrible thing"; and the child was admitted.⁵

1857, *Spollen's Trial*, p. 44 (*ire.*); Lucy Spollen, the defendant's daughter, ten years old, was produced and questioned by C. J. Lefroy: "Do you know the nature of an oath?" "Yes, sir." "And the consequence of taking a false oath?" "Yes, sir." "What punishment?" "Going to hell." "Were you ever taught to say that?" "No, sir." "How did you learn it?" "I was told, sir." "When were you told?" "When I first took an oath." "And were you never told until you first took an oath?" "No, sir." "And when did you first take an oath?" "After my father was arrested." "Would you ever know that yourself unless you were told by the person who adminis-

trates one of age, but of understanding"; 1889, *State v. Severson*, 78 Ia. 653, 43 N. W. 533, *reversed*; 1876, *State v. Richie*, 28 La. An. 327; 1891, *Davis v. State*, 31 Nebr. 247, 47 N. W. 835; and the cases in the ensuing notes usually declare the rule also. For the same principle, as applied to a child's capacity irrespective of the oath, see *ante*, § 507.

³ Statutes have often attempted to deal with the question; see *post*, § 1828, where the statutes expressly dealing with the oath are collected, and *ante*, § 488, where those defining the general capacity of children are placed. With the following decisions illustrating the general principle should be compared those cited *infra*, note 6, dealing with the sufficiency of the child's belief, and *ante*, § 507, dealing with the child's general capacity as a witness: *Ala.*: 1874, *Wade v. State*, 50 Ala. 164; 1903, *White v. State*, — id. —, 34 So. 178 (child under 12, excluded on the facts); *Ariz.*: 1898, *Donnelley v. Terr.*, — *Ariz.* —, 53 Pac. 388 (child of nearly 7 held incompetent on the facts); *Ga.*: 1873, *Peterson v. State*, 47 Ga. 524, 527 (trial Court's discretion in admitting a child of 7 or 8, held proper); 1878, *Johnson v. State*, 61 id. 35 (similar); 1888, *Johnson v. State*, 76 id.

76 (child of 10, held incompetent on the facts); 1897, *Moore v. State*, 79 id. 498, 5 S. E. 51; 1898, *Mills v. State*, 104 id. 502, 30 S. E. 778 (child of 10, held competent on the facts); 1900, *Miller v. State*, 109 id. 512, 35 S. E. 152 (child of 8, excluded on the facts); *Ia.*: 1889, *State v. Severson*, 78 Ia. 653, 43 N. W. 533 (child of 12, held competent on the facts); *Mass.*: 1853, *Com. v. Hills*, 10 Cush. 532; 1861, *Com. v. Mullins*, 2 All. 296; 1886, *Com. v. Lynes*, 149 Mass. 580, 6 N. E. 408; 1896, *Com. v. Robinson*, 165 id. 426, 43 N. E. 121 (child of 5 years and 9 months, admitted); *N. H.*: 1876, *Day v. Day*, 56 N. H. 316; *N. C.*: 1878, *State v. Edwards*, 79 N. C. 650; *R.*: 1898, *Com. v. Wilson*, 186 Pa. 1, 40 Atl. 283 (boy of 13, presumed competent).

⁴ Besides the following decisions, compare also the statutes *post*, § 1828, and those collected *ante*, § 507, which deal with the child's general capacity, but sometimes cover also the present subject: 1867, *Flanagan v. State*, 25 Ark. 96; 1858, *People v. Bernal*, 10 Cal. 66; 1876, *State v. Richie*, 28 La. An. 327.

⁵ Other early examples: 1679, *Atkin's Trial*, 7 How. St. Tr. 331, 241; 1680, *Giles' Trial*, ib. 1129, 1147.

tered the oath?" "No, sir." Then, upon questions by the counsel for the prosecution, she told of regular church-going and of daily prayers, and farther said: "It is a bad thing to tell a lie. I learned that people who told lies would be punished by God in the next world. I never knew before what an oath was, but I knew that God would punish people who told lies"; Mr. J. Monaghan: "Administer the oath."

1885, *Simpson, C. J.*, in *State v. Bolton*, 24 S. C. 185, 186, 189: "This witness was a [colored] boy about twelve years of age; he seems to have been a boy of at least ordinary intelligence; and, although he had learned from his mother, since dead, the Lord's Prayer when he was five years old, and according to his statement had repeated it every day since, yet he said he had never heard of a God or the devil or of heaven or hell or of the Bible, and that 'he had never heard and had no idea what became of the good or of the bad after death.' He said, however, that he had heard it said that the bad man caught those who lied, cursed, etc., and upon being examined he repeated the Lord's Prayer. The presiding judge, in his report of the case as to this matter, states as follows: 'As for the colored youth, he manifested an unusual sense of the efficacy of prayer and the future torments by the bad man awaiting those who speak falsely, though his answers as to a God, heaven, etc., were singular.' . . . Did he believe in a God and his providence? He stated to the Court he had never heard of a God or of a heaven or of a hell or of a devil. How then could he have a belief in the existence and providence of a Great Being, of whom up to the time when he was offered as a witness he had never heard even? Such a belief under such circumstances seems impossible. In the absence of such a belief he was incompetent, under the authorities cited."

1900, *Fert, J.*, in *State v. Crasher*, 65 N. J. L. 410, 47 Atl. 643: "The boy under examination, to ascertain whether he should be sworn, was asked and answered the following questions: 'Q. Do you know what it is to take an oath? A. No, sir. Q. Do you go to Sunday school? A. Yes, sir. Q. Do you know what will happen to you if you do not tell the truth? A. Yes, sir. Q. What will happen? A. It is a sin. Q. Have you any idea as to the punishment which will follow if you do not tell the truth? A. Yes, sir. Q. What? A. They will put me in the reform school. Q. After you die do you know what happens? Do you expect to live forever? A. No, sir. Q. After you have done living, what becomes of you then? A. Then I shall go to Heaven. Q. Suppose you have not been entirely good; what becomes of you then? A. Then I shall go to Hell.' It seems to me that this youth, judged by what is ordinarily considered orthodox, had a comprehensive idea of the rewards and punishments incident to honest and dishonest living, and in addition knew clearly what punishment the law inflicted for perjury viz. confinement in the reform school."

But it may be doubted whether this analysis of a child's belief, which sometimes becomes a far from edifying proceeding, is ever of any real profit. A child's inclination to tell the truth or the opposite is apt to be more a matter of instinct and of previous training and surroundings than of a conscious reflection.

⁶ In the following cases will be found other examples: 1861, *R. v. Holmes*, 3 F. & F. 788 (the child said its prayers and believed it was bad to tell a lie; accepted); 1879, *Carter v. State*, 63 Ala. 53; 1882, *Beason v. State*, 72 id. 191; 1895, *Grimes v. State*, 105 id. 84, 17 So. 184 ("if she knew where she would go when she died, if she swore a lie and did bad," etc.; accepted); 1898, *Williams v. State*, 109 id. 64, 19 So. 530 (a statement that she would "go to hell"; admitted); 1875, *McMath v. State*, 55 Ga. 307; 1873, *Draper v. Draper*, 68 Ill. 17 (the witness would go to hell if she did not tell the truth; accepted); 1856, *Blackwell v. State*, 11 Ind. 196; 1849, *Weldon v. State*, 32 id. 63;

1871, *Vincent v. State*, 3 Heisk. 121 ("if she swore to a lie, she would go to the bad world"; accepted); 1878, *Davidson v. State*, 39 Tex. 129; 1893, *State v. Michael*, 37 W. Va. 568, 16 S. E. 808. The following case seems to stand alone: 1894, *Williams v. U. S.*, 3 D. C. App. 335, 340 ("A child that has an adequate sense of the impropriety of falsehood does understand the nature of an oath in the proper sense of the term, even though she may not know the meaning of the word 'oath' and may never have heard that word used").

Compare the cases cited *post*, § 1838, dealing with the effect of constitutional removal of theological incapacity.

tion upon the prospects of a future state. It has already been suggested (*ante*, § 509, *post*, § 1826) that, for any purpose whatever, the preferable course is to accept a child's story for what it seems to be worth, as ascertainable upon testifying, and not to impose any fixed limitations. For the same reasons, any theological tests, especially when applied in crude form by laymen in court, must be more or less inappropriate. So long as they continue to be employed, the practice will exhibit from time to time an artificiality and incongruousness meriting the celebrated satire of that novelist whose pen so often chastised the law's abuses:

1832, *Charles Dickens*, *Bleak House*, Chap. XI; Little Jo, the crossing-sweeper, is called to the coroner's inquest, to say what he knows of the dead lodger, and these are his answers: "Name, Jo. Nothing else that he knows on. . . . No father, no mother, no friends. Never been to school. What's home? Knows a broom's a broom, and knows it's wicked to tell a lie. Don't recollect who told him about the broom, or about the lie, but knows both. Can't exactly say what'll be done to him after he's dead if he tells a lie to the gentlemen here, but believes it'll be something very bad to punish him, and serve him right, and so he'll tell the truth." "This won't do, gentlemen!" says the coroner, with a melancholy shake of the head. "Don't you think you can receive his evidence, sir?" asks an attentive jurymen. "Out of the question," says the coroner. "You have heard the boy. 'Can't exactly say,' won't do, you know. We can't take that, in a court of justice, gentlemen! It's terrible depravity. Put the boy aside." Boy put aside; to the great edification of the audience; especially of Little Swilla, the comic vocalist."¹

(c) But suppose that the youthful witness is shown upon examination not to have *at the time* the required belief. Does exclusion follow necessarily and absolutely? Or is there some way of putting the child's mind into a condition fit to be properly influenced by the oath? If there were any real vitality in the test, if an indispensable element were the active and ingrained sense of responsibility to superhuman power, then it might well be said that the witness was absolutely incompetent. Only a long course of training could produce the proper appreciation of the oath. But if the test is after all only a formal one, if practically the necessary belief is only an acceptance, on authority, of certain theological propositions unprovable by personal knowledge, then it is perhaps not inconsistent to allow its content to be explained and accepted in five minutes or some longer time proportionate to the child's intelligence; in other words, *the judge may instruct* the child what this belief is, and the child may accept it on this authority and be as well prepared to take the oath on the spot as it would have been after receiving the same dictation from parental authority. This, then, has been a point of grave judicial discussion,—whether the child-witness may become competent to take the

¹ How coarse and irreverent the spectacle of examination into infantile theology often becomes is seen in the following current anecdote (New York letter to the Chicago Tribune, June 7, 1901): "Emma Gaukof, 8 years old, of West Hoboken, answered readily in court at Jersey City to-day a question that has puzzled the profoundest theologians. Questioning her understanding of the value of an oath, Lawyer Max Halinger asked what became of little

girls who did not tell the truth. 'Why, sir, they go to hell,' replied Emma. 'And where is hell?' questioned the lawyer. 'I don't think the counsellor could answer that question himself,' remarked Judge John A. Blair. 'I know where it is, sir,' said the girl. 'It's up somewhere near Schuetzen Park, Union Hill. I know it's there,—'cause I heard a man say once that he was going there to raise it!' The child was permitted to give testimony."

oath after an interlocutory instruction by the court. It is settled, in this country at least, and notwithstanding a protest by Mr. Justice Patteson,⁸ that a previous general religious education is not necessary, and that the judge may then and there impart theological instruction and produce the necessary belief;⁹ and that for this purpose a temporary postponement of the trial is allowable.¹⁰ Of course, if between the intervals of successive trials, a child at first incompetent grows in intelligence and receives proper parental instruction, no objection can be made to its taking the oath at the second trial.¹¹

§ 1822. *Capacity of Idiots, Lunatics.* There was "a earlier legal annals some difference of opinion whether persons of weak or unsound mind were capable of taking the oath.¹ But in modern times the more rational principle has been accepted (as in the case of infants) that it must depend upon the mental condition of each witness:

1851, *Campbell, L. C. J., in R. v. Hill*, 2 Den. & P. C. C. 254: "It is for the judge to say whether the insane person has the sense of religion in his mind and whether he understands the nature and sanction of an oath. . . . A man may in one sense be non compos mentis, and yet be aware of the nature and sanction of an oath."²

The upholders of the propriety of judicial instruction of infants do not seem willing to admit that the principle is applicable to adults who are mentally capable though theologically uninformed;³ yet the same process seems here also available.

§ 1823. *Distinction between Oath-Capacity and Testimonial Qualifications.* The distinction is clear between the capacity to take an oath and the moral qualifications to testify. The oath is a special test or security, superadded and applied to persons assumed to be otherwise qualified as witnesses; and because the oath cannot have efficacy without the existence of a certain belief, the lack of that belief excludes the witness. So long, therefore, as the oath remained an indispensable requirement, there was a natural tendency to confuse the theological belief which it presupposes and that moral sense which underlies all truth-telling. With the dispensation of the oath, however, the latter element is forced into prominence, and the question arises whether a sense of moral responsibility is not necessary, as an ordinary testi-

⁸ 1836, *R. v. Williams*, 7 C. & P. 330.

⁹ Ante 1795, *Anon.*, 1 Leach Cr. L., 4th ed., 430, n. (by all the judges); 1849, *R. v. Baylis*, 4 Cox Cr. 23; 1879, *Carter v. State*, 63 Ala. 53; 1900, *State v. Todd*, 110 La. 631, 82 N. W. 323 (instruction by the county attorney); 1886, *Com. v. Lynes*, 142 Mass. 578, 8 N. E. 408 ("provided she was of sufficient age and intellect to receive instruction"); 1876, *Day v. Day*, 56 N. H. 316; 1839, *People v. McNair*, 21 Wend. 606; 1878, *State v. Edwards*, 79 N. C. 650.

¹⁰ *Anon.*, *supra*; *Day v. Day*, *supra*; 1846, *R. v. Nicholas*, 2 Cox Cr. 136, 2 C. & K. 246 (postponement refused, where the child was 6 years old; "where the defect is the result of immaturity," postponement is generally not

desirable; otherwise, perhaps, for a child 9 or 10 years old).

¹¹ 1863, *Kelly v. State*, 75 Ala. 21.

¹ *Comyn's Digest*, "Testmoigne," A, 1; 1628, *Coke upon Littleton*, 6 b; 1801, *Peak Evidence*, 122.

² *Accord*: *Holcomb v. Holcomb*, 28 Conn. 179.

³ 1824, 1 Moo. Cr. C. 86 (doubted); 1866, *R. v. Whitehead*, L. R. 1 C. C. R. 33 (an idiot; adjournment refused, but the question left undecided).

Distinguish the following: 1903, *Texas & P. R. Co. v. Reid*, — Tex. Civ. App. —, 74 S. W. 99 (a deaf witness, who could not hear the words of the oath, admitted).

mental qualification, especially likely to be wanting in infants and lunatics. This requirement has already been considered in its place, under the head of Testimonial Qualifications (*ante*, §§ 495, 506).¹

3. Persons subjected to the Oath.

§ 1824. Oath required for all Testimony delivered in Court; Interpreters. The oath, as a special additional security for credibility, belongs by its very nature to that class of securities which are capable of being applied only to testimonial statements made in court or before some judicial officer.

(1) It follows, then, that wherever the law sanctions the reception of testimonial statements not made in court or before a judicial officer, *i. e.* wherever exceptions to the Hearsay rule (*ante*, § 1420) are allowed, the oath is dispensed with. Thus, the oath is required for statements made in depositions, but not for entries made in the regular course of business nor for statements of family history, nor for the other excepted classes of statements; except that for statutory affidavits (*ante*, § 1710) the very nature of the Exception presupposes an oath. That in these excepted classes an oath was not required has never been doubted. Yet, inconsistently, the theological capacity to take an oath has sometimes been predicated as a requirement, so that, if its lack appeared, the statement would be excluded. This notion is found in a few rulings dealing with dying declarations (*ante*, § 1443). It is of course unsound; for, if the oath is not required, the capacity to take it must be immaterial; the efficacy of the oath consists in the formal reminder of retribution at the moment of testifying, and not in the mere capacity to appreciate a reminder which is in fact not made; and not even the soundest believer could testify in court without the formality of the reminder.

(2) Conversely, for all testimonial statements made in court the oath is a requisite. Here comes into consideration the distinction between circumstantial and testimonial evidence (*ante*, § 25). This distinction is of considerable consequence in the application of the Hearsay rule, and the principles already examined (*ante*, § 1790) will suffice equally for the present situation. Instances, however, are comparatively rare. It is enough to note that unless there is offered, in some form or other, a testimonial statement (*i. e.* an assertion used for inferring the truth of the fact asserted) made in court, the oath is not an applicable requirement.¹

¹ It should here be noticed that the earlier rulings, before the statutory dispensation of oaths, are often ambiguous, in that it is often difficult to be certain whether they mean to deal solely with oath-capacity or to prescribe some independent moral qualifications. The statutes, moreover, which concern the latter topic (collected *ante*, § 488) are also sometimes in terms concerned with the oath-capacity.

¹ *Com. v. Scott*, 153 Mass. 224, 234 (defendant, not being sworn, was not allowed to utter words for the purpose of testing a witness who spoke to the identity of his voice); 1886, *Osborne*

v. Detroit, 32 Fed. 36 (to show the extent of the plaintiff's paralysis, a doctor who had not been sworn thrust a pin into her body in the jury's presence during the trial; held, not improper because performed by a person unsworn; "so far as we are aware, the law recognizes no oaths to be administered upon the witness-stand except the ordinary oath to tell the truth or to interpret correctly from one language to another"; this seems erroneous; the doctor helped in bringing out the evidence, and should have been treated as a witness).

It may be added that an *interpreter*,³ and also a *shower at a view*,⁴ is a kind of witness, and must be sworn.

§ 1825. *Infants, Peers, Accused Persons.* (1) There was a time when it was doubted whether an *infant* was in all cases to be rejected when incapable of understanding the oath. But in *R. v. Brasier*¹ it was settled that there should be no exception.²

(2) It was at one time disputed whether a *peer* of the realm could not give his testimony in a court of justice with the same formality only as in the House of Lords, namely, by testifying "upon his honor"; but here too the oath-requirement was held inexorable.³

(3) Originally, an *accused person* was allowed to produce no witnesses; later, he might produce them, but they testified without oath; and finally they were allowed to be sworn.⁴ Here, however, the exception, in the transition stage, was regarded not as an exception in his favor, but as the refusal of a privilege. So, also, in many jurisdictions, the concession of an accused person's right to testify was preceded by a stage in which he was allowed to make a "statement," but not under oath. Here, again, the practice was looked upon as a refusal to concede the ordinary guarantee of credibility, and not as a favored exemption.⁵

B. THE OATH UNDER STATUTES.

§ 1827. *Abolition or Optional Dispensation of the Oath; Policy thereof.* There is a clear distinction between the total abolition of the oath-security and the making it optional with the witness. The two rest on very different grounds of policy.

(1) It can hardly be denied that the moral efficacy of the oath has long since ceased to be what it once was. In the days when the *judicium Dei* was no empty phrase, when the community believed in the serious possibility of the manifestation of truth by the Divine hand in striking down the perjurer before the multitude, the oath's efficacy was at its highest. It may be assumed that no appreciable part of the community now regard the oath in this light. What may be claimed for it to-day is merely the effect presupposed in the common-law theory already examined (*ante*, § 1816), namely, a solemn reminder of inevitable Divine punishment at some future time.

³ 1848, *R. v. Douglas*, 13 Q. B. 42, 59, 66, 72, *semble* (the standing oath of an official interpreter for depositions suffices); 1809, *Amory v. Fellows*, 5 Mass. 219, 226 (oath of an interpreter to a deposition must expressly appear to have been taken); and cases cited, *ante*, § 1810. For the form of oath, see *ante*, § 1818.

⁴ *Ante*, § 1802, where the form of oath is given.

¹ 1779, *R. v. Brasier*, East, Pl. Cr. I, 443, quoted *ante*, § 1821.

² *Accord*: 1861, *Com. v. Mullins*, 2 All. 296; 1843, *People v. McGee*, 1 Den. 21 (including idiots); 1874, *Smith v. State*, 41 Tex. 252 (idiot). Compare the statutes cited *post*, § 1828.

³ 1701, *R. v. Preston*, 1 Balk. 278; 1711,

Meers v. Stoughton, 1 P. Wms. 146; 1723, *Bishop Atterbury's Trial*, 16 How. St. Tr. 323, 470; 1723, *L. C. Macclesfield's Trial*, ib. 767, 1252.

Whether the King could without oath be a witness was also argued. In L. C. J. Campbell's *Lives of the Chancellors*, III, 215, 4th ed., the learned author expresses an opinion against the exemption of the King, and examines the precedents. But as the King was privileged not to testify (*post*, § 2370), and if he did testify could probably do so by certificate (*ante*, § 1674), the question remained an academic one.

⁴ 1702, St. 1 Anne, c. 9, § 3, and cases cited *ante*, § 575.

⁵ Cases cited *ante*, § 579.

This, then, being the process of its efficacy, is there any reason why it should be abolished as a security designed to increase the probabilities of truthfulness? It is impossible, in this place, to examine all that has been advanced for and against this proposal to abolish totally the oath-formality.¹ Observe, however, that the question is not whether persons not having a certain theological belief shall be excluded as witnesses, nor whether it shall be made optional for persons of various sorts, but *whether persons having the requisite belief shall be required to take it*. Eliminating all argument as to the injustice of exclusion, by assuming that persons of atheistic belief, and persons having scruples of conscience, and infants, are allowed to dispense with it, there remains this class of persons who would be unquestionably capable of taking it; and the inquiry therefore reduces itself to this, Whether for such persons it should be required or abandoned? The determination of this is seen to depend upon three considerations: (a) Is this class of persons an inappreciable portion of the community? (b) Are they actually so little influenced by the solemnity that it adds nothing appreciably to their determination to speak truly? (c) Are there any extrinsic disadvantages overcoming the testimonial benefit thus secured? If either of these three questions can be answered in the affirmative, then, and only then, should the oath be abolished. Now the answers to these questions must depend entirely upon experience; and experience must be chiefly a matter of locality, since the local conditions in all three respects may vary widely. No doubt in different localities the answers to these questions would differ. Yet, on the whole, it seems to be true that the answers have thus far been in the negative upon all three points. The class of persons whose belief makes them capable of being influenced by the prospect implied in an oath is decidedly the immense mass of the community. Furthermore, in practice these persons are apparently, for the most part, actually influenced for the better, in their mental operations on the witness-stand, by the imposition of the oath;² and, where experience looks to the contrary, the result has been due to the deplorable irreverence and triviality shown in the administration of the formality rather than in the inherent inefficacy of the oath itself. Finally, there seem to be no real disadvantages (in spite of Mr. Bentham's ingenious suggestions) outweighing the gain in truthfulness produced by the oath. There appears, therefore, in the present conditions, looked at as a whole, no reason to call

¹ The arguments on both sides may be found in the following places: 1823, Bentham, *Rationale of Judicial Evidence*, b. II, c. VI, Bowring's ed., vol. 6, p. 306; 1823, Livingston, *Introductory Report to the Code of Criminal Procedure*, Works, ed. 1872, I, 399; 1823, Whately, *Elements of Rhetoric*, ed. 1856, pt. I, c. II, § 4; 1840, Denman, *Speech in Parliament*, Hans. Parl. Deb. June 22, vol. 106, 3d ser.; 1857, Reilly, *Judicial Oaths*, Jurid. Soc. Pap. I, 435; 1864, Manrice, *Ought any person to be excluded from giving evidence on the ground of religious unbelief?*, id. III, 95; 1868, T. C. Arstey, *Judicial Oaths as Administered to Heathen Witnesses*, ib. 371; 1860, Appleton, *Evidence*, c. XVI, 262; 1862, Thomas, *Oaths in Legal Proceedings*, North Amer. Rev. No. 310, Sept. 1862.

² The occasional inefficiency of the oath even for such persons recalls the anecdote of Lord Eldon (in *Twiss' Life*, I, 133): "There were, when I was not much advanced in professional business, two attorneys, father and son, of the name of Priddle. In point of character they stood low. Old Lord Mansfield used to say to the father, 'Don't read your affidavit, Mr. Priddle; we give the same credit to what you say as we do to what you swear.'"

for the abandonment of the oath for those persons whose belief makes them susceptible to its sanction.

(2) But the question of its invariable requirement from *all persons whatever* is an entirely different one. The true purpose of the oath is not to exclude any competent witness, but merely to add a stimulus to truthfulness wherever such a stimulus is feasible. Until the 1800s, however, this advanced notion of its purpose had not been reached. The requirement was inexorable; with the result that three classes of persons were absolutely excluded from testifying, namely, adults having an atheistical belief, infants lacking any theological belief, and adults having the requisite belief but forbidden by conscience³ to take an oath. It came gradually to be perceived that the use of the oath, not to increase testimonial efficiency, but to exclude qualified witnesses, was not only an abuse of its true principle, but also a practical injustice to suitors who needed such testimony. This injustice is clearly enough seen to-day; but its perception was naturally slow in coming, so long as in the community at large the profession of belief in deism or atheism was associated closely with the notion of moral defects. This association hardly passed away in any degree until the middle of the 1800s, — an era marked, at the same time, by the indirectly related movements of literary romanticism, political liberalism, industrial invention, legal free speech, and theological free thought. The first statutory efforts in England to relieve from this injustice are found at the end of the first quarter of the 1800s. To-day, practically everywhere, the injustice is remedied. Arguments are no longer needed to prove the impropriety of the old inexorable rule.⁴ It is conceded that the oath should be dispensed with for appropriate classes of witnesses. We are to-day at the end of that stage of the question. What is to be noted (but is sometimes forgotten⁵) is that the demand for the dispensation of the oath for witnesses for whom it is inappropriate differs entirely from the proposal to abolish the oath for persons theologically capable of taking it. One is a question of the past; the other is a question for the future.

§ 1828. *Same: State of the Law in the Various Jurisdictions.* In almost every jurisdiction there has been some legislation dealing with the subject of oaths. The provisions sometimes are inconsistent, sometimes duplicate each other without need, sometimes are merely declaratory of the common law; and it would be profitless here to attempt to analyze the precise state of the law in each jurisdiction.¹

³ According to the Scripture, "Swear not at all" (Matthew V, 34).

⁴ See the authorities cited *ante*, note 1, especially Bentham.

⁵ It was long ago emphasized in the Second Report of the Common Law Practice Commissioners of 1853, at p. 14.

¹ The legislation is as follows; but with these enactments should be compared those quoted *ante*, § 488, which are sometimes very broad: ENGLAND: 1833, St. 3 & 4 Wm. IV, c. 49

("every person of the persuasion called Quakers and of Moravians" may affirm instead of swearing); c. 82 ("every person for the time being belonging to the said sect called Separatists" may affirm; the form being prescribed); 1838, St. 1 & 2 Vict. c. 77 (St. 1833 extended to persons formerly belonging to those sects); 1838, St. 1 & 2 Vict. c. 105 (whenever an oath may be administered, it is binding "provided the same shall have been administered in such form and with such ceremonies as such person may declare

to be binding"); 1861, St. 24 & 25 Vict. c. 63 (a person who "shall refuse, or be unwilling, from conscientious motives, to be sworn," may make affirmation); 1861, *Mason v. Cannan*, 1 K. & N. 266 ("defect of religious faith," held to be still "an absolute bar" to competency, for persons in general); 1869, St. 32 & 33 Vict. c. 44, § 4 (a witness objecting to take an oath, or objected to as incapable thereof, "shall, if the presiding judge is satisfied that the taking of an oath would have no binding effect on his conscience," make affirmation); 1865, St. 40 & 41 Vict. c. 69, § 4 (on a charge of carnally knowing a girl under the age of consent, where the girl concerned "or any other child of tender years who is tendered as a witness, does not, in the opinion of the Court or Justice, understand the nature of an oath," the child's testimony may be received without oath, if the Court believes that it "is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth"); 1867, *R. v. Prunty*, 16 Cox Cr. 244 (precedent statute applied); 1868, *R. v. Wadland*, 1b. 408 (applied to admit the statement upon a conviction under § 3 of the statute); 1868, St. 31 & 32 Vict. c. 44, § 1 ("Every person, upon objecting to being sworn, and stating, as the ground of such objection, either that he has religious belief, or that the taking of an oath is contrary to his religious belief, shall be permitted to make his solemn affirmation"); § 2 (where an oath has been duly administered, the fact the witness "had no religious belief" shall not affect its validity); § 3 (if any witness desires to "swear with uplifted hand," after the Scotch manner, he may do so); 1869, St. 32 & 33 Vict. c. 44, § 8 (similar to St. 1865; oath unnecessary, if the child "does not understand the nature of an oath").

CANADA: *Dominion*: 1845, Reg. St. 6 & 7 Vict. 22 (rectifying the doubt whether colonial laws, making admissible the testimony of various uncivilized tribes "being destitute of the knowledge of God and of any religious belief," would be void for repugnancy to English law, is provided that every such law shall be valid, subject to the usual royal veto rights); Can. St. 1860, c. 37, § 13 (like Eng. St. 1865, c. 69, § 4); *Crim. Code* 1892, § 645 (rape under age, and indecent assault; same); St. 1893, *Evidence Act*, c. 31, § 23 ("If a person called or desiring to give evidence objects on grounds of conscientious scruples to take an oath, or is objected to as incompetent to take an oath," he may affirm); § 24 ("If a person required or desiring to make an affidavit or deposition . . . refuses or is unwilling to be sworn, on grounds of conscientious scruples," the judge shall permit him to affirm); § 25 ("In any legal proceeding" the rule of Eng. St. 1865, c. 69, § 4, is adopted).

British Columbia: *Rev. St.* 1897, c. 71, § 28 (like Ont. *Rev. St.* 1897, c. 73, § 14); § 25 (like Can. St. 1893, c. 31, § 23); § 26 (affirmation may be received of any "aboriginal native, or native of mixed blood, of the continent of North America or the islands adjacent thereto, being an uncivilized person, destitute of the knowledge of God and of any fixed and clear belief in religion or in a future state of rewards and punish-

ments"); §§ 27-29 (provided that in preliminary inquiries the substance of such person's testimony shall be reduced to writing and signed by a mark, etc.); St. 1901, c. 9, § 25 (like Eng. St. 1865, c. 69, § 4); St. 1902, c. 22, § 4 (like Ont. St. 1865, c. 12).

Manitoba: *Rev. St.* 1892, c. 40, *Rule* 406 (like Ont. *Rule* 406); c. 57, § 25 (like Can. St. 1893, c. 31, § 23); §§ 27, 28 (like *Id.* §§ 23, 24).

New Brunswick: *Consol. St.* 1877, c. 46, § 18 (if a person "shall refuse or be unwilling from alleged conscientious motives to be sworn," and the judge is "satisfied of the sincerity of such objection," he may permit an affirmation; the affirmation reciting that "the taking of an oath is according to my religious belief unlawful").

Newfoundland: St. 1901, c. 10, § 2 (a person, "upon objecting to be sworn, and stating as the ground of such objection either that he has no religious belief or that the taking of an oath is contrary to his religious belief," may affirm).

New Scotia: *Rev. St.* 1890, c. 168, § 46 (like Eng. St. 1865, c. 44, § 1).

Ontario: *Rev. St.* 1897, c. 73, § 12 (Quakers, Mennonites, Tinkers, and United Brethren, may affirm); § 13 (a person refusing, "from alleged conscientious motives, to be sworn," and declaring that an oath "is according to my religious belief unlawful" may affirm); § 14 (a person who "objects to take an oath or is objected to as incompetent to take an oath" may affirm, if the judge "is satisfied that the taking of an oath would have no binding effect upon his conscience"); *Rules of Court* 1897, § 506 (witnesses under a commission "shall be examined on oath, affirmation, or otherwise in accordance with their religion"); St. 1902, c. 12, § 29 (if any person desires to swear "with uplifted hand," as in Scotland, he shall be so permitted, "without further question").

Prince Edward Island: St. 1890, c. 2, § 12 (like N. Br. *Consol. St.* 1877, c. 46, § 16).

UNITED STATES: *Alaska*: C. C. F. 1900, §§ 694, 695 (like *Or. Annot.* c. 1892, §§ 694, 695); § 696 (substantially like *Id.* § 670).

Arizona: *Rev. St.* 1897, § 1866 ("No person shall be incompetent to testify on account of his religious opinions, or for want of any religious belief"); § 2007 ("persons on account of their opinions on matters of religious belief" are not to be excluded).

Arkansas: *Const.* 1874, Art II, § 26 ("Nor shall any person be rendered incompetent to be a witness on account of his religious belief; but nothing herein shall be construed to dispense with oaths or affirmations"); Art. XIX, § 1 ("No person who denies the being of a God shall . . . be competent to testify as a witness in any court"); *Stats.* 1894, § 2922 ("Every person who shall declare that he has conscientious scruples against taking an oath or swearing in any form shall be permitted to make his solemn declaration or affirmation in the following form: 'You do solemnly and truly declare and affirm'"); § 2920 ("The usual mode" "by the person who swears laying his hand on and kissing the Gospels," to be observed except as otherwise provided); § 2921 ("Every person who shall desire it shall be permitted to

swear with an uplifted hand in the following form, 'You do solemnly swear, etc.').'; § 2923 ("Whenever the Court or magistrate . . . shall be satisfied that such person has any peculiar mode of swearing, connected with or in addition to either of the forms mentioned, which is more solemn and obligatory in the opinion of such person, the Court or magistrate may adopt such mode of swearing"); § 2924 ("Every person believing in any other than the Christian religion shall be sworn according to the peculiar ceremonies of his religion, if there be any such ceremonies, instead of the modes heretofore prescribed").

California: Const. 1879, Art. I, § 4 ("No person shall be rendered incompetent to be a witness or juror on account of his opinions on matters of religious belief"); C. C. P. 1872, § 1879 ("persons on account of their opinions on matters of religious belief" are not to be excluded); § 2094, as amended in 1874 (the form of administration may be: "You do solemnly swear (or affirm, as the case may be) that the evidence you shall give in this issue (or matter), pending between — and —, shall be truth, the whole truth, and nothing but the truth, so help you God"; amended in 1901 by the Commissioners by striking out the concluding clause, "So help you God"); for the validity of these amendments of 1901, see *ante*, § 498; 1903, *People v. Parent*, 139 Cal. 600, 73 Pac. 423 (though the amendment was unconstitutional, the omission of the above clause is not material); § 2095 ("Whenever the Court . . . is satisfied that he [the witness] has a peculiar mode of swearing, connected with or in addition to the usual form of administration, which in his opinion is more solemn or obligatory, the Court may in its discretion adopt that mode"); § 2096 ("When a person is sworn who believes in any other than the Christian religion, he may be sworn according to the peculiar ceremonies of his religion, if there be any such"); § 2097 ("any person who desires it may at his option, instead of taking an oath, make his solemn affirmation or declaration"; repealed in 1901 by the Commission).

Colorado: Const. 1876, Art. II, § 4 ("No person shall be denied any civil or political right, privilege, or capacity, on account of his opinions concerning religion; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations"); Annot. Stats. 1891, § 4821 ("No person shall be deemed incompetent to testify as a witness on account of his or her opinion in relation to the Supreme Being or a future state of rewards and punishments; nor shall any witness be questioned in regard to his or her religious opinions"); § 4822 (like Cal. C. C. P. § 1879); § 3290 (in all cases where an oath is to be administered, "and such person shall have conscientious scruples against taking an oath, he or she shall be permitted, instead of taking an oath, to make his other solemn affirmation or declaration"); § 3289 (on any occasion of administering an oath, "it shall be lawful . . . to administer it in the following form, to wit, The person swearing shall, with his or her hand uplifted, swear 'by the ever living God'"); C. C. P. § 336 ("A witness who desires it may, at

his option instead of taking an oath, make his solemn affirmation, or declaration").

Columbia (District): Comp. St. 1894, c. 71, § 3 ("The people called Quakers, those called Nicolites or New Quakers, those called Tunkers, and those called Menonists, holding it unlawful to take an oath on any occasion, shall be allowed to make their solemn affirmation as witnesses, in the manner that Quakers have been heretofore allowed to affirm, which affirmation shall be of the same avail as an oath, to all intents and purposes whatever"); § 4 ("That before any of the persons aforesaid shall be admitted as a witness in any court of justice in this District [State], the Court shall be satisfied, by such testimony as they may require, that such person is one of those who profess to be conscientiously scrupulous of taking an oath"); Code 1901, § 1056 ("All evidence shall be given under oath according to the forms of the common law, except that where a witness has conscientious scruples against taking an oath, he may in lieu thereof solemnly, sincerely, and truly declare and affirm").

Connecticut: Gen. St. 1897, § 1098 ("No person shall be disqualified as a witness in any action by reason of . . . his disbelief in the existence of a Supreme Being").

Delaware: Rev. St. 1893, c. 108, § 5 ("The usual oath in this State shall be by swearing upon the Holy Evangelists of Almighty God; the person to whom it is administered laying his right hand upon the book and kissing it"); § 6 ("a person may be permitted to swear with the uplifted hand; that is to say, he shall lift up his right hand and swear by the ever-living God, the searcher of all hearts, that, etc., and at the end of the oath shall say, 'As I shall answer to God at the Great Day'"); § 7 ("A person conscientiously scrupulous of taking an oath may be permitted, instead of swearing, solemnly, sincerely, and truly to declare and affirm to the truth of the matters to be testified"); § 8 ("A person believing in any other than the Christian religion may be sworn according to the peculiar ceremonies of his religion, if there be any such").

Florida: Const. 1887, Declaration of Rights, § 5 ("No person shall be rendered incompetent as a witness on account of his religious opinions"); Rev. St. 1892, § 1634 (for an oath before justices in civil cases, "If the witness desires, the word 'affirm' may be used instead of 'swear,' and the words 'so help you God' may be omitted"); c. 4086, § 1 ("Atheists, agnostics, and all persons who do not believe in the doctrine of future rewards and punishments, shall be permitted to testify in any of the Courts in this State"); § 2 ("Said person or persons may solemnly affirm instead of taking an oath").

Georgia: Code 1885, § 5268 ("Religious belief goes only to the credit"); § 5279 ("The sanction of an oath, or affirmation equivalent thereto, is necessary to the reception of any oral evidence. The Court may frame such affirmation according to the religious faith of the witness").

Hawaii: Civ. Laws 1907, § 1411 ("If any person called as a witness . . . required or desiring to make an affidavit or deposition, shall re-

free or be unwilling from alleged conscientious motives to be sworn, it shall be lawful for the Court, . . . upon being satisfied of the sincerity of such objection, to permit such person instead of being sworn, to make a solemn affirmation or declaration in the words following, that is to say: I . . . do solemnly sincerely, and truly affirm and declare, that the taking of any oath is according to my religious belief, unlawful, and I do now also solemnly, sincerely, and truly affirm and declare that the evidence, etc.": § 1413 (infants; quoted *ante*, § 488).

Idaho: Const. 1899, Art. I, § 4 ("No person shall be denied any civil or political right, privilege, or capacity, on account of his religious opinions; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations"); Rev. St. 1897, § 5956 (like Cal. C. C. P. § 1879); §§ 6128-6131 (like Cal. C. C. P. §§ 2084-2097).

Illinois: Const. 1870, Art. II, § 3 ("No person shall be denied any civil or political right, privilege, or capacity, on account of his religious opinions; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations"); Rev. St. 1874, c. 101, § 3 (an oath may lawfully be administered "in the following form, to wit: The person swearing shall, with his hand uplifted, swear by the ever-living God, and shall not be compelled to lay the hand on or kiss the Gospels"); § 4 (when "such person shall have conscientious scruples against taking an oath, he shall be admitted, instead of taking an oath, to make his solemn affirmation or declaration in the following form, to-wit: You do solemnly, sincerely, and truly declare and affirm").

Indiana: Const. 1851, Art. I, § 7 ("No person shall be rendered incompetent as a witness in consequence of his opinions on matters of religion"); § 8 ("The mode of administering an oath or affirmation shall be such as may be most consistent with and binding upon the person to whom such oath or affirmation may be administered"); Rev. St. 1897, § 518 ("No want of belief in a Supreme Being or in the Christian religion shall render a witness incompetent; but the want of such religious belief may be shown upon the trial"); § 507 ("The mode of administering the oath shall be such as may be most consistent with and binding upon the conscience" of the witness).

Iowa: Const. 1857, Art. I, § 4 ("No person shall be . . . rendered incompetent to give evidence in any Court of law or equity, in consequence of his opinions on the subject of religion").

Kansas: Const. 1860, Bill of Rights, § 7 ("Nor shall any person be incompetent to testify on account of religious belief"); Gen. St. 1897, c. 95, § 351 ("The mode of administering an oath shall be such as is most binding on the conscience of the witness").

Kentucky: Const. 1891, § 5 ("The civil rights, privileges, or capacities of no person shall be taken away, or in any wise diminished or enlarged, on account of his belief or disbelief of any religious tenet, dogma, or teaching").

Louisiana: C. P. 1894, § 476 (witnesses "must

be sworn on a Bible in open court"); § 479 ("If the religious opinions of a witness are opposed to his taking an oath, his affirmation of the truth of his testimony shall suffice").

Maine: Pub. St. 1883, c. 83, § 92 ("No person is an incompetent witness on account of his religious belief; but he is subject to the test of credibility; and a person who does not believe in the existence of a Supreme Being may testify under solemn affirmation and is subject to the pains and penalties of perjury"); § 103 ("A person to whom an oath is administered shall hold up his hand, unless he believes that an oath administered in that form is not binding, and then it may be administered in a form believed by him to be binding. One believing in any other than the Christian religion may be sworn according to the ceremonies of his religion"); § 104 ("Persons conscientiously scrupulous of taking an oath may affirm as follows: 'I affirm under the pains and penalties of perjury, which affirmation is of the same force and effect as an oath'").

Maryland: Const. 1867, Declar. of Rights, Art. 36 ("Nor shall any person, otherwise competent, be deemed incompetent as a witness or juror on account of his religious belief; provided he believes in the existence of God, and that under His dispensation such person will be held morally accountable for his acts and be rewarded or punished therefor either in this world or the world to come"); Art. 39 ("That the manner of administering an oath or affirmation to any person ought to be such as those of the religious persuasion, profession, or denomination of which he is a member, generally esteem the most effectual confirmation by the attestation of the Divine Being").

Massachusetts: Pub. St. 1882, c. 169, § 13, Rev. L. 1902, c. 175, § 15 ("The usual mode of administering oaths now practised in this Commonwealth, with the ceremony of holding up the hand, shall be observed in all cases in which an oath may be administered by law, except as hereinafter provided"); P. S. § 14, R. L. § 16 ("When a person to be sworn before a Court or magistrate declares that a peculiar mode of swearing is in his opinion more solemn and obligatory than by holding up the hand, the oath may be administered in such mode"); P. S. § 15, R. L. § 17 ("Every Quaker when called on to take an oath shall be permitted, instead of swearing, solemnly and sincerely to affirm, under the pains and penalties of perjury"); P. S. § 16, R. L. § 18 ("Every person who declares that he has conscientious scruples against taking any oath shall, when called upon for that purpose, be permitted to affirm in the manner prescribed for Quakers. If the Court or magistrate on inquiry is satisfied of the truth of such declaration"); P. S. § 17, R. L. § 19 ("Every person believing in any other than the Christian religion may be sworn according to the peculiar ceremonies of his religion, if there are any such. Every person not a believer in any religion shall be required to testify truly under the pains and penalties of perjury; and the evidence of such person's disbelief in the existence of God may be received to affect his credibility as a witness").

Michigan: Const. 1850, Art. IV, § 41 ("The Legislature shall not diminish or enlarge the civil or political rights, privileges, and capacities of any person on account of his opinion or belief concerning matters of religion"); Art. VI, § 34 ("No person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief"); Comp. L. 1897, c. 322, § 93 ("The usual mode of administering oaths now practised in this State, by the person who swears holding up the right hand, shall be observed in all cases in which an oath may be administered by law, except in the cases herein otherwise provided"); § 94 ("When the Court, magistrate, or other officer before whom any person is to be sworn shall be satisfied that such person has any particular mode of swearing which is in his opinion more solemn or obligatory than holding up the hand, such Court or officer may adopt that mode of administering the oath"); § 95 ("Every person conscientiously opposed to taking an oath shall, when called on to take an oath, be permitted, instead of swearing, solemnly and sincerely to affirm, under the pains and penalties of perjury"); § 96 ("No person shall be deemed incompetent as a witness in any court, matter, or proceeding, on account of his opinions on the subject of religion; nor shall any witness be questioned in relation to his opinions thereon, either before or after he shall be sworn"); 1858, *People v. Jensen*, 5 Mich. 303, 319 (since the statute, no inquiry at all can be made as to theological belief).

Minnesota: Const. 1857, § 17 ("Nor shall any person be rendered incompetent to give evidence in any Court of law or equity in consequence of his opinion upon the subject of religion"); Gen. St. 1894, § 5641 (form of oath of witnesses: "You do solemnly swear. . . So help you God"); § 5642 ("The word 'swear' may be omitted, and the word 'affirm' substituted, whenever the person to whom the obligation is to be administered is religiously scrupulous of swearing or taking an oath in the prescribed form; and in such case the words 'so help you God' may be omitted and the words 'under the pains and penalties of perjury' substituted"); § 5643 ("When an infidel, or any person not a believer in any religion, is offered as a witness, the following form of oath shall be used: 'You do honestly and sincerely promise and declare,' etc."); § 5646 ("persons on account of their religious opinions or belief" are not to be excluded); § 5645 ("Every person who declares that he has conscientious scruples against taking an oath, or swearing in any form, shall be permitted to make his solemn declaration or affirmation"); § 5644 ("Whenever the Court before which any person is offered as witness is satisfied that such person has any peculiar mode of swearing, which is more solemn and obligatory, in the opinion of such person, than the usual mode, the Court may, in its discretion, adopt such mode of swearing such person"); § 5643 ("Every person believing in any other than the Christian religion shall be sworn according to the peculiar ceremonies of his religion, if there are any such ceremonies"); § 5666 ("The Court before whom an infant, or

a person apparently of weak intellect, is produced as a witness, may examine such person to ascertain his capacity, and whether he understands the nature and obligations of an oath; and any Court may inquire of any person what are the peculiar ceremonies observed by him in swearing, which he deems most obligatory").

Mississippi: Annot. C. 1893, § 1742 ("A person shall not be incompetent as a witness because of religious belief or the want of it"); § 1744 ("Any witness, being scrupulous of taking an oath, may give testimony upon his solemn affirmation, which shall be as good and effectual as an oath. The form of affirmation shall be, in substance, as follows, to wit: 'You do solemnly and truly declare and affirm,' etc. In all cases where an oath or affidavit is required by law, it shall be sufficient if the same be made or given on the solemn affirmation of the party").

Missouri: Const. 1875, Art. II, § 5 ("No person can, on account of his religious opinions, . . . be disqualified from testifying"); Rev. St. 1899, § 5640 ("Every person who shall declare that he has conscientious scruples against taking an oath or swearing in any form shall be permitted to make his solemn declaration or affirmation in the following form, 'You do solemnly declare and affirm,' etc., concluding with the words 'under the pains and penalties of perjury'"); § 5641 (substantially like Cal. C. C. P. § 3095); § 5642 ("Every person believing in any other than the Christian religion shall be sworn according to the peculiar ceremonies of his religion, if there be any such ceremonies").

Montana: Const. 1889, Art. III, § 4 ("No person shall be denied any civil or political right or privilege on account of his opinions concerning religion; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations"); C. C. P. 1893, §§ 3431-3434 (like Cal. C. C. P. §§ 3094-3097).

Nebraska: Const. 1875, Art. I, § IV ("No person shall . . . be incompetent to be a witness on account of his religious belief; but nothing herein shall be construed to dispense with oaths and affirmations"); Comp. St. 1899, § 5939 ("The mode of administering an oath shall be such as is most binding upon the conscience of the witness").

Nevada: Const. 1864, Art. I, § 4 ("No person shall be rendered incompetent to be a witness on account of his opinions on matters of his religious belief"); Gen. St. 1885, §§ 3446, 3447 (like Cal. C. C. P. §§ 3096, 3097); § 3399 (like Cal. C. C. P. § 1879); § 4578 ("The solemn affirmation of witnesses shall be deemed sufficient" in criminal cases).

New Hampshire: Pub. St. 1891, c. 224, § 10 ("No other ceremony shall be necessary in swearing than holding up the right hand, but any other form or ceremony may be used which the person to whom the oath is administered professes to believe more binding upon the conscience"); § 11 ("Persons scrupulous of swearing may affirm; the word 'affirm' being used in administering the oath, instead of the word 'swear,' and the words 'this you do under the pains and penalties of perjury,' instead of the words 'so help you God.'"); § 12 ("No person

who believes in the existence of a Supreme Being shall be excluded from testifying on account of his opinions on matters of religion".

New Jersey: Const. 1844, Art. I, § 4 ("No person shall be denied the enjoyment of any civil right merely on account of his religious principles").

New Mexico: Comp. L. 1897, § 3015 (every witness offered "shall be admitted to give evidence on oath or solemn affirmation"); § 2559 (the oath is to be taken "in the following form, viz.: The person swearing shall, with his right hand uplifted, follow the words required in the oath as administered, beginning: I do solemnly swear, and closing: So help me God"); § 2560 (when a person "shall have conscientious scruples against taking the same, he shall be permitted, instead of such oath, to make a solemn affirmation, with uplifted right hand, in the following form, viz.: You do solemnly, sincerely, and truly declare and affirm, and close with: And this I do under the pains and penalties of perjury").

New York: Const. 1895, Art. I, § 3 ("No person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief"); C. C. P. 1877, § 845 ("The usual mode of administering an oath, now practised, by the person who swears laying his hand upon and kissing the Gospels, must be observed, where an oath is administered, except as otherwise herein specially prescribed in this article"); § 846 ("The oath must be administered in the following form, to a person who so desires, the laying of the hand upon and kissing the Gospels being omitted: 'You do swear, in the presence of the ever-living God.' While so swearing, he may or may not hold up his right hand, as his option"); § 847 ("A solemn declaration or affirmation, in the following form, must be administered to a person who declares that he has conscientious scruples against taking an oath, or swearing in any form: 'You do solemnly, sincerely, and truly declare and affirm'"); § 848 ("If the Court or the officer, before which or whom a person is offered as a witness, is satisfied that any peculiar mode of swearing, in lieu of, or in addition to laying the hand upon and kissing the Gospels, is, in his opinion, more solemn and obligatory, the Court or officer may, in its or his discretion, adopt that mode of swearing the witness"); § 849 ("A person believing in a religion, other than the Christian, may be sworn according to the peculiar ceremonies, if any, of his religion, instead of as prescribed in § 845 or § 846 of this act"); § 850 (the Court "may inquire of a person, produced as a witness, what peculiar ceremonies in swearing he deems most obligatory"); the foregoing are amended by St. 1899, c. 340; § 845 ("Except as otherwise specially prescribed in this article, when an oath is administered, the witness shall lay his hand on the Gospels and express assent to the oath, and it shall be according to the present practice, except that the witness need not kiss the Gospels"); § 846 (the words "and kissing of the Gospels" are omitted); § 847 (similar).

N. C.: Code 1883, § 3306 (officers administering an oath shall require the party "to lay

his hand upon the Holy Evangelists of Almighty God, in token of his engagement to speak the truth, as he hopes to be saved in the way and method of salvation pointed out in that blessed volume; and in further token that, if he should swerve from the truth he may be justly deprived of all the blessings of the Gospel and made liable to that vengeance which he has imprecated on his own head; and he shall kiss the holy Gospel, as a seal of confirmation to the said engagements"); § 3310 ("When a person to be sworn, shall be conscientiously scrupulous of taking a book oath in manner aforesaid, he shall be excused from laying hands upon, or touching the holy Gospels; and the oath required shall be administered in the following manner, namely: he shall stand with his right hand lifted up towards heaven, in token of his solemn appeal to the Supreme God, and also, in token, that if he should swerve from the truth, he would draw down the vengeance of heaven upon his head, and shall introduce the intended oath with these words, namely: 'I, A. B., do appeal to God, as a witness of the truth and the avenger of falsehood, as I shall answer the same at the great day of judgment, when the secrets of all hearts shall be known,' etc., as the words of the oath may be"); § 3311 ("The solemn affirmation of Quakers, Moravians, Dunkers, and Mennonists, made in the manner heretofore used and accustomed, shall be admitted as evidence in all civil and criminal actions"); 1898, *Pearre v. Folb*, 123 N. C. 239, 31 S. E. 475 (oath not on a Bible, held void under the statute).

North Dakota: Const. 1889, Art. I, § 4 ("No person shall be rendered incompetent to be a witness or juror on account of his opinion on matters of religious belief"); Rev. C. 1895, § 5664 ("Before testifying the witness must be sworn to testify as follows: 'You do solemnly swear [etc.]... so help you God.' Any witness who is conscientiously scrupulous of taking the oath above described shall be allowed to make affirmation, substituting for the words 'so help you God' at the end of the oath the following: 'This you do affirm under the pains and penalties of perjury'"); § 5706 (so also for interpreters).

Ohio: Const. 1851, Art. I, § 7 ("Nor shall any person be incompetent to be a witness on account of his religious belief; but nothing herein shall be construed to dispense with oaths and affirmations"); Rev. St. 1898, § 4950 ("A person may be sworn in any form he deems binding on his conscience").

Oklahoma: Stats. 1893, § 4229 ("Before testifying, the witness shall be sworn to testify to the truth, the whole truth, and nothing but the truth. The mode of administering an oath shall be such as is most binding on the conscience of the witness").

Oregon: Const. 1859, Art. I, § 6 ("No person shall be rendered incompetent as a witness or juror in consequence of his opinions on matters of religion, nor be questioned in any court of justice, touching his religious belief, to affect the weight of his testimony"); § 7 ("The mode of administering an oath or affirmation shall be such as may be most consistent with and bind-

ing upon the conscience of the person to whom such oath or affirmation may be administered"; C. C. P. 1892, §§ 867-870 (like Cal. C. C. P. §§ 2094-2097, substituting in § 2097, after "any person," "who has conscientious scruples against taking an oath," instead of "who desires it"); § 710 (like Cal. C. C. P. § 1879).

Rhode Island: Const. 1842, Art. I, § 3 ("One's opinion in matters of religion" shall in no wise diminish, enlarge, or affect his civil capacity").

South Carolina: Rev. St. 1893, § 2908, Code 1902, § 2827, St. 1721, c. 3 (any witness "may make solemn and conscientious affirmation and declaration according to the form of his religious belief or profession, as to any matter or thing whereof an oath is required," to be as valid as if taken "on the Holy Evangelists").

South Dakota: Const. 1899, § 86 ("No person shall be denied any civil or political right, privilege, or position, on account of his religious opinions"); Stats. 1899, § 6507 (like N. D. Rev. C. § 5684); § 6347 (like N. D. Rev. C. § 5706).

Tennessee: Annot. C. 1896, § 5593 ("Persons who do not believe in a God and a future state of rewards and punishments may be witnesses in any cause pending in any of the courts of this State. Said unbelievers may solemnly affirm instead of taking an oath, and false testifying by such persons shall be punished as perjury, as [provided] by law under such circumstances. Such unbelief in God and a future state of rewards and punishments shall go only to the credibility of the witness"); § 5551 (the witness shall "lay his hand upon the New Testament and solemnly swear upon the Holy Evangelists of Almighty God to speak the truth the whole truth and nothing but the truth, or other oath prescribed in the particular case, and kiss the Book as a seal of confirmation of the engagement"); § 5552 ("If the person to be sworn is conscientiously scrupulous of taking the book oath, he may be sworn with the right hand uplifted in the following form: 'I (or you) do solemnly appeal to God, as a witness of the truth and avenger of falsehood, as I shall answer for the same at the great day of judgment, when the secrets of all hearts shall be known, etc., as the nature of the case may be'"); § 5553 ("All persons conscientiously scrupulous of taking an oath may make solemn affirmation in the words of the oath required"); § 5554 ("Persons may also be sworn according to the forms of their own country, or particular religious creed, when required").

Texas: Const. 1876, Art. I, § 5 ("No person shall be disqualified to give evidence in any of the courts of this State on account of his religious opinions or for want of any religious belief, but all oaths or affirmations shall be administered in the mode most binding upon the conscience, and shall be taken subject to the pains and penalties of perjury"); P. C. 1895, § 776 ("No person is incompetent to testify on account of his religious opinion or for the want of any religious belief"); Rev. Civ. St. 1896, § 2303 (substantially the same).

United States: Federal Equity Rules, No. 91 ("Whenever under these rules an oath is or may be required to be taken, the party may, if

conscientiously scrupulous of taking an oath, in lieu thereof make solemn affirmation to the truth of the facts stated by him").

Utah: Const. 1895, Art. I, § 4 ("Nor shall any person be incompetent as a witness or juror on account of religious belief or the absence thereof"); Rev. St. 1898, § 3412 (like Cal. C. C. P. § 1879); §§ 3438-3441 (like id. §§ 2094-2097).

Vermont: Const. 1793, c. 1, Art. 3 ("Nor can any man be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiments or peculiar mode of religious worship"); Stats. 1894, § 1244 ("No person shall be incompetent as a witness in any Court, matter, or proceeding, on account of his opinions on matters of religious belief; nor shall a witness be questioned, nor testimony taken or received, in relation thereto").

Virginia: Const. 1869, Art. V, § 14 ("Men's opinions in matters of religion" shall in no wise affect, diminish, or enlarge their civil capacities"); this article is omitted in Const. 1902.

Washington: Const. 1889, Art. I, § 6 ("The mode of administering an oath or affirmation shall be such as may be most consistent with and binding upon the conscience of the person to whom such oath or affirmation may be administered"); § 11 ("Nor shall any person be incompetent as a witness or juror in consequence of his opinion on matters of religion, nor be questioned in any court of justice touching his religious belief to affect the weight of his testimony"); C. & Stats. 1897, § 6056 ("Whenever the Court or officer before which a person is offered as a witness is satisfied that he has a peculiar mode of swearing connected with or additional to the usual form of administration, which, in witness' opinion, is more solemn and obligatory, the Court or other officer may, in its discretion, adopt that mode"); § 6057 ("When a person is sworn who believes in any other than the Christian religion, he may be sworn according to the ceremonies of his religion, if there be any such"); § 6058 ("Any person who has conscientious scruples against taking an oath may make his solemn affirmation, by assenting, when addressed, in the following manner: 'You do solemnly affirm that,' etc., as in section 6055"); § 6055 ("An oath or affirmation may be administered as follows: The person who swears holds up his hand, while the person administering the oath thus addresses him: 'You do solemnly swear . . . so help you God'").

West Virginia: Const. 1872, Art. III, § 15 ("Men's opinions in matters of religion" shall in no wise affect, diminish, or enlarge their civil capacities").

Wisconsin: Const. 1848, Art. I, § 19 ("No person shall be rendered incompetent to give evidence in any Court of law or equity in consequence of his opinions on the subject of religion"); Stats. 1896, § 3637 (prescribes a form for justice courts, and allows an affirmation for one having conscientious scruples); § 4081 ("In all cases in which an oath or affidavit is required or authorized by law, the same may be taken in any of the usual forms"); § 4082 ("Whenever the Court before which any person shall be offered as a witness shall be satisfied that such person has any peculiar mode of swearing which

With reference to the *abolition* or *dispensation* of the oath, the condition in general may be summarized as follows:

(1) In no jurisdiction has the use of the oath been abolished.

(2) In almost every jurisdiction the rigor and injustice of the common-law rule has been removed, in one of two ways:¹

(a) In all jurisdictions that have legislated, except one (Oklahoma), a statute allows the witness to *choose to make affirmation* instead of oath. This choice is usually provided for those who lack the requisite belief and for those who may have the belief but are forbidden by conscientious scruples. Sometimes the option is even wider and is given to all who prefer to affirm, whether or not they could in belief or conscience take the oath. This option is broader than would seem necessary, and can be excused only upon the policy that to force an exposure of theological belief is undesirable. The third class of persons (*ante*, § 1827, par. 2) of whom an oath ought not to be required, namely, infants qualified to testify but lacking in theological instruction, remain unfortunately in most jurisdictions unprovided for. A statute similar to that of England,² but applicable to all trials whatever, is a desirable enactment,³ and its absence was long ago forcibly criticised by an eminent judge of great experience.⁴ The ill effect of the error is sometimes indirectly removed by the legislation now to be mentioned.

(b) Another way of relief has sometimes been found under *constitutional* (rarely statutory) provisions guaranteeing that theological belief shall not affect one's *civil capacities* (or, specifically, one's competency as a witness). These provisions are almost universal; in only two jurisdictions (Arkansas and Maryland) is a theological belief expressly declared necessary.⁵ By usual

is more solemn and obligatory, in the opinion of such person, than the usual mode, the Court may, in its discretion, adopt such mode of swearing such person; and any Court may inquire of any person what are the peculiar ceremonies, observed in swearing, which he deems most obligatory"; § 4063 ("Every person believing in any other than the Christian religion shall be sworn according to the peculiar ceremonies of his religion, if there be any such ceremonies"); § 4064 ("Every person who shall declare that he has conscientious scruples against taking any oath or swearing in any form shall be permitted to make his solemn declaration or affirmation"); St. 1903, c. 151, amending Stats. 1898, § 4064, and repealing §§ 4063, 4064 ("Every person who shall declare that he has conscientious scruples against taking the oath or swearing in the usual form" may affirm).

Wyoming: Const. 1889, Art. I, § 18 ("No person shall be rendered incompetent . . . to serve as a witness . . . because of his opinion on any matter of religious belief whatever"); Rev. St. 1887, § 3340 ("A person may be sworn in any form he deems binding on his conscience"); § 3413 ("Persons conscientiously opposed to swearing may affirm"; when an oath is required, it shall be lawful to use this form: "The person swearing shall with his or her right hand uplifted swear, concluding with the

words 'So help me God'"); St. 1891, c. 2, § 2 (amending Rev. St. § 3413, by inserting after "swearing," in the first line, "or to taking any oath").

² The earliest statute making optional the oath is said by Professor Thayer to have been that of Rhode Island Colony (1 R. I. Col. Records, 181, cited in Thayer's Cases on Evid., 2d ed., 1067), "that a solemn profession or testimony . . . shall be accounted throughout the whole colony as of full force as an oath; and because many in giving engagement or testimony are usually more overawed with the penalty which is known than with the most High who is little known in the kingdoms of men," the penalties of perjury are attached. This provision, however, does not appear in the volume of statutes now in force.

³ St. 48 & 49 Vict. c. 69.

⁴ Some of the Canadian jurisdictions already have it.

⁵ 1876, Stephen, Digest of Evidence, Art. 107, Appendix, Note XL.

⁶ A similar provision formerly existed in Maine: 1841, Smith v. Coffin, 18 Me. 157, 166 (a statute providing that "no person who believes in the existence of a Supreme Being" shall be excluded applies to exclude from the oath a person not having that belief, even though he might have affirmed if he had scruples).

construction, the result of this legislation has been to allow the administration of the oath both to adults and to children lacking common-law belief.⁷ The singular result is that relief is afforded, not in the natural way, by substituting affirmation for oath, but in an evasive way, by preserving an invocation which has no meaning for the witness and by thus reducing the oath to an empty formula. It would be equally consonant with the words of the Constitution to interpret them merely as allowing persons to affirm instead of swearing; it is unnecessary to suppose that the Constitution intended to devitalize the oath without abolishing it. In the few jurisdictions where the Constitution, in such an article, expressly saves all oaths and affirmations, it is clear that the oath ought to remain, as to the requisite belief, precisely what it was at common law;⁸ but under such Constitutions, nevertheless, the witness' right to make affirmation instead of oath should be with equal certainty guaranteed.⁹

⁷ Notice that the result is sometimes reached under the broad testimonial statutes quoted *ante*, § 488: 1861, *Fuller v. Fuller*, 17 Cal. 612 (a statute that "no person offered as a witness shall be excluded on account of his opinion on matters of religious belief" was held to make "religious sentiments or convictions" immaterial; here, a Chileño who understood "the meaning of the word 'obligation' as applied to an oath" was admitted); 1878, *Johnson v. State*, 61 Ga. 36, *semble* (theological test not required for children; nor, perhaps, for imbeciles; but probably for adults of sound mind possessing the proper belief, the oath under that sanction is required; capacity to take an oath now means, "perhaps," the child's intelligence "that she ought to tell the truth on a solemn occasion rather than a lie"); 1889, *Ewing v. Bailey*, 36 Ill. App. 191, 193 (similar to the next case); 1890, *Hronek v. People*, 134 Ill. 139, 152, 24 N. E. 861 ("There is no longer any test or qualification in respect to religious opinion or belief"; and the oath may be taken irrespective of it); 1840, *Snyder v. Nations*, 5 Blackf. 295 (statute removes the necessity of religious faith; here a deaf-and-dumb person who "had no conception of the religious obligation of an oath" was admitted); 1903, *State v. King*, 117 Ia. 484, 91 N. W. 768 (under Code § 4601, quoted *ante*, § 488, a child's "intelligence, and not belief, nor the power of moral perception, is the test"); 1882, *Bush v. Com.*, 80 Ky. 244, 249 (the constitutional clause alters the common law and "permits persons to testify without regard to religious belief or disbelief"; here an atheist witness was allowed to be sworn; the ruling is irrespective of the Civil Code provision allowing affirmation and making all persons competent); 1894, *White v. Com.*, 98 Id. 180, 28 S. W. 340 (preceding case approved, and applied to a child); 1903, *State v. Williams*, 111 La. —, 35 So. 505 (a child, otherwise sufficiently intelligent, is admissible without regard to theological belief; Act No. 29, of 1886, quoted *ante*, § 488, abolishes all other grounds of disqualification; *State v. Washington*, 49 La. An. 1602, 22 So. 841, repudiated); 1895, *State v. Reddington*, 7 S. D. 346, 64 N. W.

170 (Kellam, J.: "No witness, whether child or adult, is required to be able or willing to discuss with the Court or counsel either the fact or condition of a future state. He may even have no established views of general theology. He is only required to be able to distinguish the moral difference between right and wrong; and, when the law or the Court says he must understand the obligation of an oath, it means only that, possessing such ability to discriminate, he understands that his position as a witness imposes upon him the moral and legal duty to tell only what is true. Whether a witness is so qualified is left in the first instance to the discretionary judgment of the trial Court"; here a child was admitted); 1846, *Perry v. Com.*, 3 Gratt. 632, 641 (the Bill of Rights abrogates all incapacity by reason of religious belief; an eloquent opinion by Scott, J.; the leading case on the subject).

Distinguish the following, which goes rather on the principle of § 506, *ante*: 1903, *Lee v. Missouri P. R. Co.*, — Kan. —, 73 Pac. 110 (a boy of eleven, excluded because he did not know that it was wrong to lie under oath; though the Constitution made theological belief unnecessary).

The following case merely refuses to reach the result of the above cases under the testimonial statutes quoted *ante*, § 488: 1880, *Priest v. State*, 10 Nebr. 393, 399 (a statute making competent "every human being of sufficient capacity to understand the obligation of an oath," held still to require "an immediate sense of responsibility to God," and not to have "changed the character of an oath"; here an Indian was excluded).

⁸ 1877, *Clinton v. State*, 33 Oh. St. 31 (a provision that "no person shall be incompetent to be a witness on account of his religious belief, but nothing herein shall be construed to dispense with oaths and affirmations," held to preserve all the common-law requirements of religious belief as a part of the capacity to take oaths). *Contra*, *Hronek v. People*, Ill., *supra*, note 7.

⁹ This latter question seems not to have arisen for decision; probably because a statute usually gives the option of affirmation.

§ 1829. *Statutory Changes as to Nature, Form, Capacity, Proof, Persons.* A summary survey may now be taken of the effect of statutes upon the remaining detailed rules laid down at common law:

(1) The *nature* of the oath (*ante*, § 1817) is changed in two types of provisions: (a) those which allow mere belief in a Supreme Being (irrespective of punishment) to suffice; (b) those which declare theological belief immaterial and yet, by judicial construction, permit the oath to be taken (*ante*, § 1828).

(2) For the *form* of the oath (*ante*, § 1818), the common-law doctrine is usually found preserved in the statutes, sometimes with specific sanction for certain forms. There is usually a provision allowing or requiring the most obligatory form to be used, — a stricter rule than was usually recognized at common law.

(3) The *capacity* to take the oath has in some jurisdictions been expressly changed for children, and in others for adults also by implication of certain constitutional provisions (*ante*, § 1828). The *proof* of capacity is often affected by statutory prohibition of questions to the witness. Certain statutes have also regulated the mode of *examination of a child* as to general competency (*ante*, §§ 488, 508). The practice of discrediting a witness by his religious belief has also been altered (*ante*, §§ 935, 1820).

(4) The *persons* by statute excepted from the necessity of taking oaths are the three classes already noted (*ante*, § 1828).

Sub-title II: PERJURY-PENALTY.

§ 1831. *Nature of the Security.* The two expedients of the oath and the perjury-penalty are similar in their operation; that is, they influence the witness subjectively against conscious falsification, the one by reminding of ultimate punishment by a supernatural power, the other by reminding of speedy punishment by a temporal power. The reminder, in the case of the perjury-penalty, is rarely found expressly uttered in the formula of words for administering an oath or an affirmation; it seems to be taken for granted as known to the witness. Nevertheless, it is a real and powerful security for truth-telling, and its function has been only the more emphasized since the general recognition of the dispensability of the oath:

1824, Mr. Thomas Starkie, *Evidence*, 91: "The testimony must be sanctioned, not merely by an oath, but by a judicial oath, in the course of a regular proceeding, by an authorized person. For if the oath were extrajudicial, the witness could not be punished for committing perjury under that oath, and therefore one of the securities for truth which the law has provided would be wanting."

1871, *Maulsby, J.*, in *Hayes v. Wells*, 34 Md. 518: "Liability of a witness to the penalties of perjury if he corruptly misstate facts is one of the securities for truth."

§ 1832. *Rules of Exclusion depending on this Requirement.* No special rules of exclusion deducible from the theory of this security have found their way into the common law. Singular as this may seem, it appears to be due merely to the overshadowing importance of the oath, during the

formative period of the law, when the oath's rigid requirements received so much attention that the perjury-penalty became a mere auxiliary to the oath, and no effort was made to develop independently any rules for securing amenability to the perjury-penalty. The only rules, therefore, seem to be such as are preserved as surviving parts of the oath-requirement even where the oath has been dispensed with.

(1) On the one hand, as no one doubts, the imposition of the perjury-penalty is allowable only for testimonial statements delivered *in court* or before a *judicial officer*, like the oath (*ante*, § 1824), and is therefore never exacted for extrajudicial statements admissible under the Exceptions to the Hearsay rule (*ante*, § 1420). On the other hand, it is exacted of all such *intra-judicial* testimonial statements; so that, supposing the oath to be dispensable, still no person could be admitted to the stand without at least making affirmation, *i. e.* subjecting himself to the perjury-penalty.

(2) But the requirement goes no further; that is to say, looking at the nature and operation of the perjury-penalty, there is *no exclusion* of a witness because circumstances exist which make him *legally* or *practically not amenable* to the influence of the penalty. This absence of rules deduced from the theory of the security is observable in several classes of cases:

(a) When a *deposition* is taken under a commission in *another country*, the deponent ordinarily could not be punished for perjury, either because the crime was committed out of the jurisdiction, or because the oath was given by a foreign officer, or because the deponent does not come within the jurisdiction; nevertheless, the deposition is admissible:

1744, *Willes*, C. J., in *Omichund v. Barker*, *Willes* 535, 553: "When the depositions of witnesses are taken in another country, it frequently happens that they never come over hither, or if [they do] they cannot be indicted for perjury because the fact was committed in another country. Those therefore who are plainly not liable to be indicted for perjury have often been, and for the sake of justice must be, admitted as witnesses. And so there is an end of this objection."¹

(b) When a deposition in *perpetuam memoriam* is taken, it usually will not (and under the early Chancery rule it could not) be used until after the deponent's death (*ante*, §§ 1403, 1412); so that the risk of temporal punishment for perjury is mainly or entirely wanting; nevertheless, such a deposition is receivable:

1822, *Leach*, V. C., in *Angell v. Angell*, 1 Sim. & Sta. 88: "Inasmuch as those written depositions can never be used until after the death of the witnesses, and are not indeed published until after the death of the witnesses, it follows, whatever may have been the perjury committed in these depositions, it must necessarily go unpunished. And this testimony, therefore, has this infirmity, that it is not given under the sanction of those penalties which the general policy of the law imposes upon the crime of perjury."

¹ In *Lincoln v. Battelle*, 6 Wend. 475, 481 (1831), a deposition sworn abroad before the foreign Court and not before the commission, the foreign law prohibiting the commission to

exact an oath, was held admissible, for if the witness swore before the commission, and were perjured, "he would probably escape punishment."

(c) Where a child is competent as a witness, but is not old enough under the criminal law to be guilty of the crime of perjury, its testimony would nevertheless be received.²

(d) Where the testimony is not on a material point, the witness is not guilty of the crime of perjury and therefore is not amenable to punishment; nevertheless, testimony is never excluded on this ground.³ In general, moreover, an informality of proceedings, such as would render a prosecution for perjury impossible, is not treated as ground for exclusion; for example, informalities in taking a deposition prevent its acceptance because the testimony is not taken before one lawfully authorized or lawfully acting as a judicial officer (*ante*, § 1376), but not because the perjury-penalty is inapplicable. A contrary view has indeed been advanced in the ecclesiastical courts, but it rests on an unfounded belief as to the common-law practice and is out of harmony with the analogies already cited:

1840, Dr. Lushington, in *Woods v. Woods*, 2 Curt. Eccl. 518, 528 (rejecting depositions stated to have been taken improperly on questions submitted by the wrong person): "Nothing, in my judgment, can be more dangerous to the credit of these Courts than that it should be considered that they would decide questions affecting the rights and interests of the parties upon evidence the individuals giving which, if they depose falsely and corruptly, might not be liable to an indictment for perjury. Nothing, indeed, could be more fatal to the due administration of justice than that evidence should be received under such circumstances. . . . If a prosecution for perjury could not be sustained against witnesses, I should be bound to reject their evidence. Such is the established rule of other Courts; . . . and I think the rule is founded in justice, — otherwise persons giving evidence would be liberated from a consideration of great weight, the fear of punishment for false swearing."

Thus the establishment of the perjury-penalty, while a real and useful security for truth, has not carried with it any group of exclusionary rules; and there appears no reason for regretting this failure to add new complications to our system of evidence.

Sub-title III: PUBLICITY.

§ 1834. *General Nature of the Security.* The publicity of a judicial proceeding is a requirement of much broader bearing than its mere effect upon the quality of testimony; it would be essentially desirable and demandable on additional grounds. Nevertheless, it plays an important part as a security for trustworthiness, and would exist as an independent requirement for that reason only, even were other grounds wanting. The reasons for its existence therefore fall under two heads, first, those which make it a security for trustworthiness and completeness of testimony, and, secondly, those which have other advantages in view.

(1) Its operation in tending to improve the quality of testimony is twofold.

² 1878, *Johnson v. State*, 61 Ga. 28; 1896, *Com. v. Robinson*, 165 Mass. 436, 43 N. E. 121; 1901, *Com. v. Hamage*, 177 Id. 249, 58 N. E. 1078.

prosecution for perjury would lie for a statement "I believe" by a witness, but this objection was not allowed to prevail: *ante*, § 728, note 1, at the end.

³ So also at one time it was thought that no

Subjectively, it produces in the witness' mind a disinclination to falsify, first, by stimulating the instinctive responsibility to public opinion, symbolized in the audience, and ready to scorn a demonstrated liar, and next, by producing the fear of exposure of subsequent falsities through the presence of informed persons who may chance to be present. Objectively, it secures the presence of those who by possibility may be able to furnish testimony in chief or to contradict falsifiers and yet may not have been known beforehand to the parties to possess any information. The operation of this latter reason was not uncommonly exemplified in earlier days in England, when attendance at court was a common mode of passing the time for all classes of persons:

1797, Lord *Hilden*, in *Twiss' Life*, I, 800: "I prosecuted a ship at Bristol to condemnation for having on board smuggled goods to a great amount. George Ross, who was a good-natured friendly man, but violent in court, and particularly as counsel for smugglers, raved in this case and swore that I had contrived to have these goods put on board in order to condemn the ship, whilst the captain had gone ashore to see a wife whom he tenderly loved and his children whom he was extremely fond of, at the end of a very long voyage in which he had been absent from them. This was all coinage.¹ But it was put a stop to by a sailor in court starting up and exclaiming, 'Well, that's a good one! That's a good fetch! Why, my mistress and her children were aboard ship with our captain during the whole of the voyage!'"

The same advantage is gained, and much relied on, in more modern times, when the publicity given by newspaper reports of trials is often the means of securing useful testimony.² These two sets of reasons have often been expounded as justifying and demanding the traditional common-law practice of holding trial with open doors:

1690 (T), Sir John *Hawles*, Solicitor-General, commenting on *Cornish's Trial*, in 11 How. St. Tr. 460: "The reason that all matters of law are, or ought to be, transacted publicly is that any person, unconcerned as well as concerned, may as *amicus curiæ* inform the Court better, if he thinks they are in error, that justice may be done; and the reason that all trials are public is that any person may inform in point of fact, though not subpoena'd, that truth may be discovered, in civil as well as in criminal cases. There is an invitation, to all persons who can inform the Court concerning the matter to be tried, to come into the court, and they shall be heard."³

1768, Sir *William Blackstone*, *Commentaries*, III, 373: "This open examination of the witnesses, *vis à vis*, in the presence of all mankind, is much more conducive to the clearing up of truth than the private and secret examination taken down before an officer or his clerk, in the ecclesiastical courts and all others that have borrowed their practice from the civil law; where a witness may frequently depose that in private which he will be ashamed to testify in a public and solemn tribunal."

1823, Mr. *Jeremy Bentham*, *Rationale of Judicial Evidence*, b. II, c. X, § 2 (Bowring's ed., vol. VI, p. 355): "The advantages of publicity are neither inconsiderable nor unobvious. In the character of a security it operates in the first place upon the deponent. . . . In many cases, say rather in most (in all except those in which a witness bent upon men-

¹ In those days, as the accused could not testify, his counsel was by sufferance accustomed to embody the supposed explanations of the accused in his address, and this license was of course sometimes abused.

² One notable instance occurred in the trial of *Smyth v. Smyth*, in 1853 (*Woodley's Celebrated Trials*, I, 115, 140, 144) where a jeweller,

reading the report of the first day's proceedings, saw that perjury was committed as to the date of engraving a ring and brooch left with him; and his information enabled the defence to expose the falsity of the entire claim, in which an estate of \$20,000 yearly income was at stake.

³ In *Lilburne's Trial* (1649), 4 How. St. Tr. 1369, 1373, he claims the right of a public trial.

duty can make sure of being apprized with perfect certainty of every person to whom it can by any possibility have happened to be able to give contradiction to any of his proposed statements), the publicity of the examination or deposition operates as a check upon mendacity and incorrectness. However sure he may think himself of not being contradicted by the deposition of any percipient witnesses, yet if the circumstances of the case have but afforded a single such witness, the prudence or imprudence, the probity or improbity, of that one original witness may have given birth to derivative and extrajudicial testimonies in any number. Environed as he sees himself by a thousand eyes, contradiction, should he hazard a false tale, will seem ready to rise up in opposition to it from a thousand mouths. Many a known face, and every unknown countenance, presents to him a possible source of detection, from whence the truth he is struggling to suppress may through some unsuspected channel burst forth to his confusion. . . . [§ 6.] Another advantage of this publicity [by printing the proceedings] . . . is the chance it affords to justice of receiving, from hands individually unknown, ulterior evidence, for the supply of any deficiency or confutation of any falsehood, which inadvertency or mendacity may have left or introduced."

(2) The other reasons, independent of evidential service, for requiring publicity are of three distinct sorts. (a) Subjectively, a wholesome effect is produced, analogous to that secured for witnesses, upon all the officers of the court, in particular, upon judge, jury, and counsel. In acting under the public gaze, they are more strongly moved to a strict conscientiousness in the performance of duty. In all experience, secret tribunals have exhibited abuses which have been wanting in courts whose procedure was public.⁴ (b) Persons not called as parties to the suits before the court may nevertheless be affected, or think themselves likely to be affected, by pending litigation. They should have the opportunity of learning whether they are thus affected, and of protecting themselves accordingly; they have "a right to be present for the purpose of hearing what is going on."⁵ (c) The educative effect of public attendance is a material advantage. Not only is respect for the law increased and intelligent acquaintance acquired with the methods of government, but that confidence in judicial remedies is secured which could never be inspired by a system of secrecy.⁶

In general, therefore, and as a rule, a trial must be conducted in such a way as to allow the access of the general public.⁷

§ 1835. **Exceptions to the Rule of Publicity:** (1) **Excluding Persons from the Court-Room.** All the reasons for requiring publicity are of a contingent

⁴ See Bentham, *ubi supra*.

⁵ *Daubney v. Cooper*, 10 B. & C. 257, 246.

⁶ See Bentham, *ubi supra*. The whole of his Chapter X well repays perusal. A conception of the advantages of publicity may be gained by perusing the contrasting history of French procedure (Famein, *Histoire de la procédure criminelle en France, passim*). Compare also Mr. (afterwards L. C. J.) Denman's praise of this security in 40 *Edinh. Rev.* 195 (1824), and Charles Roeder's *Rassians*, "Our Dark Places," II.

⁷ 1829, *Daubney v. Cooper*, 10 B. & C. 257, 246 ("We are all of opinion that it is one of the essential qualities of a court of justice that its proceedings should be public, and that all

parties who may be desirous of hearing what is going on, if there be room in the place for that purpose, provided they do not interrupt the proceedings and provided there is no specific reason why they should be removed, have a right to be present for the purpose of hearing what is going on"); 1831, *Collier v. Hicks*, 2 B. & Ad. 663, 668 (at a trial before magistrates in an open court, "the public had a right to be present, as in other courts," per Tenterden, L. C. J.); Cooley, *Constitutional Limitations*, 6th ed., c. 10, p. 379; 1887, *State v. Brooks*, 22 Mo. 542, 573 (the passage in Mr. J. Cooley's work quoted with approval).

A coroner's inquest is not a trial: 1827, *Garnett v. Ferrand*, 6 B. & C. 611, 626.

and abstract nature. In the long run certain general advantages are secured by a usual practice. No tangible and positive advantage is gained for a party in a given case by publicity or lost by privacy. Moreover, since the whole community cannot enter, the exclusion of some only who might have entered does no definite harm. Finally, in certain conditions, the advantages may be overbalanced by disadvantages. The rule therefore need not be absolute and invariable. Exceptions may properly be recognized. As is an excess of sentimental fastidiousness to deny the propriety of allowing exceptions.

(1) At common law, the propriety of exclusion of *mere spectators* in a given instance should depend upon the facts of each case. Both as to the classes of persons excluded and as to the grounds for exclusion, all that can be required is that the measure be a reasonable one under the circumstances. The danger of overcrowding, the risk of violence or brawls, the moral harm of satisfying prurience in trials of certain crimes,—these are the ordinary grounds for exclusion. It cannot be doubted that such exceptions should be allowed.¹ By statute, they are sometimes expressly sanctioned, either in general terms or for special classes of cases.²

(2) An adjournment of the court to another place than the regular courtroom could not in itself result in preventing publicity, even though the Court were held in a lawyer's office or the like, unless during the session there an actual prohibition of the public's attendance were issued. Such adjournments might, however, involve irregularities of procedure on grounds independent of the present principle; and, as they have generally been treated from that point of view, no definition of the exceptional justifying causes, as allowable

¹ 1894, *People v. Swafford*, 63 Cal. 228, 3 Pac. 906 (a judicial order excluding all except judge, jurors, witnesses, and persons connected with the case, does not violate the requirement of publicity); 1887, *People v. Kerrigan*, 78 Id. 222, 14 Pac. 849 (so also for an order, to prevent disorder by the spectators, excluding all but court officers, reporters, and "friends of the defendant and persons necessary for her to have"); 1840, *Stone v. People*, 3 Ill. 326, 338. *Contra*: 1897, *People v. Yeager*, 113 Mich. 228, 71 N. W. 491 (under Const. Art. VI, § 20; following *People v. Murray*, 89 Id. 376, 60 N. W. 88, and holding invalid Act 406, § 18, of 1890: "Whenever it shall appear that, upon the trial of any cause, evidence of licentious, lascivious, degrading or peculiarly immoral acts or conduct, will probably be given, the judge presiding at such trial may, in his discretion, require and cause every person, except those necessarily in attendance thereof, to retire and absent himself or herself from the courtroom during such trial, or any portion thereof"; in the trial here, for assault with intent to rape, the Court had admitted the friends of both sides; this decision is deplorable).

² 1848, St. 11 & 12 Vict. c. 43, § 19 (the justices have power "in their discretion to order that no person shall have access to or remain in the room or building, if it appear to them that the ends of justice will be best answered by so doing"); commented on, with reference to later

statutes of 1896, in 100 Law Times, pp. 234, 267, 291; Colo. C. C. P. 1891, § 427 (it shall be the Court's duty to exclude persons not officers or connected with the case, on counsel's suggestion that the evidence "will be of such character that unnecessary publicity would operate injuriously on public morals"); Ga. Code 1895, § 3296 (in trials for "seduction or divorce or other case where the evidence is vulgar and obscene, or relates to the improper acts of the sexes, and tends to debauch the morals of the young," the trial Court has discretion to exclude "all or any portion of the audience"); Mich. Comp. L. 1897, § 11673 (on a charge of rape, seduction, etc., a committing magistrate may exclude all persons not officers of the court or required to attend); § 11663 (committing magistrate may exclude minors during the examination of witnesses); Utah Rev. St. 1896, § 696 ("In an action for divorce, criminal conversation, seduction, abortion, rape, or assault with intent to commit rape, the Court may in its discretion exclude all persons who are not directly interested therein, except jurors, witnesses, and officers of the court"); Wis. Stat. 1898, § 4789 (magistrate may exclude all bystanders and others not officers or otherwise required to be present, on examination for rape, assault with intent to rape, seduction, adultery, bastardy, "or other offense against chastity, morality, or decency").

under the present principle, seems to have been made. It would seem that exceptions could be recognized.²

§ 1836. *Same: (2) Preventing Publication of Proceedings.* Does the policy of publicity justify and demand, as a necessary deduction, the opportunity for the general public of ascertaining the tenor of the proceedings through contemporaneous printed reports, no less than through personal attendance in the court-room? Of the advantages gained by publicity, as enumerated above (*ante*, § 1834), it will be observed that the first sort (the tendency to improve the quality of testimony) is here equally to be expected, though not in the same degree, and that the second sort is also to be expected, though again hardly in the same degree. Publicity by contemporaneous reports, furthermore, is, on the one hand, the more effective sort, first in that an absolutely larger number of persons are certain to be reached, and secondly in that at the present day the attendance of representatives of all classes of the community at court sessions is (in cities at least) not as common as it formerly was. On the other hand, this mode of publicity is nowadays in our own country much less effective than in England, because ordinarily the newspapers (in cities at least) are so neglectful of the civic duties of their occupation that they give only scanty space to reports of legal proceedings; it is also less necessary because the exploitation of the news of crime usually occurs at the time of its commission and of its investigation by the police, so that its use in inducing informed persons to bring forward evidence has been mainly exhausted before the time of the trial; finally, it is less necessary, because the absence of this mode of publicity would still leave all the advantages and guarantees of the other mode in as ample a manner as they existed at common law before daily newspapers existed or followed this practice. There are thus balancing considerations; so that the sum of the case seems to be on the whole as it was first stated, namely, that this mode of securing publicity is calculated to secure the same kinds of advantages as publicity by personal attendance, though not to secure them in the same degree. It may be assumed, then, that the requirement of publicity calls also for the preservation of this mode of securing it, though not with the same urgency.

There may, then, properly be exceptions, *i. e.* situations in which the Court may forbid the printed publication of the proceedings pending the progress of the trial. It is usually assumed that such a publication is lawful unless a specific order of the Court has prohibited it. The question then is, For what reasons may a Court properly prohibit it? Of palpably just grounds,

² Since the subject is one rather of trial procedure than of evidence, no attempt has been made to collect all the precedents. Rulings dealing with the subject are as follows: 1897, *Reed v. State*, 147 Ind. 41, 46 N. E. 135 (in a room other than the usual one); 1877, *Mohon v. Harkreader*, 18 Kan. 383 (at a private law-office); 42, *Le Grange v. Ward*, 11 Oh. 257 (not at the county seat); 1892, *Bates v. Sabin*,

64 Vt. 511, 514, 24 Atl. 1013 (at the judge's house); 1895, *Sutton v. Snohomish*, 11 Wash. 24, 39 Pac. 293 (adjourning to the house of a witness on account of his illness, to take his testimony); 1898, *Selleck v. Janesville*, 100 Wis. 187, 75 N. W. 978 (adjourning to the plaintiff's house, on account of her illness, to take her testimony).

there are at least two: first that the proceeding is only a preliminary or *ex parte* one, and that a publication would therefore give an erroneous impression of the conduct of the parties; secondly, that conditions of popular emotion exist, amid which the publication before verdict rendered would tend to excite the public mind, to cause pressure upon the minds of the witnesses, the judge, and the jury, and thus to do injustice to one of the parties by preventing a fair and unbiassed investigation of the facts. The whole question, however, has not been and can hardly be developed in judicial precedent solely with reference to its evidential bearings; for it is commonly complicated with two other matters of law, — on the one hand, the law of libel by privileged reports, and, on the other hand, the law of contempt of court (i.e. obstruction of justice) by comment on a pending trial. For this reason, and for the reason that publicity has also an independent utility (*supra*, § 1834), it is hardly possible to say that there is upon this subject any rule having reference purely to the evidential bearings of the policy of publicity, and it is unlikely that there ever will be.¹

¹ Some of the precedents are as follows: *Eng.*: 1811, *R. v. Fisher*, 2 Camp. 543 (preliminary examination); 1817, *Watson's Trial*, 33 How. St. Tr. 80, 109, 111, 538 (order not to publish the proceedings till the close of the trial; here the prosecution's opening address was so published); 1817, *Brandreth's Trial*, *ib.* 776, 779 (order only); 1817, *Turner's Trial*, *ib.* 957 (same as in *Watson's case*); 1830, *Brant's and Thistlewood's Trials*, 33 *id.* 1162, 1335, 1543 (publication presumably in aid of the accused); *s. o.*, *R. v. Clement*, 4 B. & Ald. 218; see an examination of the earlier English cases by Mr.

(afterwards L. C. J.) Denman, in 40 *Edinb. Rev.* 197 ff. (1834); *U. S.*: 1858, *Dunham v. State*, 6 La. 245; 1851, *Timony's Case*, 23 N. H. 162 (bill in equity); 1896, *Re Hughes*, 8 N. M. 225, 43 Pac. 592; 1842, *U. S. v. Holmes*, 1 Wall. Jr. 1, 11 (reporters of newspapers were by order refused admission within the bar, except on condition of not publishing the proceedings pending trial; the Court construed the Act of March 2, 1831, *Rev. St.* § 725, as preventing them from prohibiting the publication); 1834, *State v. Frew*, 24 W. Va. 416.

SUB-TITLE IV: SEQUESTRATION¹ OF WITNESSES.

CHAPTER LXXI.

§ 1837. History; Statutes.
 § 1838. Probative Purpose and Operation.
 § 1839. Demandable as of Right.
 § 1840. Mode of Procedure.

§ 1841. Persons to be Included.
 § 1842. Disqualification as a Consequence of Disobedience.

§ 1837. *History; Statutes.* The expedient of separating a party's witnesses, in order to detect falsehood by exposing inconsistencies, seems to have been early discovered and long practised in various communities. Though probably not in itself older or more widespread than some other fundamental notions of proof, nevertheless its age and universality have come to be more emphasised in our own legal annals because of the instance recorded and handed down in the apocryphal Scriptures. The story of Daniel's judgment in Susanna's case has given to this expedient a unique and classical place in our law as well as in our literature:

The History of Susanna: "[Two elders coveted Susanna, a very fair woman and pure, the wife of Joacim; they tempted her, but she resisted; then they plotted, and charged her with adultery; and she was brought before the assembly;] and the elders said: 'As we walked in the garden [of Joacim] alone, this woman came in with two maids, and shut the garden doors, and sent the maids away. Then a young man, who there was hid, came unto her, and lay with her. Then we that stood in the corner of the garden, seeing this wickedness, ran unto them. And when we saw them together, the man we could not hold, for he was stronger than we and opened the door and leaped out. But having taken this woman, we asked who the young man was, but she would not tell us. These things do we testify.' Then the assembly believed them, as those that were the elders and judges of the people. . . . But [Daniel,] standing in the midst of them, said: . . . 'Are ye such fools, ye sons of Israel, that without examination or knowledge of the truth ye have condemned a daughter of Israel?' . . . Then Daniel said unto them, 'Put these two aside, one far from another, and I will examine them.' So when they were put asunder one from another, he called one of them, and said unto him: 'Now then, if thou hast seen her, tell me, under what tree sawest thou them companying together?' who answered, 'Under a mastick tree.' And Daniel said, 'Very well; thou hast lied against thine own head.' . . . So he put him aside, and commanded to bring the other, and said unto him, 'Now therefore tell me, under what tree didst thou take them companying together?' who answered, 'Under an holm tree.' Then said Daniel unto him, 'Well; thou hast also lied against thine own head.' . . . With that, all the assembly cried out with a loud voice, and praised God who saveth them that trust in him. And

¹ This term for the process of placing prospective witnesses out of the hearing of a testifying witness has precedent in the usage of Louisiana (37 La. An. 463), of Texas (3 S. W. 389), and of Georgia (Code Index, a. v. "Witness"), and seems preferable to any other; there is indeed no other single term in acceptance. In the Southern States, by an early usage of obscure origin, it is termed (e. g. in 2 Swan 257) "putting under the rule," the word "rule"

being merely the original English term for "order of court."

² Here Daniel, in several lines of vituperation, prophesies the elder's downfall; it would seem that this indicates a desire to anger and confuse the witness, preventing him from recollecting the details of his story if he had invented one.

³ Here again came disconcerting anathema.

they arose against the two elders, for Daniel had convicted them of false witness, by their own mouth. . . . From that day forth was Daniel had in great reputation in the sight of the people."

The story of Susanna's vindication, sanctioned as it was by its place in the Scriptures, came to serve as a powerful argument in English courts, after the spread of printing and the popularization of the Bible made the people at large familiar with it. From almost the beginning of our recorded trials, the story is found repeatedly cited, and was a favorite text of invocation for those who hoped in the same way to prove their innocence.⁴ Meantime, however, it is clear that the expedient already had in English practice an independent and continuous existence, even in the time of those earlier modes of trial which preceded the jury and were a part of our inheritance of the common Germanic law. It appears to have been customary to examine separately the secta-witnesses⁵ and the transaction- and document-witnesses,⁶ as well as other persons from whom a consistent story was expected in order to obtain legal action;⁷ and the process seems to have had substantially the same object and probative operation that we find in it to-day:

1818, *Asen*, Pl. Ab. 351, col. 1, London: "The justices immediately called the four witnesses before them and examined each of them separately as to the making, sealing, and place and time, how and when [an alleged deed of release was made], and other necessary circumstances touching the deed. . . . [Three of the four had said that] on

⁴ *Circa* 1460, Sir John Fortescue, L. C., in his *De Laudibus Legum Anglie*, c. 31, dilates on the marvel of its success. Other examples: 1608, Sir Walter Raleigh's Trial, Jardine Crim. Tr., I, 419 ("My lords, for the matter I desire, remember too the story of Susannah; she was falsely accused, and Daniel called the judges 'fools, because without examination of the truth they had condemned a daughter of Israel,' and he discovered the false witnesses by asking them questions"); 1683, Sidney's Trial, 9 How. St. Tr. 817, 861 (cited by Sidney, arguing for himself); 1684, Rosewell's Trial, 10 id. 147, 190; 1696, Cook's Trial, 13 id. 311, 348, note; Fenwick's Trial, ib. 537, 732; 1723, Braddon, Observations on the Earl of Essex's Murder, 9 id. 1232, 1276, 1283, 1294.

There appears to be no mention of it in the recorded trials about the time of the great dramatist's earlier life in London; but one likes to imagine that his "Daniel come to judgment" was inspired by the tale of some trial known to him in which appeal to this story had furnished a theme for popular discussion; it could not have been Raleigh's trial, for the lines in the "Merchant of Venice" had already been printed some three years.

⁵ See instances from Bracton's Note-Book, cited in Thayer, Preliminary Treatise on Evidence, 14.

⁶ See instances collected ib. 20, 22, 98; Pollock and Maitland, Hist. Eng. Law, II, 635, 637. To these add the following: 1158 (1), Wallingford and Oxford v. Abbott Walkelin, Bigelow's Plac. Ang. Norm. 196, 201 (controversy over a

right of market; a number of men of the county were chosen in order by their oaths to decide the claim, but "segregati, qui jurarent, diversis opinionibus causam suam confundebant," and their diversities are then stated in detail).

⁷ The expedient was used in examining the summoners in a writ of mortdancerster; Britton, b. III, c. 10, § 9 (Nichols, II, 92) (as to re-summons in mortdancerster, where the tenant denies that he was first summoned, "let the summoners be examined, and if upon examination they are found to disagree in the circumstances of the summoning, let the tenant be adjudged quit as to the default, and the summoners in mercy. And if they are found to agree, then he may defend the summons by his law"). See also, for this, Fleta, b. V, c. 3, § 7; b. VII, c. 6, §§ 12, 13, 20. A good example of this practice with the summoners occurs in Bracton's Note-Book, pl. 10, where "omnes discordant adinvicem." Compare also the proceeding with the grand jury, quoted in Stephen, History of the Criminal Law, I, 258; 1300+, MS. Lex Mercatoria, cited by Mr. A. T. Carter, in 17 L. Q. Rev. 247 (sequestration shown to be a part of the procedure in the early market-courts); 1630 (1), Hudson's Treatise on the Star Chamber, p. 204, quoted in Leadam's Select Cases in the Star Chamber, Seld. Soc. Pub. vol. XVI, p. xxxiv. In short, it would seem that the value of the practice was well understood on all hands, and that it was resorted to in any sort of proceeding in which it was appropriate.

⁸ As quoted in Thayer, *ubi supra*, 99.

a certain Thursday they all came together to the manor . . . and found there this said Richard, who showed them the said writing and said it was his deed. Each of them was asked, separately and by himself, at what hour they came there, and in what building in the manor Richard showed them the writing, and how he was dressed. One of them said that they came there in the morning before sunrise, and that the writing was shown to the four witnesses in the queen's chamber in the manor, and Richard was dressed in a German tunic *de medlete*, and was shod in white shoes. The second said that they came at six o'clock, and the writing was shown to the four witnesses at this hour in the hall of the manor. The third said that they came, all at the same time, at nine o'clock, and Richard showed them the writing in the stable of the manor and he had on a black cloak. The fourth witness, William de Codinton, said that he never came to the manor with the said three witnesses, and never knew or heard of the making of the writing "except from the others' report. And judgment was given against the deed.

It was natural enough, when trial by jury had developed and the jurors had come to rely much upon the testimony of witnesses brought into court before them (that is, perhaps, after the 1400s), that the ancient expedient should continue to be applied in these new conditions. From the beginning of this epoch, and onwards, it is clear that the practice was well known and often used.⁹ There is perhaps no testimonial experiment which, having as long a history, has persisted in this manner without essential change.

The practice of course crossed the water with the common law. To-day, in many jurisdictions of the United States and Canada, statutes have expressly (though unnecessarily) made provision for sequestration, usually concerning its employment before committing magistrates; and occasionally the statute serves to determine one of the mooted points hereafter to be

⁹ Examples: *Cron* 1480, Fortescue, *De Laudibus Legum*, c. 36; 1571, Duke of Norfolk's Trial, Jardine's *Crim. Tr.*, I, 191; 1600, Earl of Essex's Trial, *ib.* 349; 1645, *Guilliams v. Hulse*, 1 Sid. 181; 1694, *Roswell's Trial*, 10 How. St. Tr. 147, 160; 1696, *Charnock's Trial*, 12 id. 1396; 1764, *Canning's Trial*, 19 id. 330; 1775, *Trial of Maharajah Nundocomar*, 20 id. 364; 1793, *Hudson's Trial*, 23 id. 1021.

¹⁰ *Men. Rev. St.* 1902, c. 40, Rule 563 (the judge may order "some or all of the witnesses" to be removed, including "any party to the cause or his solicitor, intending or subpoenaed to give evidence"; or he may require the party to be examined before his other witnesses; and he may punish any witness who disobeys, and may "exclude the testimony of any witness who returns to or remains in the Court without leave of the judge"); *Ont. Rules of Court* 1897, § 547 ("The judge shall at the request of either party order a witness to be excluded," and also "If the judge deems it expedient, a party intending to give evidence; or he may require each party to be examined before the other witnesses in his behalf"; in discretion the judge may exclude the testimony of "any witness or party" who disobeys); *Alaska C. Cr. P.* 1900, §§ 314, 330 (like *Or. Annot. C.* 1892, §§ 1001, 831); *Ariz. P. C.* 1887, § 1246 (committing magistrate may exclude all witnesses while one is examined, and may also cause

them to be kept separate); § 1247 (he may also on defendant's request exclude all persons except prosecutor, counsel, officers having defendant in custody, and clerk); *Ark. Stats.* 1894, § 1995 (on accused's request, committing magistrate may exclude all persons except clerk, peace officer, prosecutor, accused, parties' attorneys, and witness under examination); § 1996 (he may also cause the witnesses to be kept separate from each other and out of hearing of the witness deposing); § 2043 ("If either party require it, the judge may exclude from the courtroom any witness of the adverse party not at the time under examination, so that he may not hear the testimony of the other witness"); *Cal. P. C.* 1872, § 867 (committing magistrate "may exclude all witnesses who have not been examined; he may also cause the witnesses to be kept separate, and to be prevented from conversing with each other until they are all examined"); § 868 (he "must also, upon the request of the defendant, exclude from the examination every person except his clerk, the prosecutor and his counsel, the attorney-general, the district attorney of the county, the defendant and his counsel, and the officers having the defendant in custody"); *C. C. P.* 1872, § 2043 ("If either party requires it, the judge may exclude from the courtroom any witness of the adverse party"; amended by the Commissioners in 1901, by add-

§ 1838. *Probative Purpose and Operation.* The process of sequestration consists merely in preventing one prospective witness from being taught by hearing another's testimony:

ing: "but a party to the action or proceeding cannot be so excluded, and if a corporation is a party thereto, it is entitled to the presence of one of its officers, to be designated by its attorney"; for the validity of this amendment, see *ante*, § 488; *Conn. Gen. St.* 1887, § 2016 (coroner may sequester witnesses); *Ga. Code* 1895, § 5280, Cr. C. § 1017 ("In all cases, either party has the right to have the witnesses of the other party examined out of the hearing of each other; the Court will take proper care to effect this object as far as practicable and convenient; but any mere irregularity shall not exclude the witness"); *Ida. Rev. St.* 1887, § 6075 (like Cal. C. C. P. § 2043); §§ 7874, 7875 (like Cal. P. C. §§ 867, 868); *Ill. Rev. St.* 1874, c. 261 (committing magistrate may exclude, during a witness' examination, other witnesses, or separate the witnesses so that they cannot converse with each other until they have been examined); *Is. Code* 1897, § 5225 (committing magistrate may exclude all witnesses except the one testifying, and may cause witnesses to be kept separate); § 5226 (he must also exclude on defendant's request all persons except the attorneys and certain officers); *Kan. Gen. St.* 1897, c. 102, § 50 (committing magistrate may in discretion exclude all witnesses not being examined, and "may direct the witnesses for or against the prisoner to be kept separate so that they cannot converse with each other until they shall have been examined"); *Ky. C. C. P.* 1895, § 601 (judge may order separation, not to include parties or court officers); *C. Cr. P.* §§ 62, 63 (committing magistrate may order separation, and must do so on request of either party; but not so as to exclude the defendant, his counsel, or the prosecutor); *Mass. St.* 1894, c. 536, § 4, *Rev. L.* 1902, c. 191, § 51 (separate examination authorized, in proceeding to free a person under restraint, of the person and of witnesses); *St.* 1894, c. 444, § 4, *Rev. L.* c. 32, § 3 (same for fire marshal's inquest); *Minn. Gen. St.* 1894, § 7145 (committing magistrate may in discretion exclude all witnesses not testifying, and may direct "the witnesses for or against the prisoner to be kept separate" until examined); *Mich. Comp. L.* 1897, § 11883 (committing magistrate may sequester witnesses); *Mont. P. C.* 1895, §§ 1678, 1679 (like Cal. P. C. §§ 867, 868); *C. C. P.* § 3371 (like Cal. C. C. P. § 2043); *Nebr. Comp. St.* 1899, § 7026 (committing magistrate, "if requested, or if he sees good cause," shall order separate examination, and separation of witnesses on one side from those on the other); *Nev. Gen. St.* 1885, § 4043 (during defendant's examination before committing magistrate, witnesses on either side shall not be present; and the magistrate may exclude all unexamined witnesses during the examination of one, and may cause witnesses to be kept separate and be prevented from conversing with each other until all are examined); § 4044 (he shall on de-

fendant's request exclude all persons except the clerk, prosecutor and counsel, attorney-general, district attorney of county, defendant and his counsel, and officer having him in custody); *N. H. Pub. St.* 1891, c. 232, § 11 (sequestration allowable on preliminary examination by magistrate); *N. M. Comp. L.* 1897, § 3584 (committing magistrate may exclude all unexamined witnesses during another's examination, and may keep witnesses apart and prevent them from conversing until all have been examined); *N. Y. C. Cr. P.* 1881, § 202 (committing magistrate may sequester witnesses while others are examined, and must do so while defendant is examined); *N. C. Code* 1883, § 1149 (before a coroner's inquest, no witnesses are to be present during accused's examination; during any witness' examination, others may be sequestered); *N. D. Rev. C.* 1895, §§ 7958, 7959 (like Cal. P. C. §§ 867, 868, adding, "and such other person as he may designate" after "defendant and his counsel"); *Oh. Rev. St.* 1898, § 7148 (committing magistrate may "if requested, or if there is good cause therefor, order separation of witnesses"); *Or. C. C. P.* 1892, § 631 (like Cal. C. C. P. § 2043); *C. Cr. P.* § 1601 (committing magistrate "may exclude the witnesses who have not been examined during the examination of the defendant or during the examination of a witness for the State or the defendant"); *Tenn. Code* 1896, § 4599 (party is not to be put under the rule when he is a witness); § 7020 (committing magistrate may sequester witnesses); *Tex. C. Cr. P.* 1895, § 699 (at either party's request, witnesses on both sides may be removed so as not to hear testimony of any other witness); § 700 (those on one side may or may not be separated from those on the other, as the Court directs); § 701 (party requesting separation may designate some or all for the purpose); § 702 (witnesses thus sequestered are to be instructed not to converse about the case nor to read reports of testimony); *Utah Rev. St.* 1898, § 3477 (like Cal. C. C. P. § 2043); §§ 4668, 4669 (like Cal. P. C. §§ 867, 868); § 696 (exclusion of spectators in trials involving indecencies; "provided that in any cause the Court may in its discretion, during the examination of a witness, exclude any and all other witnesses in the cause"); *Vt. Stats.* 1894, § 1235 (separation allowable in discretion, on demand of either party, in a county court); § 1962 (separate examination of witnesses demandable by either party in criminal cases); *Va. Code* 1887, § 3967 (witnesses may be sequestered by committing magistrate); *W. Va. Code* 1891, c. 155, § 13 (committing justice may sequester witnesses); *Wis. Stats.* 1898, § 4788 (committing magistrate may in discretion exclude witnesses other than the one examined, and may cause the separation of "the witnesses for or against the prisoner"); *Wyo. Rev. St.* 1887, § 3172 (like *Oh. Rev. St.* § 7148).

Circa 1460, Chief Justice Fortescue, *De Landibus Legum Angliæ*, c. 26: "And if necessity requires, the witnesses may be separated, until they have testified to whatever they intended, so that what one says shall not instruct or warn another how to testify consistently."

1834, Kirkpatrick, C. J., in *State v. Zellers*, 7 N. J. L. 226: "The less a witness hears of another's testimony, the more likely he is to declare his own knowledge simply and truthfully."

1872, Freeman, J., in *Wisner v. Maupin*, 2 Baxt. 342, 357: "The object being to prevent the witnesses with feelings interested from being prepared to meet the statements of witnesses already made, and to compel them to rely on their own memory for the accuracy of their statements without being warped or influenced in their statements by what they have already heard deposed."

1902, McClellan, C. J., in *Louisville & N. R. Co. v. York*, 128 Ala. 305, 30 So. 676: "The purpose to be subserved in putting witnesses under the rule is that they may not be able to strengthen or color their own testimony, or to testify to greater advantage in line with their bias, or to have their memories refreshed, sometimes unduly, by hearing the testimony of other witnesses; and it is legitimate argument against the veracity or fairness of a witness to say that his testimony has been developed along the lines of his inclination in the case by the opportunities he has had, from hearing the other witnesses, to refute them or to amplify his own statements to meet the exigencies of the trial."

But the probative service thereby rendered is somewhat different according as the witnesses separated are called for opposing parties or for the same parties.

(1) If the hearing of an *opposing witness* were permitted, the listening witness could thus ascertain the precise points of difference between their testimonies, and could shape his own testimony to better advantage for his cause. The process of separation, then, is here purely preventive; i. e. it is designed, like the rule against leading questions, to deprive the witness of suggestions as to the false shaping of his testimony.

(2) But the separation of *witnesses on the same side* may do something more than this. It is equally preventive, in that it deprives the later witness of the opportunity of shaping his testimony to correspond with that of the earlier one. But it is, additionally, detective in its effects; i. e. it exposes their difference of statement on points on which, had they truly spoken, they must have made identical statements. This variance of statements is the significant achievement of the witnesses' separation, and seems to rest for its probative cogency on two salient circumstances, namely, (a) that the witnesses speak upon the same side, and (b) that the subject of their statements is the details of a single occurrence. (a) The first circumstance serves to remove uncertainty, by fixing unmistakably upon one party's case the whole burden of error. Where two persons, claiming to have been present on the same occasion with equal opportunities of observation, are called upon opposite sides and contradict each other, the contradiction does not of itself establish anything; it may indicate that one of the two is falsifying, but it does not indicate one rather than the other as the falsifier; it is still open to either side to claim its witness as the truthful one, so that neither side is clearly fixed with the error or falsity. But where both speak for the same

party, contradicting each other, it is manifest without anything further that the error is upon that particular side; the result is achieved by mere comparison of statements, without the necessity of first granting credit to an opposing witness and without any of the troublesome uncertainty which arises from being forced to weigh their respective credits.¹ (b) The second circumstance, mentioned above, emphasizes the probability of a downright manufacture of testimony. The truth of the main fact is put forward by the party as confirmatively established by the harmony of their joint testimony; and, where two persons come purporting to have observed the same event in the same way, the details of that fact, necessarily and equally open to their observation at the same time, ought to produce the same harmony of impression, and therefore of testimony. If, then, that harmony disappears upon further questioning as to these details, one of two inferences follows: Either (b) there is an honest mistake, in observation or in memory on the part of one; but the former is less likely to the extent that the one fact was necessarily connected in observation with the other,² and the latter is almost impossible where (as is usual) the statements are positive, and therefore mere failure of memory does not serve to explain; moreover, even an honest mistake as to details shows the probability of a mistake on the main fact. Or, (bb) there is a collusive arrangement, or a deliberate intention by one, to testify falsely; for if, on connected matters of detail, which by the operation of the senses ought equally to have produced identical impressions and therefore identical statements, there is no harmony, then the apparent harmony of statement on the principal fact can be explained only³ as artificial (i. e.) as the result of an individual plan or a combination to manufacture false testimony. This not only discredits one or both of the witnesses in all their testimony, but also throws suspicion on the entire mass of evidence of that party, if this fabrication by the witnesses may seem to have been known to him. More concisely and less accurately: If matters A, B, C, and D must have happened together, then a disagreement as to the tenor of matters B, C, and D, by witnesses called on the same side to prove A, indicates probable perjury by one or more as to A, and possible subornation of perjury by the party.

The weight of this exposure of contrary statements is of course diminished according to the degree of possibility of honest mistake, which in turn depends upon the necessity of connection between the facts testified to and upon the extent to which one or more of the witnesses venture positive statements as to details. Moreover, the expedient is not invariably successful even where perjury does exist, because either a concerted working out of false details, or a cautious failure of memory, beyond the circle of the main fact, may sometimes baffle all efforts at detection. But when all allowances are made, it remains true that the expedient of sequestration is (next to cross-

¹ Compare the theory of inconsistent statements of the same witness (*ante*, § 1017).

² The well-known and common deceptions of the senses (as expounded in Mr. Sully's treatise

on Illusions and elsewhere) need not here be taken into account, because usually they may be supposed to have affected both witnesses equally.

³ Except for the alternative (b), *supra*.

examination) one of the greatest engines that the skill of man has ever invented for the detection of liars in a court of justice. Its supreme excellence consists in its simplicity and (so to speak) its automatism; for, while cross-examination, to be successful, often needs the rarest skill, and is always full of risk to its very employers, sequestration does its service with but little aid from the examiner, and can never, even when unsuccessful, do serious harm to those who have invoked it.

From the following passages some illustrations of its operation may be gathered:

1879, *Kerne's Trial*, 7 How. St. Tr. 707, 708; charge of being a priest; two women, Edwards and Jones, were offered to testify to hearing him say mass. *Defendant*: "I desire to ask her what discourse she had with Mary Jones, the other witness, for she has been instructing her what to say, and that they may be examined asunder"; which was granted. *L. C. J. Scroggs*: "Did she [Jones] tell you what she could say?" *Edwards*: "She did." *L. C. J.*: "What?" *Edwards*: "She went once to hearken, and she heard Mr. Kerne say something in Latin, which she said was mass." *L. C. J.*: "Call the other woman; you shall now see how these women agree." *Clerk*: "Call Mary Jones." *L. C. J.*: "Let the other woman [Edwards] go out. . . . What did you tell her you could say?" *Jones*: "I told her . . . he said somewhat aloud that I did not understand." *L. C. J.*: "Did you not tell Margaret Edwards that you heard him say mass?" *Jones*: "No, my lord." *L. C. J.*: "Call Margaret Edwards again. Margaret Edwards, did Mary Jones tell you that she heard Mr. Kerne say mass?" *Edwards*: "Yes, my lord." *Jones*: "No, I am sure I did not, for I never heard the word before, nor do not know what it means." *L. C. J.*: "So they contradict one another in that."

1688-1725, *Braddon's Observations on the Earl of Essex's Murder*, 9 How St. Tr. 1229, 1276; the Earl of Essex, in 1683, suspected of plotting with Protestants against Charles II, had been found dead in the Tower with his throat cut; it was given out as a suicide; but Braddon collected much evidence to prove that a band of ruffians, hired by the Papist Duke of York, who succeeded in 1685 as James II, had murdered the Earl; three of the guards had deposed, however, to giving the Earl a razor at his request just before his death. Braddon, who was convicted of seditious libel, afterwards published a defence, in which the guards' story is thus dealt with: "That this story, of the delivering the razor to my lord a little before his death, is the forgery of those who were privy to my lord's murder, appears very plain from the notorious contradictions as to the time of delivering this razor to my lord [for one said he delivered it the day previous, another put it at the early morning of the same day, and the third at a few moments before his death]. . . . If any gentleman shall say that all these three attendants upon my lord at the time of his death agree in this, viz. that there was a razor delivered to my lord when prisoner in the Tower, and that their contradictions are only in the point of time when this razor was delivered to his lordship—it is true they are [only] circumstantial contradictions in the time of delivering this razor to my lord of Essex. And the contradiction of the two elders, in their charge of adultery against Susanna, was only in point of the place where they took Susanna in adultery. For the first of those elders swore that they took Susanna in adultery under a mastick-tree; but the second swore it was under a holm-tree; but both these conspiring accusers agreed in the main, viz. that they took her in adultery. Yet nevertheless, by their contradictions as to the tree under which they pretended to have taken her in adultery, Daniel convinced the whole Court, which before had rashly condemned Susanna, that those two conspiring accusers had falsely sworn against Susanna. . . . And I never yet heard any person deny Daniel's wisdom and justice in this detection. . . . [Had the coroner, in the Earl's case, caused the three guards to be separately examined and their contradictions been exposed, then the jury must have believed] that

they were all these protageded falsely to swear what might influence the coroner and his jury to believe that my lord himself cut his own throat. . . . That those wardens and servant, who would have proved my lord *fals de se*, have for that purpose sworn what is false in every material part of their evidence, doth plainly appear from this one consideration or maxim relating to proofs, viz.: When two or more who pretend to be co-witnesses to a fact shall contradict one another in some material circumstance relating to that fact, those contradictions strongly conclude that they have sworn falsely."

1685, *Oates' Trial*, 10 How. St. Tr. 1079, 1168; in this trial the notorious perjurer was at last brought to book; the case turning upon the truth of Oates' statement that he was in London on a certain day, and his witnesses having differed widely in their description of his dress when he was seen by them, Oates complained: "What does it signify, my lord, whether the wig were long or short, black or brown?" L. C. J. *Jeffreys* replied: "We have no other way to detect perjuries but by these circumstances, . . . as in a controversy about words, were they spoken in Latin or in English, and so to all places and postures of sitting, riding, or the like; as you know the perjury of the elders in the case of *Sassaena* was by their different testimony in particular circumstances discovered."

§ 1839. *Demandable as of Right.* A difference of judicial opinion exists as to whether sequestration is demandable as of right, or is grantable only in the trial Court's discretion. It seems properly to be demandable as of right, precisely as is cross-examination. In the first place, it is simple and feasible. In the next place, it is so powerful and practical a weapon of defence that no contingency can justify its denial as being a mere formality or an empty sentimentality. In the third place, in the case when it is really useful (namely, a combination to perjure), it is almost the only hope of an innocent opponent. After all is said and done, the fact remains (as Sir James Stephen has declared,¹ out of a lengthy experience as a criminal judge) that successful perjury is always a possible feature of human justice. No rule, therefore, should ever be laid down which will by possibility deprive an opponent of the chance of exposing perjury. Finally, it cannot be left with the judge to say whether the resort to this expedient is needed; not even the claimant himself can know that it will do him service; he can merely hope for its success. He must be allowed to have the benefit of the chance, if he thinks that there is such a chance. To require him to show some probable need to the judge, and to leave to the latter the estimation of the need, is to misunderstand the whole virtue of the expedient, and to deny it in perhaps that very situation of forlorn hope and desperate extreme when it is most valuable and most demandable:

1870, *Sneed, J.*, in *Rainwater v. Elmore*, 1 Heisk. 363, 365: "The lawyer who has practised long in jury cases cannot have failed to observe that the practice of permitting witnesses to hear each other's testimony has often resulted in a great and gross abuse of public justice. Human nature is frail, and that frailty is as often illustrated in the witness box as elsewhere. The witness in an excited litigation often becomes the mere partisan of the litigant whose cause he represents. . . . [He often] lapses into the conviction that the scene before him is a mere tilt and tourney, in which he enters to overturn and counterveil the testimony of the adverse party. He has heard the evidence of his own party in regard to the transaction, and perhaps he remembers it somewhat differently; but a

¹ Hist. Crim. Law, I, 408 ("Under particular circumstances, no really effectual protection against perjury ever has been or ever can be devised").

conflict would be fatal, and he often reasons his flexible conscience into the opinion that his own memory is at fault and the statement of his confederate is the true version; and ingenuitly is taxed at once to strike it where it is vulnerable and to destroy it; a brief and whispered conference behind the bar, and he finds one of his own party who saw the transaction as he saw it; and the thing is done. Of what value is cross-examination — that to ignore the truth may now defy the onset of the most skillful cross-examination; and even he who would fain lean towards an honest story finds himself confounded, and often yields his own conviction, to adopt the strong, emphatic statements of another. The object of the trial is to elicit the truth; but under such circumstances and in an excited controversy the truth is as often smothered as disclosed. . . . This doctrine, that upon witnesses' separation, appears to be traceable to the darker ages of English jurisprudence. . . . We have no hesitation in declaring that such a doctrine cannot stand the test of principle, and that it is utterly incompatible with the perfect enjoyment of the right of a fair trial guaranteed by the laws to the citizens of this country."

The most that ought to be conceded to the judge is to refuse an order of sequestration where it does not appear to be asked in good faith, *i. e.* not in the honest hope of exposing false testimony, but merely to obstruct the trial or to embarrass the opponent's management of his case.

A few Courts concede that sequestration is demandable as of right.³ But the remainder, following the early English doctrine,⁴ hold it grantable only in the trial Court's discretion; ⁵ declaring usually, however, that in practice

³ 1837, *R. v. Murphy*, 3 C. & P. 307 ("almost a right for the opposite party"); 1852, *R. v. Newman*, 3 C. & P. 360 (ordered if the opponent insists, even where the witness is also the prosecutor); 1874, *Meeks v. State*, 51 Ga. 433, 432, *combie*; 1897, *Shaw v. State*, 102 id. 600, 59 S. E. 477; 1871, *Walker v. Com.*, 6 Bush 91, 62, 94, *combie*; 1881, *Salisbury v. Com.*, 79 Ky. 425, 423; 1884, *State v. Zellars*, 7 N. J. L. 234 ("the strict rule is that they [defendant's witnesses] should be out of court [during the prosecution's testimony]"); 1852, *Nelson v. State*, 2 Swan 337, 337; 1870, *Rainwater v. Kinore*, 1 Heisk. 363 (see quotation *supra*; but the motion must be supported by affidavit); 1869, *Gregg v. State*, 3 W. Va. 707, 709; more than a dozen other jurisdictions reach the same result by statute (*ante*, § 1837).

⁴ 1893, *Cook's Trial*, 13 How. St. Tr. 311, 349 (L. C. J. Treby: "It is not necessary to be granted for the asking; for we are not to discourage or cast any suspicion upon the witnesses, when there is nothing made out against them; but it is a favour that the Court may grant, and does grant sometimes, and now does it to you; though it be not of necessity"); 1696, *Vaughan's Trial*, ib. 486, 494 (L. C. J. Holt: "You cannot insist upon it as your right, but only a favour that we may grant"); 1741, *Gooder's Trial*, 17 id. 1093, 1018. It was said, however, to be granted as of right to the crown; yet this is doubtful. That it should be treated as a mere favor to the accused was natural enough in the 16th, when the accused (*ante*, § 373) could not as of right have his own wit-

ness sworn or even called. In the taking of evidence before the Houses of Parliament there was sequestration as a matter of course for all cases: 1811, *Berkeley Peerage Trial*, *Sherwood's Abstract*, 181; 1822, *Taylor v. Lawson*, 3 C. & P. 543.

⁵ Besides the following rulings, the statutes cited *ante*, § 1837, have often a bearing: 1849, *McLean v. State*, 16 Ala. 672, 673; 1867, *Wilson v. State*, 52 id. 299, 303 (but "should rarely if ever be withheld"); 1898, *McClellan v. State*, 117 id. 140, 23 So. 653; 1897, *People v. McCarty*, 117 Cal. 65, 48 Pac. 384; 1883, *Johnson v. State*, 14 Ga. 55, 63 (but intimating that it is the right of the prosecution); 1860, *Errissman v. Errissman*, 25 Ill. 126; 1850, *Porter v. State*, 2 Ind. 435 ("a favor, it is true, rarely refused"); 1898, *Parker v. U. S.*, 1 Ind. Terr. 592, 43 S. W. 856; 1871, *Habell v. Ream*, 31 La. 269, 290 (but it is "rarely withheld"); 1900, *State v. Davis*, 110 id. 746, 82 N. W. 338; 1895, *Kentucky Lumber Co. v. Abney*, — Ky. —, 31 S. W. 179; 1899, *Baker v. Com.*, — id. —, 50 S. W. 54; 1893, *State v. Hagan*, 45 La. An. 839, 840, 12 So. 329; 1908, *State v. Forbes*, 111 La. —, 35 So. 710; 1892, *Com. v. Folanabee*, 195 Mass. 274, 277, 29 N. E. 471; 1893, *Com. v. Thompson*, 159 id. 56, 58, 28 N. E. 1111; 1882, *People v. Hall*, 48 Mich. 482, 487, 12 N. W. 665, *combie*; 1887, *People v. Burns*, 67 id. 537, 35 N. W. 154; 1894, *People v. Machen*, 101 id. 400, 59 N. W. 644; 1895, *People v. Conditine*, 105 id. 149, 63 N. W. 196; 1895, *Johnston v. Ins. Co.*, 106 id. 96, 64 N. W. 5; 1860, *State v. Fitzsimmons*, 20 Mo. 226, 230; 1895, *State v. Duffey*,

it is never denied, at any rate for an accused in a criminal case. There is no reason for a distinction between civil and criminal cases; successful perjury is an equally deplorable result, in whatever form it overwhelms its victims.

§ 1840. *Mode of Procedure.* (1) The time for sequestration begins with the delivery of testimony upon the stand and ends with the close of testimony. It is therefore not appropriate during the reading of the pleadings or the opening address of counsel;¹ any danger of improper suggestions at such times is to be dealt with in other ways (*ante*, § 786). It continues for each witness after he has left the stand,² because it is frequently necessary to recall a witness in consequence of a later witness' testimony. It need not be demanded at the very opening of the testimony; at any time later, when the supposed exigency arises, the order may be requested.³

(2) The sequestration may be asked for by *either party*.⁴ But even though the party sees no exigency or does not care to incur the enmity of some opposing witness, or for other reasons fails to ask, the order may be made at the request of the jury,⁵ or by the judge of his own motion.⁶

(3) The *notification of withdrawal* is accomplished either by furnishing a list to the sheriff specifying the witnesses on either side and obtaining an order from the Court directing him to take them apart; or, more simply, by obtaining an order notifying all prospective witnesses to withdraw from the court-room:

1833, *Gantt, J., in Anon.*, 1 Hill S. C. 251, 254: "It is usual and proper, as was done in this case, to furnish a list so as to enable the sheriff to see that they withdraw. But the parties may, if they choose, decline making out lists, and by doing so they would be under the obligation of keeping their respective witnesses out of court. . . . But there is no necessity to put down the names of witnesses who are not in attendance; when they do attend, the party intending to swear them must either put their names on the list or see that they do not come into court before they are called to testify."

1858, *Hanly, J., in Golden v. State*, 10 Ark. 500, 506: "The course in such case is either to require the names of the witnesses to be stated by the counsel of the respective parties by whom they were summoned, and to direct the sheriff to keep them in a separate room until they are called for; or, more usually, to cause them to withdraw by an order from the bench accompanied with notice that if they remain they will not be examined."

(4) The process itself involves three parts: (a) preventing the prospective witnesses from consulting each other; (b) preventing them from hearing a

122 *id.* 549, 31 S. W. 22; 1894, *Birfield v. State*, 15 Neb. 484, 487, 19 N. W. 607; 1896, *Halbert v. Rosenbalm*, 49 *id.* 498, 506, 66 N. W. 622; 1894, *Murphy v. State*, 43 *id.* 34, 61 N. W. 491; 1896, *Chicago B. & Q. R. Co. v. Kellogg*, 54 *id.* 132, 74 N. W. 403; 1919, *State v. Sparrow*, 3 *Murph.* 487, *semble* (neither defendant nor prosecution may claim it as a right); 1870, *Cavazos v. Gonzalez*, 33 Tex. 133; 1902, *De Lucenay v. State*, — Tex. Cr. —, 69 S. W. 796; 1881, *People v. O'Loughlin*, 2 Utah 133, 144, 1 Pac. 653; 1881, *Benaway v. Coyne*, 3 *Chandl.* 214, 219.

² 1881, *Benaway v. Coyne*, 3 *Chandl. W.*

214, 219. The following ruling seems unsound: 1876, *Penniman v. Hill*, 24 W. R. 345, *Hall, V. C.* (not granted during the reading of affidavits).

³ 1874, *Boach v. State*, 41 Tex. 261, 263.

⁴ 1837, *Southey v. Nash*, 7 C. & P. 632 (here, after the defendant's own witnesses had testified).

⁵ This is assumed on all hands; the statutes cited *ante*, § 1837, usually mention it.

⁶ 1881, *Earl of Shaftesbury's Trial*, 8 *How. St. Tr.* 759, 778.

⁷ 1867, *Wilson v. State*, 52 Ala. 299, 300; 1880, *Ryan v. Couch*, 66 *id.* 244, 245.

testifying witness; (c) preventing them from consulting a witness who has left the stand; the last including consultation between witnesses who have left the stand, since they are still prospective witnesses.⁷

The first element is possibly not of great importance, because before trial there has been already unrestrained opportunity for consultation; the second element is the vital one; the third is scarcely less important. The prevention applies equally as between opposing witnesses and between witnesses for the same party; though, as noted already (*ante*, § 1838), it is the collusion of the latter that is mainly to be prevented. The prevention is accomplished usually by placing all the witnesses in a room separate from the trial-room, under charge of an officer, who is to restrain their departure and prohibit their conversation. This simple machinery enforces the rule in all three parts of its operation. Under varying conditions, the rigor of the rule in these details may no doubt be relaxed in the trial Court's discretion.⁸ But nothing should sanction any indirect method of conveying to the prospective witnesses information of the testimony already given. For example, it would seem obvious to good sense that the perusal of journals reporting the testimony should be forbidden.⁹ On the other hand, repeating hypothetically upon examination the possible words of a former witness without suggesting whether he actually used them, may be allowable.¹⁰

Whether an attorney in the cause may consult with a sequestered witness has been the subject of some difference of opinion;¹¹ the possibilities of abuse by unscrupulous persons (and by hypothesis there is about to be perjury, i. e. the rule is most needed for unscrupulous persons) are certainly great; and it seems clear, first, that it may not be done without leave of Court, and, secondly, that it may be done only aloud and in the presence of a court-officer; an honest attorney can hardly object to such regulations.

⁷ These three parts are sometimes set forth in the statutes cited *ante*, § 1837, though commonly only the first two are in terms stated; but the first, as ordinarily stated, includes the third. In judicial decisions these elements of the process are rarely stated in detail, but there can be no doubt that the common-law rule implies all three.

⁸ 1894, *Broyles v. Primock*, 97 Ga. 643, 25 S. E. 389 (the trial Court has discretion as to the instructions to be given to witnesses as to not communicating during adjournment); 1883, *Nelson v. State*, 2 Swan 327, 236 (whether they shall be locked up continuously, or be ordered to keep out of the court-house, or be allowed to disperse for meals, depends upon the trial Court's discretion).

⁹ *Contra*: 1861, *Com. v. Henry*, 2 All. 173, 178. The Texas statute provides against this.

¹⁰ 1900, *State v. Taylor*, 54 S. C. 360, 34 S. E. 369 (witnesses may be told, "either correctly or incorrectly, what another witness on the same side has testified to, with a view to test the correctness of the memory or the honesty of the witness"; here the question was allowed, "If your husband says . . . is he telling the truth

or a falsehood?"). Compare § 787, *ante*, § 18—, *post*, where other cases are collected.

¹¹ 1890, *Travelers Ins. Co. v. Sheppard*, 85 Ga. 781, 314, 12 S. E. 19 (whether an agent assisting in the cause may not for some purpose consult with the witnesses without leave, not decided); 1876, *White v. State*, 52 Miss. 216, 234 (counsel may consult with witness); 1884, *Allen v. State*, 63 id. 627, 629 (same); 1901, *Shaw v. State*, 79 id. 21, 30 So. 43 (the party may still consult with his witness); 1871, *Williams v. State*, 35 Tex. 286 (attorney may confer with the witness, while under the rule, "in a proper manner"); 1877, *Brown v. State*, 3 Tex. App. 294, 310 (conference is allowable only when held in the presence of an officer of the court); *Jones v. State*, *ibid.* 150, 153 ("the better practice" is to confer only in the presence "or at least by permission of the Court"); 1879, *Davis v. State*, 6 id. 196 (conference allowable in trial Court's discretion); 1890, *Holt v. State*, 9 id. 571, 580 (same for conference by defendant); 1883, *Dubose v. State*, 13 id. 416, 426 (trial Court's discretion); 1883, *Creswell v. State*, 14 id. 1, 16 (same); 1888, *Kennedy v. State*, 19 id. 618, 631 (same).

§ 1841. Persons to be included in the Order. (1) The party demanding the sequestration may not object to the Court's omission of certain persons from the rule. No doubt the exclusion of all may sometimes be vital to his plan; but no doubt also it usually is not; and the possibilities of abuse, by indiscriminate exclusion, would be so great that the omission of individuals from the rule may properly be left to its trial Court's discretion, without doing violence to the doctrine (*ante*, § 1839) that sequestration, as a general principle, is demandable of right. It seems to be universally conceded that the trial Court may authorize individual omissions.¹

(2) The party against whom the demand is made has no right to the omission of any specific person, other than himself and his counsel, from the order of exclusion; the trial Court's discretion here also must control. For example, it cannot be insisted that members of the party's family² or expert witnesses³ remain in court. Frequently, however, trial Courts sanction the omission of a prospective witness whose assistance in the management of the cause is under the circumstances indispensable.⁴ Under the English practice, where the attorney has no official status in the trial, his case was no different from that of other witnesses, and the trial Court's discretion might include him in the order of exclusion;⁵ on the other hand,

¹ Besides the following rulings, the statutes cited *ante*, § 1837, frequently deal with this point: 1899, *Riley v. State*, 66 Ala. 193, 194, 7 So. 149; *Barnes v. State*, 1b. 204, 206, 7 So. 38; 1899, *Webb v. State*, 100 Id. 47, 42, 14 So. 965 (sheriff); 1899, *Roberts v. State*, 122 Id. 47, 25 So. 239; 1900, *Hall v. State*, 137 Id. 44, 34 So. 681; 1892, *Vance v. State*, 56 Ark. 408, 19 S. W. 1866 (expert witnesses to sanity); 1846, *People v. Garnett*, 29 Cal. 622 (excepting the chief of police); 1893, *People v. Hong Ah Duck*, 61 Id. 287, 294; 1893, *People v. Sam Lung*, 70 Id. 318, 11 Pac. 673 (Garnett case approved); 1888, *Thomas v. State*, 27 Ga. 267, 296; 1876, *Clay Bank v. Kent*, 57 Id. 263; 1877, *Turbarville v. State*, 58 Id. 545; 1891, *Dale v. State*, 60 Id. 582, 557, 15 S. E. 287; 1893, *Central R. Co. v. Phillips*, 91 Id. 527, 527, 17 S. E. 232; 1897, *Shaw v. State*, 108 Id. 660, 29 S. E. 477 (though the exclusion is a right, the trial Court has a discretion; here the remaining of two witnesses to assist in the prosecution was held not improper); 1899, *Keller v. State*, 1b. 506, 31 S. E. 92; 1900, *Kelly v. State*, — Id. —, 45 S. E. 418; 1896, *Repub. v. Tsanikich*, 11 Haw. 241, 344; 1851, *Johnson v. State*, 2 Ind. 552; 1874, *State v. Baptiste*, 26 La. An. 134, 136 (physicians); 1882, *State v. Revella*, 34 Id. 291, 293; 1885, *State v. Ford*, 37 Id. 443, 443; 1890, *State v. Hughes*, 71 Mo. 633, 636; 1895, *State v. Whitworth*, 126 Id. 573, 29 S. W. 595 (father of the prosecutrix in a rape case); 1879, *McMillan v. State*, 7 Tex. App. 142, 144; 1891, *Johnson v. State*, 10 Id. 571, 577 (medical experts); 1884, *Spear v. State*, 16 Id. 98, 114 (same); 1896, *Leache v. State*, 22 Id. 279, 3 S. W. 339; 1893, *Demout v. State*, 29 Tex. Cr. 271, 45 S. W. 917; 1896, *Johnkan v. State*, — Id. —, 48 S. W. 181 (clerk of court); 1899, *Buchanan v. State*, — Id. —, 52 S. W. 769;

1881, *People v. O'Loughlin*, 8 Utah 133, 1 Pac. 688; 1877, *State v. Hopkins*, 50 Vt. 316, 322, 228 (here, the sheriff); 1896, *State v. Lockwood*, 58 Id. 378, 8 Atl. 589 (deputy sheriff); 1896, *State v. Ward*, 61 Id. 153, 179, 17 Atl. 483 (attorney not employed in the case); 1899, *Jackson v. Com.*, 96 Va. 107, 30 S. E. 452.

² 1899, *McGuff v. State*, 66 Ala. 147, 150, 7 So. 38; 1879, *People v. Sprague*, 53 Cal. 491; 1894, *May v. State*, 94 Ga. 76, 20 S. E. 251; *Hinkle v. State*, 1b. 595, 21 S. E. 595; 1896, *Bond v. State*, 20 Tex. App. 431, 437.

³ 1899, *Roberts v. State*, 122 Ala. 47, 25 So. 239. In *State v. Forbes*, 1903, 111 La. —, 35 So. 710, experts were excepted by consent.

⁴ 1848, *R. v. O'Brien*, 7 State Tr. n. s. 1, 46 (reporter to seditious speeches; being also engaged to report the evidence for the prosecution at the trial, he was not obliged to leave the court with the other witnesses; Blackburne, C. J.: "There is no stern rule of the kind; they are all subject to be modified by reasonable construction"); 1880, *Ryan v. Couch*, 64 Ala. 244, 248 (a witness who has "acquired such an intimate knowledge of the facts, by reason of having acted as the authorized agent of either of the parties, that his services are required by counsel," should not be excluded; here, the father of the absent plaintiff); 1893, *Central R. Co. v. Phillips*, 91 Ga. 523, 527, 17 S. E. 952; 1900, *Jacobs v. State*, — Tex. Cr. —, 59 S. W. 1118 (interpreter excepted); 1867, *The Bark Havre*, 1 Ben. 295, 306 (master of the vessel, being both owner's agent and witness, held improperly excluded by the commissioner taking testimony; "unless his contumacy compelled that course").

⁵ 1826, *Pomeroy v. Baddeley*, Ry. & Mo. 436 (Littledale, J., allowed an attorney to remain, "his assistance being in most cases necessary");

It seems clear that a counsel would never have been excluded, though the question seems not to have arisen there, since a counsel would hardly ever be a witness (*post*, § 1911). But in the United States, where the functions of attorney and counsel are not separated, the rule for counsel would of course apply, and a counsel of record in the cause should be permitted as of right to remain.⁶ The case of the party himself is more difficult. It is apparent that the danger of an attempt to falsify testimony and the utility of sequestration to expose it are most emphatic for a party who is a prospective witness.⁷ On the other hand, the party's aid in the conduct of the cause may be indispensable, and his absence is in any case hardly consistent with his general right to protect his interests by watching the conduct of the trial; in the United States, or in most parts of it, these considerations (looking to the ordinary relations of client and counsel) are probably more forcible than in England, where the counsel has full independence and professional authority. The simple solution, avoiding both horns of the dilemma, would be to exempt the party from the order of exclusion, but to require him to take the stand first of the witnesses on his side; on the principle that, though he has the right to be present, yet he has also the duty to do all that is feasible towards preventing suspicion and subserving the opponent's right to sequestration. This particular solution, however, seems not yet to have been reached by any Court.⁸ A few Courts treat the party upon the footing of other witnesses;⁹ but others declare him entitled of right to remain, ordinarily or invariably,¹⁰ and the latter view has been generally preferred in legislation.

1881, *Everett v. Lowdham*, 5 C. & P. 61 (Bomanquet, J., allowed him "under the circumstances" to remain).

⁶ 1841, *State v. Brookshire*, 2 Ala. 308; 1872, *Wiener v. Maupin*, 2 Baxt. 342, 357. *Contra*: 1872, *Powell v. State*, 13 Tex. App. 244, 252 (depends on discretion). The statutes cited *ante*, § 1837, often expressly provide for this point.

⁷ 1872, *Freeman, J.*, in *Wiener v. Maupin*, 2 Baxt. 342, 357 ("The reason of the rule applies with equal, if not more, force to their case than to the disinterested witness"); 1881, *Hargis, J.*, in *Salisbury v. Com.*, 79 Ky. 425, 432 ("He of all others, except the wilfully corrupt, is most obnoxious to the rule").

⁸ But it has been suggested: 1874, *Tripp, J.*, in *Tift v. Jones*, 52 Ga. 538, 542 ("It would be a proper rule that such party should be first examined, unless there be reasons to the contrary, in the absence of his other witnesses; this would preserve his right to be present in the court during the whole trial of his case").

Compare the rule of some States that a party must take the stand before his other witnesses, (*post*, § 1849). This aims at the same end.

⁹ Besides the rulings in this note and the next, the statutes cited *ante*, § 1837, often make express provision: 1876, *Penniman v. Hill*, 24 W. R. 245 (Hall, V. C., said that parties may equally be excluded); 1879, *Randolph v. McCain*, 34 Ark. 686 (Eakin, J.: "It would be dangerous to give him, as a matter of right, exceptional advantages,

when he of all others, if available at all by the temptation to concoct evidence, would have the greatest interest in doing so"); 1874, *Tift v. Jones*, 52 Ga. 538, 540, 542; 1881, *Salisbury v. Com.*, 79 Ky. 425, 432 (prosecuting witness); 1872, *Wiener v. Maupin*, 2 Baxt. 342, 356 (the Tennessee statute cited *ante*, § 1837, was passed to override this decision; see the citation in the next note).

¹⁰ *Eng.*: 1853, *Charnock v. Dewings*, 3 C. & K. 378 (Talfourd, J., held "that on constitutional grounds he had no authority to order the defendants to leave the court so long as they behaved with propriety"); 1854, *Constance v. Brain*, 3 Jur. n.s. 1145; 1858, *Selfe v. Isaacson*, 1 F. & F. 194; *Can.*: 1899, *Bird v. Veith*, 7 Br. C. 31 (parties are not to be excluded, "unless some good reason is shown"); 1879, *Sivewright v. Sivewright*, 8 Ont. Pr. 61 (examiner at chambers; exclusion held improper on the facts); 1885, *Culverwell v. Birney*, 10 Id. 575 (exclusion held proper on the facts); *U. S.*: 1880, *Ryan v. Couch*, 66 Ala. 244, 248; 1880, *Chester v. Bowen*, 55 Cal. 46, 48, *semble*; 1895, *Kentucky Lumber Co. v. Abney*, — Ky. —, 31 S. W. 279 (but the chief officer of a corporation-party is not a party); 1892, *Richards v. Duce*, 91 Tenn. 723, 724, 20 S. W. 533 (exclusion of one co-defendant during testimony of another, improper); 1897, *Lenoir Car Co. v. Smith*, 100 Tenn. 127, 42 S. W. 879 (an officer of a corporation "charged with the duty of looking after its interests in a pending

§ 1842. *Disqualification as a Consequence of Disobedience.* If the order of exclusion is knowingly disobeyed, the Court unquestionably has the power to refuse to admit the disobedient person to testify; and it ought to exercise this power, in its discretion, whenever there appears any reason to believe that the proposed testimony was important, that the witness had heard the other testimony, and that he wished to know its tenor. It may be assumed that the power should not be exercised unless the witness, as above said, was aware of the order of exclusion;¹ for the burden of causing every witness to be notified, and thus of preventing inadvertent violation, may fairly be placed upon the party demanding the sequestration. But granting this much, it follows that the most appropriate and only effective means of enforcing an order of Court and of securing the right of sequestration is to have it clearly understood that disqualification as a witness may follow disobedience:

1874, *Trippe, J.*, in *Bird v. State*, 50 Ga. 585, 586 (the counsel for defendant stated when the rule for separation was made that he had no witnesses, and was warned by the Court that if he later brought any they would be excluded; later, he brought two, whom he admitted were known to him when the order was made): "It was said a fine might have been imposed. That would not have vindicated the rule of law involved. . . . Either party would think it but poor compensation for the loss of an important right in a trial to have the other party or counsel fined. Courts should have summary power to enforce the rules of law in such cases, so that by their practical working they may be vindicated in all their integrity. If any right were lost, it was wilfully and defiantly thrown away."

There is, . . . doubt, something to be said against this rigorous doctrine, at least where the disobedience has occurred without any connivance of the opposing party and solely through the witness' own contumacy:

1840, *Napton, J.*, in *Keith v. Wilson*, 6 Mo. 435, 441: "Will it be contended that a party is bound to watch his witnesses to prevent their misconduct? . . . If a witness' contumacy be a sufficient ground to warrant the Court in excluding him altogether, notwithstanding it appears that it was through no connivance or default of the party to the suit, an unavailing and reluctant witness might, by wilful and intentional disobedience to the order, at any time deprive the party of the benefit of his testimony."

1849, *Caldwell, J.*, in *Laughlin v. State*, 18 Oh. 90, 102: "When we consider the little control that a party can have over his witnesses; the little attention he is likely to be able to give to their movements; the crowds and the confusion that generally exist during exciting trials; the questions that may arise on the trial that could not be anticipated, and which may require bystanders to be called in as witnesses, who have been present and heard the other witnesses testify, — these, and other considerations which might be presented, render it difficult and we think impossible to establish any general rule of exclusion that would not in many cases deprive parties of important and necessary testimony for the fair presentation of their cause."

1880, *Crawford, J.*, in *Rocks v. State*, 65 Ga. 280: "To exclude him might deny trial" is within the statute giving parties the right to remain; otherwise "corporations will be excluded from its benefits altogether"; 1899, *Heaton v. Dennis*, 103 id. 155, 52 S. W. 175 (principal beneficiary under a will is a party, under the statute); add the statutes cited *ante*, § 1837. The party's obedience to an improper order of exclusion does not prevent him from taking advantage of his objection: *Heaton v. Dennis*, *supra*.
¹ And there must of course have been an express order of sequestration; 1883, *R. v. Furley*, 5 State Tr. n. s. 543, 544.

the party of the testimony of the only person in the world by whom he could prove his innocence."

But there are several answers to these arguments. In the first place, the fact that the opposing party would be deprived of valuable testimony is in itself no wrong, provided he himself has by connivance invited it. In the next place, it is usually very difficult to prove this connivance, and to require it proved might entirely nullify the rule. Again, if the witness is in fact open to the charge of fraudulent evasion, he is an unsafe and untrustworthy witness; a party has no absolute right to the testimony of a trickster, and he cannot complain, even though himself innocent, at the loss of tainted testimony; the argument of some of the judges above quoted assumes erroneously that the party could certainly prove something in his favor by a witness whose conduct has already suggested the strong probability that he will falsify. Furthermore, of two innocent parties, the contingency of suffering should clearly be for him whose witness has been in fault; and this is particularly so where it was also that party's duty, at whatever inconvenience, to secure the obedience of his own witnesses to a plain and simple order of Court. The refusal to admit to testify need of course not be an absolute and peremptory consequence of disobedience. No one has ever contended for this; the trial Court, on all the circumstances, is to determine whether this measure should be taken. But it seems clear that the Court may properly take the measure in its discretion, even where no connivance by the party is made to appear.

The difference of judicial opinion in the precedents arises chiefly over the case of a witness' wilful disobedience without the party's connivance. The English and Canadian rulings have fluctuated, and the question seems there not to be settled.³ In the United States, the great majority of Courts hold in general that the Court may in discretion disqualify the witness; some of these Courts, however, making the proviso that the party must have connived.⁴ The other Courts seem to forbid in general terms the disqualifica-

³ England: 1775, *Cardigan Case*, 3 Doug. R. C., 2d ed., 174, 219 (may be excluded); 1776, *Worcester Case*, ib. 290, 245 (same); 1790, *Doe v. Cox*, Cliff. R. C. 114 (Goold, J., refused to admit the witness, but the Court in banc held this erroneous); 1819, *R. v. Webb*, per Best, J., cited in 3 Stark. Evid. 1733 (may be excluded); 1831, *Attorney-General v. Bulpitt*, 9 Price 4 (Exchequer; "It is a sacred and inflexible rule" that the witness shall be rejected); 1839, *R. v. Boyle*, 1 Lew. Cr. C. 325, Bayley, J., and others (must be admitted); 1839, *R. v. Colley*, M. & M. 339 (Littledale & Gascolee, J., held it discretionary); 1830, *Parker v. W. William*, 4 Moo. & P. 480, 6 Bing. 683, C. P. (exclusion rests with the judge's discretion; the Exchequer rule being conceded to require exclusion); 1831, *Beamon v. Ellice*, 4 C. & P. 595 (Taunton, J., admitted the witness, with hesitation); 1836, *Cook v. Kethercote*, 6 C. & P. 741 (Alderson, B., refused to exclude the witness); 1836, *Thomas v. David*, 7 M. 260 (Coleridge, J., said that it was "entirely in the discretion of the judge"); 1842, *Chandler v. Horne*, 2 Moo. & Rob. 433 (Erskine, J., said that the rule of discretion formerly prevailed, but now it was settled that the witness could not be excluded); 1852, *Cobbett v. Hudson*, 1 E. & B. 11 (Campbell, L. C. J., said that "the better opinion" was that the judge could not exclude the witness).

Canada: Ont.: 1853, *Strachan v. Jones*, 3 U. C. C. P. 253 (a party held improperly excluded); 1853, *McFarlane v. Martin*, ib. 64 (party held properly admitted); 1853, *Winter v. Mixer*, 10 U. C. Q. B. 110 (trial Court has discretion); 1855, *Mahoney v. Macdonnell*, 9 Ont. 137 (exclusion held improper; here the witness was a co-party); 1856, *Black v. Beane*, 12 id. 523 (exclusion held improper); *P. E. I.*: 1854, *Young v. Young*, 1 P. E. I. 96 (the judge has the power to excuse for disobedience; here, a party).

⁴ In the following citations the rule is understood to be laid down generally, except where

tion of the witness; though in some of them it can hardly be doubted that a proviso as to the party's connivance would be enforced.⁴ On the whole,

the proviso is expressly noted; but in some of the rulings probably the proviso would have been stated if the facts had called for it: *Ala.*: 1841, *State v. Brookshire*, 2 Ala. 308; 1888, *Sidgreaves v. Wyatt*, 23 Id. 617; 1887, *Montgomery v. State*, 40 Id. 684, 687; 1870, *Hall v. State*, 44 Id. 393, 395; 1878, *Wilson v. State*, 52 Id. 399, 308; 1892, *Thorn v. Kemp*, 96 Id. 417, 422, 13 So. 749; 1898, *Sanders v. State*, 106 Id. 4, 16 So. 935; 1902, *Hall v. State*, 187 Id. 44, 34 So. 661; 1903, *Jarvis v. State*, *ib.* —, 34 So. 1025; *Ark.*: 1885, *Pleasant v. State*, 15 Ark. 624; 1888, *Golden v. State*, 19 Id. 590, 597 ("the right of excluding witnesses for disobedience, though well established, is rarely exercised"; here, not exercised against one who was not known to be needed); *Cal.*: 1903, *Behrman v. Terry*, 31 Colo. 155, 71 Pac. 1116 (in the absence of connivance by the party, the witness cannot be excluded); 1903, *Vickers v. People*, *ib.* 491, 73 Pac. 845 (exclusion held improper, where the rule was violated without connivance of the party calling); *Ga.*: 1874, *Bird v. State*, 50 Ga. 588, 589; 1881, *Butts v. State*, 66 Id. 506, 513, *semble*; 1881, *Lassiter v. State*, 67 Id. 739, *semble* (see the construction of this case in *Grant v. State*, *infra*); 1886, *Etheridge v. Hobbs*, 77 Id. 531, 534, 3 S. E. 251; 1887, *Carson v. State*, 80 Id. 170, 5 S. E. 295, *semble*; 1890, *Bone v. State*, 86 Id. 108, 121, 12 S. E. 205; 1892, *Grant v. State*, 89 Id. 636, 12 S. E. 1045; 1893, *Perguson v. Etcherson*, 91 Id. 785, 787, 16 S. E. 29; *Ill.*: 1880, *Bullinar v. People*, 36 Ill. 324, 329; 1896, *Goos Bow v. People*, 160 Id. 438, 43 N. E. 593; *Ind.*: 1889, *Porter v. State*, 3 Ind. 428; 1900, *Jackson v. State*, 14 Id. 327; *Kan.*: 1878, *Davenport v. Ogg*, 15 Kan. 345 (may be excluded if the party shows the disobedience); *Ky.*: 1886, *Haskins v. Com.* — Ky. —, 1 S. W. 739; 1901, *Gilbert v. Com.*, 111 Id. 788, 64 S. W. 844; 1903, *Creshaw v. Gardner*, — Id. —, 78 S. W. 26 (exclusion of a witness knowingly and without excuse omitted from the order by the party calling him, held proper in discretion); *La.*: 1880, *State v. Gore*, 15 La. An. 79; 1884, *State v. Watson*, 36 Id. 148; 1898, *State v. Cole*, 38 Id. 843, 845; 1893, *State v. Hagan*, 45 Id. 829, 841, 12 So. 929; 1895, *State v. Jones*, 47 Id. 1824, 16 So. 515; *Mass.*: 1887, *Com. v. Crowley*, 169 Mass. 121, 46 N. E. 415 (excluded, in the trial Court's discretion, where the counsel was in fault in knowingly allowing the witness to stay); *Mich.*: 1897, *People v. Piper*, 112 Mich. 646, 71 N. W. 175 (not excluded, if party is not conniving); *Miss.*: 1833, *Sartorius v. State*, 24 Miss. 602, 606; 1901, *Taylor v. State*, — Id. —, 30 So. 657 (in discretion); *Mo.*: 1888, *Dyer v. Morris*, 4 Mo. 214, 216; 1840, *Keith v. Wilson*, 6 Id. 426, 441 (except where the party is not in fault by laches or connivance); 1890, *State v. Fitzsimmons*, 30 Id. 236, 239; 1888, *O'Bryan v. Allen*, 25 Id. 68, 74, 8 S. W. 225 (like *Keith v. Wilson*); 1894, *State v. Gezell*, 124 Id. 381, 596, 27 S. W. 1101 (same); 1895, *State v. David*, 131 Id. 386, 23 S. W. 29; 1900, *State v. Sumpter*, 153 Id. 426, 58 S. W. 76 (inadvertent violation without

party's connivance, no ground for exclusion); 1900, *State v. Fannon*, 156 Id. 149, 59 S. W. 75 (exclusion where the party was not conniving, held improper); *Nebr.*: 1901, *Mangold v. Off.*, 68 Nebr. 397, 88 N. W. 807 (exclusion is proper, unless the witness' conduct was "without the knowledge, consent, or connivance" of the party); 1901, *Clemmons v. Clemmons*, — Id. —, 86 N. W. 404 (inadvertent disobedience; exclusion held improper on the facts); *Oh.*: 1849, *Laughlin v. State*, 18 Oh. 99, 101; 1883, *Dickson v. State*, 29 Oh. St. 73, 77 (except where there has been no procurement or connivance of the party); *Or.*: 1879, *Hubbard v. Hubbard*, 7 Or. 43, 47 (unless there is complicity by the party); *Pa.*: 1836, *Karl's Trial*, pamph., 10; *S. C.*: 1832, *Anon.*, 1 Hill 251, 255 (except where there is no fault in the party); *Tenn.*: 1880, *Hmth v. State*, 4 Lea 423, 430 (the discretion was held improperly exercised to exclude a witness unknown to the party at the time of the order); *Tex.*: 1874, *Goins v. State*, 41 Tex. 324, 326, *semble*; 1875, *Sherwood v. State*, 42 Id. 496, 401; 1878, *Ham v. State*, 4 Tex. App. 645, 673; 1890, *Walling v. State*, 7 Id. 625; *Utah v. State*, 9 Id. 266, 370; 1881, *Avery v. State*, 10 Id. 199, 213; 1896, *Hill v. State*, 23 Id. 579, 3 S. W. 764, *semble*; 1901, *Caviness v. State*, 43 Tex. Cr. 420, 60 S. W. 553 (witness held improperly excluded on the facts, the party not conniving); *U. S.*: 1893, *Holder v. U. S.*, 150 U. S. 91, 14 Sup. 10 (may be excluded in discretion, but not merely and always for violation).

⁴ *Cal.*: 1882, *People v. Boscovitch*, 20 Cal. 426; *Ga.*: 1853, *Johnson v. State*, 14 Ga. 55, 61, *semble*; 1880, *Rooks v. State*, 45 Id. 330; 1890, *Cunningham v. State*, 97 Id. 214, 22 S. E. 964 (distinguishing *Perguson v. Etcherson*, 91 Ga. 785, 16 S. E. 23); 1903, *McWhorter v. State*, — Id. —, 44 S. E. 573 (not excluded, on the facts); *Ind.*: 1886, *Horne v. Williams*, 12 Ind. 326 (undecided); 1883, *Davis v. Byrd*, 94 Id. 695 (at least where the party himself is not in fault; repudiating prior intimations to the contrary); 1884, *Bark v. Andis*, 98 Id. 29, 64 (same); 1887, *State v. Thomas*, 111 Id. 518, 13 N. E. 35 (same); *Pa.*: 1860, *Grimes v. Martin*, 10 Ia. 247, 249; 1900, *State v. Kincock*, 111 Id. 630, 88 N. W. 724 (mere disobedience of witness, not of itself sufficient); *Ky.*: 1899, *Parker v. Com.* — Ky. —, 81 S. W. 573 (a co-indictor remained, the defendant not explaining that he wished to use the other as a witness; disqualification of co-defendant held erroneous on the facts); *Md.*: 1897, *Parker v. State*, 67 Md. 323, 321, 10 Atl. 219; *Miss.*: 1897, *Perguson v. Brown*, 78 Miss. 214, 21 So. 608; 1898, *Timberlake v. Thayer*, 76 Id. 76, 23 So. 767; 1904, *Illinois C. R. Co. v. Ely*, — Id. —, 36 So. 673 (exclusion for disobedience, held improper); *Neu.*: 1886, *State v. Salgo*, 3 Nev. 321, 323; *N. C.*: 1919, *State v. Sparrow*, 3 Murph. 487; *Tenn.*: 1834, *Woods v. M'Pherson*, Felt 371, *semble*; 1901, *Pile v. State*, 107 Tenn. 322, 44 S. W. 476 (witness inadvertently vio-

then, the Courts occupy a common ground where there has been fault in the party; at one extreme stand a few Courts denying disqualification even in that case; at the other extreme stand probably the majority of Courts, permitting disqualification even without the party's fault.

holding the rule, held improperly excluded); 447; Wash.: 1898, State v. Lee Deen, 7 Wash. Va.: 1849, Hopper v. Com., 6 Gratt. 684 (ob- 308, 24 Pac. 1108 (it is erroneous to exclude the- 1879, Hey's Case, 32 id. 246, 248, *semble*; witness, unless the party is in fault); W. Va.: 1894, Com. v. Brown, 90 Va. 671, 678, 19 S. E. 1889, Gregg v. State, 3 W. Va. 708, *semble*.

SUB-TITLE V: PRELIMINARY NOTICE, OR DISCOVERY, TO THE OPPONENT.

CHAPTER LXII.

A. GENERAL POLICY AND PRINCIPLE.

§ 1845. Notice or Discovery of Evidence to the Opponent before Trial; (1) at Common Law.

§ 1846. Same: (2) in Chancery.

§ 1847. Policy of Exceptions to the Rule (Accused Person; Civil Parties; Documents; Circumstantial Evidence of Character, etc.).

§ 1848. Distinction between a Rule of Evidence and a Rule of Pleading or Procedure.

B. SPECIFIC EXCEPTIONS TO THE RULE.

1. Circumstantial Evidence.

§ 1849. Evidential Facts excluded because of Unfair Surprise.

2. Testimonial Evidence.

§ 1850. Criminal Cases; Listing or Indorsing the Prosecution's Witnesses; (1) Common-law Rule.

§ 1851. Same: (II) Statutory Rule of Procedure allowing List of Witnesses.

§ 1852. Same: (1) List of Grand-Jury Witnesses.

§ 1853. Same: (2) List of Witnesses Known to Prosecuting Attorney.

§ 1854. Same: (2) List of All Prospective Witnesses.

§ 1855. Same: (III) Statutory Rule of Evidence expressly excluding Unlisted Witnesses.

§ 1856. Civil Cases; (1) Discovery in Equity; (2) Statutory Interrogatories to a Party; (3) Names of Witnesses.

1. Documents.

§ 1857. Inspection before Trial by Discovery in Equity.

§ 1858. Inspection at Common Law (Oyer and Proferat; Motion to Produce; Documents of Common Interest or of Trusteeship; Corporate Records; Insurance Policies).

§ 1859. Inspection under Statutes.

§ 1860. Same: Other Principles discriminated.

§ 1861. Document shown to Opponent at Trial; Opponent's Inspection as making it evidence.

4. Premises, Chattels, and Bodily Members.

§ 1862. Inspection before Trial.

A. GENERAL POLICY AND PRINCIPLE.

§ 1845. Notice or Discovery of Evidence to the Opponent before Trial;

(1) At Common Law. We are here concerned with the question whether the danger of unfair surprise is a ground for excluding unexpected evidence or for furnishing the means of ascertaining before trial the tenor of the opponent's evidence. The question may be considered from two points of view, first, that of evidence in general, i. e. the ascertaining of the whole truth at the time of trial, and, secondly, that of litigation in general, i. e. the just settlement of controversies by the most efficacious and expeditious methods of procedure of all sorts.

(A) So far as concerns the *process of ascertaining truth at the time of the trial itself*, one thing seems clear, namely, that surprise is in itself no just ground for showing consideration to the party surprised. On the supposition that the intended evidence is true, and that its force is all that is claimed for it, the opponent cannot be said to suffer any real harm. The truth can produce no harm.¹ It may overthrow the opponent's claim; but, from the

¹ "How can a man be caught in the truth?" asked the Earl of Castlemaine (quoted ante, § 1002).

point of view of the administrators of justice, it is no more than right that this should result. The opponent may indeed be surprised to find that the truth has been discovered, or that a truth, unknown to him, bears against his case; but he cannot complain, when the truth has been brought to light, merely on the score that this was unexpected by him. If it was not, then so much the worse for his untrue and unjust claim and so much the better for truth and justice.

It is apparent, then, that surprise can be no just ground for objection, unless we abandon the supposition that the surprising evidence is *true*. Assume, then, that it is *false*. It may be false in two ways,—either in the sense that it is totally untrue, or in the sense that as a bare fact it exists but yet would appear to have a less or different inferential force if other facts could be known (*ante*, § 34). For example, it is proposed to show that the opponent sent a letter, now lost, admitting the correctness of the present claim against him; assume that no such letter was written. Or, it is proposed to show that the accused, shortly after the homicide, left the town at night; assume that this is true, but that in fact he was called away suddenly to the bedside of his dying mother. Of this latter sort of facts are all testimonial statements of witnesses regarded as impeachable by the witness' character (*ante*, § 875); for it is an unquestionable fact that the tribunal has before it on the stand a competent person making assertions which tend to show that certain events took place; but if the mendacious disposition of the witness could be made to appear, the inference that the events occurred as he states would be materially weakened or even totally destroyed.

Let us assume, then, that the data offered in evidence against the opponent are (if the tribunal could only know it) false in one of these two senses. The opponent's situation is now vitally changed. On the former assumption, it would have done him no good to be notified in advance; he could not have altered the truth, and if he had wished to, the law could not lend him aid to that end. But now it is not the truth that he struggles against, but falsity. Had he but known in season that these fabricated facts were to be offered in evidence against him, he could have exposed the fabrication. He could have secured witnesses to show (in the above examples) that no letter of that date and place could have been written, because he was at the time absent or ill; that his mother was dying and the family had telegraphed for him; that the witness telling such a plausible story was mendacious in character or was seduced by a bribe. All this he was in truth and justice entitled to show; yet for all this some notice of the evidence, obtained in advance, was perhaps essential. Notice might have saved him, through the truth; without notice, he may be overcome by falsities.

It is apparent, then, that any rule requiring notice in order to avoid unfair surprise must rest on the assumption that it is to serve as a prophylactic or protection against possible falsities, and not merely as a warning of evidential verities. It follows, therefore, that notice cannot in itself and always be required for the purposes of doing justice, but that on principle it

need be required *only when there is a danger*, more or less probable according to the showings of experience, *of falsities whose details could not otherwise have been anticipated and prepared against.*

Can any precise and practical definition be made of the situations in which this danger can be predicated? It seems to be difficult, if not impossible. Perhaps a few specific and extreme situations can be discovered (*post*, § 1847); but not much more. For evidence of any form or quality whatever, testimonial or circumstantial, documentary or oral, recent or ancient, consisting in human conduct or in material objects, lying in the knowledge of a few persons or of many, situated within the jurisdiction or without it,—for all sorts, it remains equally possible that the specific piece of evidence offered may be absolutely true, or completely or partly fabricated. It is not easy, by any analysis or classification, by experience or by deduction, to enumerate, and to say that this or that class of evidence is in general attended by the feasibility of falsification, while another is not. We are therefore not far from this difficult dilemma, *i. e.*, we must either require prior notice as a general rule, or we must decline to require it at all. We must either regard the dangers of falsification as indicating the dominant policy, and require notice (because of our inability to discriminate) even where it might not be needed, in order to do justice in the cases where it would be needed; or, we must regard the danger to innocent opponents as comparatively small and as overbalanced by counter-considerations, and must therefore decline to require notice at all.

Now the common law, in this dilemma, never had any hesitation. It accepted the second alternative, and declined to require notice at all. This is so fundamental an assumption in our law of evidence that express judicial statements of it have rarely been made, even in passing. The following passages will illustrate it:

1826, *Garrou, B.*, in *Preston v. Carr*, 1 Y. & J. 175, 179: "It is a very common thing at *Nisi Prius* to ask 'If such a witness is here'; the answer given on the other side is, 'You will know in good time, when he is called.'"

1850, Lord Brougham, in *Bain v. R. Co.*, 3 H. L. C. 1, 16: "The ground of exception stated [for a certain witness] is surprise, and surprise only,—not that the evidence was in itself inadmissible, but that it was inadmissible because the intention to adduce it had not been notified on the record. . . . Surprise is no ground of objection."

1858, *Clifford, J.*, in *U. S. v. Holmes*, 1 Cliff. 106, 112, answering an argument of surprise: "Surprise may often arise out of the offer of evidence strictly competent, and yet that circumstance has never been considered as affecting the question of its admissibility. Embarrassments of that sort, which are more or less incident to every trial, are usually remedied by motion to the Court for a postponement of the trial to a future day in the term or for a continuance."

The common law, however, certainly did not fail to consider the need of protecting innocent opponents; for a keen perception of these possibilities is easily to be seen in other rules of evidence. But it believed that there were counter-considerations which overbalanced this danger. That this was its motive is to be seen with clearness in the circumstance that as soon as a

moral change occurred in the community, diminishing the force of these counter-considerations, the balance was tipped in the opposite direction and a change took place in the law, corresponding roughly to the change of opinion towards these considerations. What were, then, these powerful counter-considerations?

(a) In the first place, the common law, originating in a community of sports and games, was permeated essentially by the instincts of sportsmanship. This has had both its higher aspect and its lower aspect. On the one hand, it has contributed a sense of fairness, of gentlemanliness, of chivalrous behavior to a worthy adversary, of carrying out a contest on equal and honorable terms. The presumption of innocence, the character rule, the privilege against self-accrimination, and other specific rules (to name those of evidence alone), show the effect of this instinct against taking undue advantage of an adversary. The minor rules of professional etiquette (now surviving much more markedly in England than in the United States) illustrate the same tendency even more clearly. On the other hand, it has contributed to lower the system of administering justice, and in particular of ascertaining truth in litigation, to the level of a mere game of skill or chance. Some of the effects of this unfortunate tendency has been noted in other places (*ante*, §§ 57, 194, *post*, § 2251). It may be seen also in the rule allowing a new trial for an immaterial error in a ruling upon evidence (*ante*, § 21), and in the general attitude toward rules of procedure as expedients for winning the game of litigation irrespective of the ascertainment of truth. The right to use a rule of procedure or evidence precisely as one plays a trump card, or draws to three aces, or holds back a good horse till the home stretch, is a distinctive result of the common-law moral attitude toward parties in litigation:

1874, Sir J. Arneuld, *Life of Lord Denman*, II, 92 (commenting on the failure of justice in Lord Cardigan's Case in 1840): "The only answer . . . is that English criminal procedure does not so much seek the discovery of truth pure and simple, as the discovery of truth according to certain artificial rules. . . . The prisoner must be convicted according to the strict rules of the legal game, or not convicted at all, and that, too, however clear his guilt may be."

1896, Sir F. Pollock and Professor F. W. Maitland, *History of English Law*, II, 667: "At one of these [poles or extremes] the model is the conduct of the man of science, who is making researches and will use all appropriate methods for the solution of problems and the discovery of truth. At the other stands the umpire of our English games, who is there, not in order that he may invent tests for the powers of the two sides, but merely to see that the rules of the game are observed. It is towards the second of these ideals that our English mediæval procedure is strongly inclined. We are often reminded of the cricket match. The judges sit in court, not in order that they may discover the truth, but in order that they may answer the question, 'How's that?' This passive habit seems to grow upon them as time goes on. . . . Even in a criminal cause, even when the king is prosecuting, the English judge will, if he can, play the umpire rather than the inquisitor."²

² The orthodox attitude even among the most radical reformers may be seen in the following passage of Mr. (afterwards L. C. J.) Denman, in 40 *Edinb. Rev.* 181 (1834), arguing for the privilege against self-accrimination: "The accused's guilt he still has a right to see dis-

tinctly proved upon him by legal evidence. . . . Human beings are never to be run down like beasts of prey, without respect to the laws of the chase. If society must make a sacrifice of any one of its members, let it proceed according to general rules, upon known principles, and with

Now one of the cardinal moral assumptions in a contest of skill or chance is that a player need not betray beforehand his strength of resource, and that the opponent cannot complain of being surprised. The accepted laws and moral standards of whist protect the player from exposing his cards before playing them; the owner of the racing-stable keeps as a valuable secret the time made by his horse in the last private trial before the race; and a chess-player's skill consists largely in concealing from his opponent the far-seeing sequence of moves which he has planned. It is this feature of games and sports that has influenced powerfully the policy of the common law in the present aspect. *Nemo tenetur armare adversarium suum contra se.*⁸ To require the disclosure to an adversary of the evidence that is to be produced, would be repugnant to all sportsmanlike instincts. Rather permit you to preserve the secret of your tactics, to lock up your documents in the vault, to send your witness to board in some obscure village, and then, reserving your evidential resources until the final moment, to marshal them at the trial before your surprised and dismayed antagonist, and thus overwhelm him. Such was the spirit of the common law; and such in part it still is. It did not defend or condone trickery and deception; but it did regard the concealment of one's evidential resources and the preservation of the opponent's defenceless ignorance as a fair and irreproachable accompaniment of the game of litigation. There is no accounting for this except as in part a product of a characteristic instinct of the Anglo-Norman community in which our law grew up.

(b) A second counter-consideration is found in the possibilities of abuse by unscrupulous opponents, were prior notice required to be given. We have assumed that the innocent opponent must often need such notice, to protect himself against falsities. But reverse the situation, and suppose an honest claimant and a guilty and unscrupulous opponent. If prior notice were to be given in all cases (and there can be, as above noticed, no easy discrimination), the honest claimant would then be exposed to the danger of fraud and chicanery by his opponent. Advised of the prospective witnesses, he would try, perhaps with success, to tamper with them. Warned of the evidential facts to be offered, he would prepare false evidence in denial or in explanation. This danger, then, must equally be reckoned with in fixing upon a general policy. Though experience may vary or its teachings may be difficult to interpret, at least one cannot say that to fear this danger more than the other is to be irrational. The common law may not have attempted to analyze with sufficient care and deliberateness the relative weight of these dangers, and it may have been too ready to emphasize the one here involved. Yet this danger undoubtedly exists, and its existence goes in part to justify the result reached by the common law. Moreover, the later abandonment of the radical common-law doctrine appears to have come about, in the main,

clear proof of necessity; 'let us carve him as a feast fit for the gods, not hew him as a carcase for the hounds.'

⁸ 1688, Co. Litt. 36 a; 1650, Wingate's Maxims, No. 171, p. 645; 1702, Anon., 3 Salk. 342.

only to the extent that this danger has been seen to disappear or has been ignored.

(B) So far as concerns the interests of *litigation in general*, the policy of requiring discovery or notice of evidence before trial is equally urgent, though on larger grounds. Its propriety, moreover, is independent of the truth or falsity of the opponent's evidence; it is, in fact, strongest where the opponent's evidence is assumed to be true. That policy rests on the fact of experience that the parties to controversies are prone to proceed either with a blind faith in the strength of their cause and the truth of its essential propositions of fact, or with the misguided assumption that the facts forming its defects and weaknesses are unknown to the adversaries and that their concealment to the last moment will heighten the chances of success. If these two states of mind could be prevented, a large proportion of litigation would be cut short at the beginning, with advantage to justice; because parties entertaining either belief without foundation would be disabused of it at an early moment, would perceive the uselessness of further contest in court, and would act accordingly. Any requirements of preliminary discovery, designed to lead to such a saving of time and expense, would be well worth imposing in the interests of expeditious litigation and of justice at large.⁴

The objections to the expedient, from this point of view, are of a twofold sort: (a) The reduction of litigation to a small compass, in time and expense, would diminish the emoluments of the professional men at law, — whether as attorneys or counsellors, or as other officers of court depending upon the number and amount of fees. This is not a consideration which honorable men could entertain as in the least hindering a measure otherwise desirable. But it was in fact undoubtedly a powerful though silent motive, in the resistance, active and inert, with which the efforts towards reform in this respect were met in England in the closing days of Lord Eldon's domination, — and indeed everywhere else, whenever such a reform was needed. The incumbents under a system which gave in perquisites to the Chancellor some eighty-five thousand dollars a year,⁵ and to the Chief Justice of the King's Bench some eighty thousand a year,⁶ and to the minor officers in proportion,

⁴ See the remarks of L. C. J. Best, quoted post, § 1847. This was a favorite theme of Bentham's, as noticed post, § 1856, note 1.

⁵ *Twiss' Life of Lord Eldon*, III, 315, Campbell's *Lives*, X, 68; reduced in 1832 to £10,000 in fixed salary: *Arnould's Life of Lord Denman*, I, 300. "Lord Eldon, in the returns which he himself made to the House of Commons, admits that in 1810 he received, as Lord Chancellor, a gross income of £22,730, from which sum, after deduction of all expenses, there remained a net income of £17,000 per annum. . . . So long as judges or subordinate officers were paid by casual perquisites and fees, paid directly to them by suitors, a taint of corruption lingered in the practice of our courts. Long after judges ceased to sell injustice, they delayed justice from interested motives; and when questions

concerning their perquisites were raised, they would sometimes strain a point for the sake of their own private advantage. . . . Until the reign of Geo. IV, [in 1826,] judges continued to take fees and perquisites" (1847, *Jeaffreson, A Book about Lawyers*, I, 344, 349). Lord Eldon's patronage was additionally worth £25,000 annually (*Bentham, Works*, V, 539). Lord Eldon openly opposed, while Chancellor, in 1809, the bill to prohibit the sale of offices connected with the administration of justice, and defended the existing practice as a source of profit to the Chancellor (14 *Hans. Parl. Deb.*, 1st ser., 1016; *Campbell's Lives of the Chancellors*, 8th ed., X, 290).

⁶ Compare the instances cited ante, § 1677, note 2.

⁷ *Arnould's Life of Lord Denman*, I, 183; re-

were not likely to be zealous for any expedients which reduced the length and expense of litigation. In particular, the officers of the Chancery (the factory of fees, and the hospital of incurable controversies) would have inclined to oppose any expedient by which the process of discovery before trial was made freely available in common-law courts. This objection, then, — the reduction of fees — has been historically, though not rightfully, a serious obstacle in carrying out all proposals to minimise litigation by requiring the mutual disclosure of evidence before trial.

(b) The second objection is the same as the one already noticed from the point of view of evidence alone, namely, the possibilities of abuse by unscrupulous opponents, if discovery of evidence before trial were required. This danger is always involved in such an expedient; and it would remain for experience to show whether the harm thereby caused in one class of cases would be more than balanced by the advantage gained in other cases in the way of speedy and costless settlement of controversies.

The result is, then, that the common law (in general, and apart from the few specific exceptions to be noted) *recognised no rule requiring prior notice of intended evidence to be given to the opponent or furnishing legal process for obtaining such information*; that, nevertheless, the investigation of truth at trials is in decided need of such information for opponents who are in danger of being attacked by false evidence, and that the general process of justly ending controversies is hampered by the lack of such information even where the evidence is assumed to be true; that, on the other hand, a general requirement of such discovery or notice before trial would introduce a new danger of fraud and thus imperil the ascertainment of truth; and that therefore the correct policy to be followed depends upon whether the former or the latter consideration is found in experience to be more weighty, and whether the latter danger can be obviated or reduced in any specific class of cases.

§ 1846. *Same*: (3) in Chancery. It might be supposed that, in the court of Chancery, a bill for discovery served as a means of evading the strict common-law rule, and that thereby a notice could be compulsorily obtained of the evidence intended to be produced by the opponent. But there was here no radical departure from the established doctrine of the common law; it was a policy, not of one Court rather than another Court, but of the whole legal system indigenous to the soil. So marked, indeed, is its feature as a racial product that where a conflict came, as it did in the Chancery court, between the imported procedure of the Roman and ecclesiastical law (which furnished to chancery procedure most of its important characteristics) and the native instincts of the British gentlemen who sat as chancellors and clerks, the racial influence prevailed, and the sportsmanlike rule that no notice need be given competed with marked success against the ecclesiastical and inquisitorial

duced in 1885 to £10,000, and in 1890 to £8,000, in fixed salary: *Ib.* 186. The iniquities of the fee system were Bentham's constant theme; in

his *Rationale of Judicial Evidence* (vol. VII, p. 199, Bowring's ed.) he has some special comments on it in the present connection.

requirement of almost complete disclosure. The former, by virtue of its English birthright, took its natural place in the chancery practice also, as a persistent element in the larger common-law system of justice.

That the recognised objects of a bill for discovery in Chancery did not, on strict principle, include the obtaining of notice of the opponent's intended evidence, sufficiently appears in the following authoritative passages:¹

1803, *Sir James Wigram, V. C., Discovery*, § 143: "If it were now for the first time to be determined whether in the investigation of disputed facts truth would be best elicited by allowing each of the contending parties to know before the trial in what manner and by what evidence his adversary proposed to establish his own case, arguments of some weight might *a priori* be adduced in support of the affirmative of this important question. Experience, however, has shown—or, at least, Courts of justice in this country act upon the principle—that the possible mischiefs of surprise at a trial are more than counterbalanced by the danger of perjury which must inevitably be incurred when either party is permitted before a trial to know the precise evidence against which he has to contend. And accordingly, by the settled rules of Courts of justice in this country (approved as well as acknowledged) each party in a cause has thrown upon him the onus of supporting his own case and meeting that of his adversary without knowing beforehand by what evidence the case of his adversary is to be supported or his own opposed."

1840, *L. C. B. Abinger, in Combe v. London*, 4 Y. & C. 180, 185: "A party has a right to file a bill of discovery for the purpose of obtaining such facts as may tend to prove his case; and if those facts are either in possession of the other party, or, if they consist of documents in possession of the other party, in which he either has an interest, or which tend to prove his case, and have no relation to the case of the other party, he has a right to have them produced, and he may file a bill of discovery, in order to aid him in law or in equity, to exhibit those documents in evidence, or compel a statement of those facts. But does it not rest there? Has he a right, as against the defendant, to discover the defendant's case? Does any case go the length of that? Sometimes the cases trench very much on those limits; but if you take the question as a matter of principle, has a man a right, or is it consistent with common justice, that he should file a bill to discover the defendant's case? The ground on which he files his bill, is to make the defendant discover what is material to his (the plaintiff's) case; but he has no right to say to the defendant, 'Tell me what your title is—tell me what your case is—tell me how you mean to prove it—tell me the evidence you have to support it—disclose the documents you mean to make use of in support of it—tell me all these things, that I may find a flaw in your title.' Surely that is not the principle of a bill of discovery. And if you look at the cases, you will find, however they may occasionally trench on the line of distinction—you will find that is the great line of distinction."

1877, *Professor C. C. Langdell, Summary of Equity Pleading*, §§ 56, 59, 161, 171, 172: "Whatever the plaintiff does not succeed in proving in this way, *i. e.* by compelling the defendant to admit it, he must prove by the testimony of witnesses or by documents. The witnesses are examined in writing, and secretly, and none of the testimony is published until all the witnesses have been examined on both sides. The only information, therefore, that is given to the defendant to enable him either to cross-examine the plaintiff's witnesses, or to meet the plaintiff's evidence by examining witnesses on his own behalf, is what is contained in the bill; except that the defendant is also entitled to be informed of the names and addresses of the witnesses examined by the plaintiff.² It seems clear, therefore, that the bill ought to set forth all the evidence in detail which is

¹ It has already been noted (§ 4) that no attempt is made in this treatise to deal in detail with the rules of evidence in Chancery; they are referred to here merely as illustrative.

² This partial exception to the general rule

was almost nullified by the circumstance that the examination of the witnesses was held in secret by an officer upon written interrogatories prepared beforehand by the parties (*ante*, § 1367).

to be proved by witnesses, as is done in the articles of a libel [in ecclesiastical courts]. . . . Precisely the contrary of this, however, has taken place; for the plaintiff . . . is not required to state specifically what any of his witnesses will swear to, but is permitted to state the facts which he intends to prove by witnesses, as distinguished from the evidence by which they are to be proved; and, as this makes it impossible for him to examine them upon the allegations in the bill, he is permitted to examine them upon written interrogatories, and yet the defendant is not entitled to a copy of the interrogatories. . . . In the ecclesiastical courts, as has been seen, all documentary evidence has to be annexed to the pleadings, so that the adverse party is not only furnished with a copy, but has the fullest opportunity to inspect the originals; and this seems to be correct upon principle; for it is not the policy of the civil law to keep the parties in ignorance of each other's evidence until it is read at the hearing; and it is only to prevent perjury and subornation of perjury that the testimony of witnesses is kept secret until all the witnesses have been examined, — a reason which seems to have little, if any, application to documentary evidence. In equity, however, the parties are never entitled to inspect each other's documents, nor to have copies of them, nor in any way to know their precise contents until they are read upon the hearing. . . . [It is true, that] a plaintiff in equity is entitled to the benefit of all the evidence in the defendant's possession which will aid him in proving the allegations of the bill, whether such evidence consist of the defendant's personal knowledge or be contained in documents or writings; . . . [and] as equity furnishes no direct means by which a suitor can obtain an inspection of his adversary's documentary evidence before trial or hearing, attempts have often been made to accomplish the object indirectly and illegitimately, by means of discovery; and sometimes such attempts have been attended with success. . . . Not only have suitors in equity endeavored to avail themselves of discovery as a means of obtaining an inspection of their adversary's documentary evidence, but they have attempted by the same means to obtain information generally as to their adversary's case or defense, beyond what was disclosed by his pleadings; and these attempts have sometimes received countenance from the Courts, and especially from a much-cited passage in *Milford*: 'The plaintiff has a right to a discovery of the case on which the defendant relies, and of the manner in which he means to support it.' But Wigram has shown conclusively that any such right is wholly foreign to the principles of discovery; and his view has been adopted by Lord Romilly in a well-considered judgment."

It is true that, to a limited extent (noticed *post*, § 356), the result of a bill of discovery would usually be the revelation of some portion of information not before known to the applicant. But the general theory remained, and the rule was strictly enforced, that the adversary's own evidence was not to be revealed on a bill for discovery. In short, equitable discovery involved no more than the negation of the party's privilege at common-law trials not to testify against his own cause, and was not intended to give relief against the common-law principle which refused to exact before trial a disclosure of the tenor of the evidence intended to be given for his cause. Moreover, the tediousness of a bill in chancery came ultimately to nullify in great part whatever of effectiveness belongs to it in theory.

§ 1847. *Policy of the Exceptions to the Rule (Accused Persons; Civil Parties; Documents; Circumstantial Evidence of Character, etc.).* It has been seen above (§ 1845) that the common-law doctrine was open to subsequent modification on one of two grounds, namely, either when the overbalancing danger of furnishing an unscrupulous opponent with the opportunity of fraud could be ignored, or when this danger could be found

to be of comparatively trifling magnitude. The first ground, it is true, could come to be accepted only by force of some powerful moral sentiment or impulse, which would induce us to act irrespective of immediate experience or of reasoning; while the second ground would be reached in direct experience, with reference to the actual operation of the rule. In both of these ways, then, a change has come about.¹

(1) *Accused persons.* In the first place, since the close of the 1700s, a general revulsion of sentiment towards accused persons in criminal cases has occurred. This modern attitude, already noticed in other aspects (*ante*, §§ 579, 865), has already run its legitimate course, and is now an anachronism; but its marks remain in the inherited law of the present generation. In its present bearings, the effect is to induce us to help at any cost the accused person, who in theory of law is innocent. The danger that, if guilty, he may be disposed and enabled to tamper with witnesses, to manufacture false evidence in defence, and otherwise to misuse the aid thus furnished,—this danger (unquestionably a real one) was, or at least deliberately risked. The determination to protect the innocent accused has induced us to aid him, at any cost of accompanying dangers, by giving him fair notice of the persons to be called as witnesses:

1803, Sir James F. Stephen, *History of the Criminal Law*, I, 225, 398: "I do not think any part of the old procedure operated more harshly upon prisoners than the summary and secret way in which justice of the peace, acting frequently the part of detective officers, took their examinations and committed them for trial. It was a constant and most natural and reasonable topic of complaint by the prisoners who were tried for the Popish Plot that they had been taken without warrant, kept close prisoners from the time of their arrest, and kept in ignorance of the evidence against them till the very moment when they were brought into Court to be tried. This is set in a strong light by the provisions of [1709, 84. 7 Anne, c. 21, § 14, quoted *infra*, allowing a list of witnesses in treason]. . . . This was considered as an extraordinary effort of liberality. It proves, in fact, that even at the beginning of the eighteenth century, and after the experience of the Stuart trials held under the Stuarts, it did not occur to the Legislature that, if a man is to be tried for his life, he ought to know beforehand what the evidence against him is, and that it did appear to them that to let him know even what were the names of the witnesses was so great a favor that it ought to be reserved for people accused of a crime in which legislators themselves or their friends and connections were likely to be prosecuted. It was a matter of direct personal interest to many members of Parliament that trials for political offences should not be grossly unfair; but they were comparatively indifferent as to the fate of people accused of sheep-stealing or burglary or murder. . . . [The prisoner] was not allowed as a matter of right, but only as an occasional exceptional favor, . . . to see his [own] witnesses or put their evidence in order. When he came into Court, he was set to fight for his life with absolutely no knowledge of the evidence to be produced against him."²

¹ 1901, Pound, C., in *Ulrich v. McConaughey*, 68 Neb. 10, 88 N. W. 180: "The common law originally was very strict in confining each party to his own means of proof, and, as it has been expressed, regarded a trial as a cock fight, wherein he won whose advocate was the gamut bed with the longest spurs. But we have come to take a more liberal view, and have done away

with most of those features which gave rise to that reproach."

² No doubt, in ultimate analysis, it may be justified on broad grounds of social and political welfare; but in its immediate operation it is an emotion or sentiment only.

³ This was equally a characteristic of Continental criminal procedure, though it lingered

All this has changed, with the spirit of the times; the extent to which the change has affected the law, by establishing an exception to the common-law principle, is later examined in detail (*post*, §§ 1850-1855). That the modern tenderness for accused persons has been the effective motive for the change, and that no disposition has yet appeared to abandon the common-law attitude where this motive does not operate, may be clearly enough seen in two circumstances, namely, that no such aid, by requiring notice of the names of witnesses, has been extended either to the prosecuting officer in criminal cases or to the respective parties in civil cases.

(2) *Civil parties.* In the next place, it has come to be clearly perceived that the danger of improper tampering with witnesses is totally lacking where the desired witness is the party himself. By requiring him to state in advance his testimonial knowledge to the opponent, we do not expose his testimony to danger,—simply because he is himself not open to tampering as a witness, and because the risk of a manufacturing of counter-evidence is no greater than would otherwise exist in any case. There is therefore no objection to a prior disclosure of his testimony to the opponent. This much was indeed conceded from the very beginning in the Court of Chancery, by the allowance of bills of discovery; and to that extent the law may be said to have recognized always this exception to the general rule. But this exception failed of recognition in courts of common law, by reason of a distinct principle there obtaining, namely, the privilege of a civil party not to testify against his own cause (*post*, § 2217). When the time came that this principle was abolished and an opponent could be compelled to testify on trial, it was easy to perceive that his intended testimony should also be made available before trial (as it always had been by bill of discovery in chancery). Accordingly the one change was everywhere found accompanying or closely following the other (*post*, § 1856). The desirability, and at the same time the safety, of making this requirement was well expounded by a liberal judge, some twenty years before the change was actually made by legislation in England; his reasoning rests on both of the considerations already noted (*ante*, § 1845, par. a and b), but especially upon the second of the two:

1830, L. C. J. *Best*, Second Report of the Common Law Practice Commissioners, 46, 50: "I propose that as soon as any action be brought, even before appearance, either party to the cause may examine on oath the other. . . . After such examinations, in a great number of cases very few if any witnesses will be required. The whole of the cases of each party will be fully disclosed, and nothing will remain for juries to do but to assess damages. In cases which depend on circumstances of which the parties have no positive knowledge and which are to be proved by witnesses, the parties will from these examinations discover the nature of these circumstances, and each side will come prepared to make the best of their respective cases. There will remain no pretence for complaining of surprise. Some persons think that parties should not know each others' cases. Parties know each others' cases in the trial of issues from chancery; and when

there much later (*Esmein, Histoire de la procédure criminelle en France*, 183, 183). In all the history of political oppression, from the English Star Chamber to the Venetian Council of Ten, this seems to be the favorite and power-

ful weapon. Compare Rev. Sydney Smith's reference to this rule in his scathing denunciation of a related one ("Letter on the Bill to allow Counsel for Prisoners in Felony," *Edinburgh Review*, 1836, Works, ed. 1839, p. 339).

cases are tried a second time these cases are more easily and satisfactorily tried than any other. Much more mischief is to be apprehended from surprise than from the fullest knowledge of a cause. . . . There are parties who, ignorant of the answer their opponents have to give, think they have good cases; there are some who know that if the whole truth can be got at they have no chance of success, but persevere in litigation in the hope that their adversaries will not discover their weakness or will not be able to take advantage of it for want of proof; others are misled by their attorneys, who afterwards excuse themselves from advising their clients to proceed by protesting that their clients deceived them. These are the ways in which parties deceive themselves or are deceived to their own ruin and sometimes the ruin of their unfortunate opponents. The examination of the parties will dispel these delusions. . . . I am persuaded that these examinations will stop many cases and prevent much misery."

1838, Feb. 7, Mr. *Henry Brougham*, Speech on the Courts of Common Law (*Hans. Parl. Deb.*, 2d ser., XVIII, 188): "Whatever brings the parties to their senses as soon as possible, especially by giving each a clear view of his chance of success or failure, and, above all things, making him well acquainted with his adversary's case at the earliest possible moment, will always be for the interests of justice, of the parties themselves, and indeed, of all but the practitioners. It is the practitioners generally, that determine how the matter shall proceed, and it may be imagined that their own interests are not the last attended to. The seeming interest of two parties disposed to be litigious, in many cases appears to be different from the interests of justice, although their real interest, if strictly examined, will not unfrequently be found to be the same. Now, justice is embarrassed by the dissimulations of conflicting parties; justice wants the cases of both to be fully and early stated; but both parties take care to inform each other as little as possible, and as late as possible, of their respective merits. One tells as much of his case as he thinks good for the furtherance of his claim and the frustration of the enemy's; so does the other, only as much of his answer as may help him, without aiding his adversary; and the judge is oftentimes left to guess at the truth in the trick and conflict of the two. The interest of the Court of Justice being to make both parties come out with the whole of their case as early as possible, the law should never lend itself to their concealments. This remark extends to the proof as well as the statement of the case; an intimation of what the evidence is may often stop a cause at once. In Scotland, the law in this respect is better than ours, for no man can produce a written instrument on trial without having previously shown it to his adversary. For want of this salutary rule I have often seen the most useless litigation protracted for the sole benefit of practitioners. I was myself lately engaged in a cause, the circumstances of which will give the House an idea of the mischief. I was instructed not to show a certain receipt to the opposite party, as my client, the defendant, meant to nonsuit his adversary in great style, as he would call it. Well, the plaintiff (an executor) stated his case, and called his witnesses to prove the debt. I did not take the trouble to cross-examine, which would have been quite unnecessary. Equally so was it to address the jury. I acknowledged the truth of all that had been sworn on the other side, but added that it was all useless, as I happened to have a receipt for the money, which had been paid to the testator. This, of course, put an end to the case. The sum sought to be recovered did not exceed twenty pounds, and the expenses could not have been less than a hundred."

1858, *Common Law Practice Commissioners*, Second Report, 35: "As to facts within the knowledge of an adverse party, the Courts of law possess no power of compelling discovery; except, indeed, that by the recent change [of 1851] in the law each party may be called as a witness by his opponent; but it is obvious that this course will only be resorted to in the most desperate emergency. It cannot reasonably be expected that a party ignorant of what his adversary may be prepared to swear, shall put so adverse and interested a witness into the box, without having had any opportunity of previous interrogation. For the purpose of discovery, previous to the trial, whether of facts or of documents, the party desiring it has now no alternative but to resort to a court of equity."

We have no hesitation in saying that this is altogether wrong. We assert as an indisputable proposition, that every Court ought to possess within itself ⁶ the means of administering complete justice within the scope of its jurisdiction. . . . This opportunity for examination prior to the trial will be useful, not only for the purpose of discovering facts exclusively in the knowledge of the opposite party, but as the means of sparing the trouble and expense of producing evidence of facts which he may be prepared to admit; while, on the other hand, it will tend to make more clearly manifest the matters which are alone in contest between the parties. In some cases, such a preliminary discovery may even altogether obviate the necessity of any trial, by compelling the one party or the other to admit facts decisive of the case upon the merits, so as to show that proceeding to trial would be a mere abuse of the forms of justice. A power of preliminary discovery would likewise tend to expose the motives of groundless actions brought for vexation, and of unfounded defences set up and persisted in for delay. It would, moreover, have a most wholesome effect in preventing false pleas from being put on the record; for as soon as the examination of the party had made manifest the falsehood of the plea, a judge might be applied to to disallow the pleading at the expense of the party pleading it. If the very existence of such a power had not the effect of preventing the necessity of its exercise, it would at least aid the Court in extirpating frivolous and improper litigation. We propose that either party in a cause shall be at liberty to deliver to the opposite party, provided such party would be liable to be called as a witness, or his attorney, written questions on the subjects on which discovery is sought; and to require such party, within a time to be fixed, to answer the questions in writing upon oath sworn and filed in the same manner and under the same sanction, in case of falsehood, as an affidavit; and that the party omitting to answer within the prescribed time shall be subject to the consequences of a contempt of the Court. But we by no means propose to confine the power of interrogating such adverse party to the written questions above referred to. We think that in many cases an opportunity should be afforded for oral examination. At the same time, care must be taken that the power of personal examination be not abused by being made a means of vexation and oppression, when used against weak or timid persons. We propose, therefore, not to leave it at the option of a party to demand an oral examination, but to give the Court, or a judge, discretion, on the application of either party, in case of an insufficient answer to the written questions before referred to, or in any other case in which it may be made to appear essential to justice, to direct an oral examination of the other party before either a judge or a master of the court."

(3) *Documents, chattels, premises.* In the next place, it has come to be acknowledged that the danger of improper tampering with evidence by an unscrupulous opponent is of comparatively small probability where the evidence in question consists of documents, chattels, or premises, in the first party's own possession. To allow the opponent, under proper safeguards, to have prior inspection of these, and even to take a copy of documents, cannot endanger the integrity of the object. Nor can the warning thus given create any substantial danger of procuring perjured testimony against the execution of the document or other facts. All the justice assisting an innocent opponent may be attained, without any appreciable risk of furnishing the means of fraud to an unprincipled one:

1831, *Common Law Practice Commissioners*, Third Report, 4: "The present practice of proffer and oyer, though in its present form chargeable with many defects, is in its

⁶ This measure had already been recommended by the *Common Law Practice Commissioners* of 1830, Second Report, 70.

principle of the highest importance. It is manifestly essential to the interests of justice that a party against whom his own written instrument or the instrument of another person is pleaded should have the means of inspection, and, if necessary, of procuring a copy before he is called upon to answer. He may wish to ascertain its genuineness, and, if genuine, whether it has sustained any material alteration since it was executed. He may wish to know the names of the subscribing witnesses and to ascertain from them what testimony they are prepared to give as to the circumstances under which it was executed. He may propose to found his defence upon some parts of the instrument which his adversary has not chosen to set forth and which may either show its invalidity in point of law or provide him with an answer in point of fact. . . . We can see no good reason why, in every case in which proof would be required of a bond or other deed, it should not also be made of any other instrument of whatever description, which is either alleged to be or which may be presumed to be in writing. Such an alteration of the law would prevent the delay, expense, and uncertainty which attends an application to the Court or a judge, and would place the whole practice on this subject on a more simple and uniform as well as a more equitable footing."

The germ of this exception for documentary evidence already existed in the common-law rule of *profert* and *oyer* (*post*, § 1857). Not until the general change of attitude towards the common-law doctrine of concealment of evidence was the rule of *oyer* allowed to be extended to its proper scope. Since the middle of the 1800s, legislation has almost universally provided, in some form or other (*post*, §§ 1859, 1862), that where the opponent has requested this opportunity of protecting himself against unfair surprise, it is to be granted him; and such an inspection is usually made the indispensable condition to the possessor's subsequent use of the document in evidence on the trial. This result seems to have come about through a distinct perception of the true balance of danger; but it also signifies (in spite of the frequent judicial enunciation of these statutes) that to a certain extent our communities have deliberately abandoned the sportsman's theory of litigation.

Two further modifications of the general common-law rule remain to be noticed, both already existing in the original common-law period and before the changes of opinion above-mentioned had come about.

(4) *Documents at the trial.* One of these rests, as does the statutory rule (3) just mentioned, on an appreciation that in a certain condition there is practically no danger of abuse by an unscrupulous opponent, and that furthermore the first party, even on the sportsman's theory, is losing no real advantage. Where a document is brought by the first party to the trial, and is about to be used before its close, he may attempt to use it without allowing the opponent to inspect it. This might easily lead to abuse by the party using the document; moreover, to require it to be shown neither gives the opponent any opportunity for fraud, nor compels the first party to lose any advantage of concealment, since it is to be used in any event before the close of the trial. Accordingly, the opponent's right to inspection is conceded. The details of the rule are later examined (*post*, § 1861).

(5) *Circumstantial evidence of conduct.* It has been noticed already (§ 1845) that a necessary assumption, in the common-law principle declining to require notice, is that no discrimination is easily feasible and that the

rule must ordinarily be invariable, i. e. that, though there is just ground for notice where the intended evidence is false, yet the situations in which the evidence is probably false cannot be well discriminated by any definition from the situations in which it is probably true, and therefore the requirement must be either for notice in all cases or for notice in none; and the common law chose the latter alternative. If this assumption is erroneous, and if any such situation can be definitely ascertained and marked off, then there is sufficient reason for making an exception to the general rule and for requiring notice. Now there is at least one such situation, namely, where evidence to impeach a witness consists of *particular acts of misconduct or particular falsities*. Here it is obvious that there is the fullest opportunity of falsification, with an absolute impotence for the opponent to expose it. For example, if a witness' character could be attacked in this way, the witnesses might on the trial falsely place the misconduct in New York or Texas; they might falsely date it in the past month or five years ago, and they might falsely specify it as forgery or murder or larceny; and against these fabrications of place, date, and conduct the opponent is totally defenceless, because he cannot even guess beforehand, in the wide range of space, time, and criminality, what the tenor of these falsities will be. Such an absolute immunity for falsehood would not fail to be availed of by unscrupulous parties, and the consequences would be monstrous. This was long ago perceived by the common-law judges. That is the way, said Chief Justice Scroggs, "to accuse whom you please, and that may make a man a liar that cannot imagine this will be put to him; and so no man's testimony that comes to be a witness shall leave himself safe."⁵

It might have been supposed that the consequence of this policy would be a rule permitting such misconduct to be offered in evidence when notice of time, place, and conduct had been given beforehand; and such a rule would probably be more desirable. But, instead of this, the simpler measure of absolute prohibition was adopted,—a result due clearly enough to the fact that other reasons had also a bearing on the impropriety of receiving such evidence.⁶

§ 1848. *Distinction between a Rule of Evidence and a Rule of Procedure or Pleading.* The sole question here for the law of evidence is whether, because of surprise or lack of notice, certain evidence will be excluded. If no such effect is given, then it is to be said that the rules of evidence are no longer involved. But the policy of guarding against unfair surprise may lead to other rules, not of evidence; and such rules are without the present purview. These are of two general sorts:

(1) Where evidence unfairly surprises the opponent, the Court may in its discretion grant a *continuance* and postpone the trial.⁷ It may also, after verdict, grant a new trial, though this ground alone will rarely suffice.

⁵ 1698, *Cochran's Trial*, 7 How. St. Tr. 1067, 1081, 1107; quoted ante, § 1103.

⁶ This class of rules is further examined post, § 1908.

⁷ See Clifford, J., quoted ante, § 1845, for the rule in jury trials; for Chancery, see Langbein, *supra*, § 60.

(2) To avoid unfair surprise, the claimant's *pleadings* may be required to state with greater particularity the facts upon which his claim is based. For example, in many jurisdictions, by statute, the plaintiff, in an action for a sum of money made up of several items incurred on an account, is required to deliver before trial to the defendant or to annex to the declaration an *itemized statement* of the particulars, on penalty of being forbidden to prove the account.³ But this is no more than a rule of pleading; the distinction being that by a rule of evidence he could have proved his case by other evidence if he failed to give the notice, while by this rule of pleading he is confined to the particulars stated, which thus become virtually allegations of his declaration. The same expedient is sometimes resorted to for other kinds of claims.⁴ Occasionally, also, a statute requires a *copy of a contract*, or other document forming the basis of the claim, to be filed with the declaration;⁵ and it would seem that such a rule produces a similar effect, i.e. makes the terms of the copy a part of the allegations, and thus does something more than the statutes later noted (*post*, § 1859), which either require the filing of the original, or require the prior delivery of a copy in order to use the original in evidence, but leave the party at liberty to refuse and to prove his case otherwise.

B. SPECIFIC EXCEPTIONS TO THE RULE.

1. Circumstantial Evidence

§ 1849. *Notice of Evidential Facts, in general; Particular Acts to evidence Character, etc.* To the general rule allowing the use of all circumstantial facts without giving prior notice, and refusing to recognize unfair surprise as a ground for the exclusion of evidence, there seems to be but one generally recognized exception. At common law there was, as already noticed (*ante*, § 1847), a special and palpable danger of undetectable fraud in allowing the *moral character* of an opposing party or witness to be evidenced by *particular acts of misconduct*, or *particular falsities*, when attempted to be proved otherwise than by cross-examination of the party or witness himself or by record of conviction for crime. There were, however, other reasons of policy combining to oppose such evidence; and accordingly it was not merely prohibited unless after notice given, but prohibited unconditionally.¹

¹ The following are merely examples: Cal. C. C. P. 1872, § 484 (account stated; a copy must be delivered to the opponent five days after demand in writing, in order to be admissible); Ida. Rev. St. 1887, § 4309 (a party, on failure to deliver to the opponent a copy of an alleged account within ten days after demand in writing, will "be precluded from giving evidence thereof"); Minn. Gen. St. 1894, § 5946 (similar); N. M. Comp. L. 1897, § 2685, sub-sec. 60 (similar); Utah Rev. St. 1896, § 2023.

² Colo. C. C. P. 1891, § 159 (on a hearing for an injunction, only testimony of the character stated in a prior notice is to be admitted, with certain modifications); Tex. Rev. Civ.

Stats. 1895, §§ 5260-5263 (in trespass to try title, an abstract of title must be given to the opponent on written demand, etc., and the documentary evidence of title shall be confined to the matters therein specified). The following seems to be of this sort: Fla. Rev. St. 1892, § 1122 (no claim for credit is to be allowed in actions between the State and individuals, unless previously exhibited to the comptroller and disallowed; unless the defendant is at trial in possession of vouchers "not before in his power to produce," and was prevented by unavoidable accident from prior exhibition).

⁴ Pa. St. 1887, Pub. L. 371, Ms. r. 25; 1893, *Malone v. R. Co.*, 157 Pa. 430, 443, 27 Atl. 756.

⁵ The reasoning by which this result was

2. Testimonial Evidence.

§ 1850. Criminal Cases; Listing or Indorsing the Prosecution's Witnesses;

(I) Common-law Rule. In the orthodox common-law practice, no notice was required to be given to the accused, in any criminal prosecution, of the name or testimony of any witness intended to be produced on behalf of the prosecution.¹ This absence of any requirement was complete, *i. e.* (A) it neither required the notice as a *rule of preliminary procedure* irrespective of any evidential effect; (B) nor did it impose a *rule of evidence* excluding witnesses whose names had not been furnished. The operation of this practice led unquestionably to great injustice; but the law was plain and unquestioned:

1873, *Christiancy, C. J.*, in *Hill v. People*, 26 Mich. 490, 497: "The common law did not require the names of any of the witnesses to be indorsed upon the indictment for any purpose connected with the trial. But, as the witnesses who were to testify before the grand jury were sworn in open court before they were sent to the grand jury, a list of the witnesses intended to be examined before that jury was required to be indorsed on the back of the bill as drawn up to be laid before them. This was required for two purposes, first, that the clerk or other officer whose duty it was to swear the witness might know who were to be called and sworn and that he might certify to their being sworn, which he did by adding after their names 'sworn in court'; and, second, that the grand jury might know what witness to call and who had been sworn. In this mode, it is true, a defendant indicted for a misdemeanor incidentally got the benefit of a list of the witnesses who had testified before the grand jury, because in cases of misdemeanor he was entitled to a copy of the indictment. But in cases of felony he failed to receive even this incidental benefit, as in such cases he was not entitled to a copy of the indictment."²

It follows that, apart from the express or implied requirement of some statute, there is at common law no rule of evidence excluding witnesses whose names have not been furnished to the accused;³ nor is there any rule of pre-

reached has been already fully set forth in judicial utterances quoted *ante*, §§ 194, 979, 1002, and need not be rehearsed here. The rules that depended upon it prohibited the proof, by the above mode, of particular acts of misconduct of a witness (§ 979), or of a party (§ 194) except when the party's character was a part of the issue (§ 202), or of a witness' collateral errors (*ante*, § 1002). But the influence of those rules has been so powerful that they have often been extended, by analogy, to prohibit such a mode of proof of other qualities than moral character (§§ 225 ff., 992 ff.).

¹ Except so far as a deposition was taken and thus the accused was necessarily notified in order to permit an opportunity of cross-examination (*ante*, § 133). This was secured afterwards in England, by statute, independently of those provisions: 1836, St. 6 & 7 W. IV, c. 114, § 4 (accused allowed to inspect depositions at the trial); 1849, St. 11 & 12 Vict. c. 42, § 27 (accused allowed a copy of depositions before trial); so also in many of the grand-jury statutes cited *post*, § 1851.

² Compare also the passage from Sir J. Stephen, quoted *ante*, § 1847, and Lord Keskine's speech, in *Queen Caroline's Trial*, in 1830, favoring a motion to furnish the accused with a

list of the prosecution's witnesses (2 *Hazard* Parl. Deb., 2d ser., 804-812, 422-436, 470, 472, 574; quoted in part in *Campbell's Lives of the Chancellors*, 5th ed., X, 52).

³ 1835, *R. v. Hollingberry*, 6 Dowl. & R. 245, 248 (conspiracy; witness not produced before grand jury may be used); 1901, *State v. Robinson*, 61 S. C. 106, 39 S. E. 247; 1895, *People v. Thiede*, 11 Utah 241, 39 Pac. 537. This rule therefore equally applied to witnesses not on the grand-jury list, where (as in Massachusetts, note 4, *infra*) this list was exceptionally given without statutory enactment: 1856, *Com. v. Phelps*, 11 Gray 73 (illegal sale of liquor; evidence is not restricted to sales testified to before the grand jury; Shaw, C. J.: "Suppose his shop is in a large street, and a hundred people go in and each buys liquor; must the Government call the whole hundred before the grand jury, in order to call them before the jury of trials?").

In South Carolina, a statute expressly denies any list: 8. C. Code 1902, C. Cr. P. § 40 (the accused in a capital offence "shall have a true copy of the whole indictment, but not the names of the witnesses," three days before trial).

The Irish practice seems to have varied. 1855, *R. v. Petcherini*, 7 Cox Cr. 79, 82 (Ireland; O'Hagan, Q. C., objected to a witness who had

liminary procedure permitting the accused to obtain such a list by motion before trial.⁴

§ 1851. Same: (II) Statutory Rule of Procedure allowing List of Witnesses. But the injustice of the common-law rule began to be corrected by statute early in the 1700s. The policy of this change has already been examined (*ante*, § 1847). The effect of the change upon the rules of evidence has been important and complicated.

The original English statute, and all but two of the American statutes, purport in terms to make nothing more than a rule of procedure, of the type already denominated (A) (*ante*, § 1850); that is, they require the proper officer to deliver to the accused, with or without demand, a list of witnesses, at a specified time before the trial begins. This requirement would ordinarily be enforced by a motion, made *before trial* or *at the trial's opening*, on behalf of the accused, demanding the list. In this aspect, the statute merely makes a rule of criminal procedure, possibly affecting the indictment's validity or the trial's postponement, but not involving the admissibility of evidence; and as such it is without the present purview.¹

But the further question naturally arises, whether by implication the statute has also affected the law of evidence by making a rule of evidence of the type already termed (B) (*ante*, § 1850); i. e. whether a failure to observe the rule of procedure, in not delivering the list or in omitting a name therefrom, is to result in the exclusion of witnesses not named in the list. Now, in respect to this consequence, the statutes differ in their terms, and fall into three classes: they require the delivery of a list (1) of the witnesses examined before the grand jury (or the prosecuting attorney) either by indorsing their names and abodes on the indictment (or information) and giving the accused a copy of the indictment (or information), or (in some jurisdictions) by filing in court the minutes of their testimony;² or (2) of the witnesses known to the

not been examined by the committing magistrate: "There is a rule on the Munster Circuit that, unless a witness appears unexpectedly, . . . it is not fair to an accused person that a witness should lie by or be kept back without making an information, and thus deprive a prisoner of means of cross-examination or of making inquiries"; Crampton, J.: "I have been acting on a contrary rule for twenty-one years".

⁴ 1792, R. v. Holland, 4 T. R. 690 (information against an officer of the East India Company; inspection not allowed of the report of a board of inquiry, examining witnesses in India, on which the information was founded; "if we were to grant this motion, it would subvert the whole system of criminal law"); 1820, The Queen's Case, cited *supra*, note 2. But in Massachusetts, exceptionally, the practice changed without statute: 1830, Com. v. Knapp, 6 Pick. 496, 498; 1833, Com. v. Locke, 14 id. 485 (motion for a list of grand-jury witnesses, granted, "on the general principles of justice and sound policy"); yet this allowance did not extend to any but grand-jury witnesses: 1838, Com. v. Walton, 17 Pick. 408.

¹ Some of the rulings, however, for distinction's sake, are collected and placed post, § 1864, note 5.

² Can. Crim. Code 1892, § 645 (quoted *infra*, note 4); Alaska C. Cr. P. 1900, § 30 (like Or. Annot. C. 1892, § 1260); Ariz. Rev. St. 1901, C. Cr. P. § 630 ("the names of the witnesses examined before the grand jury, or whose depositions may have been read before them," must be inserted or indorsed before presentment); Ark. Stats. 1894, § 2073 ("When an indictment is found, the names of all witnesses who were examined must be written at the foot of or on the indictment"); Cal. P. C. 1872, § 943 ("the names of the witnesses examined before the grand jury, or whose depositions may have been read before them, must be inserted at the foot of the indictment or indorsed thereon before it is presented in court"); Ga. Const. 1877, Art. I, par. 5 ("every person charged with an offence against the laws of the State . . . shall be furnished on demand with a copy of the accusation and a list of the witnesses on whose testimony the charge against him is founded"); P. C. 1893, § 8 (same); § 943 (same; the former Code read; "the witnesses who gave testimony before the grand jury"); 1871, Dean v. State, 43 Ga.

prosecuting attorney, by filing a list in court or by delivering a copy; this provision being specially appropriate to a prosecution upon information,

218 (the constitutional clause "on demand" controls the statute, and a failure to deliver the list without demand is no ground for arrest of judgment); 1874, *Bird v. State*, 50 Ga. 555, 567 (following *Dean v. State*); 1884, *Inman v. State*, 72 Ga. 345, 376 (the language of the Constitution is equivalent to that of the Code, and is not broader, as to the class of names to be listed); *Ind. Rev. St.* 1887, § 1763 ("When an indictment is presented by the grand jury, the names of all the material witnesses must be indorsed upon the indictment; but other witnesses may afterward be subpoenaed by the State, but unless the names of such witnesses" were thus indorsed on presentment, no continuance can be granted the State on their account); *Mass. Rev. L.* 1902, c. 210, § 9 (the foreman shall return "a list of all witnesses sworn before the grand jury during the sitting, which shall be filed of record with the clerk"); § 54 (on an indictment for murder, the defendant in custody shall be served with a copy of the indictment); § 56 (on an indictment for a felony, the defendant in custody or under recognizance may on demand have a copy of the indictment "and of all indorsements thereon"); *Mich. Comp. L.* 1897, § 11863 (the foreman shall return to court or deliver to the prosecuting attorney "a list of all the witnesses sworn before the grand jury," when an indictment is found); § 11893 (the indictment, "with the names of the complainant and all the witnesses indorsed on the back thereof," is to be filed); *Minn. Gen. Stats.* 1894, § 7220 (the grand jury shall return into court "the depositions of the witnesses examined before them," or the minutes of the testimony); § 7223 (within two days after demand, the clerk shall furnish a copy of the depositions to the defendant); § 7234 ("the names of the witnesses examined before the grand jury" shall be inserted or indorsed before presentment); § 7278 (at the arraignment, the clerk shall deliver to the defendant a copy of the indictment "and of the indorsements thereon, including the list of witnesses indorsed on it or appended thereto"); *Miss. Annot. C.* 1892, § 2363 (the foreman shall certify and return into court "the names of all witnesses sworn before the grand jury"); *Mo. Rev. St.* 1890, § 2517 ("When an indictment is found by the grand jury, the names of all the material witnesses must be indorsed upon the indictment; other witnesses may be subpoenaed or sworn by the State," but no continuance shall be granted for their absence unless on affidavit showing cause); § 2477 ("the names of the witnesses for the prosecution must be indorsed on the information, in like manner and subject to the same restrictions as required in case of indictments"); *Mont. P. C.* 1895, § 1813 ("When an indictment is found, the names of the witnesses examined before the grand jury must be inserted at the foot of the indictment or indorsed thereon before it is presented to the Court"; but no indictment may be quashed for failure to do this, "if the indorsement is made before the motion to quash is disposed of"); § 1910 (in-

dictment may be set aside for failure to do this); *Nev. Comp. L.* 1900, § 4194, *et.* 1961, c. 428, § 229 ("the names of the witnesses examined before the grand jury" shall be inserted or indorsed before presentment); § 4234, *id.* § 269 (like *Minn. Gen. St.* § 7278); § 4240, *id.* § 275 (when the names of witnesses examined or of deponents are not inserted or indorsed, the indictment shall be set aside); *N. Mex. Comp. L.* 1897, § 998 ("the names of the witnesses examined before the grand jury must in all cases" be inserted or indorsed on presentment); *N. Y. C. Cr. P.* 1891, § 271 ("the names of the witnesses examined before the grand jury, or whose depositions may have been read before them, as provided in § 235, must be indorsed upon the indictment before it is presented to the Court. If not so indorsed, the Court must, upon the application of the defendant, at any time before trial, direct the names of such witnesses as they appear upon the minutes of the grand jury to be furnished to him forthwith"); *N. C. Code* 1883, § 1176 (when a grand jury's presentment is made "upon the knowledge of any of their body or upon the testimony of witnesses, the names of such grand jurors and witnesses shall be indorsed thereon"); *N. D. Rev. C.* 1899, § 2084 ("the names of the witnesses examined before the grand jury must in all cases be inserted at the foot of the indictment or indorsed thereon before it is presented to the Court"); § 2082 (it may be set aside for failure to do this); *Oh. St.* 1898, c. 41, § 17 ("the names of witnesses examined before the grand jury must be indorsed thereon before the same is presented to the Court"; but a failure to do so shall not be sufficient reason for setting aside the indictment, if within a reasonable time, fixed by the Court, the indorsement of the witnesses for the prosecution is made; at any time the Court may direct the indorsement of additional witnesses); *Or. Annot. C.* 1892, § 1250 ("the names of the witnesses examined before the grand jury" must be inserted or indorsed before presentment); *St.* 1899, p. 99 (names of witnesses examined on oath by district attorney are to be indorsed or inserted on the information before filing; "otherwise the testimony of such witnesses cannot be heard against the defendant on the trial"); 1902, *State v. Warren*, 41 Or. 346, 60 Pac. 679 (statute held not applicable to witnesses examined before a coroner's jury); *S. D. Stats.* 1890, § 2495 ("When an indictment is found, the names of the witnesses examined before the grand jury must in all cases be inserted at the foot of the indictment or indorsed thereon before it is presented to the Court"); *Tenn. Code* 1895, § 7084 (the foreman shall indorse "the names of the witnesses so sworn by him," but the omission to do so shall not invalidate the indictment or presentment); § 7057 ("When presentment is made upon the evidence of witnesses sent for by the grand jury, the names of the material witnesses for the State, examined before the grand jury, shall in all cases be in-

where there is no grand-jury indictment³; or (3) of all witnesses intended to be produced,—these last statutes thus being much wider in scope than the preceding two classes and not attended by their peculiar limitations.⁴

done thereon before it is presented to the Court"); *Tax. C. Cr. P.* 1895, § 432 [415] (the State's attorney shall "indorse thereon [the indictment] the names of the witnesses upon whom testimony the same was found"); *Utah Rev. St.* 1896, § 4728 (like *Cal. P. C.* § 943); § 4778 (indictment may be set aside for failure to do this); § 4806 (information; "the names of the witnesses testifying for the State on such examination [before the committing magistrate] must be indorsed thereon"); § 4771 (information may be set aside for failure to do this); *Va. Code* 1887, § 3904 (like *W. Va. Code* 1891, c. 184, § 8, but omitting "or" in the second clause); *Wash. Const.* 1889, Art. I, § 22 (the accused is entitled "to have a copy" of "the accusation against him"); *Codes & St.* 1897, § 6825 ("When an indictment is found, the names of the witnesses examined before the grand jury must be inserted at the foot of the indictment or indorsed thereon," and the clerk must furnish or permit a copy "within one day after demand made"); *W. Va. Code* 1891, c. 187, § 8 ("When a presentment or indictment is so made [on the information of grand jurors themselves], or on the testimony of witnesses called on by the grand jury, or sent to it by the Court, the names of the grand jurors giving the information, or of the witnesses, shall be written at the foot of the presentment or indictment"); *Wis. Stats.* 1898, § 2549 (the foreman shall return to the Court "a list under his hand of all witnesses who shall have been sworn before the grand jury during the term, and the same shall be filed by the clerk"); § 4642 (a person accused of an offence punishable by imprisonment in the State prison shall be entitled to a copy "of the indictment or information and of all indorsements thereon").

³ *Calo. St.* 1893, p. 116, § 1 (the information shall be indorsed by the district attorney with "the names of such witnesses as are known to him at the time of filing the same," and also "the names of such other witnesses as may become known to him before the trial, at such time as the Court may by rule or otherwise prescribe; but this shall not preclude the calling of witnesses whose names or the materiality of whose testimony are first learned by the district attorney upon the trial"); *Kan. Gen. St.* 1899, § 5348 ("When an indictment is presented by the grand jury, the names of all the material witnesses known at the time to the public prosecutor must be indorsed upon the indictment, but the names of other witnesses may afterwards be indorsed on said indictment before or during the trial, as the Court may by rule or otherwise prescribe"; but unless the names known are so indorsed before trial, the prosecution cannot have a continuance for such witnesses); § 5315 (the prosecuting attorney on filing an information shall "indorse thereon the names of the witnesses known to him at the time of filing the same. He shall also indorse thereon the names of such other witnesses as may afterwards

become known to him, at such times before the trial as the Court may by rule or otherwise prescribe"); *Mich. Comp. L.* 1897, § 11834 (the prosecuting attorney, on filing an information, shall "indorse thereon the names of all the witnesses known to him at the time of filing the same, and at such time before the trial of any case as the Court may by rule or otherwise prescribe, he shall also indorse thereon the names of such other witnesses as shall then be known to him"); *Mont. P. C.* 1895, § 1734 ("The county attorney must indorse upon the information at the time of filing the same, the names of the witnesses for the State, if known"); § 1818 (information may be set aside for failure to do this); *Nebr. Comp. Stats.* 1899, § 7315 (like *Wash. C. & Stats.* § 6825); *N. D. Rev. C.* 1899, § 7985 (the State's attorney shall indorse on the information "the names of all witnesses for the prosecution known to him at the time of filing the same; but other witnesses may testify on the trial of such cause in behalf of the prosecution on the trial of said action the same as if their names had been indorsed on the information"); *Oh. St.* 1895, c. 41, § 5 (on all informations shall be subscribed the names of the witnesses known to the county attorney at the time of filing; and those of such others as may afterwards become known to him shall be indorsed "at such time before the trial as the Court may by rule prescribe"); *S. D. Stats.* 1899, § 8442 (the prosecuting attorney on filing an information shall "indorse thereon the name of the witnesses known to him at the time of filing the same, and at such time before the trial of any case as the Court may by rule or otherwise prescribe; he shall also indorse thereon each other witness as shall then be known to him"); *Wash. Codes & St.* 1897, § 6825 (the prosecuting attorney on filing an information shall "indorse thereon the names of the witnesses known to him at the time of filing the same; and at such time before the trial of any case as the Court may by rule or otherwise prescribe, he shall indorse thereon the names of such other witnesses as shall then be known to him"); *Wyo. St.* 1891, c. 59, § 2 (the prosecuting attorney shall indorse on the information the "names of the witnesses known to him at the time of filing," and afterwards of such as "may thereafter become known to him, at such times before the trial as the Court may by rule or otherwise prescribe"); § 3 (a failure to request such indorsement to be made shall be deemed a waiver by defendant; "and such endorsement may be made before, at, or after any trial"); *St.* 1895, c. 123, §§ 2, 3 (repeals the foregoing).

⁴ *Eng.* 1709, St. 7 Anne, c. 21, § 14 (treason; the Act was so conditioned as not to come into practical effect till 1781, at Lord Gordon's trial; it provided for a delivery to the accused, ten days before trial, and in the presence of two or more witnesses, of "a list of the witnesses that shall be produced on the trial for proving the said indictment," "mentioning

The statutes of the first sort are the most numerous. The statutes of the third sort are the least numerous, but they include the earliest instances, namely, those of England and the Federal Congress. The statutes of the first and second sort often co-exist in the same jurisdiction, but obviously those of the first and third or the second and third are not found in the same statute book. These three types of statutes may now be considered in order. But it will be noticed that under each of the first and second types, the question arises for two distinct sorts of witnesses, namely (a) the *specified class* of witnesses (i. e. grand-jury witnesses or witnesses known to the prosecuting officer), and (b) the *remaining witnesses* (i. e. not having appeared before the grand jury or not having been known to the attorney).

§ 1852. *Same*: (1). *List of Grand-Jury Witnesses*. (a) Where the statute requires the names and abodes of witnesses examined before the grand jury to be indorsed upon the indictment, so that the accused can obtain them on his copy of the indictment, may a witness testify on the trial who was examined, if his name was *not thus indorsed*? There is some reason for taking the statute by implication to require the exclusion of such a witness:

1848, *Kinney, J.*, in *Ray v. State*, 1 G. Gr. 216, 318: "The names of the witnesses upon the indictment will inform him [the accused] of the authors of the prosecution, and thus enable him to prepare for his defence. For his benefit, the crime charged in the indictment is required to be clearly and distinctly stated, that he may know with certainty the nature and character of the offense; and that he may not be taken by surprise on the trial, it is quite as necessary that he should know who the witnesses are by whom it is expected the indictment is to be sustained."

1853, *Greene, J.*, in *Smith v. State*, 4 id. 189, 190: "Inconvenient as this rule may at times appear, still in justice to the accused, it should perhaps be maintained. There is certainly great fairness in advising a prisoner of those witnesses who may appear against him, in time to guard against false or tainted testimony."

the names, profession, and place of abode"; compare the later statutes cited ante, § 1850, note 1); *Can. Crim. Code* 1892, § 645 ("the name of every witness examined, or intended to be examined, shall be endorsed on the bill of indictment," and the foreman shall initial the name of every witness examined); § 655 (copy of the depositions filed may be had on demand); § 658 (in treason, a list of witnesses "to be produced on the trial" must be delivered ten days before arraignment); 1896, *R. v. Townshend*, 28 N. Sc. 468, 474 (the provision for initialing, construed); 1903, *R. v. Holmes*, 9 Br. C. 264 (rule for indorsing the names of witnesses, construed); *Cal. Annot. Stats.* 1891, § 1460 (like Ill. Rev. St. 1870, § 421, omitting "treason"); Ill. Rev. St. 1870, c. 38, § 421 ("Every person charged with treason, murder, or other felonious crime shall be furnished, previous to his arraignment, with a copy of the indictment and a list of the jurors and witnesses. In all other cases he shall, at his request or the request of his counsel, be furnished with a copy of the indictment and a list of the jurors and witnesses"; note that this statute, which is reproduced in Colorado, in form belongs to this third type, but in judicial construction is dealt with as of the first type); *N. H. St.* 1901, c. 104, § 1 (every person indicted for murder

"shall be entitled to a list of witnesses to be used . . . to be delivered to him twenty-four hours before the trial"); § 5 ("in the trial of murder cases, witnesses may be called in behalf of the State to rebut or explain any evidence of new matter offered by the defendant or to discredit his witnesses, though the names of such witnesses have not been furnished to the defendant; but time may be allowed the defendant to answer such evidence, if in the opinion of the Court justice requires it"); *N. J. St.* 1898, c. 237, § 84 (a person indicted for treason shall have a list of "the witnesses to be produced on the trial for proving the said indictment, mentioning the names and places of abode of such jurors and witnesses, delivered unto him at least three entire days before the trial; and in murder, misprision of treason, manslaughter, sodomy, rape, arson, burglary, robbery, forgery, perjury, or subornation of perjury . . . two entire days at least before the trial"); *U. S. St.* 1790, April 30, § 29, Rev. St. 1878, § 1033 (a list "of the witnesses to be produced on the trial for proving the indictment, stating the place of abode," is to be delivered "at least three entire days" before trial, for treason, and "at least two entire days" before, for other capital offences).

This result has been occasionally accepted.¹ But the majority of Courts have preferred to believe that the statute bears no such necessary implication, and that the purposes of fairness are sufficiently attained by leaving the trial judge to postpone the trial where a real and unfair surprise has in fact been caused.² It would seem, having regard to the possibilities of abuse which are propagated in criminal procedure by an arbitrary and unyielding rule, that this is the sound view to take. It must be added that, of course, where the ground of objection is the failure to indorse any names at all (not merely the omission of one or more names), the proper remedy is to move before trial to quash the indictment or to postpone trial, because the failure was then plainly ascertainable by the accused.³

(b) Is there, furthermore, to be any exclusion of witnesses who were not examined before the grand jury and therefore were not indorsed because not required to be by the statute? To carry the implication of the statute thus far would be to do violence to its spirit as well as to its words; and no such rule of exclusion seems to be adopted by any Court, except perhaps to the extent of allowing the trial judge in discretion to prevent, by this method or by postponement, an unfair surprise:

1841, *Douglas, J.*, in *Gardner v. People*, 4 Ill. 53, 59: "The list of witnesses which is required to be furnished to the prisoner prior to the arraignment is to be composed of the witnesses endorsed on the indictment by the foreman of the grand jury. . . . The question is now presented whether the prosecuting attorney is to be confined to the list of witnesses endorsed on the back of the indictment. . . . If such a construction were placed upon this statute as would exclude all witnesses whose names were not endorsed on the indictment, many offenders would go unpunished, not on account of their own innocence, nor of the negligence of the State's attorney, but by a defect in the law itself, or a narrow and illiberal construction of it not sanctioned by reason or justice. We think, therefore, that the prosecution is not confined to the list of witnesses endorsed on the indictment and furnished previous to arraignment; but that the Circuit Court, in the exercise of a sound discretion, and having a strict and impartial regard to the rights of the community and the prisoner, may permit such other witnesses to be examined as the justice of the case may seem to require."

1858, *Woodward, J.*, in *State v. Abrams*, 6 Ia. 117, 121: "The question is whether the prosecution is confined to the witnesses upon whose testimony the charge is founded

¹ 1844, *Ray v. State*, 1 G. Gr. 316, 318; 1846, *Harriman v. State*, 2 Id. 370, 384; 1853, *Smith v. State*, 4 Id. 138, 150. The later statute in Iowa (post, § 1855) expressly lays down the same rule, with certain conditions.

² 1863, *People v. Symonds*, 22 Cal. 348, 354 (no exclusion causes; perhaps a postponement, but this is not "a matter of right"); 1864, *People v. Loran*, 38 Id. 113 (there is no exclusion because grand-jury witnesses are not indorsed; the only remedy is a motion to quash, at the arraignment); 1845, *McKinney v. People*, 7 Ill. 540, 551; 1864, *Andrews v. People*, 117 Id. 198, 199, 7 N. E. 265, *semble*; 1864, *State v. Roy*, 63 Mo. 268 (motion to quash; point not decided); 1866, *State v. Griffin*, 87 Id. 608, 612, *semble*; 1866, *Ballard v. State*, 19 Nebr. 608, 615, 23 N. W. 371 (see citation post, § 1853 (a)); 1866, *People v. Thiede*, 11 Utah 241, 30 Pac. 637.

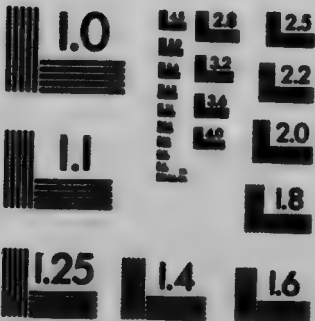
But in any event an actual knowledge of the prospective witness, or such knowledge as removes unfair surprise to the accused, obviates any objection: 1900, *People v. Quinn*, 127 Cal. 542, 56 Pac. 385 (name not initialled); 1901, *Cross v. People*, 192 Ill. 291, 61 N. E. 400 (witness, not indorsed, but notified to defendant in due season, admitted); 1908, *People v. Hammond*, — Mich. —, 36 N. W. 1085; 1882, *State v. Anderson*, 16 Or. 448, 452; 1893, *State v. Townsend*, 7 Wash. 462, 35 Pac. 367; 1896, *State v. Everitt*, 14 Id. 574, 45 Pac. 180 (misspelling of name; "[the defendant] had really had notice that these witnesses would testify, and that . . . is the only object of the statute").

³ 1863, *People v. Symonds*, 22 Cal. 348, 354; 1845, *McKinney v. People*, 7 Ill. 540, 552, *semble*. Compare the same result reached under the third sort of statute, post, § 1854.



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and whose names are indorsed. We think it is not. Such a rule would greatly embarrass the administration of justice in the punishment of offences. It would make it necessary for the State to search for all possible evidence before it presented an indictment, and thus favor the escape of the guilty; or it would deprive of much evidence and even of that which is the best and the most satisfactory. There is no principle of law or of natural right which entitles a defendant to a previous knowledge of all the witnesses to be called against him. Our statute has gone sufficiently far, probably, in giving him the knowledge of those upon whose information the charge is based, by requiring their names to be indorsed upon the indictment. . . . This may be supposed to give the accused the knowledge of all the witnesses known to the prosecution, and it is difficult to consider him entitled to more than this."

Some Courts appear disposed to make this rule an absolute one, denying any force to the objection.⁴ Others allow a desirable flexibility, by conceding to the trial Court the discretion, in case of a real and unfair surprise, either to postpone the trial or to exclude the witness.⁵ The result of the latter rule

⁴ *Ga.*: 1855, *Keener v. State*, 18 Ga. 194, 216 (so that the State is not limited "to any particular set of witnesses"); 1884, *Inman v. State*, 72 id. 269, 276; *Ida.*: 1902, *State v. Wilmburne*, — *Ida.* —, 70 Pac. 849; *Ill.*: 1872, *Scott v. People*, 63 Ill. 508, 510, *semble*; *Ind. T.*: 1903, *Binyon v. U. S.* — *Ind. T.* —, 76 S. W. 265 (defendant is not entitled, under Annot. *State*, 1899, § 1446, being § 2103 of Mansfield's Ark. Dig., to a list of witnesses who had not been examined before the grand jury); *Mich.*: 1873, *Hill v. People*, 26 Mich. 496, 498 (the statute "would not prevent the calling of any other witnesses [than those sworn before the grand jury], though their names were not so indorsed"); *Mo.*: 1879, *State v. Nugent*, 71 Mo. 136, 144 ("the only consequence of a failure to indorse their names [of other witnesses] upon the indictment is that no continuance will be granted the State on account of the absence of such witnesses," unless for good cause); 1881, *State v. Patterson*, 73 id. 695, 699; 1884, *State v. Roy*, 83 id. 268, *semble* (under a statute expressly providing that "other witnesses [than those testifying before the grand jury] may be subpoenaed and sworn by the State"); 1886, *State v. O'Day*, 89 id. 559, 1 S. W. 759; 1887, *State v. Pagels*, 92 id. 300, 310, 4 S. W. 931; 1891, *State v. Steifel*, 106 id. 129, 17 S. W. 227; 1897, *State v. Shreve*, 137 id. 1, 38 S. W. 548; 1897, *State v. Smith*, *ib.* 25, 38 S. W. 717; 1900, *State v. Tate*, 156 id. 119, 56 S. W. 1099; *Or.*: 1903, *State v. Belding*, — *Or.* —, 71 Pac. 330 (information); *U. S.*: 1895, *Thiede v. Utah*, 159 U. S. 510, 515, 16 Sup. 62 ("in the absence of some [express] statutory provision, there is no irregularity in calling a witness whose name does not appear on the back of the indictment or has not been furnished to the defendant before the trial"); *Utah*: 1895, *People v. Thiede*, 11 Utah 241, 39 Pac. 837.

⁵ *Cal.*: 1886, *People v. Freeland*, 6 Cal. 96, 98 ("any witness may be introduced upon the trial, by consent of the Court, notwithstanding he was not before the grand jury, subject only to the right of the prisoner to a postponement in case such evidence should operate as a surprise upon him"); 1866, *People v. Jocelyn*, 29 id.

562; *Calo.*: 1877, *Wilson v. People*, 3 Calo. 325, 329 (like the Perry case, in Illinois); 1885, *Minich v. People*, 8 id. 440, 445, 9 Pac. 4 (later Illinois cases followed); 1896, *Boykin v. People*, 22 id. 496, 45 Pac. 419 (actual notice removes any ground for objection); 1897, *Askew v. People*, 23 id. 446, 48 Pac. 524 ("the witnesses contemplated by the statute are those which have testified before the grand jury or who were known by the prosecution to be material witnesses at the time of the arraignment"; yet the prosecution, on learning of others, must notify the defendant "in time to prepare his defence"; if it does not, the defendant must show surprise and the necessity of further time to prepare); *Ill.*: 1841, *Gardner v. People*, 4 Ill. 83, 89 (see quotation *supra*); 1853, *Gates v. People*, 14 id. 433, 436 (Gardner case approved); 1853, *Perry v. People*, *ib.* 496, 498 (admissible where no surprise is caused or preparation made necessary); 1873, *Porter v. People*, 70 id. 171, 175 ("This Court has repeatedly held that the People are not restricted" to the indorsed names); 1874, *Smith v. People*, 74 id. 144, 147 (allowable "in the exercise of a sound discretion"); 1879, *Logg v. People*, 92 id. 598, 600 (same); 1880, *Bulliner v. People*, 95 id. 394, 402 (same); 1891, *Kota v. People*, 136 id. 685, 688, 27 N. E. 53; 1893, *Gifford v. People*, 148 id. 173, 178, 35 N. E. 754 (same); 1894, *Trask v. People*, 151 id. 523, 529, 38 N. E. 248 (same); 1896, *Gore v. People*, 162 id. 259, 265, 44 N. E. 500 (same); 1897, *Kirkham v. People*, 170 id. 9, 48 N. E. 465 (same); 1900, *Bohen v. People*, 184 id. 358, 56 N. E. 408 (same); *Ida.*: 1858, June 10, *State v. Abrahama*, 6 *Ida.* 117, 120 (but this case is no longer law, by a statute passed immediately thereafter, and quoted *post*, § 1855); *Mich.*: 1903, *People v. Hammond*, — *Mich.* —, 93 N. W. 1095 (admissible, if there was no real surprise); *S. D.*: 1886, *Terr. v. Godfrey*, 6 Dak. 46, 50 N. W. 481, *semble*; 1894, *State v. Boughner*, 5 S. D. 461, 59 N. W. 736; 1894, *State v. Church*, 6 id. 89, 60 N. W. 143 (citing the Gardner case, in Illinois); 1895, *State v. Reddington*, 7 id. 368, 64 N. W. 170 (*State v. Church* said to be law: "having no statute, as some States have [expressly] requiring notice to a defendant as a com-

is in effect to create, under the statute's inspiration, a common-law doctrine of discretionary exclusion. It may be added that the accused's actual knowledge of the prospective witness negatives unfair surprise, and is thus often mentioned as a specific reason nullifying his objection.

§ 1853. *Same*: (2) *List of Witnesses Known to Prosecuting Attorney*.
(a) Under the statutes requiring the prosecuting attorney to indorse on the information the names and abodes of prospective witnesses then known to him, may a witness thus known but not indorsed be afterwards excluded? The statute does not expressly direct this; and it seems clear that the spirit of the statute is sufficiently preserved by leaving the exclusion of such witnesses to the trial judge's discretion in case of a real and unfair surprise; having regard, here also, for the possibilities of abuse that would be produced by a technical rule to the contrary:

1883, *Horton, C. J.*, in *State v. Cook*, 30 Kan. 82, 84, 1 Pac. 32: "The Court, in the furtherance of justice, ought to have the power, and in our opinion does have the power, to permit the name of any witness to be indorsed upon the information at any time, even after the trial has actually commenced. Said § 67 [requiring the district attorney to indorse before trial the names of witnesses known to him] is not a condition to the qualification of a witness. As a general rule, the Court should allow the names of the witnesses of the State to be indorsed upon the information after the commencement of the trial, if it be important so to do; but of course, if the defendant is taken by surprise thereby, the Court should extend to him all possible facilities for a fair, full, and impartial trial, and, if necessary, may delay or even continue the hearing of the case until he has ample opportunity to prepare to meet the evidence of the witnesses indorsed upon the information after the commencement of the trial. . . . If the Court shall be convinced that the county attorney had purposely failed to indorse on the information the names of the witnesses known to him at the time of filing the same, to render it difficult for the defendant to prepare his defense, the Court may under such circumstances within its discretion refuse to grant the request of the county attorney to indorse on the information the names of the additional witnesses. But in all cases where the request . . . is made in good faith and to promote justice, the Court has authority to grant the same, keeping in view the just administration of the criminal laws and the right of the defendant for reasonable time to prepare to meet unexpected evidence."

Such is the rule adopted in a majority of the Courts that have considered the question.¹ One or two, however, with undue technicality, take the opposite view and require the exclusion of the witness;² yet even these Courts

dition precedent" to the calling of unindorsed witnesses, the rejection of such witnesses "ought to be left largely to the wise discretion of the trial Court"; here the prosecution knew of the witnesses beforehand; 1895, *State v. Isaacson*, 8 id. 69, 65 N. W. 430 (witnesses admitted, of whom notice had been given in open court before trial begun).

¹ *Kan.*: 1883, *State v. Cook*, 30 Kan. 82, 83, 1 Pac. 32 (quoted *supra*); 1883, *State v. Teisadore*, ib. 476, 483, 2 Pac. 650; 1884, *State v. McKinney*, 31 id. 570, 577, 3 Pac. 356; 1887, *State v. Taylor*, 36 id. 329, 336, 13 Pac. 550; 1888, *State v. Dowd*, 39 id. 412, 415, 16 Pac. 483; 1889, *State v. Reno*, 41 id. 674, 680, 21 Pac. 803; 1890, *State v. Adams*, 44 id. 135, 24 Pac. 71;

1893, *State v. Sorter*, 52 id. 531, 534, 34 Pac. 1036; *Mont.*: 1894, *State v. Black*, 15 Mont. 143, 151, 38 Pac. 674 (witness known but not indorsed may be admitted if no prejudice is shown); 1900, *State v. Calder*, 23 id. 504, 59 Pac. 903; *State v. Schnepel*, ib. 523, 59 Pac. 927; *N. D.*: 1896, *State v. Kent*, 5 N. D. 516, 67 N. W. 1052 (admissible, where the defendant in fact knows of the witness; as here, where a former trial had been had); *Wash.*: 1903, *State v. Lewis*, 31 Wash. 515, 72 Pac. 121, *semble*.

² It will be noticed that in Michigan the final choice of views has probably not yet been made: *Mich.*: 1892, *People v. Hall*, 48 Mich. 482, 497, 12 N. W. 665 (inadmissible); 1885, *People v. Quick*, 58 id. 321, 322, 25 N. W. 302 (intimating

allow in discretion the indorsement of additional witnesses before trial begun.⁸

(b) May a witness *not known* at the time of filing the information by the prosecuting attorney, and therefore not indorsed thereon, nor required to be, suffer exclusion because of the lack of prior indorsement? Here clearly the implication of the statute forbids such an exclusion, nor would any considerations of fairness require it under any circumstances:

1870, *Safford, J.*, in *State v. Dickson*, 6 Kan. 309, 219: "It is the [statutory] duty of the prosecuting attorney to indorse upon such information the names of the witnesses known to him at the filing of the same. . . . These provisions are no doubt wise and salutary in their aims and effects. But, as we understand it, there is nothing in them or in any other statute which would have the effect of prohibiting a witness from testifying whose name had become known to the prosecution after the commencement of the trial and without his name being indorsed upon the information at all. Nor do we think that such a prohibition, if it did exist, would as a rule be calculated to promote justice. Cases (as is well known to every practitioner at the bar) often occur, where during the progress of the trial a necessity arises for the introduction of certain kinds of testimony which could not have been known or anticipated on the part of the prosecution before the commencement of the trial, [for example, in the impeachment of opposing witnesses]. . . . In such a case the universal practice has been to call and examine witnesses without regard to their having been previously named and summoned or even thought of. Other instances in which the adoption of a rule such as is contended for might operate to defeat the ends of justice will readily be suggested; and it is not seen how injustice would be likely to result from allowing such witnesses to be examined in any case."

1878, *Christiancy, C. J.*, in *Hill v. People*, 26 Mich. 496, 499: "We can discover no reason, founded on justice or common sense, for requiring the indorsement of such as the prosecutor during the progress of the trial shall happen to discover to be important witnesses, or for the exclusion of such witnesses upon such ground; and we think it would be exceedingly pernicious in the administration of the criminal law to recognize such an objection. Should a criminal go unpunished because all the evidence of his guilt has not come to the knowledge of the prosecuting attorney before the commencement of the trial, when it is always the interest of criminals to conceal all knowledge of this kind and when the guilt of the prisoner can be proved beyond a doubt by evidence which the prosecuting attorney has discovered during the progress of the trial? This would be a new feature in the administration of the criminal law, which no court ought ever to adopt without the express requirement of the Legislature, and which we cannot sup-

that "cases may sometimes arise" for admission; declaring however that no distinction exists, for known witnesses, between those to be used for rebuttal and others); 1899, *People v. Price*, 74 id. 37, 41, 41 N. W. 853 ("the statute is imperative; . . . it is no sufficient excuse for not doing so that the whereabouts of the witness is not known, or that the prosecutor does not know that he can secure his attendance"; the trial Court has no discretion); 1890, *People v. Howe*, 81 id. 396, 400, 45 N. W. 961 (similar); 1893, *People v. Mills*, 94 id. 630, 638, 54 N. W. 488 (here admitted, there being no real surprise; no precedent cited); 1895, *People v. Burwell*, 106 id. 27, 30, 63 N. W. 986 (similar; no precedent cited); 1900, *People v. Casey*, 124 id. 279, 63 N. W. 883 (witness in rebuttal, excluded, because not indorsed and no excuse given); *Nebr.*: 1888, *Stevens v. State*, 19 *Nebr.* 647, 649, 28 N. W. 304 (the trial Court has no discretion to

permit indorsement on an information after trial begun); 1886, *Ballard v. State*, ib. 609, 615, 28 N. W. 371 (same, but *contra*, for an indictment); 1896, *Parks v. State*, 20 id. 515, 517, 31 N. W. 5 (like *Stevens v. State*); 1896, *Carroll v. State*, 53 id. 431, 73 N. W. 939 (but a mistake of name is immaterial, if not misleading); 1899, *Sweeney v. State*, 59 id. 269, 80 N. W. 815; *Wash.*: 1896, *State v. McGonigle*, 14 *Wash.* 594, 45 *Pac.* 20, *semble* (writing them in the body of the document suffices).

⁸ *Mich.*: 1888, *People v. Perriman*, 72 *Mich.* 186, 188, 40 N. W. 425 (it is not "an absolute requirement"); 1888, *People v. Evans*, ib. 367, 371, 40 N. W. 473 ("some discretion is left with the Court"); *Nebr.*: 1896, *Fager v. State*, 49 *Nebr.* 439, 68 N. W. 611; 1896, *Barney v. State*, ib. 515, 68 N. W. 636. But the Court's consent to the indorsement is necessary: 1882, *L'Esle v. Moran*, 48 *Mich.* 639.

poss any intelligent Legislature will be likely to adopt with reference to an honest administration of justice."

This result is generally accepted;⁴ moreover, all courts taking the view presented in (a), *supra*, in the passage from Chief Justice Horton, would also agree in this result. It should be added that a witness brought in *rebuttal* may nevertheless be a witness originally known, and therefore does not necessarily fall within the present class.⁵ Moreover, the status of a witness in rebuttal under the present type of statute is different from his status under the variety of statute dealt with in the next section, which applies in terms to those only who are brought "in support of the indictment."

§ 1854. *Same*: (3) *List of All Prospective Witnesses*. Under the third type of statute described (*ante*, § 1851), namely, requiring the delivery of a list of all witnesses "to be produced," there is usually but one class to be considered, under the statutory wording; i. e. the distinction already noted (*ante*, §§ 1852, 1853, par. a and b) between the specified class and the remaining witnesses — grand-jury witnesses and other witnesses, known and not known witnesses — disappears from the statute. Only one question is raised, i. e. whether by implication the statutory rule of procedure creates also a rule of evidence excluding witnesses not so listed. These statutes are so narrow in regard to the classes of offences involved — being confined to prosecutions for treason or for capital offences in general¹ — that there has been but little judicial interpretation. Thus far the accepted results seem to be as follows:

1. Where a particular witness is *not upon the list*, or is *misdescribed* by name or by abode so as in effect to mislead the accused, the witness will be excluded, because the only mode of protecting the accused and enforcing the statute is to employ this measure.²

⁴ *Kan.*: 1870, *State v. Dickson*, 6 *Kan.* 209, 219 (quote *supra*); 1873, *State v. Medicott*, 9 *id.* 257, 282; *Mich.*: 1873, *Hill v. People*, 36 *Mich.* 496, 499; 1889, *People v. Price*, 74 *id.* 37, 41, 41 *N. W.* 853 (here, however, declaring that a continuance was proper); 1894, *People v. Machen*, 101 *id.* 400, 404, 59 *N. W.* 864; 1897, *People v. Baker*, 112 *id.* 211, 70 *N. W.* 431 (in discretion); 1899, *People v. McCarron*, 121 *id.* 1, 79 *N. W.* 944 (same; here for a witness in rebuttal); 1901, *People v. Luders*, 126 *id.* 440, 83 *N. W.* 106 (same); *Mont.*: 1894, *State v. Black*, 15 *Mont.* 143, 151, 38 *Pac.* 674; *Nebr.*: 1886, *Parks v. State*, 20 *Nebr.* 515, 517, 31 *N. W.* 2, *semble*; 1888, *State v. Huckins*, 23 *id.* 309, 36 *N. W.* 827, *semble* (here, for character witnesses); 1895, *Fager v. State*, 49 *id.* 439, 442, 69 *N. W.* 611 (allowed for certain rebutting testimony); 1897, *Kelly v. State*, 51 *id.* 573, 574, 71 *N. W.* 299 (allowable for testimony "obviously and purely rebuttal in its nature"; but this seems to ignore that the statute applies only to "known" witnesses, and a witness not used in rebuttal may still not be a "known" witness, and *vice versa*; see the distinction *infra*, § 1854, which is here by confusion adopted); 1897, *Kelly v. State*, 51 *id.* 573, 574, 71 *N. W.* 299 (allowable for witness in rebuttal); 1899, *McVey v. State*,

57 *id.* 471, 77 *N. W.* 1111 (same); 1899, *Kastner v. State*, 59 *id.* 767, 79 *N. W.* 713 (same); 1901, *Trimble v. State*, 61 *id.* 604, 85 *N. W.* 844; *N. D.*: 1896, *State v. Kent*, 5 *N. D.* 518, 67 *N. W.* 1052; *S. D.*: 1897, *State v. King*, 9 *S. D.* 628, 70 *N. W.* 1046; *Wash.*: 1893, *State v. Lee Doon*, 7 *Wash.* 306, 34 *Pac.* 1103; 1894, *State v. Regan*, 8 *id.* 506, 36 *Pac.* 472 (in discretion); 1895, *State v. Holmes*, 12 *id.* 170, 40 *Pac.* 735, *semble* (same); 1896, *State v. Bokien*, 14 *id.* 403, 44 *Pac.* 889 (same); 1896, *State v. Kelly*, *ib.* 702, 45 *Pac.* 38 (same); 1900, *State v. Phelps*, 22 *id.* 181, 60 *Pac.* 134 (same).

⁵ The rulings in Nebraska, cited in the preceding note, ignore this distinction; compare the Michigan rule, in *People v. Quick*, *supra*, note 2.

⁶ Of course U. S. Rev. St. § 1023 does not apply to a prosecution for a misdemeanor: 1877, *U. S. v. Butler*, 1 *Hughes* 457, 466 (conspiracy to obstruct an election; the defendant's application for the names of prosecutor and witnesses was refused); 1897, *Shalp v. U. S.*, 26 *C. C. A.* 570, 81 *Fed.* 694.

⁷ 1817, *R. v. Watson*, 22 *How. St. Tr.* 1, 69 (residence misdescribed); 1840, *R. v. Frost*, *Gurney's Rep.* 77, 188, 778, 4 *St. Tr. n. s.* 88, 172, 303, 9 *C. & F.* 129 (residence misdescribed);

2. But where *no list at all* has been delivered, the rule of procedure could have been enforced by motion before or at the opening of the trial, and hence there is no necessity for creating a rule of evidence and excluding the witnesses; the accused's virtual waiver of the rule or procedure prevents him from asking afterwards that it be turned into a rule of evidence.³

3. Under the peculiar wording in some statutes of this type, requiring a list of the witnesses that are to be produced "in support of the indictment," a witness offered *in rebuttal* is wholly without its scope, and therefore need not be named on the list.⁴ In the statutes which do not contain this qualifying clause, it would seem proper to construe them as meaning only the witnesses "intended to be produced," and thus a witness not known beforehand to be needed would be without their scope, and the distinctions accepted under other statutes (*ante*, § 1853, par. 5) would become applicable. But this point seems not yet to have been judicially decided.

As a rule of procedure, the requirement of these statutes, and its judicial interpretation, is without the present purview.⁵

§ 1855. *Same: (III) Statutory Rule of Evidence expressly excluding Unlisted Witnesses.* The foregoing statutes in terms provide merely a rule of preliminary procedure, and any rule of evidence arising out of them rests solely on implication, and therefore is more or less in the hands of the

1899, *Horton v. U. S.*, 15 D. C. App. 310, 319 (notice naming an incorrect abode, held not insufficient, when the accused was not in fact misled); 1846, *Lord v. State*, 18 N. H. 173, 175 ("Undoubtedly it is competent to the respondent, when a witness is called in such a case to be examined against him, to except that such witness is not named in the list furnished to him, for the purpose of excluding the testimony of that witness"); 1902, *State v. Greenleaf*, — *id.* —, 54 Atl. 38 (*State v. Lord* followed); 1851, *U. S. v. Hanway*, 2 Wall. Jr. 139, 163, 168 (here the testimony, though offered in rebuttal, was held to have been properly due in chief; the implication was that the rule did not apply to genuine rebuttal-testimony); 1891, *Logan v. U. S.*, 144 U. S. 263, 306, 12 Sup. 617 (not decided; but *Lord v. State* apparently approved); 1902, *Bird v. U. S.*, 187 *id.* 118, 23 Sup. 42 (not decided; witness held properly named in the list delivered).

³ 1840, *R. v. Frost*, *supra* (by nine to six, it was held that an objection taken at the time of calling the first witness was not good, because, if it had been taken earlier, the trial might have been postponed and a good delivery made); 1846, *Lord v. State*, 18 N. H. 173, 176 (objection must be taken when the case is called; so also where the objection of insufficient description of residence applies is common to the whole list; but an objection to the description of residence of a single witness may be taken when he is produced); 1795, *U. S. v. Stewart*, Wharton's St. Tr. 172, 2 Dall. 343 (trial postponed to allow reasonable time, after list furnished, for investigation; present point not decided); 1891, *Logan v. U. S.*, 144 U. S. 263, 304, 306, 12 Sup. 617 (failure to deliver a list under the statute,

and refusal to grant postponement, held error, where objection was made when the case was called for trial; but whether the error sufficed alone to require a reversal was not decided).

⁴ *U. S. v. Hanway*, 2 Wall. Jr. 139, 163, 168, *semble* (cited *supra*); 1893, *Goldsby v. U. S.*, 160 U. S. 70, 6 Sup. 216 (under an Arkansas statute requiring delivery of a list of the witnesses "to be produced on the trial for proving the indictment," witnesses in rebuttal need not be included; in this opinion the cases in the Courts of Iowa, Illinois, Kansas, Nebraska, and Michigan are cited indiscriminately, without regard to the radical differences of the statutes under which the rulings were given; such a treatment is inexcusable, and serves only to confuse).

The same conclusion is reached under the similar words of the Iowa statute dealt with in the next section.

⁵ The following rulings, however, may be placed here as being of service in the present relation; they seem to be all that have hitherto been made in regard to the witness-list: 1839, *R. v. Frost*, *supra*, 4 State Tr. n. s. 35, 461 (examining at length the history of the English statute; the jury-list and witness-list must be delivered at the same time); 1795, *U. S. v. Isurgenta*, 2 Dall. 335, 343 (statute applied in general); 1826, *U. S. v. Curtis*, 4 Mason 232, 335 (the latter limit of the period is "before the cause is tried by the jury, and not before the party is arraigned," because the arraignment is here not the beginning of the "trial"); 1840, *U. S. v. Dow*, Taney C. C. 34, 35 (the "two entire days" must be exclusive of the day of delivery and day of arraignment).

Courts to form. But in one jurisdiction (Iowa), since imitated by another (Oregon), a statute has expressly laid down a rule of evidence, and has prescribed the precise terms upon which witnesses may be excluded.¹ This statute, originally passed shortly after the ruling in *State v. Abrahams*,² has been radically amended in order to avoid the arbitrary operation of its original terms;³ but it still remains an example of the evils of over-technicality in favor of an accused. Its adoption by other jurisdictions is not to be recommended. The judicial rulings in this State since 1858, resting as they do upon the express evidential commands of a unique statute, cannot be employed in other Courts. The purely local nature of the profuse rulings upon the words of this statute renders it impracticable to deal with them here; except to point out that the statute is held not to apply to witnesses offered in rebuttal⁴ or to documentary evidence,⁵ nor to exclude witnesses named erroneously without misleading effect⁶ or witnesses not material.⁷

§ 1856. *Civil Cases (Discovery in Equity; Statutory Interrogatories to a Party; Names of Witnesses)*. The common law required no notice to be given in advance to the opponent as to the names of witnesses intended to be produced (*ante*, § 1845); nor have the reasons that produced a change in the law for criminal prosecutions (*ante*, § 1847, par. 1) had any bearing on the policy applicable to civil litigation. Mr. Bentham long ago proposed some such a modification,¹ but this remains as one of the few important sugges-

¹ *Ia. Code 1897, § 5373* ("The county attorney, in offering the evidence in support of the indictment in the order prescribed in the last section, shall not be permitted to introduce any witness who was not examined before a committing magistrate or the grand jury, and the minutes of whose testimony were not presented with the indictment to the court, unless he shall have given to the defendant a notice in writing, stating the name, place of residence, and occupation of said witness, and the substance of what he expects to prove by him on the trial, at least four days before the commencement of such trial. Whenever the county attorney desires to introduce evidence to support the indictment, of which he shall not have given said four days' notice because of insufficient time therefor since he learned said evidence could be obtained, he may move the Court for leave to introduce such evidence, giving the same particulars as in the former case, and showing diligence such as is required in a motion for a continuance, supported by affidavit; whereupon, if the Court sustains said motion, the defendant shall elect whether said cause shall be continued on his motion, or the witness shall then testify; and if said defendant shall not elect to have said cause continued, the county attorney may examine said witness in the same manner and with the same effect as though four days' notice had been given the defendant as hereinbefore provided, except [that] the county attorney in the examination of said witness shall be strictly confined to the matters set out in his motion"); *Or. St. 1899, p. 100, § 5*

("the name of each witness examined on oath or affirmation by a district attorney in support of any information" shall be inserted or indorsed before filing; "otherwise the testimony of such witness cannot be heard against the defendant at the trial of such information").

² Cited *supra*, § 1852, par. (b), note 5.

³ *St. 1858, c. 109, Code 1860, § 4786, Code 1873, § 4421*, contained substantially the enactment *supra*, as far as the proviso; *St. 1876, c. 168, § 3, Code 1880, § 4431*, added the proviso.

⁴ 1859, *State v. Gillick*, 10 *Ia.* 98, 100; 1867, *State v. Parish*, 22 *id.* 284, 285.

⁵ 1894, *State v. Farrington*, 90 *Ia.* 681, 57 *N. W.* 606; 1897, *State v. Boomer*, 103 *id.* 106, 72 *N. W.* 424 (clerk producing records; notice of their contents unnecessary).

⁶ 1899, *State v. Dale*, 109 *Ia.* 97, 80 *N. W.* 206; 1903, *State v. Dunn*, 116 *id.* 219, 89 *N. W.* 284.

⁷ 1903, *State v. Hasty*, — *Ia.* — , 96 *N. W.* 1115.

¹ 1827, Bentham, *Rationale of Judicial Evidence*, b. IX, c. 7, Bowring's ed., vol. 7, p. 368 (called an "anticipative survey of the contents of the budget of evidence"). Under the name of "settlement of issues," a similar expedient in the way of preliminary procedure was strongly urged by L. C. J. Denman, during Mr. Bentham's lifetime and as a result of his teachings (*Arnold's Life of Lord Denman*, I, 201); and analogous measures have since come to form part of some systems of procedure.

tions of his that has not had palpable results in legislation. Probably our indifference to the need of improvement and our disinclination to attempt any solution of the problem is due to two reasons, first, the extreme difficulty of framing a fair practical rule which shall not be cumbrous and merely obstructive, and, secondly, the sufficient general acquaintance ordinarily possessed by each party with the possible range of persons whose testimony might be material, by reason of which no actual hardship occurs except in occasional instances. By statute, however, several exceptions have been created; only one of these is expressly intended to furnish compulsory notice of the opponent's evidence; in the other instances, the notice results rather as an incident of some other purpose.

(1) *Discovery in chancery.* In chancery practice, a party to a suit at law has always been entitled, by a *bill of discovery*, to ascertain before trial the tenor of his opponent's knowledge and belief upon all the facts in issue —, in other words, to obtain disclosure of his testimony before trial. The soundness of this policy rests upon reasons already examined (*ante*, § 1847, par. 2). But the tenor of this discovery was strictly limited to the *opponent's own testimony*, that is, his own admissions resting on his knowledge and belief. It is true that the bill required from the opponent an answer under oath stating all that he claimed in opposition; but to this extent what was obtained was no more than a sworn pleading, stating such material facts as would be alleged in any pleading. But of the evidence which he was to bring forth in support of those facts — the names of his witnesses and the circumstances to which they would testify — he was required to betray nothing in advance,² except so far as he himself could bear testimony. In answering as a witness to facts, it was no excuse for him that his testimony would incidentally reveal his witnesses' names;³ but this did not impugn the general principle that he was entitled to keep to himself all evidential data except his own testimony. This principle, which obtained equally for documentary evidence (*post*, § 1858), was applied in scores of cases to a great variety of arguable situations, but a guiding doctrine was not open to dispute:

1836, *Sir James Wigram, V. C., Discovery*, §§ 81, 82: "Proposition I: It is the right, as a general rule, of a plaintiff in equity to examine the defendant as to all matters of fact which, being well pleaded in the bill, are material to the proof of the plaintiff's case and which the defendant does not by his form of pleading admit. Proposition II: Courts of equity, as a general rule, oblige a defendant to pledge his oath to the truth of his defence. With this (if a) qualification, the right of a plaintiff in equity to the benefit of the defendant's oath is limited to a discovery of such material facts as relate to the plaintiff's case, and does not extend to a discovery of the manner in which or the

² 1826, *Preston v. Carr*, 1 Y. & J. 175; 1833, *Ingilby v. Shafto*, 33 Beav. 676.

³ 1836, *Storey v. Lord Lennox* 1 Keen 341, 357 (Lord Langdale, M. R.: "In telling the truth, as he is bound to do, the defendant may incidentally disclose to the plaintiff that which may enable the plaintiff to learn the names of

the witnesses and the nature of the evidence; and if this consequence could be used as a ground for resisting a discovery, one of the most extensively useful parts of the jurisdiction of the courts of equity would be lost"). Compare note 2, *infra*.

evidence by means of which the defendant's case is to be established, or to any discovery of the defendant's evidence."⁴

It may be added that the principle of a bill of discovery was never considered to be applicable to *third persons not parties* so as to secure from them before trial a disclosure of possible evidence;⁵ just as it was not available against such persons to secure an inspection of documents (*post*, § 1857).

(2) *Statutory interrogatories to parties-opponent.* This equitable practice of requiring discovery of the opponent's own testimony before trial was, as an exception to the general rule, a doctrine of clear wisdom, open to no objection (*ante*, § 1847, par. 2); and it was accordingly engrafted by statute upon the practice in common-law Courts, without the cumbrous appendances of a bill for discovery. This reform came about in England in 1854,⁶ after nearly a generation of agitation, and has been since adopted by statute in a majority of American jurisdictions.⁷ These statutes provide

⁴ Compare the quotations *ante*, § 1844, and the following: 1839, Story, Equity Pleading, 6th ed., § 572.

There was, to be sure, one settled exception, but apparent only, to the rule that notice of the opponent's own case could be obtained beforehand, namely, the rule for using a party's *written admissions*. If A produced at the trial an admission of liability by B, not specified beforehand in the pleadings, the trial might be postponed for B's benefit. This rule, however, in its orthodox form, was not a rule excluding such evidence, but merely refusing to act upon it until time had been given to answer it: 1837, Austin v. Chambers, 6 Cl. & F. 1, 38 (admissions not put directly in issue by the pleadings, so as to give an opportunity of contradicting or explaining, are not to be given binding effect); 1838, Atwood v. Small, 1b. 332, 319, 350, 488, 516 (similar doctrine); 1838, Copland v. Toulmin, 7 id. 349, 373; 1843, Malcolm v. Scott, 3 Hare 39, 63 (letters not charged in the bill; Vigram, V. C., held that "if one party should keep back evidence which the other might explain, and thereby take him by surprise, the Court will give no effect to such evidence without first giving the party to be affected by it an opportunity of controverting it"); 1846, McMahon v. Burchell, 1 C. P. Cooper, 457, 477 (L. C. Cottenham approved the preceding doctrine; at pp. 480-509 other cases are collected). But the rule seems never to have been accepted in the United States: 1837, Smith v. Burnham, 2 Sumner 612, 633 (a learned opinion by Story, J., pointing out that the reasons for the English rule are not satisfactory, and denying its validity in the United States); 1846, Brandon v. Cabell, 10 Ala. 155, 162 ("From Austin v. Chambers it would seem that the rule is founded upon the secrecy with which evidence in chancery is taken, as it is there put upon the fact that the party would be deprived of the power of cross-examining the witness, if the name of the person was not stated in the bill, to whom the admissions were made; this objection could not apply in this State, where the party must always have the power of cross-examination";

but the rule was held in any case inapplicable to admissions used in rebuttal of the defendant's own case); 1870, Story, Equity Pleading, 6th ed., by Redfield, § 265 a.

⁵ 1887, Post v. R. Co., 144 Mass. 341, 348, 11 N. E. 540 ("It is clear that Courts do not compel discovery from persons who sustain no other relation to the contemplated litigation, or to the subject of the suit, than that of witnesses; and it is also clear that a bill for discovery cannot be used to enable a plaintiff to fish for information of any causes of action he may have against other persons than the defendants"); 1908, Hurricane Tel. Co. v. Mohler, 51 W. Va. 1, 41 S. E. 431 (good opinion, with a full citation of cases). Compare Ont. Rules of Court, 1897, § 483, Holmes and Langton's notes.

⁶ St. 17 & 18 Vict. c. 125, Common Law Procedure Act; 1863, Rules of the Supreme Court, Order XXXI, Rules 1 ff. The practice under this statute may be seen in the following cases: 1878, Eade v. Jacobs, L. R. 3 Exch. D. 335; 1882, Attorney-General v. Gaskill, L. R. 20 Ch. D. 519; 1883, Lyell v. Kennedy, L. R. 8 App. Cas. 317. Distinguish the rulings upon the attorney's privilege (*post*, § 2318).

Canada: B. C. Rev. St. 1897, c. 52, § 124; Man.: Rev. St. 1902, c. 40, Rule 387; Newf.: Consol. St. 1892, c. 50, Rules of Court 28; N. W. Terr.: Consol. Ord. 1898, c. 21, Rules 201-225; N. S.: Rules of Court 1900, Ord. 30, Rules 1 ff.; Ont.: Rules of Court 1897, §§ 439-442, 481; P. E. I.: St. 1873, c. 22, §§ 244-248.

⁷ Compare the statutes cited *post*, § 2218 (party's privilege); Ala. Code 1897, §§ 1850-1858; Ariz. Rev. St. 1901, § 2528; Ark. Stats. 1894, §§ 5776 ff.; Cal. C. C. P. 1872, § 2021 (deposition may be taken "at any time after the service of summons," etc., "I, when the witness is a party to the action," etc.); § 2022 (a deposition may be used on proving that a witness is deceased, etc., but this condition does not apply to depositions taken under sub-section 1 of § 2021, *supra*); Conn. Gen. St. 1888, §§ 1060-1062, 1069 (but if discovery is compelled, testimony on the stand cannot be compelled); Fla. Rev. St. 1882, §§ 1116, 1117; Ga. Code 1886, §§ 3953-

for the submission before trial of interrogatories to the opponent to be answered by him, — usually in writing, but sometimes also (or alternatively) orally before an officer of Court.

In the interpretation of these statutes, it seems to be generally held that their purpose was merely to extend to all Courts the expedient that formerly existed in chancery alone (*ante*, § 1846), that therefore the principle is not changed, and that the discovery is limited to the extraction of the party's own testimony and cannot be asked merely to ascertain his other evidence to support his own case or the names of his witnesses; so that the common law in this respect (*supra*, par. 1) remains unchanged for civil cases:

1895, *Lindley*, L. J., in *Re Strachan*, 1 Ch. 439, 445: "[The applicant] wants to see how her opponent hopes to prove his case, and what she wants to see is the evidence he has procured to prove the insanity which he alleges and she disputes. In England it is considered contrary to the interests of justice to compel a litigant to disclose to his opponent before the trial the evidence to be adduced against him. It is considered that so to do would give undue advantages for cross-examination and lead to endless side-issues, and would enable witnesses to be tampered with and give unfair advantage to the unscrupulous. It is very true that an honest and fair-dealing litigant, on seeing how strong a case his opponent had, might at once withdraw from further litigation. But our rules of evidence and of discovery are not based upon the theory that it is advantageous to let each side know what the other can prove, but rather the reverse."³

2067; *Ill. Rev. St.* 1874, c. 31, § 6; *Ind. Rev. St.* 1897, § 553; *La. C. Pr.* 1894, § 347; *Mass. Pub. St.* 1882, c. 167, §§ 28, 49-56, *Rev. L.* 1902, c. 173, §§ 35, 57-63; *Mich. Comp. L.* 1897, § 10311; *Circuit Court Rules* of 1844, Post's ed., rule 48; *Miss. Annot. Code* 1892, §§ 1761, 1762; *Mont. C. C. P.* 1895, §§ 3242, 3261 (like *Cal. C. C. P.* §§ 2021, 2032); *Nev. Gen. St.* 1885, § 3429; *N. H. Pub. St.* 1901, c. 235, § 11; *N. J. Gen. St.* 1896, *Practice*, §§ 156-166; *St.* 1908, c. 247, §§ 146, 144; *N. M. Comp. L.* 1897, § 3038; *N. Y. C. C. P.* 1877, §§ 370-372; and amendments; *N. O. Code* 1883, §§ 579-587; *N. D. Rev. C.* 1895, §§ 5645-5652; *Ok. Rev. St.* § 5295; *Or. C. C. P.* 1892, §§ 814, 828 (like *Cal. C. C. P.* §§ 2021, 2032); *S. C. C. C. P.* 1893, §§ 390-398, *Code* 1902, §§ 390-398; *S. D. Stat.* 1899, §§ 6483-6490; *Tenn. Code* 1896, §§ 5684-5693 (either party may have such discovery as the rules of equity allow); *Tex. Rev. Civ. Stat.* 1895, §§ 2292-2298; *Va. Code* 1847, §§ 3359, 3360, 3370, 3379; *Wash. C. & Stats.* 1897, §§ 6008-6013, 6745; *W. Va. Code* 1900, c. 130, § 33; *Wis. Stat.* 1898, §§ 4094-4096; *St.* 1901, c. 344 (amending the details of *St.* 1896, § 4094); *Wyo. Rev. St.* 1887, §§ 2591, 2641.

From the above statutes are to be distinguished two types of statutes which may be used to attain indirectly the same purpose and yet may practically have different limitations, namely, statutes which declare that a party shall be "competent to testify, *viva voce* or by deposition, like any other witness" (cited *ante*, § 466), or shall be "compellable to testify *viva voce* or by deposition like any other witness" (cited *post*, § 2318); the main differences are (a) the procedure and scope of inquiry may be different, as illustrated in *Matthews v. R. Co.*, 1898, 142 Mo. 645, 648, 44 S. W. 803; (b) the rule about impeaching

one's own witness may cause obstruction (*ante*, § 916) as well as the rule about cross-examining to one's own case (*post*, § 1891); (c) a deposition, in the strict sense, cannot be later used on the trial unless the deponent is deceased or otherwise unavailable (*ante*, § 1402); but in this last respect, note that the California Code and those following it (quoted in the above list) meet this by expressly exempting a party's deposition from the rule.

³ Accord; *Ang.*: 1878, *Ende v. Jacobs*, L. R. 3 Exch. D. 335; 1884, *Marriott v. Chamberlain*, L. R. 17 Q. B. D. 154, 163 ("It is not permissible to ask the names of persons merely as being witnesses whom the other party is going to call and their names not forming any substantial part of the material facts"; but *Storey v. Lord Lennox*, quoted *supra*, note 3, was also approved); 1888, *Humphries v. Taylor D. Co.*, L. R. 39 Ch. D. 693; 1893, *Re Strachan*, 1 Ch. 439, 445; 1895, *Kennedy v. Dodson*, 1 Ch. 354; *Conn.*: 1897, *Jones v. Pemberton*, 6 Gr. C. 69; 1899, *Coyle v. Coyle*, 19 Ont. Pr. 97; *U. S.*: 1913, *Volusia Co. Bank v. Bigelow*, — F.R. —, 33 So. 704; 1901, *Robbins v. R. Co.*, 180 Mass. 51, 61 N. E. 365; 1876, *Storm v. U. S.*, 24 U. S. 76, 84 (in examining on the stand, parties "cannot complain if the Court excludes questions propounded merely to ascertain the names of persons whom they may desire to call as witnesses to disprove the case of the opposite party").

For the rule in patent-infringement cases, see *infra*, note 18.

The rule about not impeaching one's own witness here tends to cross lines with the present rule when it is sought to discredit the opponent's character by his own interrogatories on discovery; compare the cases cited *ante*, § 916, with the following: *Eng. Rules of Court*, 243,

In a few of the statutes this limitation is preserved in express words.⁹ But it may be questioned whether this result is a wise one. Some advances ought to be conceded (*ante*, § 1847) towards the abandonment of the rigid common-law doctrine of secrecy. As the matter now stands, many Courts are in their rulings exhibiting the inherent practical difficulties and inconsistencies which arise from the attempt to reconcile the antiquated limitations of the bill of discovery with the spirit of these statutes and of modern progress.

The details of this statutory interpretation are not within the present purview;¹⁰ but the following passage will illustrate the operation of the statute in a single State:

1900, Mr. Justice Dalg, "Preparation for Trial," The Brief, II, 299: "In preparing for the trial of your action, it may be necessary to take the deposition of the adverse party with the expectation of having to use it as evidence. The Code contemplates the use of the deposition upon the trial, and the examination is not allowed for the mere purpose of enabling the applicant to prepare for trial. The examination is in every case of very great benefit to the party applying for it, and for that reason is almost invariably resisted with vigor, the conflict giving rise to a vast amount of litigation, producing decisions not always easy to reconcile and not always adhered to. In my experience no remedy has been more warmly contested, and it is hardly possible today to make an application for it without a fatiguing study of a vast number of cases. The reason for this is due to the resistance naturally to be expected to an assumed inquisitorial investigation, which may disclose the case of an adversary and discover its weakness, and to the disposition of the Courts to limit the privilege of examination for fear of abuse. The remedy first made its appearance in our practice with the Code of Procedure in the middle of the century now drawing to a close. The language of the old Code ('No action to obtain discovery under oath in aid of the prosecution or defense of another action

Nov. 1893, R. 12; N. Sc. Rules of Court 1900, Ord. 20, R. 1; 1900, Bank of British Columbia v. Trapp, 7 Br. C. 254 (on examination for discovery, the opponent may be treated as if on cross-examination, under the Rules of Court); 1900, Hopper v. Dunsmuir, 10 Id. 23 (similar; good opinion by Hunter, C. J.).

For discovery from an officer of a corporation, see the following: 1903, Morrison v. Grand T. R. Co., 4 Ont. L. R. 43, 5 Id. 38 (a locomotive engineer is not an officer of a corporation); 1903, Beck v. International Nav. Co., 134 Fed. 711 (interrogatories in admiralty to the officers of a corporation).

⁹ Mass. Pub. St. 1892, c. 167, §§ 29, 40-56 (quoted *infra*, § 1839); N. H. Pub. St. 1901, c. 224, § 14 ("no party shall be compelled, in testifying or giving a deposition, to disclose the names of the witnesses by whom nor the manner in which he proposes to prove his case," unless in taking his own deposition); 1863, Carter v. Beale, 44 N. H. 408, 412 (statute applied); 1865, Eaton v. Farmer, 44 Id. 300, 303 ("If it reasonably appears that the answer of the party will disclose the names of his witnesses and the manner of proving his case, and he states that it will do so, he ought not to be required to state fully how it will have that effect"; other clauses of the statute interpreted and applied); 1879, Penniman v. Jones, 59 Id. 119 (statute applied).

¹⁰ The practice under the above statutes rests usually on the limitations peculiar to equitable

discovery, and hence the detailed rulings interpreting them are without the present scope, more especially as they turn frequently on the precise wording of the local statute; the following will serve as examples of the mode of reasoning involved: 1884, Kelly v. R. Co., 60 Wis. 480, 19 N. W. 521 (careful opinion); "the object of our statute, as it now stands, is to elicit a full and complete disclosure of whatever may be relevant to the controversy"; 1886, Whorsett v. Ellis, 65 Id. 639, 27 N. W. 630, 28 N. W. 333.

It has been held, but not soundly, that the Federal statutes impliedly negative the use of such discovery in Federal courts under a State statute which would be valid (*ante*, § 6) in Federal courts only when not inconsistent with Federal statute: 1885, *Ex parte Fisk*, 113 U. S. 713, 5 Sup. 724 (N. Y. C. C. P. §§ 870 ff., providing for discovery before trial, is inconsistent with U. S. Rev. St. § 861, providing that "the mode of proof in the trial of actions at common law shall be by oral testimony and examination of witnesses in open court," and the latter must prevail; clearly unsound, since the process of extraction by discovery is merely a process of learning what the opponent's testimony is or will be and is in its very nature not "a mode of proof in the trial"); 1901, Flower v. MacGinnis, 50 C. C. A. 291, 112 Fed. 377 (a deposition cannot be taken, under R. S. § 863 and Sup. Ct. Rule 68, until the cause is at issue).

shall be allowed; nor shall any examination of a party be had on behalf of the adverse party, except in the manner prescribed by this chapter, led the Courts at first to consider the examination as a mere substitute for the former bill of discovery and thus, logically, in administering the remedy, to hold that parties availing themselves of it were bound to conform as near as might be to the rules and practice governing bills of discovery. Under the present Code, in which the examination of a party before trial, at the instance of his adversary, the examination of a witness *de bene esse* and the taking of depositions for the perpetuation of testimony in anticipated litigations are all grouped in one article, it is held that the proceeding is purely statutory, to be governed by the provisions of the Code, and not to be controlled by the former practice. This clearing away of former restrictions did not, however, tend to diminish litigation upon the subject, and there is yet much to perplex the practitioner in the very fine distinctions which have been favored by the Courts. The tendency of the Courts is not yet toward liberality, in permitting examinations of parties at the instance of their adversaries, and a very wide discretion is exercised in determining whether the facts set forth in the applicant's affidavit show that the testimony is material and necessary. A perusal of the statute might reasonably lead to the conclusion that the Legislature intended to afford a very broad and general remedy; but a review of the great array of decisions upon the article would lead to the conviction that the Courts, in the conscientious discharge of duty, have made a deal of work and trouble for themselves which might have been avoided, without special injury, by a less conservative construction, by permitting the examination except where it is obviously intended to annoy and harass and by confining the examination strictly to the issues, or limiting it to particular matters as the statute expressly permits . . . In favor of a liberal extension of the right to examine an adversary, may be urged the disposition which led to the invention of bills of discovery in the past, and the great progress made in substituting for them the oral examination. Pleadings themselves are but one form of extracting from an adversary in advance of the trial admissions or answers to the charge against him. . . . It is interesting to note that the Court of last resort in this State has expressed its fear of latitude leading to abuse with respect to one branch of the subject only, namely, that which relates to the examinations *before action brought* of a person who is expected to be made a party to it. . . . If the examination is allowed by the Court it need not be limited to the affirmative cause of action or defense of the party desiring the examination, but may be a general examination, the same as if it were had at the trial. . . . [The examination has been refused] where there is no proof that the facts are not as well known to the party seeking the examination as to the adversary whom he wishes to examine; where it is not shown that an examination of the adversary could not be had at the trial and it does not appear that an examination before trial is necessary or important; where it is made to appear that the examination is sought merely for the purpose of annoyance or delay; where the information sought can be obtained from records or documents; where it cannot be ascertained on what issue the party desires the examination or where a defendant sought to examine a plaintiff before service of a complaint in order to frame an answer; where it is not alleged that the facts exist which are sought to be proved by the examination; and, generally, where the Court is not satisfied that the examination of the adversary is either material or necessary. The instances under this head are too numerous to cite; and it may be suggested that each case will be judged upon its own facts and that the practitioner, in groping his way through the maze of adjudications on this division of the subject, will find common sense a not untrustworthy guide."

(3) A further statutory exception to the common-law rule is in fact created wherever the prior filing of *affidavits* is required¹¹ or where witnesses

¹¹ Example: Mo. Rev. St. 1899, §§ 3143, 3154 test by notary, etc., must be filed a specified (affidavits as to indorsement, partnership, pro- time before trial). Compare § 1710, ante.

not produced before a magistrate below are excluded.¹³ Moreover, in all cases of depositions taken by the opponent, the notice required by the rule exacting an opportunity of cross-examination (*ante*, § 1878) results in fact in advising the other party of the evidential facts desired to be proved by the opponent, and thus amounts to an exception under the present principle. So, also, the requirement that depositions be filed with the clerk of court a specified number of days before trial¹⁴ accomplishes the same purpose, even where the other party did not attend the taking.¹⁵ Whether an express notice must be given under the present rule, where a deposition taken for a former trial is desired to be used at a second trial, depends more or less on the wording of these statutes.¹⁶ In no other respect does statute seem yet to have made any inroad upon the common-law rule.¹⁷

3. Documents.

§ 1857. *Inspection by Discovery in Equity.* Just as in chancery practice the party-opponent lacked a privilege as party to withhold his testimony and was compellable to disclose all his testimonial knowledge and belief, so he was compellable at the trial or hearing to produce documents in his possession which were serviceable as evidence (*post*, § 2219). It was therefore not difficult for the Court of Chancery to sanction the policy of obliging the opponent to exhibit such documents to the other party before the hearing, in order that the latter might inspect and copy them. Conceding no privilege of ultimate suppression, it was easy to require an earlier disclosure. Hence in chancery practice there was an apparent exception, as already noted (*ante*, § 1846), to the general rule denying the right of inspec-

¹³ By statute, in one or two jurisdictions, a party appealing a case from a magistrate and obtaining a jury trial, is sometimes prohibited from using at the second trial any evidence not produced before the magistrate; Md. Pub. Gen. L. 1888, Art. 75, §§ 80, 81 (in cases of disputed boundaries, documents and witnesses not used at the survey may, on certain conditions, be excluded at the trial); N. J. Gen. St. 1896, Justices' Courts, §§ 86, 187, 188 (on appeal from justice's judgment, notice required on certain conditions for evidence not produced below; apparently abolished by the last clause in 1896). But the object of this measure seems mainly to be, not to protect against unfair surprise, but to diminish lengthy litigation and increase respect for magistrates' justice by compelling parties to treat it as a real trial and not merely as an empty formality preceding the actual contest.

¹⁴ See the statutes cited *ante*, §§ 1380-1383.

¹⁵ The following case illustrates this application of such a statute: 1886, *Searle v. Richardson*, 67 Ia. 170, 172, 25 N. W. 113.

¹⁶ Illustrations: Notice required: 1859, *Samuel v. Withers*, 16 Mo. 532, 535, 541 (under an early statute for chancery practice; "notice of the intended use should be given, or it should be filed anew in the suit, so that the party against whom it was intended to be read may have knowledge thereof"); 1860, *Gitt v. Watson*, 18

Id. 274 (decree in a former chancery suit, not required to be filed); 1860, *Cabanis v. Walker*, 81 Id. 274, 279, 296 ("The rule . . . is not an inflexible one, and may be dispensed with when the ends of justice require it"). *Contra*: 1869, *Shaul v. Brown*, 26 Ia. 37, 50.

¹⁷ The following ruling illustrates the judicial disinclination to imply any exception on the basis of a statute: 1847, *Wilton v. Railroads*, 1 Wall. Jr. 192 (under St. July 4, 1836, § 5 Stats. 193, substantially identical with Rev. St. 1878, § 4950, cl. 7, providing that a defendant in a patent-infringement suit, who pleads previous invention or use, shall give notice thirty days beforehand of the names and residences of the persons alleged to have made prior invention or use, it is held that no notice is required of the names of witnesses by whom the specified prior use or invention is to be proved; construing the ambiguous language of Mr. J. Story in Philadelphia & T. R. Co. v. Scimpson, 14 Pet. 448, 459, and correcting the contrary statement in Greenleaf on Evidence, II, § 501, founded on Mr. J. Story's language); 1870, *Seymour v. Osborne*, 11 Wall. 516, 536 (assimilating the practice in equity, as to the names of users); 1878, *Bates v. Cox*, 96 U. S. 31, 39; 1879, *Planing-Machine Co. v. Keith*, 101 U. S. 470, 498 (like *Wilton v. Railroads*).

tion before trial. Moreover, since the auxiliary jurisdiction of chancery was available to secure such discovery in aid of an action at common law, as well as in aid of bills for relief in chancery, this right of inspection was available, through a separate proceeding in chancery, for the purposes of a suit at law. The *modus operandi* was as follows:

1877, Professor C. C. Langdell, *Equity Pleading*, § 166: "[The plaintiff applies] to the Court for an order that the defendant produce the documents described in the answer and leave them with the clerk in court, and that the plaintiff have leave to inspect the same and take copies thereof. If the order is made, the documents produced pursuant to the order are treated as part of the answer; the effect of the production being the same as if the documents produced had been set forth verbatim in the answer. Indeed, by the ancient practice, documents were thus set forth in the answer, instead of being merely described. . . . By the modern practice, when documents have been left with the defendant's clerk in court, pursuant to an order, if the plaintiff wishes to have them produced before an examiner or at the hearing of the cause or on a trial at law, he does not subpoena the defendant as formerly, but the defendant's clerk in court attends with them upon request and upon being paid his usual fees. A production of documents may be wanted for three distinct purposes, first, that they may be inspected and a copy of them taken, secondly, that they may be exhibited to witnesses for the purpose of proving their execution or any other fact connected with them, thirdly, that they may be read in evidence at the hearing or trial of the cause. All of these purposes are perfectly accomplished by the modern practice; while the ancient practice failed to accomplish perfectly the first purpose, for it gave the plaintiff no opportunity to inspect the document till after the cause was at issue."

But this right of inspection in chancery was an exception in superficial appearance only to the general rule (*ante*, § 1845) that a party is not entitled to ascertain before trial the tenor of his adversary's evidence. The strict limitation of this right of inspection was that it should include only those documents which contained the *evidences of the applicant*, and not those which contained the adversary's own evidence. If, for example, A sued B to enforce a contract, and the instrument was in B's possession, A could obtain inspection of that instrument, but not of a release which B might also possess. It is true that A might sometimes be unaware of the precise contents or even of the existence of documents evidencing his own case but possessed by B, and to this extent the discovery and inspection would relieve him from the risk of unfair surprise and would thus in spirit be an exception to the general rule and a decided improvement over his situation under common-law procedure. But this would be merely an accidental result in a given case; in theory of law he was inspecting merely that which was in a sense already his own. The strict and invariable rule, already briefly noted (*ante*, § 1846), in harmony with the rule already examined for witnesses (*ante*, § 1856), was that no inspection in advance could be demanded of those documents which were to serve merely as the adversary's own evidence. In other words, in chancery there was no exception to the broad principle of the common law that a party is not entitled to ascertain before trial the tenor of the documentary evidence which the adversary pos-

nesses to support his own case. However difficult and inconsistent this principle might be in its detailed application, it is essential to note its unquestioned acceptance as a principle; because whatever advances have been made in a more enlightened direction will thus be seen to be a distinct derogation from the established doctrine of chancery and to be wholly the creature of statute:

1833, *L. C. Brougham*, in *Bolton v. Liverpool*, 1 Myl. & K. 88, 91: "I take the principle to be this: A party has a right to the production of deeds sustaining his own title affirmatively, but not of those which are not immediately connected with the support of his own title and which form part of his adversary's. He cannot call for those which, instead of supporting his title, defeat it by entitling his adversary. Those under which both claim he may have, or those under which he alone claims. . . . The plaintiff here does not claim anything positively or affirmatively under the documents in question; he only defends himself against the claims of the corporation, and suggests that the documents evidencing their title may aid his defence. How? By proving his title, he says. But how can those documents prove his title? Only by disclosing some defect in that of the corporation. . . . He rests on the right which he has in common with all mankind to be exempt from dues and customs; and he says, 'Prove me liable if you can'; the corporation have certain documents which they say prove this liability. He cannot call for these documents merely because they may upon inspection be found not to prove his liability, and so to help him and hurt his adversary whose title they are."

1852, *Pollock*, C. B., in *Hunt v. Hewitt*, 7 Exch. 236, 244: "The right of a plaintiff in equity is limited, first, to a discovery confined to the questions in the cause; secondly, of such material documents as relate to the proof of his, the plaintiff's, case on the trial; and does not extend to the discovery of the manner in which the defendant's case is to be established, or to evidence which relates exclusively to his case. The party applying, therefore, who is in the same situation as a plaintiff in equity, must show, first, what is the nature of the suit, and of the question to be tried in it; and it seems also, that he should depose in his affidavit to his having just ground to maintain or defend it; secondly, the affidavit ought to state with sufficient distinctness the reason of the application and the nature of the documents, in order that it may appear to the Court or judge that the documents are asked for the purpose of enabling the party applying to support his case, not to find a flaw in the case of the opponent, and also that the opponent may admit or deny the possession of them. To this affidavit the opponent may answer, by swearing that he has no such documents, or that they relate exclusively to his own case, or that he is for any sufficient reason privileged from producing them; or he may submit to show parts, covering the remainder, on affidavit that the part concealed does not in any way relate to the plaintiff's case."

1877, Professor *Langdell*, *Equity Pleading*, §§ 59, 171: "In equity the parties are never entitled to inspect each other's documents, nor to have copies of them, nor in any way to know their precise contents until they are read upon the hearing. . . . But it is not always easy to distinguish accurately between what is evidence for the defendant and what is evidence for the plaintiff. So long as each party confines himself to evidence in support of an affirmative case or defence, there is little difficulty. . . . But it is sometimes assumed that when evidence is sought in support of a merely negative case, the evidence itself (and consequently the charge) may be negative [and yet be the plaintiff's own evidence]; but this seems to be clearly erroneous. When, therefore, a plaintiff in equity alleges that the defendant founds his case or defence upon a certain document in his possession, and then charges that the document does not in fact establish any such case or defence, while he is ostensibly seeking evidence in support of his own negative case or defence, he is in truth merely seeking to pry into the defendant's evidence, either with a view to finding out its weak points or in the hope of

finding something which will tell in his own favor. . . . It seems therefore that such a charge is wholly illegitimate."¹

§ 1858. *Inspection at Common Law (Oyer and Profert; Motion to Produce; Documents of Common Interest or of Trusteeship; Corporate Records; Insurance Policies).* At common law the party-opponent was absolutely privileged from producing on the trial documentary evidence in his possession (*post*, § 2219). It was natural, then, to find that an inspection of his documentary evidence before trial could also not be obtained. It would be conceivable that he might be compellable to produce it upon trial and yet not to exhibit it before trial, — in other words, that his privilege might be abolished (as it has been), while his duty to avoid surprise might not be granted (as it has not always been). But it was entirely unlikely to find the privilege to withhold at the trial coexisting with an obligation to allow inspection before trial. Accordingly, what we find is that the limited right of inspection which did exist ran more or less parallel with the situations in which the privilege was either not applicable or was virtually negated in chancery practice and therefore (to avoid circuitry) in common-law practice also.

In brief, there were five distinct classes of situations in which a court of common law allowed to the party the inspection before trial of documents in the adversary's possession. Of these five situations, two alone presented genuine and plain exceptions to the general rule (*ante*, § 1845) that a party is not entitled to ascertain before trial the tenor of his adversary's evidence; the others rested either on some independent rule of law or on an attempt to approach the chancery rule that a party was entitled to inspect his own evidence that happened to be in the adversary's hands.

(1) *Profert and Oyer.* By the doctrine of *profert* and *oyer*, a party pleading a deed of a limited class was obliged to set forth its contents in his pleading; the historical connection of this doctrine with the rule forbidding proof of documents except by the original has been already noticed (*ante*, § 1177). As a consequence of this *profert*, i. e. the proffer at the trial, the opponent was entitled to *oyer*, i. e. the hearing of the reading of the document. But these phrases had grown up in the early days of oral pleading; and, ever since the practice of written pleading, the two parts of the process had been replaced, respectively, the *profert*, by a statement of the tenor of the document in the pleading of the party offering it, and the *oyer*, by an opportunity for the opponent before trial to inspect it and be furnished with a copy. The practice in the early 1800s was thus described by the most famous pleader (next to Mr. Joseph Chitty) of his day:

1823, Mr. Wm. Tidd, *Practice*, 9th ed., I, 586: "Oyer of deeds, etc., is demandable by the defendant or by the plaintiff. If the plaintiff in his declaration necessarily make

¹ The details of chancery practice, for the reason already explained (*ante*, § 4), are without the purview of this work; the rules as to production of documents may be found in the usual

treatises, and especially in the following: 1851, Pollock, *Production of Documents for Inspection*, pp. 6 ff.; 1895, Sutherland, *Production and Inspection of Books and Papers*.

a *profert in curia* of any deed, writing, letters of administration, or the like, the defendant may pray oyer of the deed, etc., and must have a copy delivered to him, if demanded, paying for the same at the rate of fourpence per sheet. And a defendant who prays oyer of a deed is entitled to a copy of the attestation and names of the witnesses, as well as of every other part of the deed. So likewise, if the defendant in his plea make a necessary *profert in curia* of any deed, etc., the plaintiff may pray oyer, and shall have a copy at the like rate. And the party of whom oyer is demanded is bound to carry the deed to the adverse party. . . . Formerly all demands of oyer were made in court, where the deed is by intendment of law when it is pleaded with a *profert in curia*; and the score, when oyer is craved, it is supposed to be of the Court, and not of the party; and the words *ei legitur in hoc verbo*, etc., are the act of the Court. In practice, however, oyer is now usually demanded and granted by the attorneys."

The effect of this degenerated tradition was practically to accomplish the wholesome purpose of allowing an inspection of the adversary's own documentary evidence before trial. Thus, to the extent that *profert* was required and oyer was demandable (and they were correlative), a genuine exception to the general contrary rule (*ante*, § 1845) was recognized. It will be seen, however, that its recognition did not depend on any radical inroad upon the usual policy; for the party pleading the deed had in effect already betrayed its general tenor, and there was little to gain by an inspection, unless the handwriting or the names of the attesting witnesses were desired to be ascertained. Moreover, the narrow scope of the requirement, and the arbitrary quibbles governing its application, reduced it to a very limited usefulness. It contained the germ of great possibilities; but it was in practice not an extensive exception:

1831, *Common Law Practice Commissioners*, Third Report, 45: "By law, no *profert* is required to be made and consequently no oyer can be demanded of any instrument, except private deeds, letters testamentary, and letters of administration. If there are other cases, they are unfrequent and obscure. The following are consequently excluded: records and public writings of whatever description, private writings under seal but not falling within the legal definition of deeds (for example, a sealed will or a sealed award), and private writings not under seal of whatever description; and even of private deeds a numerous class is excepted, viz., such as take effect either by livery of seisin or by operation of the statute of uses. . . . The whole of this practice appears to be too strict, too intricate, and too prolix, and in some parts of it obscure and unsettled. It is strongly calculated to give rise to technical difficulty and formal objection, and tends in some other respects also to produce unnecessary delay and expense. The truth is that the law of *profert* and oyer was originally devised in reference to a state of things that no longer exists; being altogether founded on that method, now for so many ages obsolete, of oral pleading between litigants actually confronting each other in open court."¹

(2) *Corporate and Manorial Records*. That a member of a corporation or a copyholder of a manor had a right to inspect the records of the corporation or the manor had been settled before the 1700s; the membership of the one depended on the entry in the records and the title of the other passed by registration upon the books of the manorial lord. But this right to inspect rested not on a rule of procedure or evidence, but on the substantive

¹ For statutes dealing with oyer, see *post*, § 1860.

law; in other words, the general right to inspect for a reasonable purpose existed apart from the pendency of litigation, and the right to inspect for obtaining evidence was merely an incidental exercise of the general and independent right. It would and did follow that a party to a cause could obtain evidence by inspection of the records of a corporation of which he was a member, even though the corporation was not a party to the cause,² and, conversely, that a party to a cause could not obtain inspection of the records of an opponent-corporation if he was not as a member entitled to inspection generally.³ Thus, whatever right of inspection was and still is recognized in such cases depends upon the extent of the substantive right of members of corporations, under the law of corporations, and is therefore without the present purview.⁴

(3) *Documents subject to a Common Interest or a Trusteeship.* Apart from the preceding class of cases, which rested on no rule of evidence properly so called, and from the rule of oyer, the common-law Courts at the beginning of the 1700s recognized no right to obtain before trial an inspection of documents in an adversary's hands:

1698, *Groenvelt v. Burrell*, 1 *Ld. Raym.* 252 (refusing to the plaintiff an inspection and copy of the records of the college of physicians, in an action against one of them for false imprisonment): "This record may be pleaded without a *proferri in curia*, and therefore no oyer can be prayed of it, and therefore the defendants shall not be bound to give a copy, for it would be in effect to discover their evidence. And the plaintiff has no right in this record, therefore this case differs from the case of the public books of a corporation, for there the party has an interest. In the same manner, where there is a dispute between a lord and a copyholder, the copyholder shall see the rolls, because he has an interest in them."⁵

² 1730, *Attorney-General v. Coventry*, *Bunb.* 290 (cited *infra*, note 5); 1745, *R. v. Hostmen*, 2 *Str.* 1233 (mandamus to admit a person to the fraternity; "the Court said that every member of the corporation had, as such, a right to look into the books for any matter that concerned himself, though it was in a dispute with others").

There was of course much learning as to whether a person had an entitling interest though not in strictness a member; moreover, the right was in those days confined to public corporations so-called; but these details are without the present purview; the following rulings illustrate them: 1701, *R. v. Worsenham*, 1 *Ld. Raym.* 705; 1734, *Warriner v. Giles*, 2 *Str.* 954 (city market books); 1746, *Brewers' Co. v. Benson*, *Barnes* 236 (defendant allowed inspection of plaintiff's books, though no member, because their by-laws affected his right to trade); 1773, *Allan v. Tap*, 2 *W. Bl.* 850 (inspection of records of Clement's Inn, not a public corporation, not allowed); 1819, *R. v. Sheriff of Chester*, 1 *Chitty* 476 (action for neglecting to levy a writ; inspection of books of quarter sessions held not within the rule); 1834, *Harrison v. Williams*, 3 *B. & C.* 143 (action for penalty under a city by-law; inspection by defendant of corporate books allowed, the defendant being under corporate jurisdiction, though not a member).

³ 1744, *R. v. Bridgeman*, 2 *Str.* 1203 (dispute between Wigan corporation and defendant; inspection refused, for otherwise "one private man would have as good a right to inspect the deeds and evidences of another"); 1800, *Southampton v. Graves*, 8 *T. R.* 590 (inspection of corporate records of defendants refused to plaintiff not a member; Lord Kenyon, C. J.: "Where the dispute is between different corporations, there an inspection may be granted; but I cannot conceive why an inspection of the muniments of a corporation should be granted when a similar inspection would be denied between private persons only").

⁴ For the question whether a stockholder, desiring to learn of the corporate doings, must proceed by mandamus to obtain inspection rather than by bill of discovery, see the following cases: 1900, *Fuller v. Hollander*, 61 *N. J. Eq.* 648, 47 *Atl.* 646; 1901, *Trimble v. American Sugar-Ref. Co.*, 16 *340*, 45 *Atl.* 912; 1899, *Re Steinway*, 159 *N. Y.* 250, 53 *N. E.* 1103.

⁵ *Accord*: 1730, *Attorney-General v. Coventry*, *Bunb.* 290 (action against trustees of a charity; inspection not compelled; "this being their private evidence, they shall not be obliged to discover it; and it is not like the case of corporation books or court rolls, which are of a public nature"; even for manorial rolls, a stranger to the manor could not obtain in-

In the first half of the 1700s are to be found rulings in which not only is the inspection refused where it would certainly have been granted a century later, but even the very principle and distinction on which the Courts later proceeded were expressly denied a recognition.⁶

But with the accession of Lord Mansfield, in 1756, to that moral dominion in the common-law realm which he exercised throughout a generation, a decided change was noticeable. His ideas were a century in advance of his time, as subsequent events proved. But while he held sway, a broad and liberal practice prevailed, — a practice whose avowed object was to afford summarily to a party at law, upon mere motion, as ample an assistance of the present sort as he could have obtained by the tedious and expensive process of a bill of discovery in chancery.⁷ This advanced rule seems to have been unquestioned during Lord Mansfield's time.⁸

On the arrival of Lord Kenyon as his successor, in 1788, a halt was called. The well-known antagonism of mental attitude between this reactionary and his brilliant predecessor, and between their respective schools of followers, placed the unprogressive influences of thought in command of the English judiciary. So far as any one man could nullify the (to him) dangerous innovations of the preceding régime, Lord Kenyon set himself to do it. Applying in decorous fashion and under the forms of law the maxim of a Kilkenny fair, he proceeded to strike whenever he saw such an innovation. That it had been introduced or developed by Lord Mansfield was enough for him; it stood condemned. The result was, in the first place, a repudiation of this general practice of granting inspection wherever it could have been obtained in chancery, and, in the next place, a mazy uncertainty as to the precise extent to which the right would still be conceded.⁹ Not all the advance was lost; the tradition of Lord Mansfield's generation still lingered on in practice, in spite of his successor's unequivocal censure; and after Lord Kenyon's death in 1802, a counter-reaction set in. There was also still the

spection, though otherwise for a copyholder, whether the lord of the manor is a party or not).

⁶ 1705, *Ward v. Apprice*, 8 Mod. 264 (inspection not compelled of a book kept by the defendant as part-owner of a ship, but intrusted to the custody of the plaintiff's another part owner; "if he has broke his trust, you must seek for remedy in equity"; yet the Court "owned it to be a mischievous case," where "one common book of their transactions" was kept thus private; and contended that in an action on a single indenture inspection would be allowed the opponent); 1707, *Hill v. Aland*, 1 Salk. 215 (action on special agreement in a note; defendant not allowed to have a copy from the plaintiff; to which, in 1793, Mr. Evans, the editor, appends the significant note, "quære, whether in modern practice such a rule would not be made absolute?").

The remarks of the Court in *Jevens v. Harridge*, 1 Wm. Saund. 9 (1667), sometimes cited as an early recognition of the later doctrine, do not seem to bear this meaning. Mr. J. Vaughan Williams, in *Fritchett v. Smart*, 7 C. B. 625,

says: "It is difficult to say how the Court acquired the equitable jurisdiction which they exercise in compelling the production of documents."

⁷ 1785, *Barry v. Alexander*, Tidd's Pract., I, 592, 9th Eng. ed. (Mansfield, L. C. J.: "Wherever the defendant would be entitled to a discovery, he should have it here, without going into equity").

⁸ In 1800, in *Southampton v. Graves*, 8 T. R. 590, Mr. J. Grose remarked: "When I first came into this court, it was understood to be the constant practice to grant rules of this kind as matters of course." It seems to have been generally conceded by the judges of the ensuing generation that the common-law right of inspection came in with Lord Mansfield and was under him more liberal than afterwards; e. g. by Dallas, C. J., in *Threlfall v. Webster*, *infra*.

⁹ 1823, Dallas, C. J., in *Threlfall v. Webster*, 1 Bing. 161: "My mind is surrounded by difficulties on the subject of these applications, although it has been usual to comply with them."

unquestionable rule, noticed above (par. 2), permitting inspection of corporate and manorial books; and it was apparently upon the analogy of this doctrine that the phrasing of the general right of inspection by parties now came to be fashioned. It began to be said, from 1800 onwards, that a party was entitled to prior inspection whenever he had an interest in the document, or (in another phrasing, meant to be equivalent) wherever the opponent was the virtual trustee of the document. But there was for a generation afterwards no semblance of judicial agreement, either as to this formal definition, or, when it was accepted, as to its application in similar cases. It is impossible to harmonize the rulings that ensued; until, in the second quarter of the century, something like a consensus was reached for a definition of the above tenor.²⁰

²⁰ The rulings are as follows: 1798, *Cheewind v. Marnell*, 1 B. & P. 371 (inspection refused for defendant of a bond on which action was brought; the suggestion of forgery disinclined the judge to order the plaintiff to do that "which might be the means of convicting him of a capital felony"; a poor reason, since the plaintiff could not recover on trial without doing the same supposed dangerous thing); 1806, *Blakey v. Porter*, 1 Taunt. 386 (plaintiff allowed to inspect and copy an indenture of lease, in an action on a covenant therein, plaintiff never having had a duplicate original); 1811, *Bateman v. Phillips*, 4 Id. 157 (unstamped agreement of guarantee, in which plaintiff was interested, though not technically a party to it; order for production by defendant granted, that plaintiff might stamp it and render it admissible in evidence); 1812, *King v. King*, ib. 664 (similar facts to *Blakey v. Porter*, with similar ruling; "it must be understood that when one part only is executed of a deed, the party who holds it is trustee for the other"); 1815, *Street v. Brown*, 6 Id. 308 (inspection refused for the plaintiff, in an action on a charter-party, of the defendant's counterpart, the plaintiff's part being lost; the principle of granting is "that the party holding the deed was a trustee for the other"); 1814, *Harris v. Aldrit*, 2 Chitty 229 (inspection allowed of a mortgage by defendant to plaintiff; being in plaintiff's possession, it had been seized and given in custody, with the plaintiff's other papers, to a constable apprehending him on a charge of felony); 1817, *Cooke v. Tanswell*, 8 Taunt. 131 (order for inspection of an indenture, recognized; "these applications are themselves of novel introduction; the Court is inclined rather to confine than to enlarge the practice"); 1819, *R. v. Sheriff of Chester*, 1 Chitty 476 (*Abbott, C. J.*: "The ordinary case where the Court allows a party to inspect documents in the hands of a third person is that in which the party called upon is the trustee for the applicant, . . . where the documents came originally into the trustee's hands . . . for the benefit and advantage of the party desiring to see them"); 1819, *Morrow v. Saunders*, 1 B. & B. 318 (inspection allowed to plaintiff of a partnership deed, in an action on a contract to form a partnership; no counterpart of the deed having ever existed); 1823, *Threlfall v. Webster*,

1 Bing. 161 (inspection refused for plaintiff of bills of exchange on which action was brought, said to have come into defendant's hands by fraud; *Dallas, C. J.*: "How to dispose of these cases must depend upon the discretion of the judges"); 1823, *Beale v. Bird*, 2 Dowl. & R. 419 (inspection of agreement forming the basis of the action, not allowed for the purpose of pleading in abatement); 1823, *Pickering v. Noyes*, 1 B. & C. 262 ("Is there any case where a deed has been ordered to be produced, unless it has been deposited in the hands of the holder as a trustee for others only or for others jointly with himself?"; inspection refused of a deed to defendant in an action of trespass *q. c. f.*); 1824, *Hildyard v. Smith*, 1 Bing. 457 (action on a bill of exchange; inspection refused to defendant, though forgery was suggested); 1825, *Ratcliffe v. Bleassey*, 3 Id. 148 ("The principle established by all the cases is that a party can only be compelled to produce a deed where he holds it as trustee for another"; here inspection of a partnership deed was refused to a plaintiff in an action for breach of agreement, the plaintiff not being a party to the deed; "if the plaintiff had any interest, the defendant would not be permitted to withhold the deed"); 1827, *Woodcock v. Worthington*, 2 Y. & J. 4 (lease; "where one part only is executed, the inspection may be obtained against the party who has the custody of it, who is considered to be a trustee of the other party; but where two parts have been executed interchangeably between the parties, the rule is different"); 1827, *Browning v. Aylwin*, 7 B. & C. 204 (inspection allowed to plaintiff of defendant's brokers' books, containing the sole original of a contract in issue; here the defendant's bond to the city covenanted to allow such inspection); 1828, *Rundle v. Beaumont*, 4 Bing. 537 (action on a charter-party; inspection of plaintiff's log-book refused to defendant, no interest being shown; *Ratcliffe v. Bleassey* held to express the law); 1828, *Rowe v. Howden*, ib. 539 (action by ship-owners against broker; inspection of a letter in defendant's hands refused, plaintiff having no interest); 1829, *Bousfield v. Godfrey*, 5 Id. 418 (action on a written contract; inspection allowed, for stamping and copying, of a sole original of which defendant had surreptitiously obtained possession); 1830, *Blogg v. Kent*, 6 Id.

The rule thus established may properly be called a common-law doctrine, although it was modelled on equitable analogy, was late in permanent acceptance, and was seldom recognised in the practice inherited by American courts.¹¹ The interesting question is whether it represented in fact an exception to the general rule against allowing prior inspection of the adversary's own evidence. On the one hand, it was clearly regarded by the common-law judges as something less than could be obtained in chancery; and

614 (inspection allowed to plaintiff of the sole original of a contract sued upon); 1880, *Imperial Gas Co. v. Clarke*, 7 id. 95 ("trustee" rule recognised; here, the inspection was sanctioned for a director against the corporation); 1891, *Hewitt v. Pigott*, 1b. 400 (deed to trustees for creditors; order for inspection refused; Park, J.: "In general a party is not bound to exhibit his muniments to an adversary"); 1893, *Cocks v. Nash*, 6 C. & P. 154 (trustee of a deed for the plaintiff, held not compellable to produce it for the defendant); 1896, *Edginton v. Nixon*, 2 Bing. N. C. 316 (copy granted against one who had obtained the original by spoliation); 1897, *Charnock v. Lumley*, 5 Scott 438 (action on an agreement by defendant to publish plaintiff's book; inspection of the agreement allowed to the plaintiff); 1898, *Smith v. Winter*, 3 M. & W. 309 (inspection refused to defendant of a deed to A., for whom defendant was surety; defendant held not to be "such a party as entitles him to inspect the deed"); 1841, *Woolner v. Devereux*, 9 Dowl. Pr. 673 (inspection allowed by defendant of a note on which action was brought; "the judge has jurisdiction to make such an order, if the circumstances call for it, as, if there is any suggestion of forgery, or that the instrument has been dealt with since it was executed, or where the party swears that he has no recollection that he has made such a note"); 1843, *Thomas v. Dunn*, 6 M. & Gr. 274 (action on a contract; inspection ordered for defendant of the original in plaintiff's attorney's hands; deposit with the masters being refused); 1845, *Goodliff v. Fuller*, 14 M. & W. 4 (inspection refused to plaintiff of plaintiff's letters to defendant, in an action for breach of promise of marriage; "this is not a case where the instrument is held by one of the parties as a trustee for the other"); 1846, *Stannan v. Arden*, 15 id. 587 (facts like the next case; Alderson, B.: "All that is material is that both parties have an interest in the documents and that an inspection of them is material to the prosecution of the action"); 1848, *Ley v. Barlow*, 1 Exch. 800 (parliamentary contract and subscriber's agreement of a railroad corporation, the plaintiff being an allottee of shares; Park, B.: "All the parties to that deed have *prima facie* a right to inspect it, as it is not private property"); 1849, *Pritchett v. Smart*, 7 C. B. 625 (action on bill of exchange; inspection of opponent's books not allowed, since the applicant "has no interest in the book"); 1852, *Doe v. Roe*, 1 E. & B. 279 (right of entry for breach of covenant in lease; inspection allowed to tenant); 1853, Second Report of Common Law Practice Commissioners, 34 ("Independently of statutory enactment, the

Courts of common law have exercised the power of compelling the production of documents for the purpose of being stamped so as to be available in evidence, as also the inspection of documents upon which the action or defence is immediately founded, as well as of documents necessary for the purpose of evidence in which the applicant has a direct interest and which are held by the opposite party in a fiduciary capacity, and of certain documents of a public character such as the rolls of a manor or corporation books"); 1860, *Price v. Harrison*, 8 C. B. n. s. 617, 634 (*Williams, J.*: "About 25 or 30 years ago, the rule laid down was that inspection would only be granted where there was but one copy of the document and the party holding it held it as a quasi-trustee for the other party; but long before the late act [of 14 & 15 Vict.] the rule had been extended so as to include every case where the party seeking to inspect has an interest in the document").

¹¹ There were early statutes in many States, and this may explain the paucity of common-law rulings. The New York cases are as follows: 1811, *Brush v. Gibbon*, 2 Cow. 16, note (inspection allowed to defendant of a note in plaintiff's possession, defendant expecting to prove it a forgery); 1813, *Lawrence v. Isa. Co.*, 11 John. 245, note (inspection allowed to an insured of documents in possession of the insurer); 1822, *Willis v. Bailey*, 19 id. 268 (inspection refused of papers not shown to be the foundation of the action; the prior decision was reached "not without some hesitation," and proceeded on the principle that similar discovery in equity could have been had); 1824, *Denalow v. Kowler*, 2 Cow. 592 (trover for a bond; inspection not allowed the plaintiff of the bond, which had been delivered to defendant); 1824, *People v. Vall*, 1b. 623 (inspection allowed of an application for a highway, as being a public document); 1824, *Jackson v. Jones*, 3 id. 17 (ejectment; inspection allowed to the plaintiff of deeds relied on by the defendant for his defence, the plaintiff expecting to prove them forgeries); 1825, *Wallis v. Murray*, 4 id. 399 (inspection allowed to plaintiff of a written contract on which the action was founded, though a counterpart, now lost, had once been in plaintiff's hands; the English limitation as to trusteeship, discarded; equitable principle of discovery adopted); 1826, *Bank of Utica v. Hillard*, 6 id. 63 (inspection not allowed to defendant of entries in plaintiff's books relating to a note declared on; "this practice is of recent origin in England"); 1832, *Townsend v. Lawrence*, 9 Wend. 458 (*Wallis v. Murray* held to represent the sound doctrine).

in chancery, as already noticed (*ante*, § 1857), the inspection was limited to documents sustaining the applicant's own case. Moreover, its underlying theory was that the applicant was merely inspecting his own property. On the other hand, it is plain that the documents sometimes granted for inspection were purely revelations of the adversary's own evidence; that is to say, the applicant might have an "interest" in them, and yet they might be solely his adversary's muniments of claim,—as where to a defendant is granted inspection of a note sued upon. However this might be, it would seem that the common-law Courts believed that they were doing less, and never more, than the Chancellor would have done; and the apparent anomalous instances may perhaps be explained under the ensuing principle (par. 4).

(4) *Postponing Defendant's Pleading.* In the time of Lord Mansfield there arose a practice of securing inspection, by indirection, in favor specially of defendants. This consisted in allowing the defendant a stated interval to plead unless the plaintiff in the meantime permitted the inspection.¹³ The effect of this seems to have been distinct from the order of inspection just examined (*supra*, par. 3), in that, first, it was available only for defendants, and secondly, it was unlimited as to the class of documents. Nevertheless it was sometimes spoken of as an equivalent for a bill of discovery;¹⁴ and its precise status does not seem clear. After 1800 it probably became merged in the confused practice already noticed as to orders to produce, and it is probable that some of that confusion was due to precedents in which defendants, under the present principle, had received different treatment from plaintiffs.

(5) *Insurance Documents.* In actions upon insurance policies, the practice became settled, in the early 1800s, to grant inspection of all relevant documents.¹⁵ Whether this was merely a clear instance of the principle of par. 3, above, or fell rather under the practice noted in par. 4, above, or formed a distinct arbitrary rule by itself, is not clear. In this class of cases, at any rate, the right to inspection had become settled, irrespective of whether the documents belonged to one's own case.¹⁶

(6) In *criminal cases*, none of the foregoing rights of inspection were recog-

¹³ 1780, *Witter v. Canaleto*, Tidd's Practice, 1, 592, 9th Eng. ed. (Buller, J., giving as a reason that the defendant within the time might in any case obtain discovery in equity); see it also recognized by Heath, J., in *Bateman v. Phillips* (1811), 4 Taunt. 157, 163; and by Eldon, L. C., in *Princess of Wales v. Lord Liverpool* (1818), 1 Swanst. 114.

¹⁴ 1806, *Clifford v. Taylor*, 1 Taunt. 167 (defendant allowed to plead after delivery to him of copies of policies, etc., by plaintiff; Mansfield, C. J.: "This practice of compelling the delivery of copies is very convenient, for it saves the delay and expense of a bill in equity").

¹⁵ 1806, *Goldschmidt v. Marryat*, 1 Camp. 559, 562 (in actions on policies of insurance, orders to the plaintiff to produce all papers concerning

the cause "had become extremely common, . . . as they often obviate the necessity of going into a court of equity"); 1808, *Clifford v. Taylor*, *supra*, note 13; 1866, *Rayner v. Ritson*, 6 B. & S. 268 (insurer is entitled to inspect all documents in insured's possession material to the issue, irrespective of whether they form a part of the insurer's case; the traditional practice is not taken away by St. 14 & 15 Vict.).

¹⁶ It was not recognized in the United States: 1813, *Sage v. Ins. Co.*, 5 Day 409, 413 (inspection not required, for the insured, of documents in an insurer's hands; "this would be a very extraordinary and novel practice in our courts of law"); except perhaps in New York: *Lawrence v. Ins. Co.*, *supra*, note 11.

mind.²⁰ Moreover, even in civil cases, the right of inspection before trial was available solely as against the opponent, and, except for the case of corporate records (*ante*, § 1857, par. 2), not as against a *third person not a party*; ²¹ this was upon the analogy that a bill of discovery did not lie against a third person (*ante*, § 1856), and though open to argument as a needless restriction, it seems not to have been changed under most modern statutes (*post*, § 1859, par. 3).

§ 1859. *Inspection under Statutes.* By the middle of the 1800s, in England, and long before that time, in a few of the United States, professional opinion had come to be satisfied that some better methods, more summary in effect and more broad in scope, should be made available for parties seeking inspection of documents in the adversaries' hands; and legislation everywhere made changes. This legislation was plainly animated by a conviction that the existing principles were defective, and that, for the reasons already examined (*ante*, § 1847), a determined inroad should be made on the sportsman's theory that the adversary is entitled to keep his own evidence to himself until the trial. Nevertheless, looking merely at the words of the statutes concerning documentary evidence, it was not in every case apparent that they have done so. This, therefore, became a chief question in the application of these statutes; namely, whether they had not merely furnished a more summary procedure in common-law courts (for this was usually clear), but had also expanded the scope of the class of documents of which inspection was demandable.

In considering the statutes for this purpose, then, it must be remembered that there were already three chief modes available; one of these was the right of oyer of documents liable to profert; the others were the equitable bill of discovery, and its related process, the motion at common law for inspection of documents held under a common interest. (1) For the first, the question now was whether oyer was still demandable. (2) For the second and third, the questions were (a) whether the discovery-process of Chancery had been transferred to the common-law Courts, so as to enlarge the right of inspection beyond the scope of the common-law right to inspect documents held under a common interest; and (b) if it had been thus transferred, whether the discovery-process itself had been enlarged, so as to include even more than had been obtainable in equity, i. e. to include inspection of the adversary's own documentary evidence. These questions depended in part upon the words of the statutes and in part upon the supposed objects of the reform; and upon the latter consideration it is relevant to remember that at

²⁰ 1792, *R. v. Holland*, 4 T. R. 690 ("the rule for inspection is confined to civil cases, and those where the party applying is interested in the papers").

²¹ 1755, *Crew v. Saunders*, 2 Stra. 1006 (action against postmasters; plaintiff refused inspection of books of post-office authorities, not being parties; the plaintiff not having a personal interest in the books); 1833, *Cocks v. Nash*, 9

Bing. 726 (inspection refused to defendant, surety for N., of a deed between N. and her creditors, held by H. as trustee; the apparent reason being that the trustee on the trial might appear to be absolutely privileged from disclosure); 1835, *Davenagh v. McKinnle*, 5 Cow. 37 (inspection not allowed of a deed in E.'s hand, constituting a link in plaintiff's title); 1868, *Henry v. Isa. Co.*, 35 Fed. 15, *semble*.

the same time as these statutes, or just previously to them, the opponent's privilege to withhold his own testimony at the trial (*post*, § 2218) had almost everywhere been abolished.

(1) *Oyer*. One of the recommendations of the Practice Commissioners in England in 1831¹ was that the principle of *oyer* be extended to include all documents pleaded; and the result, though long-deferred, of this recommendation was the abolition, in 1852, of *proferat* as a requirement and the implied retention and enlargement of *oyer*;² this implication the Courts confirmed.³ In the United States, a few statutes have expressly made a similar enlargement.⁴

(2) *Equitable discovery and common-law motions*. In England the statutes which purported to deal with these two existing practices were passed as a result of the general agitation for reform headed by Lord Brougham and Lord Denman.⁵ They had been recommended by the Practice Commis-

¹ Quoted *ante*, § 1868, par. 1.

² St. 15 & 16 Vict. c. 76, §§ 55, 56 (the terms are quoted in the next note).

³ 1860, *Ponarth Harbour D. & R. Co. v. Cardiff W. Co.*, 7 C. B. n. s. 816 (Willen, J.): "The 55th section, which abolishes *proferat* and *oyer*, is not the material one, but the 56th, which provides that 'a party pleading in answer to any pleading in which any document is mentioned or referred to shall be at liberty to set out the whole or such part thereof as may be material'; . . . that gives him the right to set out any document mentioned or referred to in his opponent's pleading, whether under seal or not, and by necessary implication it gives him a right to apply to the Court for inspection and a copy, in order to enable himself to do so"; Williams, J.: "I think we are bound to take care that a party shall not incidentally be prejudiced by a provision which has diverse intents, by abolishing *proferat*, deprived him of that advantage"; but the majority did not desire that the inspection could extend beyond sealed instruments; in 1852, Lord Campbell had said *obiter* in *Doe v. Roe*, 1 E. & B. 279, 285, that inspection could always be obtained "where an action is brought on an instrument"; 1860, *Price v. Harrison*, 6 C. B. n. s. 617, 635 (Williams, J.): "It may now be considered as fully established in all the courts that the right to inspect [in analogy to *oyer*] extends to any writing, whether under seal or not, which is relied on by the other side as the foundation of his claim or defence".

⁴ Fla. Rev. St. 1892, § 1039 (like St. 15 & 16 Vict. c. 76, § 55, abolishing *proferat* and *oyer*, but entitling the opponent to set out the document in his pleading); Ill. Rev. St. 1874, c. 110, § 20 ("It shall not be necessary in any pleading to make *proferat* of the instrument alleged; but in any action or defence upon an instrument in writing, whether under seal or not, if the same is not lost or destroyed, the opposite party may have *oyer* thereof and proceed thereon in the same manner as if *proferat* had been properly made according to the common law"); 1820, *Mason v. Buckmaster*, Breese 27 (under the early statute, *proferat* was not necessary for a note sued on, since the Court on plea of *oyer* could order

production); 1894, *Lester v. People*, 150 Ill. 469, 417, 23 N. E. 757, 57 N. E. 1004 (the statute does not apply to documents used as evidence only); Mass. Pub. St. 1892, c. 167, § 2, Rev. L. 1902, c. 173, § 5 ("Written instruments" shall be declared on, except insurance policies, by setting out a copy or the part relied on, or the legal effect; "if the whole contract is not set out, a copy or the original, as the Court may require, shall be filed upon motion of the defendant," and the copy may be made a part of the record as if *oyer* had been granted; "no *proferat* or excuse therefor need be inserted in a declaration"); P. R. § 22, R. L. § 29 (similar for instruments in an answer or subsequent pleading); Va. Code 1867, § 3244 ("It shall not be necessary . . . to make *proferat* of any deed, letters testamentary, or commission of administration; but a defendant may have *oyer* in like manner as if *proferat* were made"); W. Va. Code 1900, c. 125, § 33 (like Va. Code § 3244).

The following statute seems to belong here: Miss. Annot. Code 1892, § 677 (for "any writing of which *proferat* is made or ought to be made," no evidence shall be admitted unless a copy is annexed to or filed with the pleading).

In Tennessee, it may be assumed that *oyer* survives: Tenn. Code 1898, § 4506 ("Proferat shall be required as heretofore").

⁵ 1851, St. 14 & 15 Vict. c. 90, § 6 (upon action pending, any judge may on application by either party "compel the opposite party to allow the party making the application to inspect all documents in the custody or under the control of such opposite party relating to such action or other legal proceeding, and, if necessary, to take examined copies of the same or procure the same to be duly stamped, in all cases in which previous to the passing of this act a discovery might have been obtained by filing a bill or by any other proceeding in a court of equity"); 1853, Second Report of Common Law Practice Commissioners, 35 (recommended that the application for documents be accompanied by a right to discovery whether the opponent had in fact such documents in his possession, so as to make the process coextensive with that of a bill in chancery; the following statute carried this out);

discovery in a cautious way, as early as 1830; but they were not enacted until 1851 and 1854. In the *United States* the earliest statute seems to

1854, St. 17 & 18 Vict. c. 126, § 50 ("Upon the application of either party to any cause or other civil proceeding in any of the superior courts upon an affidavit by such party of his belief that any document to the production of which he is entitled for the purpose of discovery or otherwise is in the possession or power of the opposite party, it shall be lawful for the Court or judge to order" that the opponent answer as to such custody and as to the objection if any to production; and then "the Court or judge may make such further order thereon as shall be just"); 1855, Rules of the Supreme Court, Order XXXI, rule 12 (any party may apply for an order "directing any other party to any cause or matter to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question therein"); rule 14 (a judge may at any stage during a cause "order the production by any party thereto, upon oath, of such of the documents in his possession or power, relating to any matter in question in such cause or matter, as the Court or judge shall think right; and the Court may deal with such documents, when produced, in such manner as shall appear just"); rule 15 (any party may give notice to any other party "in whose pleadings or affidavits reference is made to any document," to produce such document for inspection and copying by the opponent; and a party not complying shall not be allowed to put such document afterwards in evidence, "unless he shall satisfy the Court or a judge that such document relates only to his own title, he being a defendant to the cause or matter, or that he had some other cause or excuse which the Court or judge shall deem sufficient," etc.).

In Canada, similar legislation obtains: *B. C. Rev. St.* 1897, c. 52, § 122; *Man. Rev. St.* 1902, c. 40, Rules 292-294, 406-425; *N. Br. Consol. St.* 1877, c. 37, § 178, 179, c. 49, § 40; *Newf. Consol. St.* 1892, c. 50, Rules of Court 26; *N. W. Terr. Consol. Ord.* 1898, c. 21, Rules 191-200, 207, 208; *N. Sc. Rules of Court* 1900, Ord. 80, Rules 12-22; *Ont. Rules of Court* 1897, §§ 446-452, 463-477; *P. E. I. St.* 1873, c. 22, §§ 244-248; *St.* 1858, c. 12, §§ 1, 9.

The statutes are as follows: the list includes those which in any way affect the right of inspection before trial or the compulsory production upon trial; in the latter aspect, however, they will be again considered in dealing with the Party's Privilege as to Documents, post, § 2219; *Ala. Code* 1897, §§ 1859-1860 (in trials at law, "on motion and due notice thereof," the Court may "require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceedings in chancery"; on penalty, for failure to comply, of judgment of nonsuit or default); *Alaska C. C. P.* 1900, § 490 (like *Or. Annot. C.* 1892, § 521); *Ark. Rev. St.* 1901, § 2656 (like *Cal. C. C. P.*

§ 1000; but using "any book, document, or paper" as the description of the things to be inspected); *Ark. Stat.* 1894, §§ 2696-2697 (the Court may compel "any party to a suit" sending therein to produce any books papers and documents in his possession or under his control relating to the merits of such suit or to any defense therein," upon suitable affidavit; on failure to comply, a nonsuit may be ordered or a plea struck out or a particular defense barred); § 2901 (regulating proceedings in equity for producing documents); *Cal. C. C. P.* 1872, § 1000 (the Court may, in a pending action, upon notice, order either party to give to the other, within a specified time, an inspection and copy, or permission to take a copy, of entries of accounts in any book, or of any document or paper in his possession, or under his control, containing evidence relating to the merits of the action or the defense therein"; on penalty, in case of refusal, of exclusion of the document from evidence or of direction to presume it to be as alleged, and also of punishment for contempt); 1901, *San Fernando C. M. & R. Co. v. Humphrey*, 111 Fed. 772 (statute applied); *Cal. C. C. P.* 1891, § 285 (like *Cal. C. C. P.* § 1000); *Annot. Stats.* 1891, § 2414 (in irrigation proceedings, no party "willfully refusing to produce any book or paper, if in his or their power to do so, when rightfully demanded for examination and copying, shall be allowed the benefit of any testimony or proofs in his, her, or their behalf"); *Conn. Gen. St.* 1898, §§ 1040-1042 (in common-law courts, a motion for production "as a court of equity might order" may be made; practice regulated); *Del. Rev. St.* 1898, c. 107, § 13 ("in the trial of actions at law, the Court on motion and due notice thereof, may order a party to produce books or writings in his possession or control, which contain evidence pertinent to the issue, under circumstances in which the production of the same might be compelled by a court of chancery"; upon failure to comply, judgment of nonsuit or default may be given, and the chancery powers of enforcement may be used); *St.* 1895, c. 121 (amended so as to allow production "at any time during the pendency of" a trial); *D. C. Comp. St.* 1899, c. 30, § 31 (like *U. S. Rev. St.* § 734); § 30 (regulates discovery in chancery); *Code* 1901, § 1672 ("In an action at common law the Court may, on motion, and on reasonable notice thereof, require the parties to produce books and writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might heretofore have been compelled to produce the same by the ordinary rules of proceeding in chancery"); *Fla. Rev. St.* 1892, § 1115 (on ten days' notice, the Court may require the opponent "to produce books and other writings in his possession power or custody, which shall contain evidence pertinent to the issue"; on failure to comply without excuse, judgment of nonsuit or default may be given); *Ga. St.* 1799, Judiciary Act, § 6 (Courts

have been that of the Federal Congress in 1780, followed by Pennsylvania, in 1798, and this closely by Georgia, in 1799. But the movement for rev-

of common law may on ten days' notice require "either party to produce books and other writings in his her or their possession power or custody, which shall contain evidence pertinent to the cause in question, under circumstances where either party might be compelled to produce the same by the ordinary rules of proceeding in equity"; Code 1886, §§ 3943-3984 (same provision continued, adding detailed rules as to notice; penalty of judgment of nonsuit or default may be imposed); *How. Civil Laws* 1897, § 1896 (the Court may "compel the opposite party to allow the party making the application to inspect all documents in the custody or under the control of such party relating to such cause or other proceeding, and if necessary to take examined copies of the same, in all cases in which previous to the passing of this Act a discovery might have been obtained in a court of equity" by the applicant); *Ida. Rev. St.* 1897, § 4876 (like Cal. C. C. P. § 1000); *Ill. Rev. St.* 1874, c. 51, § 9 (Courts are empowered "in any action pending before them, upon motion, and good and sufficient cause shown, and reasonable notice thereof given, to require the parties or either of them to produce books or writings in their possession or power which contain evidence pertinent to the issue"); *Ind. Rev. St.* 1897, § 492 (a Court may "upon affidavit of their necessity and materiality upon motion compel by order either party to produce at or before the trial any book paper or document in his possession or power, upon reasonable notice"); § 493, (a Court may "under proper restrictions upon due notice order either party to give the other within a specified time an inspection and copy of any book, or part thereof, paper or document in his possession or under his control containing evidence relating to the merits of the action or the defense therein"; on refusal, the Court may "exclude such or punish the party refusing or both"); *Ida. Code* 1897, § 4434 (a Court "may in its discretion by rule require the production of any papers or books which are material to the just determination of any cause pending before it, for the purpose of being inspected and copied by or for the party thus calling for them"); §§ 4453, 4454 (requirements of petition stated; on failure, without excuse to obey order, the same consequences prescribed as for failure to obey subpoena); *Kan. Gen. St.* 1897, c. 25, § 390 (either party may demand of the opponent "an inspection and copy, or permission to take a copy, of a book paper or document in his possession or under his control containing evidence relating to the merits of the action or defense therein"; the demand to be written and to specify particulars; on refusal within four days, the Court may on motion and notice order such inspection or copy, and on failure to comply with the order, may exclude the document or direct it to be presumed to be as alleged); § 391 (either party, if required, shall deliver to the other "a copy of any deed instrument or other writing whereon his action or defense is founded or which he intends to offer in evidence at the

trial"; on refusal, the party's original shall be excluded at the trial); *La. C. Pr.* 1894, § 160 (the Court may order a party to bring into court "the books papers and other documents which are in his possession and which are material in the cause," upon sworn petition; on refusal, unless production is shown impossible, the facts are to be taken as confessed); § 473 (on motion, a party may be ordered to produce in court on the trial day "books papers or other documents" in his possession); *Mass. Pub. St.* 1893, c. 167, § 2, par. 9, § 22, *Rev. L.* 1902, c. 173, § 6, par. 10, § 22 (for written instruments declared on by plaintiff or relied on in answer, a Court may on motion order the filing of a copy or the original; quoted *supra*, note 4); *P. S. N. H.* § 29, R. L. N. H. § 20 ("no party shall be required [in his pleading] to state evidence, or to disclose the means by which he intends to prove his cause"); *P. S. N. H.* §§ 49-54, R. L. N. H. §§ 57-63 (interrogatories may be filed, after entry of action or answer, "for the discovery of facts and documents material to the support or defense of the suit, to be answered on oath by the adverse party"; documents containing "matters not pertinent to the subject of the action" may be protected from inspection; no party shall be obliged "to disclose his title to any property the title whereof is not material to the trial of the action in the course of which he is interrogated, or to disclose the names of the witnesses by whom or the manner in which he proposes to prove his own case"); *Mich. Comp. L.* 1897, § 10074 ("The Supreme Court may make such rules, in relation to notice of matters intended to be given in evidence by either party, as shall be necessary to prevent surprise and to afford opportunity for preparation for trial"); *Circuit Court Rules* 1894, Post's ed., R. 40 (like N. Y. Rules of 1830); Rule 43 (the order shall be made according to the principles of chancery discovery); Rule 44 (on failure to obey, a nonsuit may be ordered or plea struck out or defense barred, but no other compulsion shall be used); 1901, *Rules of Circuit Court of Michigan*, No. 50, 57 N. W. Rep. (like N. Y. rules of 1830); *Miss. Gen. St.* 1894, § 4984 (in justices' courts, "when a cause of action or counterclaim arises upon an account or instrument for the payment of money only, it is sufficient for the party to deliver the account or instrument to the Court" and state the amount due; "the Court may at the time of pleading require that such writing or account be exhibited to the inspection of the adverse party with liberty to copy the same; or, if not so exhibited, may prohibit its being afterward given in evidence"); § 5750 (like Cal. C. C. P. § 1000); *Miss. Annot. C.* 1892, § 927 ("The Court in which any writ or suit is pending may on good cause shown, and after notice of the application to the opposite party, order either party to give to the other, within a specified time and on such terms as may be imposed, an inspection and copy, or permission to take a copy, of any books, papers, or documents in his possession or under his control

tion and codification in New York, a quarter of a century later, seems to have been the signal for a general progress, or at least to have attracted

containing evidence relating to the merits of the action or proceeding or of the defense thereto"; on refusal, for a refusal, of having the documents excluded from evidence; amended by § 1800, c. 97 (adding the power to order nonsuit or judgment by default, in case of failure to obey such an order); 1808, *Equitable Life Ass. Soc'y v. Clark*, 80 Minn. 471, 81 So. 684 (note of 1900 applied); *Mc. Nev. St. 1808*, § 787 (the Court shall have power "to compel any party to a suit pending therein to produce any books papers and documents in his possession or power relating to the merits of any suit or of any defense therein"); §§ 728-740 (procedure regulated; on failure to obey, the Court may order nonsuit or strike out the answer or bar a particular defense or punish as for contempt); § 741 (substantially like Cal. C. C. P. § 1000, but omitting the clause as to directing a presumption of contents); § 4448 (in an action for recovery of a sum due on account, and where the matter is "a paper and usual subject of charge on books of account," the Court may require from either party the production of "either his ledger or original book of entries, or both; and no disputed account shall be allowed upon the oath of the party, when it shall appear that he has a book of original entries, from such book shall be produced upon reasonable request"); *Mass. C. C. P. 1898*, § 1010 (like Cal. C. C. P. § 1000); *Nev. Comp. St. 1899*, § 5068 (if a party refuses to give inspection and copy, after demand in writing "specifying the book, paper, or document with sufficient particularity to enable the other party to distinguish it," followed by a judge's order to give a copy, the judge may exclude the document when offered in evidence; the rule applies to a "book, paper, or document in his possession or under his control, containing evidence relating to the merits of the action or defense therein"); § 1000 (a party refusing "if required" to give a copy of any deed, instrument, or other writing whereon the action or defense is founded, or which he intends to offer in evidence at the trial, "shall not be permitted" to give the original in evidence); §§ 5073-5075 (the Court may by rule require "the production of any books or papers which are material to the just determination of any cause pending before it, for the purpose of being inspected and copied by or for the party thus calling for them"; procedure regulated; failure to produce, without excuse, may be treated as on failure to obey subpoena); *Nev. Gen. St. 1898*, § 5448 (like Cal. C. C. P. § 1000); *N. H. Pub. St. 1901*, c. 234, § 14 ("no party shall be compelled, . . . in giving a deposition, to produce any writing which is material to his own case or defense" unless on taking his own deposition); *N. J. St. 1883*, April 5, § 6, Gen. St. 1894, Practice, §§ 157, 158 (the Court may, "in their discretion and upon five days' notice of the application, order either party to give to the other, within a specified time and under such terms as may be imposed, an inspection and copy or permission to take a copy of

any books papers or documents in his possession or under his control containing evidence relating to the merits of the action or proceeding or of the defense thereto"; on refusal, such documents shall not be given in evidence, and the Court may punish for contempt); *St. 1808*, c. 247, § 148 (re-enacts in substance Gen. St., Practice, § 157, substituting "four days" for "five days"); *N. M. Comp. L. 1897*, § 2683, subsect. 54 ("no party shall be required to state evidence in his pleadings, or to disclose therein the means by which he intends to prove his case"); subsect. 120-122 (the Court may "in his discretion and upon due notice order either party to give to the other, within a specified time, an inspection and a copy, or permission to take a copy, of a paper in his possession or under his control containing evidence relating to the merits of the action"; on refusal, the Court may on motion exclude the paper as evidence or punish for contempt or both; on failure to obey in prescribed time the order for production, the Court may order nonsuit or strike out answer or bar a particular defense affected or punished by contempt); § 2963 (original or copy of an instrument "upon which the action or defense is founded" must be filed with the pleadings, if in the party's "power or control," and on failure without sufficient reason, "such instrument of writing shall not be admitted in evidence upon the trial"); *N. Y. Rev. St. 1898*, pt. III, c. I, tit. III, § 31 (vol. II, p. 199) ("The Supreme Court shall have power in such cases as shall be deemed proper to compel any party to a suit pending therein to produce and discover books, papers, and documents in his possession or power, relating to the merits of any such suit or of any defense therein"); § 22 (the Court "shall be governed by the principles and practice of the Court of chancery in compelling discovery"); 1830, *Rules of N. Y. Supreme Court*, No. 28, as quoted in *Cowes & Hill's* edition of *Phillips on Evidence*, note 822 (application for discovery may be made, 1, by the plaintiff, to compel the discovery of papers or documents in the possession or under the control of the defendant, which may be necessary to enable the plaintiff to declare or to answer any pleading of the defendant; 2, by the defendant, to enable the defendant to answer any pleading of the plaintiff, 3, the plaintiff after declaring, and the defendant after pleading, may be compelled to produce and discover all documents on which the action or defense is founded; 4, after issue joined, either party may be compelled to discover all documents necessary to enable the other to prepare for trial); *C. C. P. 1877*, § 803 ("A court of record, other than a justice's court in a city, has power to compel a party to an action pending therein to produce and discover, or to give to the other party an inspection and copy or permission to take a copy of a book document or other paper in his possession or under his control relating to the merits of the action or of the defense therein"); §§ 804-806, 1914 (proceedings regulated; "the general rules

more attention and to have furnished more frequently (in the statute of 1828) a model for adaptation than the earlier statutes for which Congress

of practice must prescribe the cases in which a discovery or inspection may be so compelled," where not otherwise prescribed in this act; upon refusal to comply, Court may dismiss complaint or strike out answer, etc., or bar a particular claim or defence, or, for refusal to allow inspection and copy, exclude the document or punish for contempt or both; 1893, Supreme Court Rules, Nos. 14-17 (applications for production under C. C. P. § 804, *supra*, may be made as follows: 1, by the plaintiff, for documents "which may be necessary to enable the plaintiff to frame his complaint or to answer any pleading of the defendant"; 2, by the defendant, for documents "which may be necessary to enable the defendant to answer any pleading of the plaintiff"; 3, by either party, on a showing that the document "is material to the decision of the action or special proceeding or some motion or application therein, or is competent evidence in the case or an inspection thereof is necessary to enable the party to prepare for trial"); N. C. Code 1883, § 578 (like N. D. Rev. C. § 5644); N. D. Rev. C. 1893, § 5644 (the Court may "in his discretion and upon due notice order either party to give to the other within a specified time an inspection and copy or permission to take a copy of any books papers and documents in his possession or under his control relating to the merits of the action or the defense therein"; on refusal, the Court may exclude the paper from evidence or punish the party or both); Oh. Rev. St. 1898, § 5289 (the Court may, on motion and reasonable notice, "require the parties to produce books and writings in their possession or power which contain evidence pertinent to the issue in cases and under circumstances where they might heretofore have been compelled to produce the same by the ordinary rules of proceeding in chancery"; on failure to comply, the Court may give judgment of nonsuit or default); §§ 5290, 5291 (either party may demand in writing, specifying "with sufficient particularity to enable the other party to distinguish it," "an inspection and copy or permission to take a copy of a book paper or document in his possession or under his control containing evidence relating to the merits of the action or defense"; procedure regulated; on refusal within four days, the Court may issue order for inspection and copy; on failure to obey order, the Court may exclude the document, or direct it to be presumed as alleged); § 5292 (either party "shall if required deliver to the other party" "a copy of any instrument of writing whereon the action or defense is founded or which he intends to offer in evidence at the trial"; on refusal, the original shall be excluded from evidence); Oh. State. 1893, §§ 4258, 4259 (substantially like Oh. Rev. St. §§ 5290, 5292); Or. C. C. P. 1892, § 521 (like Cal. C. C. P. § 1000, omitting "upon notice," substituting "any book document or paper" to describe the material, and substituting "neglect or refuse obedience" for "refuse compliance"); Pa. St. 1798, Feb. 27, P. & L. Dig., Evidence, § 6 (Courts are to have power, in a pending

action, "on motion and upon good and sufficient cause shown by affidavit or affirmation, and due notice given, to require the parties or either of them to produce books or writings in their possession or power which contain evidence pertinent to the issue," upon penalty, on failure to comply, of judgment of nonsuit or default as to the subject to which the documents apply); R. I. Gen. L. 1896, c. 244, § 47 (if a party makes affidavit "that the opposite party is in the possession or control of some document which the applicant is entitled to examine, and prays for its production," a Court may hear the petition and answer, and "if proper, compel the party having the same in his or its possession or control to allow the applicant to examine the same and if necessary to take examined copies of the same or have such original documents impounded and make such further order in the premises as shall be just"); S. C. C. C. P. 1893, § 389, Code 1903, § 389 (like N. C. Code, § 578); S. D. State. 1899, § 6482 (like N. D. Rev. C. § 5644); Tenn. Code 1896, §§ 5684-5693 (either party is entitled to discovery "in all cases where the same party would by the rules of equity be entitled to a discovery in aid of such suit"); U. S. St. 1789, c. 20, § 15, Rev. St. 1878, c. 12, § 724 (in trials at law, the U. S. courts may on motion require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery"; on failure to produce, judgment of nonsuit or default may be given); St. 1874, June 22, c. 391, § 5 (in civil suits under revenue laws, on failure to produce a document on notice from the government attorney, his allegations are to be taken as confessed, unless non-production is explained to the Court's satisfaction); Unk. Rev. St. 1898, § 3474 (like Cal. C. C. P. § 1000; omitting reference to "inspection"); Va. Code 1887, §§ 3371, 3373 (a party may file an affidavit that there is "a book of accounts or other writing, in possession of an adverse party or claimant, containing material evidence for him, specifying with reasonable certainty such writing or the part of such book"; if it appears that the affiant "has no means of proving the contents" except by the desired production, and that the request is not tardy and the contents are "relevant and material," an order may issue; and judgment of nonsuit or default may be given; this method to be an optional remedy alternative with a bill of discovery in equity); Wash. C. & State. 1897, § 6047 (like Cal. C. C. P. § 1000; but defining the material as "any book document or paper"); W. Va. Code 1900, c. 130, § 43 (upon affidavit by a party "that a particular book of accounts or other writing or paper is important for him to have in the trial of his cause," a subpoena *d. t.* may issue upon "any party to the action," to produce the document before the court to "be used as evidence on the trial"; and unless the opponent can prove that

and the States of Pennsylvania and Georgia are entitled to credit. In applying these statutes, two distinct questions of principle (as already noted) are presented, (a) first, whether the Chancery process of inspection before trial was transferred to common-law Courts; and (b) secondly, whether if so its scope was enlarged.

(a) In the great majority of these statutes, their express terms make it clear that in common-law proceedings a mode has been sanctioned for obtaining inspection and copy *before trial*. But in those statutes of which the Federal law is the type,⁷ the enactment does no more, in form, than nullify the opponent's common-law privilege (*post*, § 2219) of withholding in general his documentary evidence *at the trial*, i. e. it merely authorizes the Court to "require the parties to produce books or writings in their possession"; and thus the doubt arises whether this provision was intended not only to take away the above privilege *at the trial*, but also to require the furnishing *before trial* of an opportunity of inspection and copying. The argument against the larger view of the statute's intention has been thus phrased:

1853, *Curtis, J.*, in *Lasigi v. Brown*, 1 Curt. 401: "By the common law, a notice to produce a paper merely enables the party to give parol evidence of its contents, if it be not produced. Its non-production has no other legal consequence. This act of Congress has attached to the non-production of a paper, ordered to be produced at the trial, the penalty of a nonsuit or default. This is the whole extent of the law. It does not enable parties to compel the production of papers before trial, but only at the trial, by making a case, and obtaining such an order as the act contemplates. . . . I think the Court should not decide finally on the materiality of the paper, except during the trial; because it would occupy time unnecessarily, and it might be very difficult to decide beforehand, whether a paper was pertinent to the issue, and whether it was so connected with the case, that a Court of equity would compel its production. These points could ordinarily be decided without difficulty during a trial, after the nature of the case, and the posture and bearings of the evidence are seen."⁸

That this illiberal and unprogressive view is unsound is sufficiently indicated in the following passages:

1895, *Simonton, J.*, in *Lucker v. Phoenix Assurance Co.*, 67 Fed. 18: "It seems to be a narrow construction of § 724 to limit its operation to the actual trial. Its purpose clearly

he has not control of the document or that it is "such as should not be used as evidence on the trial," he may be attached, and judgment of default or nonsuit may be given); *Wis. Stat.* 1898, § 4182 a (special regulations for insurance companies' records); § 4183 (like N. D. Rev. C. § 3644); Circuit Court Rules under § 4183 (application may be made by either party for documents "which may be necessary to enable the applicant to frame his complaint answer or reply, as the case may be, or which shall be material to any application made by him for any provisional remedy"; or by either party, after issue joined, for documents in the opponent's "possession or control, on which his action or defense is founded or which may be necessary to enable the party applying therefor to prepare for trial"; on failure without excuse to comply, judgment may be given after striking

out the complaint reply or answer); *Wyo. Rev. St.* 1887, §§ 2637-2640 (like *Oh. Rev. St.* §§ 5289-5292). The rulings interpreting these statutes will not be given here (except upon the two general questions ensuing), because they depend so much upon the special wording of the local statute, and because they cannot be fully understood without examining the orthodox chancery rules, which are without the present purview. The annotations to the above collections of statutes contain in most instances the relevant rulings in the respective jurisdictions.

⁷ Including those of Alabama, Arkansas, Delaware, District of Columbia, Florida, Georgia, Illinois, and Pennsylvania.

⁸ *Accord*: 1896, *U. S. v. National Lead Co.*, 75 Fed. 94 (going upon the strict sense of the words of the statute, "on the trial").

is to provide a substitute for a bill of discovery and to secure at law the purposes which such a bill would subserve; all the cases recognize this. On a bill for discovery, necessarily the facts sought would be discovered before trial. Besides this, the section says that this order for the production of papers can be made 'in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery'; the proceedings in chancery require the deposit of the papers called for with the clerk, who upon notice produces them in court or before the examiner. There is another point of view of this matter. The object of a motion of this character is to enable a party, in advance of the submission of the issue, to ascertain the strength or weakness of his case. An inspection of the papers may end the case. It is better to reach this result in this short way than in the middle of a trial."

1900, *Bradford, J., in Bloede Co. v. Bancroft Co.*, 98 Fed. 175, 182: "No reason is perceived why a Court of law after issue joined in an action pending therein should have greater difficulty in determining the pertinency of evidence contained in documents of which production before trial is sought than a Court of equity in deciding on the propriety of compelling discovery or production of similar documents . . . inspection before trial in aid of the plaintiff's or defendant's case in an action at law. . . . adopt the narrower construction of section 724 on the ground that a Court of law cannot well ascertain after issue joined but before trial the pertinency of the contents of books or writings would practically involve condemnation of the long established and beneficial practice in chancery of awarding discovery or production of documents in aid of an action at law. . . . It is, and was at and prior to the time of the passage of the Judiciary Act, within the settled jurisdiction of chancery and a usual practice to order production before trial of an action at law of documents containing pertinent evidence for inspection by a party having the requisite interest therein and desiring to use the same in preparing himself for trial. It must be assumed that Congress in passing the Judiciary Act was aware that the 'circumstances' under which production might be compelled in chancery embraced cases where the purpose of the party applying was to inspect, examine, and take copies of the books or writings before the trial of an action at law in order to prepare for such trial. It is reasonable, then, to conclude that the statute authorizes the Court in actions at law to order production for inspection, after issue joined, in all cases and under all circumstances where it might have been ordered in chancery in aid of parties to such actions, and that this Court sitting as a Court of law can in such actions under pain of nonsuit or default enforce the production of books or writings to the same extent and for the same purposes as when sitting as a Court of equity and compelling production in aid of such actions. Unless the terms 'in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery' are to be wrested from their natural meaning, it is difficult to perceive that production before trial is not equally with production at the trial within the scope of the provision. There is no sufficient warrant for an assumption that Congress intended that production of books and writings for inspection should be had only at the trial. Such a practice would in many instances be inconvenient, dilatory, and expensive, with nothing to justify it, leading to postponements to allow time for inspection and calculated to embarrass or defeat the due administration of justice."

Such, accordingly, is the view taken to-day in the greater number of Federal circuits.⁹ In some of the other jurisdictions having statutes of similar form the same view has been judicially expressed, i. e. that a mode of obtaining inspection and copy before trial is provided in them.¹⁰

⁹ 1879, *Choate, J., in U. S. v. Hutton*, 10 Ben. 268; 1895, *Lucker v. Phoenix Assur. Co.*, 67 Fed. 18 (reviewing the conflict of rulings; quoted *supra*); 1898, *Ryder v. Bateman*, 93 id. 31, *Hammond, J.*; 1900, *Bloede Co. v. Bancroft*

Co., 98 id. 175 (quoted *supra*); 1902, *Gray v. Schneider, C. C.*, 119 id. 474.

¹⁰ 1854, *Faircloth v. Jordan*, 15 Ga. 511, '15; 1837, *Arrott v. Pratt*, 2 Whart. 565. *Contra*: 1894, *Lester v. People*, 180 Ill. 408, 419, 23

(b) Supposing the statutory process to have provided for inspection and copy before trial, the question next arises whether, as regards the *class of documents* obtainable, the scope of the process is merely coextensive with the equitable bill of discovery or is larger than that. Did the statute not only supply to common-law Courts a speedy mode of doing what could have been done by applying to Chancery and thus merely enlarge the scope of the common-law motion (*ante*, § 1858) to equal that of the chancery bill, but also enlarge the statutory process beyond that of the chancery bill? The question is one of vital principle, since the chancery bill of discovery, as already noticed (*ante*, § 1857), did not presume to doubt the general common-law doctrine that there is no right of inspection of the *adversary's own documentary evidence*. Was an advance in this respect intended to be made by the statute, and was "an enlightened step (*ante*, § 1847) intended to be taken of conceding the right of prior inspection and copy of even the adversary's own documentary evidence? On the one hand, some of the statutes make expressly a negative answer, in that they declare the inspection obtainable "under the circumstances determined by the ordinary rules of proceeding in chancery."¹¹ On the other hand, some statutes make it clear that the scope of the chancery bill was not to be the limit of the statutory process.¹² There are, however, also certain statutes which either contain no significant words of definition, or use a general phrase describing the documents as "pertinent to the issue" or "relating to the merits of the action or defence" or "relating to any matter in question." Under such statutes it is easy to see that a progressive and enlightened view (*ante*, § 1847), discarding the sportsman's theory of litigation and obliging the adversary in ordinary cases to disclose his documentary evidence, might justly have been taken in the application of the statutory process.¹³ But it is regrettable to notice that this has rarely been done; the instincts of professional technicality and conservatism have been too strong, and the limitations of the

N. E. 387, 37 N. E. 1004 (the statute does not authorize a compulsory submission to inspection by the opponent before trial in preparation therefor); 1890, *Raub v. Van Horn*, 135 Pa. 573, 574, 19 Atl. 704 ("uniform practice under the Act" recognizes no right to inspection before trial; such inspection is therefore confined to the common-law doctrine as to "parties having a common interest in the instrument"; the opinion does not give due consideration to the authorities).

Of course, the common-law process (*ante*, § 1858) remains unless superseded by the statute: 1851, *Bluck v. Gompertz*, 7 Exch. 67 (action on a guarantee as to bills of exchange; inspection allowed); 1890, *Raub v. Van Horn*, *supra*.

¹¹ Such, for example, is the Federal statute, and such its necessary application: 1806, *Hylton's Lessee v. Brown*, 1 Wash. C. C. 298, 344; 1816, *Bas v. Steele*, 3 id. 381, 386; 1825, *Boyd v. U. S.*, 116 U. S. 616, 631, 6 Sup. 524; 1894, *Kirkpatrick v. Pope Mfg. Co.*, 61 Fed. 48; 1895, *Ryder v. Bateman*, 35 id. 31 (defendant's

application for inspection of a deed said to be signed by her, refused, where its purpose was merely to enable her to refresh her memory as to its signature; too conservative an opinion).

So also under the original English statute of 1851: 1852, *Hunt v. Hewitt*, 7 Exch. 266; 1859, *Metropolitan S. O. Co. v. Hawkins*, 4 H. & N. 146; 1859, *Shadwell v. Shadwell*, 6 C. B. n. s. 679; 1859, *London Gaslight Co. v. Chelsea*, ib. 411; 1868, *Boyd v. Petrie*, L. R. 5 Eq. 290; 1871, *Wilson v. Thornbury*, L. R. 17 Eq. 517; 1875, *Vale v. Oppert*, L. R. 10 Ch. App. 340; 1878, *Taylor v. Batten*, L. R. 4 Q. B. D. 85; 1881, *Danvillier v. Myers*, L. R. 17 Ch. D. 346.

¹² As, for example, in California, by a provision that the adversary refusing inspection may be prohibited from using the document in evidence at the trial; this could apply only to documents in support of the adversary's own case.

¹³ This has been done in New York, for example: *Mr. J. Daly*, in *The Brief*, vol. II, p. 308, quoted *supra*, § 1856.

orthodox bill of discovery have been perpetuated.¹⁴ That this has resulted, in many instances, in doing violence to the broad language of the statutes is plain enough; whether it is also a disobedience to the intended wishes of the Legislature is perhaps a matter for mere speculation; but in any event these Courts have lost an easy opportunity to take a creditable part in effecting solid legal progress with the powerful means freely placed in their hands by the Legislature.

(3) A bill of discovery does not lie against a third person not a party, either for his testimony or for documents in his possession (*ante*, § 1858, par. 6). But in a few jurisdictions a wise regard to the due flexibility of procedure has led to the statutory authorization of such documentary discovery.¹⁵

(4) A special class of statutes, not related in origin to any of the preceding kinds, is formed by those which, in permitting the use of copies of documents, usually being in a third person's possession, require the party intending to use one to show it before trial to the opponent, so that the latter may by comparison with the original protect himself against imposition. Such a provision is a genuine exception to the common-law rule against requiring disclosure of evidence before trial (*ante*, § 1845). This measure has been taken in many jurisdictions for certified copies of recorded deeds in general;¹⁶ and in a few jurisdictions it has also been taken for copies of abstracts of title, whose originals are in the control of some conveyancer or title-guarantor and are by statute made usable under the principle already examined (*ante*, § 1705), and for copies of sundry documents.¹⁷

¹⁴ Such has been the interpretation in England, even under the unqualified terms of the Rules of 1883: 1881, *Bewicke v. Graham*, L. R. 7 Q. B. D. 400; 1883, *Attorney-General v. Emerson*, L. R. 10 id. 191; 1883, *Kearley v. Phillips*, ib. 445; 1883, *Re Pickering*, L. R. 28 Ch. D. 247; 1893, *Lewis v. Lonsborough*, 2 Q. B. 191; 1893, *South Staff. T. Co. v. Ebb-smith*, ib. 689; 1899, *Attorney-General v. Newcastle-upon-Tyne Co.*, ib. 478 (documents which impeach the defendant's case, though they do not support the plaintiff's case, are privileged; precedents examined). So in *Canada*: 1872, *Stovel v. Coles*, 4 Ont. Ch. C. 9. So also in several of the *State Courts*: 1894, *Lester v. People*, 150 Ill. 408, 418, 23 N. E. 337, 37 N. E. 1004; 1832, *Townsend v. Lawrence*, 9 Wend. 456 ("the object of the statute was to substitute the rule of court in place of a bill of discovery"); 1893, *Arnold v. Pawtucket V. W. Co.*, 18 R. I. 189, 194, 26 Atl. 55. The practice in the various States cannot be here further examined in detail, for the reasons already mentioned in note 6, *supra*.

The Chancery rule, it may be remembered, applied only to relevant documents in the opponent's possession or control; and there was here much learning as to the conclusiveness of the opponent's oath as to the relevancy of the document and the fact of his possession: *Langdell, Equity Pleading*, §§ 164, 169; 1885, *Adams v. Lloyd*, 3 E. & N. 351, 361; 1891, *O'Shea v. Wood*,

Prob. 237, 286. This is to be noted for the purpose of distinguishing the questions which arise under the party's documentary privilege (*post*, § 2200, par. 3) and the client's privilege for documents communicated to his attorney (*post*, § 2318).

¹⁵ 1854, *St.* 17 & 18 Vict. c. 125, §§ 47, 48 (provides for interlocutory production of writings by witnesses on terms to be imposed by the judge); *Nebr. Comp. St.* 1899, §§ 5973-5975 (see quotation *supra*, note 6).

¹⁶ These statutes have already been collected, *ante*, §§ 1225, 1651.

¹⁷ The following statutes have already been set out elsewhere, for other principles: *Canada*: *Dom. St.* 1893, c. 31, § 19 (reasonable notice, not less than ten days, required for using certain certified copies; cited *ante*, §§ 1651, 1680, 1681); *B. C. Rev. St.* 1897, c. 71, § 20 (like *Can. St.* 1893, c. 31, § 19); §§ 35, 37 (notice of copy of will; cited *ante*, § 1681); § 40 (notice of copies of deeds, etc.; cited *ante*, § 1651); § 41 (notice of commercial documents; cited *ante*, § 1223); *Man. Rev. St.* 1902, c. 57, § 21 (like *Can. St.* 1893, c. 31, § 19); §§ 26, 27 (like *Ont. Rev. St.* 1897, c. 72, § 51, substituting three days, for the counter-notice); *N. Br. St.* 1881, c. 14, § 1 (telegrams; cited *post*, § 2154); *St.* 1882, c. 27 (registered deeds; cited *ante*, § 1225); *St.* 1893, c. 24, § 2 (incorporation-document; cited *ante*, § 1690); *St.* 1894, c. 20, §§ 59, 60 (registered conveyances in general; quoted *ante*, § 1225);

§ 1860. *Same: Other Principles Discriminated.* These rules for compelling prior inspection and opportunity for copying or for excluding a document unless prior inspection and copying has been allowed must be distinguished from other principles, bearing upon the same situation and sometimes applied in the same statute:

(1) At common law the party had a *privilege not to give testimony or furnish documents*, either before or during trial. The above-mentioned statutes have of course equally struck away this privilege so far as it affects the production at the trial (*post*, § 2219).

(2) At common law, if the opponent, in proving his own case, *notified* the party possessing a document to *produce it at the trial*, and the party refused to do so, the opponent was thereupon allowed to use a copy, because the original had proved unavailable for him; this involves the principle of the admissibility of copies (*ante*, § 1200).¹

(3) In what situation, if the opponent was thus forced to use a copy, the party possessor was in consequence, by way of penalty, *forbidden* thereafter to use the original in contradiction of the tenor of the copy (*ante*, § 1210). This prohibition, it will be seen, affected only the case where at the trial production was refused and the opponent in proving his case used a copy; whereas, under the statutes just examined, the exclusion affects the first party's proof of his case by a document which he has refused to show before trial.

(4) At common law, a party's *non-production at the trial* of a relevant document was always regarded as allowing the inference, under certain conditions, that its *tenor was unfavorable* to him and was what his opponent claimed it to be (*ante*, § 291). The principle may properly be applied, and often has been, to the present situation, by the statutes noted in the preceding section; i. e. to the case of a refusal to allow inspection or furnish a copy before trial. These statutes provide that the judge may exclude the document absolutely, or may direct the jury to presume it to be of the tenor alleged by the opponent; the former measure being suitable to a document aiding the party-possessor's own case and offered by him for that purpose, and the latter measure being suitable for a document forming part of the opponent's case and desired by him to be proved.

(5) The opponent's *failure by affidavit to deny the execution* of a document

§ 24 (notice of sale under mortgage; cited *ante*, § 1225); Ont. Rev. St. 1897, c. 75, §§ 41, 43 (probate of wills; cited *ante*, § 1681); § 47 (registered documents; cited *ante*, § 1225); § 51 (commercial documents; cited *ante*, § 1225); P. E. I. St. 1889, § 43 (cited *ante*, § 1225); § 48 (cited *ante*, § 1225); *United States*: Fla. St. 1901, c. 4951 (notice required for using abstracts of burnt records; quoted *ante*, § 1705); *Ida.* St. 1897, March 12, § 4 (a party using an abstract of title in evidence must furnish a copy to the opponent before trial a certain number of days); Ill. Rev. St. 1874, c. 116, § 29 (a sworn copy of an abstract of title, etc., usable instead of the

original, where the offeror has "given the opposite party a reasonable opportunity to verify the correctness of such copy"; quoted *ante*, § 1705); 1902, *Glos v. Cary*, 194 Ill. 214, 62 N. E. 555 (statute applied); *Neb.* Comp. St. 1899, § 4158 (a party desiring in civil action to use an abstract of title in evidence must give a copy beforehand to opponent; rules prescribed as to the interval of time; quoted *ante*, § 1705).
¹ For the question *what constitutes production* of an original, i. e. whether a party offering an instrument in proof is deemed to have satisfied the rule of production without showing or reading its contents, see *ante*, § 1185.

is usually, by statute, made equivalent to an admission of its genuineness, so that he cannot at the trial dispute its genuineness. This rule (*post*, § 2595) is in form a rule of pleading; yet in policy it rests in part on the consideration that in fairness the opponent should give prior notice of his intention to dispute execution; it thus works in the spirit of an exception to the general common-law principle dealt with in the foregoing sections.

(6) By statute, a *copy* of a document intended to be used is in many jurisdictions required to be *annexed to the party's pleading*. This rule (*ante*, § 1848) is one of pleading, not of evidence; yet the policy of it is in effect the same that underlies the statutes noted in the foregoing section, namely, of giving the opponent fair notice of documents to be offered against him.

§ 1861. *Document shown to Opponent at Trial; Opponent's Inspection as making it Evidence.* For the reasons of policy already considered (*ante*, § 1847, par. 4), the general rule suffers a virtual exception, well recognized at common law, where a party, having a document at the trial, uses it for any evidential purpose. Here it is no hardship to him, and it is a decided dictate of fairness, to require him to submit it for the opponent's inspection, even though the former has not yet technically and finally put it in evidence.

(a) In the first place, this rule applies where the party's witness employs a writing in *aid of recollection*, whether as a record of past recollection or merely to stimulate present recollection; in this aspect it has already been considered (*ante*, §§ 753, 762).

(b) In the second place, when a writing is offered to a witness for the preliminary purpose of testifying to its *execution* or *identity*, with the object of not actually offering it in evidence until a later stage in the case, fairness requires that the opponent should see it then or before the witness leaves the stand, in order that the opponent may cross-examine as to the writing; for otherwise the writing might not be actually offered until after the witness had left the court-room and become unavailable for the purpose of cross-examination. This application of the rule is in the United States generally accepted.¹

¹ *Eng.*: 1849, *Collier v. Nokes*, 2 C. & K. 1012 (the defendant, on cross-examination, having obtained from the plaintiff's witness testimony to the execution of a lease and an inventory and the handwriting of some letters, the plaintiff claimed the right to see them; *Wilde, C. J.*, said: "My own opinion is that if the handwriting, or any of the contents of any paper shown to a witness, is deposed to, the opposite counsel is entitled to see it, otherwise he perhaps would not be able to shape his line of conduct; he would not be so entitled if the witness merely deposed to the nature of the paper, or to its having been produced on a given occasion, or any similar thing"; but he deferred to the opposite ruling of *Parks, B.*; the distinction taken by *Wilde, C. J.*, seems untenable); *U. S.*: 1890, *Richmond & D. R. Co. v. Jones*, 92 Ala. 218, 226, 9 So. 276 (document said to have an attesting witness, shown to another witness to prove his execution; refusal to show

beforehand to opposing counsel, held improper, because it deprived him of the opportunity to require the attesting witness to be first called); *Alaska C. C. P.* 1900, § 672 (like *Or. Annot. C.* 1892, § 643); *Ark. Stats.* 1894, § 2966 ("Whenever a writing is shown to a witness, it may be inspected by the adverse party"); *Cal. C. C. P.* 1872, § 2054 ("Whenever a writing is shown to a witness, it may be inspected by the opposite party, and if proved by the witness, must be read before his testimony is closed, or it cannot be read except on recalling the witness"); amended in 1901 (by substituting, after the words "opposite party," the following: "and no question must be put to the witness concerning a writing until it has been so shown to him"; here the word "him" is ambiguous; for the validity of this amendment, see *ante*, § 488); 1877, *People v. Stevens*, 52 Cal. 437 (after a witness had identified papers, they were not read nor offered in evidence; held, that the

(c) In the third place, whenever a document is *finally put in evidence*, it would seem that the general principle requiring the production of the original signifies a production for inspection by the opponent, and not merely by the jury.²

From the present question is to be distinguished the rule of some Courts (dealt with *post*, § 2125) that where a party has voluntarily produced at the trial his own document, at the request and for the use of the opponent, the opponent's *mere inspection of the document*, without using it, *makes the whole of it admissible* in the first party's favor. This rule is in form a rule of Completeness, and must therefore be considered under that head. But the motive for its adoption is only to be explained by remembering the general common-law rule now under consideration, namely, that the opponent was not of right entitled to any prior warning of the tenor of the first party's evidence; so that, if he requested the production of a document to aid his own case, and if he was allowed to peruse it for selecting such parts, he might request it upon that pretext and then decline to use any part, and yet would thus have obtained some information as to his opponent's documents. This appeared (to the Courts adopting the above rule) as a surreptitious evasion of the common-law principle which favored keeping him in total ignorance; and hence they strove indirectly to prevent this evasion by penalizing the opponent, *i. e.* by allowing him to accept inspection at the risk of making the whole of the document admissible against him, even though it would otherwise have been inadmissible. This measure, though illiberal, was thus at any rate logical; but it never obtained a general vogue.

4. Premises, Chattels, and Bodily Members.

§ 1862. *Inspection before Trial.* So far as concerned chattels and premises in his possession or control, the adversary in common-law actions, like the true gamester that the law encouraged him to be, held safely all the trump cards of the situation, free from all legal liability of disclosure before trial; in this respect there was not recognized even the limited right of inspection (*ante*, § 1858) which after the days of Lord Mansfield had been conceded for documentary evidence.¹ But in chancery, under the same whole-

opponent had the right to inspect before cross-examination, or at least before the close of testimony; *Ida. Rev. St.* 1887, § 6065 (like Cal. C. C. P. § 2054); 1847, *Anderson v. Root*, 8 Sm. & M. 343; *Mont. C. C. P.* 1895, § 3563 (like Cal. C. C. P. § 2054); *Or. C. C. P.* 1892, § 848 (like Cal. C. C. P. § 2054). *Contra*: 1834, *Sinclair v. Stevenson*, 1 C. & P. 582, 583 (per Best, C. J., citing no authority); 1830, *Grindall v. Grindall*, K. B., *Butterworth's Rep.* 323 (Tenterden L. C. J.: "When it is read is your time to look at it; I cannot tell whether it may be read or no"); 1834, *Russell v. Rider*, 6 C. & P. 416, *semble*, *Boanquet, J.*: 1891, *Calderon v. O'Donnell*, 47 Fed. 39 (mere showing for identification does not give the right to inspection; unless

the document is offered in evidence or its contents are mentioned other than for identification: this is apparently unsound).

¹ For the time of reading the document to the jury, see *post*, §§ 1863, 1864.

In *chancery practice*, the documents produced at the hearing are to be available for the opponent's inspection; 1874, *Hil*; and *v. Harrison*, 37 N. J. L. 170 (for documents offered in evidence and thus under control of Court, an opportunity for inspection will be ordered in open Court or before an officer or the party-poseessor; but not delivery to the opponent).

² Compare the rule in *The Queen's Case*, *ante*, § 1185.

³ 1828, *Dell v. Taylor*, 6 Dowl. & R. 306

some principle and practice by which bills of discovery were allowed for ascertaining the opponent's testimony and the documents in his possession (*ante*, §§ 1856, 1857), the inspection of chattels and premises in his possession or control was obtainable wherever fairness seemed to demand it. Whether the precise limitations of the bill of discovery for documents prevailed, namely, the limitation to facts supporting the applicant's own case (*ante*, § 1857), is not clear. But the general power to require the adversary to permit inspection was settled:

1819, *Kynaston v. East India Co.*, 3 Swanst. 248 (bill to recover tithes; inspection of defendant's premises by plaintiff's witnesses demanded, to discover the value thereof); *Messrs. Withersell and Palmer*, for the plaintiff: "The principle is that wherever, in respect of the property of one individual, a right accrues to another which cannot be measured without inspection of the subject of property, the Court is competent to compel the proprietor to permit that inspection, as indispensable to the purposes of justice"; *L. C. Eldon*, approving this: "Though novel in circumstances, this case is not novel in principle. The purpose of inspection is to inform the conscience of the Court, and witnesses appointed by it are entitled to be considered as its officers. . . . The question is, whether in such a case the Court must not have the means of ascertaining by the inspection of witnesses the nature of the premises in order to ascertain their value; and whether the law meant to leave it thus, that the defendants were to state in their answer their opinion, and to send their own surveyor to give his opinion of the value, but on the other hand the plaintiff was to be in such circumstances that he could examine no witnesses who knew with precision the value of the premises. . . . It is admitted that where a man has a right to receive a certain sum in the pound on the value of trees, the Court has ordered inspection of the trees; so in the case of a commission on diamonds, inspection would be ordered of the diamonds. I remember a case where, on the suggestion that a machine used by the defendant was an infringement of a patent, the Court ordered the defendant to allow an entry into his premises for the purpose of ascertaining by inspection whether the machine was an infringement. . . . If without this proceeding the Court must miscarry, and cannot attain the justice of the case without inspection, my opinion is that, on principle, it has authority to order inspection, taking care to impose as little inconvenience as possible on those on whom orders is made."

1902, *Chase, J.*, in *Reynolds v. Burgess S. F. Co.*, 71 N.H. 332, 51 Atl. 1075 (allowing a bill of discovery of a strap said to have caused an injury): "Unless the equitable remedy of discovery has been superseded by the provision of some plain, adequate, and complete remedy at law, or is not applicable to a case of tort like that alleged in the plaintiff's action at law, — points that are hereinafter considered, — it is certain that the defendants, through their officers and agents, might be compelled in a suit like the present one to discover the form in which the strap was constructed, the character of the workmanship by which and the materials from which it was made; in short, all the facts within their knowledge, information, or belief tending to show that it was defective. If they had in their possession a plan of the strap or of the broken pieces, they might be compelled to produce it for examination by the plaintiff. Why, then, may they not be compelled to produce the broken pieces themselves? [1] Two reasons are suggested: One — positive, and, if well founded, substantial — that the defendants' right to possess and control the property, growing out of their ownership of it, cannot be infringed in this

(inspection not allowed to plaintiff of copper plates, delivered to defendant by plaintiff, and forming the subject of the action; "no instance is to be found in which the Court has ordered an inspection, to either party to a suit, of anything which is not the common property

of both"); 1840, *Turquand v. Guardians*, 8 Dowl. Pr. 201 (action for work done on the defendant's premises; a common-law judge held to have no power to order inspection by witnesses; defendant's refusal could only be the subject of comment to the jury).

way; and the other — negative, and not applying to the merits of the question — that there is no precedent for a discovery and inspection of such property. It must be admitted that the defendants' right of property in the broken strap will be interfered with to some extent if they are required to produce it, and allow the plaintiff and others to examine it. But such interference will not differ in kind or degree from that which occurs when a party is required to produce his letters, deeds, plans, other documents, or books for inspection. The rights of the defendants arising from the ownership of the strap are no more sacred than would be their rights arising from the ownership of a plan of the strap, if they had one. The infringement of property rights in such cases is justified upon the ground that it is necessary to the administration of justice. Such necessity is alleged by the plaintiff and admitted by the defendants. It is apparent that an examination of the strap will afford a better means of ascertaining the truth in respect to its suitability or unsuitableness for the office it was to perform than any possible description or plan of it could afford, and the necessity for an inspection of it is correspondingly greater than the necessity for an oral description or a plan. . . . [2] The defendants' second objection is because the discovery and inspection are sought for the purpose of having the broken strap examined by persons with a view of enabling them to testify as experts in the action at law. This objection must also be overruled. It is evident that expert testimony may be competent upon the issue to be tried, whether it relate to the form of the strap, the manner of its construction, or the character of the materials from which it was made. The defendants have ample opportunity to procure such testimony. Justice requires that the plaintiff shall also have an opportunity to have the strap examined by persons in whose skill and scientific knowledge she has confidence. There cannot be a fair trial of the case unless such opportunity is given to the plaintiff. Indeed, it may be that she cannot establish her right — if she have one — without having the opportunity. . . . [3] The defendants place much reliance upon their third point, viz., that the equitable remedy for discovery cannot be invoked in aid of an action at law for a personal tort. They do not question, and, in view of the authorities, cannot question, the proposition that discovery may be had in aid of actions of tort relating to property, such as trover, detinue, trespass, waste, etc. But they say that a defendant cannot be called upon to implicate himself directly or indirectly in a personal tort, because it would tend to show moral turpitude, and so is inconsistent with principles of natural justice. . . . If the absence of authorities is entitled to any weight, it is, under the circumstances, very slight. Cases for personal torts arising from the action of the defendant, — willful torts, so to speak, — in which the defendant could make discovery without incriminating himself, must, from the nature of the case, be very rare. It is possible that there have been none excepting *Macaulay v. Shackell*, and cases of like nature that have been decided in accordance therewith without again raising the question. Cases for negligence were not common prior to the middle of the last century. The use of steam and electricity, and the commercial activity consequent thereon, have immensely multiplied cases of this kind. Lord Campbell's act for giving compensation to the families of persons killed by the negligence of others was enacted in 1846. Eight years later a procedure bill was passed, namely, through the agency of Lord Campbell (17 & 18 Vict. c. 125), by which, among other things, it was provided that either party to a civil action in the superior courts 'shall be at liberty to apply to the court or a judge for a rule or order for the inspection by the jury, or by himself, or by his witnesses of any real or personal property, the inspection of which may be material to the proper determination of the question in dispute.' . . . In passing, it may be remarked that if the act and the reason of its enactment do not show that its author understood that Courts of equity had jurisdiction to order an inspection of real or personal property when such inspection was material to the proper determination of an issue, it certainly shows that he felt there was a necessity for such inspection in the administration of justice. The act relieved parties from the necessity of resorting to equity for discovery, and reasonably accounts for the absence, in England, of bill of discovery in aid of actions at law for negligence since that time. . . .

If *Macaulay v. Shackell*³ and *Wilmet v. Massabie*⁴ are not authorities in favor of the maintenance of the plaintiff's bill, the general principles governing the remedy of discovery certainly justify its maintenance. The case may be a new case in specie, so far as discovery is concerned, but it belongs to a class to which the remedy of discovery is applicable."

This power was in England exercised in ordering inspection of mines, and in sundry other instances,⁵ particularly in patent cases.⁶ In the United States, there seem to have been few instances of a demand for it in equitable cases;⁷ nor under the simplified code-procedure has there

³ 1 Bligh v. s. 96.

⁴ 4 Sm. 343.

⁵ 1688, *Marston v. Parrish*, 1 Vern. 407 (bill to discover whether cloths improperly pawned by the plaintiff's factor B. were in the defendant's hands; the defendant not admitting the identity of the cloths, it was ordered that the defendant "let the plaintiff, with two or more persons present, have a sight of the cloths pawned by B., so that the plaintiff might bring an action at law"); 1799, *Lonsdale v. Curwen*, 3 Bligh 168, note (bill to prevent the digging of coal by defendant in mines under the plaintiff's premises; to obtain "a perfect and complete report of the workings," the defendant was ordered to permit certain persons to inspect the mines"; the reporter adds, "The practice in courts of equity of granting orders for inspection of mines, machines, etc., is well settled"); 1804, *Walker v. Fletcher*, 1b. 173 (similar to the preceding case; form of order given); 1814, *Earl of Macclesfield v. Davis*, 3 Ves. & B. 16 (jewels, etc., bequeathed to the plaintiff as heirlooms, and said to be in an iron chest in the possession of the defendant's banker, the defendant claiming a lien; on motion, L. C. Eldon allowed the plaintiffs an order to the defendant "to permit the said box with its contents to be inspected by the plaintiffs, or any person they may appoint, at all reasonable times, upon request"); 1819, *Kynaston v. East India Co.*, 3 Swanst. 348 (quoted *supra*); 1821, *East India Co. v. Kynaston*, 3 Bligh 183, 187, 168 (order of the Chancellor in the preceding case affirmed by the House of Lords); 1848, *Twentyman v. Barnes*, 3 DeG. & Sm. 225 (fraudulent alteration of a document; order for experts' inspection, declined, on an undertaking by the opponent not to remove the document from the record-office); 1849, *Attorney-General v. Chambers*, 13 Beav. 189 (order of inspection of coal mines, granted); 1849, *Lewis v. Morris*, 8 Hare 97 (the plaintiff's inspection of his mine, leased to the defendant, allowed); 1860, *Bennett v. Whitehouse*, 28 Beav. 119 (trespass to a mine; the plaintiff allowed to inspect the defendant's mine); 1860, *Ennor v. Barwell*, 1 DeG. F. & J. 529 (an order to allow trenches to be cut, to ascertain a geological formation, held too extensive, but the power not doubted); 1861, *Bennett v. Griffiths*, 3 E. & E. 467, 476 (inspection of a mine; "the power to order an inspection of real or personal property has long existed in courts of equity; and we find that, as ancillary to that power,

the Courts of equity have ordered the removal, where necessary, of obstructions to the inspection"). Distinguish the following: 1841, *Blakenley v. Whalidon*, 1 Hare 276 (specific performance decreed under a contract of sale of a mine reserving the power to inspect).

⁶ 1818, *Bovill v. Moore*, 2 C. P. Casp. 86 (patent infringement; L. C. Eldon allowed the plaintiff "to inspect the defendant's machine and see it work"); 1818, *Brown v. Moore*, 3 Bligh 178 (infringement; inspection of plaintiff's machine allowed; ordered "that the plaintiff should put the machine into a state to work, according to the specification enrolled, etc., and permit Mr. J. M. to see it work in that state on the succeeding morning"); 1832, *Russell v. Cowley*, 1 Webster Pat. Cas. 487; *Brougham, L. C.* (infringement; two persons on each side having been agreed to be appointed as inspectors of the works, to give evidence, an order was made for inspection by them, "it being the object and intention of this Court to enable the said plaintiff to give such evidence . . . as will enable him to make out, if the fact be so, the infringement"); 1835, *Morgan v. Seaward*, 1b. 167, 169, *Shadwell, V. C.* (infringement; injunction refused, but account ordered, "the plaintiffs and their witnesses to be at liberty to inspect at all reasonable times, giving reasonable notice, the machinery to be made"); 1856, *Jones v. Lee*, 26 Eng. L. & Eq. 844, *Exch.* (action on a licensee's covenant; plaintiff allowed "to go to the defendant's factory and inspect any machines he has there").

⁷ 1869, *Stockbridge Iron Co. v. Cone Iron Works*, 102 Mass. 80, 82, 83 (mine trespass; order of inspection made, apparently by consent, but apparently sanctioned by the Court without regard to this); 1908, *Reynolds v. Burgess*, 8 F. Co. 71 N. H. 322, 51 Atl. 1075 (bill granted for discovery of the pieces of an engine-strap of the defendant, alleged to have caused death; inspection by plaintiff's witnesses and attorneys allowed; quoted *supra*); 1877, *Thomas Iron Co. v. Allentown M. Co.*, 28 N. J. Eq. 77, 82 (inspection of a mine, allowed; *Bennett v. Whitehouse, Eng.*, approved); 1867, *Thornburgh v. Savage M. Co.*, U. S. Dist. Ct., 1 Pac. Law Mag. 267, 7 Morris Mining R. 667 (quoted *post*, § 2221; inspection of a mine, allowed); 1894, *Montana Co. v. St. Louis M. & M. Co.*, 133 U. S. 160, 14 Sup. 506 (quoted *infra*, note 9); and the cases cited *post*, §§ 2194, 2221 (privilege to refuse inspection of premises and chattels).

been a disposition to adopt these transferred equitable powers;⁷ in criminal cases, naturally, the non possession of the common-law procedure has usually served to defeat the right of inspection.⁸ But by statute in a few jurisdictions⁹ ample power has now been given for ordering an opportunity of inspection, not only of premises and chattels but also of bodily members.

⁷ 1901, *Sullivan v. McConlin*, 118 Ia. 74, 84 K. W. 978 (services in plastering a house; right to obtain inspection of the house by plaintiff's witnesses on order of Court, not decided); 1863, *Cooke v. Lalancs G. M. Co.*, 3 N. Y. Civ. Proc. 323 (order for inspection of defendant's machine, on which plaintiff was injured, refused).

⁸ 1848, *Com. v. Andrews, Mass.*, Davis' Rep. 4 (murder; a motion by defendant to require the Attorney-General to allow an inspection of parts of the deceased's body and of personality of the defendant in the prosecution's possession, subject to restrictions as to mutilation, was rejected; subject to the Court's discretion to allow a postponement, etc., in case of surprise at the trial); 1867, *State v. Brooks*, 93 Mo. 542, 578, 14 W. 257, 330 (murder; whether the defendant was entitled to have expert witnesses examine the exhumed corpse, about which the prosecution had declared its intention to offer experts who had examined it; undecided). For inspection at the trial, see post, § 2231.

⁹ The following statutes apply to premises and chattels only, and should be compared with those cited ante, § 1163, post, § 2231; the statutes as to inspection of the person's body are placed post, § 2230; ENGLAND: 1854, St. 17 & 18 Vict. c. 128, § 86 ("Either party shall be at liberty to apply to the Court or a judge for a rule or order for the inspection by the jury or by himself or by his witnesses of any real or personal property the inspection of which may be material to the proper determination of the question in dispute," and the Court may make such order as seems fit); 1861, *Bennett v. Griffiths*, 3 E. & E. 467 (statute applied; quoted *supra*); 1863, Rules of the Supreme Court, Order 50, rule 3 ("It shall be lawful for the Court or a judge, upon the application of any party to a cause or matter, and upon such terms as may be just, to make an order for the detention, preservation, or inspection of any property or thing being the subject of such cause or matter or as to which any question may arise therein; and for all or any of the purposes aforesaid, to authorize any persons to enter upon or into any land or building in the possession of any party to such cause or matter; and for all or any of the purposes aforesaid to authorize any samples to be taken or any observation to be made or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence"); 1893, *Macalpine v. Calder*, 1 Q. B. 545 (Order 50 applied); 1893, St. 15 & 16 Vict. c. 63, § 42 (in patent cases, inspection may be ordered); 1860, *Patent Type Founding Co. v. Lloyd*, 5 H. & N. 192 (statute applied); CANADA: R. C.: 1898, *Esquimaux & N. E. Co. v. New Vancouver Coal Co.*, 5 Br. C. 184 (inspection of a mine allowed, under Court Rule 514);

1899, *Star Mining & M. Co. v. White Co.*, 9 Id. 423 (similar; inspection of the plans, and copies thereof, also allowed); *Man. Rev. St.* 1902, c. 40, Rule 382 (like Ont. Rule 571); Rule 394 (like Ib. 1096); *N. Sc. Rules of Court* 1900, Ord. 37, R. 6 (like Ont. Rule 1096); 1899, *Gray v. Fariman*, 22 N. Sc. 225 (the judge's discretion controls; here, the inspection of a mine); *Ont. Rules of Court* 1897, §§ 571, 1096 (quoted ante, § 1163); 1899, *Hills v. Union L. & S. Co.*, 19 Ont. L'r. 1 (rule not applied to order inspection of premises not in occupation of the opponent); *P. E. I. St.* 1872, c. 22, § 252 (jury's view or inspection by the party or his witnesses "of any real or personal property the inspection of which may be material to the proper determination of the question in dispute" may be ordered); UNITED STATES: *Co's. C. C. P.* 1891, § 364 (provisions for inspection of mining property in dispute); *Ann. St.* 1891, § 3176 (the Court may order defendant to allow the inspection of a mine, in a claim for drainage, where defendant has refused to allow plaintiff's inspection); § 3164 (same for an action involving title or right of possession of a mining claim); *Fla. Rev. St.* 1892, § 1022 ("Either party shall be at liberty to apply to the Court for a rule or order for the inspection by himself or by his witnesses of any real or personal property the inspection of which may be material to the proper determination of the question in dispute"); *Haw. Civil Laws* 1897, § 1395 (like *Fla. Rev. St.* § 1022); *Mont. C. C. P.* 1895, § 1314, formerly § 376 (whenever it is "necessary for the ascertainment, enforcement, or protection" of a mining right, "that an inspection, examination, or survey of such mine," etc., be had, the judge may order it, after three days' refusal of the possessor upon demand in writing); 1890, *St. Louis M. & M. Co. v. Montana Co.*, 9 Mont. 286, 23 Pac. 510 (statute applied and held constitutional; learned opinion by Blake, C. J.); 1901, *Anacostia C. M. Co. (State ex rel.) v. District Court*, 25 Id. 504, 65 Pac. 1020 (statute applied); 1902, *Heinss (State ex rel.) v. District Court*, 26 Id. 416, 68 Pac. 794 (statute applied); 1902, *Geyman (State ex rel.) v. District Court*, 26 Id. 483, 68 Pac. 661 (statute applied); 1903, *Parrot S. & C. Co. (State ex rel.) v. District Court*, — Id. —, 73 Pac. 230 (applied and held constitutional; *Holloway, J.*, diss., on the ground that the defendant could not be compelled to use its hoists, etc., for enabling the inspection to be made); 1894, *Montana Co. v. St. Louis M. & M. Co.*, 152 U. S. 160, 14 Sup. 506 (Montana statute held constitutional; the power "has never been denied; if it exists [for a court of equity], a fortiori the State has power to provide a statutory proceeding to accomplish the same result"); *N. J. Gen. St.* 1896, Evidence, § 24 (the Court may order a party to permit inspection by wit-

It must be noted the present question, i. e. of the right to inspect the opponent's premises or chattels *before trial*, is distinct from that of the opponent's *privilege* to withhold them from evidence at the trial (*post*, §§ 2194, 2221), and from that of the propriety of ordering a *jury's view* during trial (*ante*, § 1163); the precedents are sometimes not to be discriminated.

names or the opponent of any premises or chattels in his control, where inspection would aid the ascertainment of truth); *R. I. St.* 1909, c. 1109 (amending Gen. L. 1898, c. 244, § 12, by adding that in actions for personal injuries the Court may require the defendant to permit the plaintiff's attorney, with or without experts, "to view and examine the place and cause of such injury" as directed by the judge); *W. Va.* 1902, c. 20 (amending Stat. 1890, § 2025;

where the concealment of a deceased's property is suspected, Court may compel production of documents or writings); *St.* 1908, c. 110 (in any civil action a party may obtain an order "for the inspection by each party or his witnesses of any real or personal property in the possession or control of an opposing party the inspection of which may be deemed material and necessary to the trial and determination of the action or proceeding").

TITLE IV: SIMPLIFICATIVE RULES.

CHAPTER LXIII.

§ 1863. General Nature of these Rules; Undue Confusion of Issues, and Undue Prejudice, as Grounds for Exclusion.

§ 1864. Length of Time is in itself no Ground for Exclusion.

SUB-TITLE I: ORDER OF EVIDENCE.

§ 1865. General Subdivision of Topics.
§ 1867. Trial Court's Discretion as the Ultimate Standard for Each Case.

A. STAGES OF PRESENTATION FOR THE WHOLE CASE.

1. Putting in the Case at Large.

§ 1869. Proponent's Case in Chief; Order of Topics and Witnesses in general; Party testifying first.

§ 1870. Same: Treason; *Corpus Delicti*; Conspiracy; Document's Loss and Execution; Reading Documents.

§ 1871. Same: Conditional Relevancy; Facts offered before their Relevancy appears; Stating the Purpose of a Question.

§ 1872. Opponent's Case in Reply; Order of Topics and Witnesses in general.

§ 1873. Proponent's Case in Rebuttal; Limited to Evidence made Necessary by Opponent's Reply.

§ 1874. Opponent's Case in Surrebuttal; Limited to Evidence made Necessary by Proponent's Rebuttal.

§ 1875. Stages after Surrebuttal.

2. After Case Closed.

§ 1876. Case Closed: (1) Offeror's Case alone Closed.

§ 1877. Same: (2) Case of Both Parties Closed.

§ 1878. After Argument Begun.

§ 1879. After Judge's Charge Given.

§ 1880. After Jury Retired.

§ 1881. After Verdict Rendered.

B. STAGES OF EXAMINATION FOR THE INDIVIDUAL WITNESS.

§ 1882. Order of Examination in general.

1. Original Call.

§ 1883. Direct Examination, in general; Putting in Documents.

§ 1884. Cross-Examination, in general; Postponement and Waiver; Putting in Documents.

§ 1885. Putting in One's Own Case on Cross-Examination: (1) Orthodox Rule; (2) Federal Rule.

§ 1886. Same: Original Form of the Federal Rule; Trial Court's Discretion; Cross-examiner's Own Affirmative Case excluded.

§ 1887. Same: Policy of the Federal Rule.

§ 1888. Same: Policy of the Orthodox Rule.

§ 1889. Same: (3) Michigan Rule; Cross-examination to Facts Modifying the Direct Examination.

§ 1890. Same: State of the Law in the Various Jurisdictions.

§ 1891. Same: Qualifications of Each Rule.

§ 1892. Same: What constitutes Calling a Witness, so as to allow the Opponent to Cross-examine to his Own Case, under the Orthodox Rule: (a) in general.

§ 1893. Same: (b) on Ordinary Subpoena, or by Deposition.

§ 1894. Same: (c) on Subpoena *dues tecum*.

§ 1895. Same: Other Principles of Evidence discriminated (Rights of Cross-examination, Character on Cross-examination, Accused on Cross-examination, Form of Questions, Impeaching One's Own Witness).

§ 1896. Re-Direct Examination.

§ 1897. Re-Cross-Examination, and later Stages.

2. Recall.

§ 1898. Recall for Re-Direct Examination.

§ 1899. Recall for Re-Cross-Examination.

§ 1900. Re-Recall.

§ 1863. General Nature of these Rules; Undue Confusion of Issues, and Undue Prejudice, as Grounds for Exclusion. The peculiar mark of the ensuing group of rules is that in their operation they set aside or exclude, either conditionally or absolutely, certain kinds of evidence (otherwise admissible so far as Relevancy is concerned) which are found to have an improper effect by obstructing or confusing rather than aiding or facilitating the process of ascertaining the truth. They may be termed *Simplificative* rules, with reference to their mode of operation, in contrast to the other rules of Auxiliary Probative Policy (included under this Part II of the evidential rules of Ad-

missibility), in the sense that they work merely by way of elimination (temporary or permanent) of the objectionable evidence.¹ The distinction between this and the preceding groups of rules (Preferential, Analytic, and Prophylactic) has already been examined (*ante*, § 1172). These Simplificative rules treat the danger or inconvenience of the evidence as ineradicable by such methods as those of the foregoing rules, and therefore resort to the extreme measure of eliminating entirely the evidence supposed to be tainted with the objectionable disadvantage. It is clear that such a measure could not properly be resorted to unless either the evidential material was necessarily and thoroughly objectionable or else was of minor utility and could be easily sacrificed; nor should the exclusion be an absolute one, unless a conditional or temporary exclusion would not suffice for the purpose. These considerations do in fact appear to have prevailed, their strength in a given instance depending of course upon supposed experience with that class of evidence.

As to the qualities or elements that constitute the objectionable features and furnish the grounds for exclusion, it will be seen that they cannot concern the relevancy, or legitimate probative value, of the evidence itself; it is assumed, as to circumstantial evidence, that it is amply relevant (*ante*, § 38), and as to testimonial evidence, that the witness is duly qualified (*ante*, § 475). The qualities, therefore, which give rise to the present rules lie in some indirect and disadvantageous probative effects found in experience to be produced by the use of certain kinds of evidence. No doubt, in framing a code, one might *a priori* specify various sorts of such evil effects, of more or less importance, requiring rules of the present sort; but we are here concerned only with the standards and the experience of the judges and of the legislators, as embodied in the rules actually laid down by them and found in operation in trial by jury at common law and under statutes. These disadvantageous effects, then, forming the motives for the ensuing heads, may be broadly summarized under two heads, namely, (a) Undue Confusion, (b) Unfair Prejudice. (a) If the use of certain evidential material tends to produce undue confusion in the minds of the tribunal—i. e. the jurors—, by diverting their attention from the real issue and fixing it upon a trivial or minor matter, or by making the controversy so intricate that the disentanglement of it becomes difficult, the evidence tends to the suppression of the truth and not to its discovery; and there is good ground for excluding such evidence, unless it is so intimately connected with the main issue that its consideration is inevitable. (b) So also, if certain evidential material, having a legitimate probative value, tends nevertheless to produce also, over and above its legitimate effect, an unfair prejudice to the opponent, or by virtue of the personality of the witness tends to receive an excessive weight in the minds of the tribunal, there is good ground for excluding such evidence, unless it is indispensable for its legitimate purpose.

¹ The term *Segregative* would possibly be a better one; compare, in the Century Dictionary, s. v. *Segregate*, the quotation from Dixon's *Church History*: "According to one account, he

[Sir T. More] likened his predecessor [Vulsey] to a rotten sheep, and the King to the good shepherd who had judiciously segregated it."

The foregoing motives, as might be expected, do not always operate distinctly and precisely in the shape of rules deduced directly and solely from one or the other motive. These broad considerations of policy may be plainly enough seen in the utterances of the judges, and an appreciation of them is indispensable to an understanding of the rules. Yet the resultant concrete rules may be due in part to the one and in part to the other motive, or one of these motives may, though dominant, be attended by subordinate motives of some other kind. Hence we are bound, here as elsewhere in considering these Auxiliary Rules, to deal with them from the point of view of the specific rule itself, as it appears in actual operation, and to refer to the motives of policy merely for the purpose of understanding the object and the true limitations of the rule. The final question always in the law of evidence is, What do the judges do? and not, What do they say that they do? nor even, Why do they say that they do it?

The rules, then, for which the above-mentioned considerations of sound policy have been either the sole or the dominant motive fall conveniently under three general heads: I. Rules excluding Evidence in general (testimonial or circumstantial) not Presented in the Proper Order of Time; II. Rules excluding Specific Kinds of Circumstantial Evidence or of Witnesses because of Undue Confusion or Unfair Prejudice; III. the Rule excluding Opinion Testimony.

These may now be taken up in order, after first noticing one supposed but fallacious foundation for some of these rules.

§ 1864. *Length of Time is in itself no Ground for Exclusion.* It is sometimes said in passing, by judges explaining their reasons for enforcing some of the ensuing rules, that the length of time taken up by the presentation of some kinds of evidential material is a reason for excluding it. "The trial," once said the great Chief Justice Doe, for example, "to which parties are entitled is not an endless one, nor one unreasonably protracted and exhausting";¹ and similar expressions, mentioning this consideration along with others as operating reasons, are occasionally found:

1847, *Rolfe, B.*, in *Attorney-General v. Hitchcock*, 1 Exch. 91, 105: "The laws of evidence on this subject as to what ought and what ought not to be received must be considered as founded on a sort of comparative consideration of the time to be occupied in examinations of this nature and the time which it is practicable to bestow upon them. If we lived for a thousand years, instead of about sixty or seventy, and every case were of sufficient importance, it might be possible and perhaps proper to throw a light on matters in which every possible question might be suggested, for the purpose of seeing by such means whether the whole was unfounded or what portion of it was not, and to raise every possible inquiry as to the truth of the statements made. But I do not see how that could be; in fact, mankind find it to be impossible. Therefore some line must be drawn."²

These expressions are not incorrect, in the sense meant by their judicial authors; but they are apt to mislead. They signify that a trial's length of

¹ 1879, *Amosong Mfg. Co. v. Head*, 59 N. H. 382.

² Various similar expressions are found in the citations ante, §§ 27, 443, 1002, post, § 1907.

time, regarded as permitting a multiplicity of witnesses and a cumulation of minor circumstances, may lead to an utter confusion of the issues and thus bring about the suppression and not the discovery of the truth, and that this confusion of the issues is thus a sound reason for exclusion. They do not signify that the length of time taken up in presenting relevant evidence is in itself a sufficient reason for excluding any sources of information. Time becomes important only as affording an opportunity for that confusion of issues which may justly furnish a real and intrinsic cause of the failure of justice.

No doubt, there was an age when this was not so. Up to the end of the 1700s the spirit of the administration of trials (in criminal cases at least) sanctioned the most summary procedure. Quick despatch was expected, even at the cost of truth; or, perhaps, more truly, it was not supposed that the truth needed anything but a summary investigation. The arrest, the trial, and the execution, succeeded one another with a celerity which left little time for raising and settling doubts.³ The proceedings in a criminal trial were expected to reach a close before the tribunal separated for the day; to that end an important trial was occasionally carried on into candle-light,⁴ but the jury were allowed no food or drink until their verdict was returned. "The rule," says Sir James Stephen,⁵ "which prevailed then [in 1699, at Spencer Cowper's trial] and long afterwards, of finishing all criminal trials in one day must often have produced cruel injustice. Many of the cases I have referred to were tried in a superficial, perfunctory way. . . . The right of the Court to adjourn in cases of treason or felony was not fully established till the treason trials of 1794." The first trial for treason that lasted over one calendar day, by adjournment to another, is said to have been that of Hardy, in 1794.⁶

Gradually the spirit of the proceedings changed. Ample time to investigate every material topic came to be allowed. To-day we are going too far towards the other extreme; by showing an almost total disregard for the value of time, we invite and overlook the abuse of this liberty by unnecessary and obstructive protraction of testimony on the part of unskilful prosecutors and unscrupulous defenders. It is clear enough, however, to any one who observes the conduct of our trials, that nowhere is there an appearance in practice of a doctrine that length of time consumed is in itself an objection to the reception of relevant evidence. The harsh and rough-shod methods of earlier times have wholly disappeared. Time, as essential to the discovery of truth, is judicially regarded as a commodity of unlimited supply. If this is apparent enough in the practice at trials, it has also not lacked plain enunciation in authoritative places. Modern judges have more than once taken

³ The trial of Colonel Turner, in 1664, is an example; for a robbery committed on the night of Jan. 7, he was arraigned on the 15th, tried and convicted on the 16th, sentenced on the 19th, and executed on the 21st.

⁴ Colledge's trial, in 1681 (8 How. St. Tr. 332, 512, 603), lasted a dozen hours.

⁵ History of the Criminal Law, I, 422, 403.

⁶ Campbell's Lives of the Chancellors, 5th ed., VIII, 307. Compare the instances cited *ante*, § 1864, note 65. Elizabeth Canning's celebrated trial for perjury, in 1753 (19 How. St. Tr. 352), lasted seven days; and this served to break ground for future cases.

the opportunity to repudiate the fallacy that any party in a court of justice should be denied the liberty of demonstrating the truth of his cause, because for both the Court has not time enough to investigate it. Indeed, for a most eloquent and the earliest utterance, we may hark back to a period when this principle was as yet (in criminal cases at least) a mere ideal unrepresented in the practice of the day:

1670, *Vaughan, C. J.*, in *Bushel's Case*, 6 How. St. Tr. 990, 1003, Vaughan 135, 3 Keb. 222, 1 Mod. 119 (replying to the argument against new trials that to report all the evidence for the Judges "would be too long"): "A strange reason! For if the law allows me remedy for wrong imprisonment (and that must be by judging whether the cause of it were good or not) to say the cause is too long to be made known is to say the law gives a remedy which it will not let me have, or I must be wrongly imprisoned still because it is too long to know that I ought to be free. What is necessary to an end the law allows, is never too long. '*Non sunt longa quibus nihil est quod demere possis*' is as true as any axiom in Euclid."

1870, *Blackburn, J.*, in *Godard v. Gray*, L. R. 6 Q. B. 130, 152: "In no case that we know of is it ever said that a defense shall be admitted if it is easily proved and rejected if it would give the Court great trouble to investigate it."

1863, *Davies, J.*, in *People v. Pease*, 27 N. Y. 45, 61 (repudiating the argument that to investigate the correctness of an election-return would consume too much time): "It is the first time I have ever heard it urged that a party who had a conceded right should not have a remedy to enforce it, because a large consumption of time would take place before his right could be established. If a party has a legal title to an office, it surely can be no legal reason for denying him the opportunity to establish it, that such process will require the examination of a large number of witnesses and consume much time in the proceeding. Rights of parties cannot be determined on such a basis."

Sub-title I: ORDER OF EVIDENCE.

§ 1866. *General Subdivision of Topics.* In every trial of an adversary or responsory nature (*ante*, § 4), the first general line of division in the presentation of evidence will have reference to the *whole mass of evidence* as shared between the opposing parties. Each must have his turn. It is immaterial under what system of pleading the trial is conducted; it is assumed that the law of pleading has prescribed whether one or more than one plea may be at issue, and that the law of procedure has prescribed whether one or more than one issue may be investigated at the same trial. In any case, the party sustaining the burden of affirmation (here termed the proponent) will first come forward with his evidence in support, the party sustaining the opposite (here termed the opponent) will then come forward in denial, and each in turn may need to present further evidence. The apportionment of the whole evidential material between the parties is thus the first problem.

Next, since almost all evidential material, of whatever sort, comes before the tribunal through the assertions of witnesses (*ante*, §§ 22-25), and since every witness is subject to examination by the opposing as well as by the calling party, in order to extract the whole of his knowledge and ascertain its detailed significance (*ante*, §§ 1368-1369), there arises a further line of division in the examination for each witness; he may need to be examined

first by the calling party, then by the opposite party, and so again by each in turn. The apportionment of the order and topics of examination for each witness, as between the parties, thus presents the second problem.

Since the party calling a witness may be the opponent in the case at large, it is evident that this second line of division is a distinct one from the preceding, and exists along with and independently of it. On the other hand, the two groupings will sometimes coincide and involve the same problem; as, for example, where the opponent seeks to put in by cross-examination the evidential material supporting his own case, or where a witness is desired to be recalled after both parties have closed their cases. In general, therefore, the two lines of division can be followed separately in considering the appropriate rules; but in particular situations it becomes sufficient to treat the problem as a single one, under one or the other head according as it is more natural. The due apportionment and separation of these various topics is not an easy task, but it is an inevitable one; nevertheless, the lack of an accepted scientific nomenclature makes succinct and clear exposition almost impossible in this department of rules.

The arrangement of topics will therefore be made as follows, taking each division as representing a stage in which evidence is desired to be offered:

A. STAGES OF PRESENTATION, FOR THE WHOLE CASE.

1. *Putting in the Case at Large.*
 - a. Proponent's Case in Chief.
 - b. Opponent's Case in Reply.
 - c. Case in Rebuttal.
 - d. Case in Surrebuttal.
2. *Case Closed.*
 - a. By Proponent.
 - b. By Opponent.
3. *Argument begun.*
4. *Charge given.*
5. *Jury retired.*

B. STAGES OF EXAMINATION, FOR THE INDIVIDUAL WITNESS.

1. *Original Call.*
 - a. Direct examination.
 - b. Cross-examination.
 - c. Re-direct examination.
 - d. Re-cross-examination; and so forth.
2. *Recall.*
 - a. For direct examination.
 - b. For cross-examination.
3. *Re-recall; and later calls.*

§ 1867. *Trial Court's Discretion as the Ultimate Standard for each Case.* It is obvious that, while a usual order for introducing topics of evidence and witnesses is a desirable thing, a variation from that order cannot frequently cause direct harm; it can do so only where it tends to confuse the jury, or where it misleads the opponent or finds him unprepared to meet it. Moreover, the necessity for such a variation and the likelihood that it will confuse or mislead must depend almost entirely upon the particular circumstances of

each case. Accordingly, it is a cardinal doctrine, applicable generally to all of the ensuing rules, that they are not invariable, that they are directory rather than mandatory, and that an alteration of the prescribed customary order is always allowable in the discretion of the trial Court:¹

1840, *Story, J., in Philadelphia & T. R. Co. v. Simpson*, 14 Pet. 448, 463: "The question, then, is whether it was at that time [after the close of the offeror's case] admissible on the part of the defendants as a matter of right, or whether its admission was a matter resting in the sound discretion of the Court; if the latter, then it is manifest that the rejection of it cannot be assigned as error. The mode of conducting trials, the order of introducing evidence, and the times when it is to be introduced, are properly matters belonging to the practice of the circuit Courts, with which this Court ought not to interfere; unless it shall choose to prescribe some fixed general rules on the subject, under the authority of the act of Congress. Probably the practice in no two States of the Union is exactly the same; and therefore, in each State, the circuit Courts must necessarily be vested with a large discretion in the regulation of their practice. If every party had a right to introduce evidence at any time at his own election, without reference to the stage of the trial in which it is offered, it is obvious that the proceedings of the Court would often be greatly embarrassed, the purposes of justice be obstructed, and the parties themselves be surprised by evidence destructive of their rights which they could not have foreseen or in any manner guarded against. It seems to us, therefore, that all Courts ought to be, as indeed they generally are, invested with a large discretion on this subject, to prevent the most mischievous consequences in the administration of justice to suitors; and we think that the circuit Courts possess this discretion in as ample a manner as other judicial tribunals. We do not feel at liberty, therefore, to interfere with the exercise of this discretion."

1841, *Scott, J., in Rucker v. Eddings*, 7 Mo. 115, 118: "The law has entrusted Courts with a discretion in allowing the parties to a cause to obviate the effects of inadvertence by the introduction of testimony out of its order. This discretion is to be exercised in furtherance of justice, and in a manner so as not to encourage the tampering with witnesses to induce them to prop up a cause whose weakness has been exposed. Where mere formal proof has been omitted, Courts have allowed witnesses to be called or documents to be produced at any time before the jury retire, in order to supply it. So, material testimony ought not to be rejected because offered after the evidence is closed on both sides, unless it has been kept back by trick and the opposite party would be deceived or injuriously affected by it. So, after a witness has been examined and cross-examined, the Court may at its discretion permit either party to examine him again, even as to new matter, at any time during the trial. So, where by an accidental omission plaintiff's attorney does not call and examine a witness who was present in Court, and a non-suit is moved for after he has rested his case, the Court will permit the witness to be examined in furtherance of justice. This Court is sensible of the disadvantages under which it labors in revising the discretion of the circuit Courts in matters of this kind, and a strong case must be presented for its interference before it can be induced to disturb the judgment of inferior Courts by revising the exercise of the discretion with which they are entrusted in regard to the relaxation of the rules of evidence. It must be manifest to any one conversant with the trial of causes that the Court before which a trial is had, from having an opportunity of seeing the conduct of parties, of witnessing the difference in the experience of the opposite counsel, and many incidents which cannot be set out in a bill of exceptions and which influence the exercise of its discretion (and properly too), has superior means for a wise and judicious exercise of this power

¹ It would seem that the rules for the order of evidence began first to be formulated about the second half of the 1700s: *Burke's Report on Warren Hastings' Trial* (1794), 31 Parl. Hist. 342-350.

then is possessed by this Court, which is confined entirely to the facts spread upon the record."

1619, *Poland, J.*, in *Goss v. Turner*, 21 Vt. 437, 439: "Although there are certain established rules which have obtained in the process of trying causes before a jury and in the order of introducing the evidence of witnesses, yet these rules for the most part are but rules of practice, and are considered as under the control of the Court and subject to be varied in the exercise of a sound judicial discretion; so that a departure from the ordinary rules in the course of a trial, or a refusal to grant such an indulgence to a party on request, cannot properly be made a ground of error. Of this class are the rules as to the order of introducing the evidence, and also as to the mode of examining witnesses. Indeed, the constantly varying circumstances under which cases arise, and the haste and confusion which must frequently be expected in jury trials, without permitting the exercise of the discretion of the Court would often lead to most unjust results and disastrous consequences."

1873, *McCoy, J.*, in *Eberhart v. State*, 47 Ga. 598, 607 (referring to the admission of evidence after argument begun): "It seems to us that, in the breaking down of the old unbending forms of the common law by our Code, the necessity for a specific order of proceedings goes with it; that one shall be held to his announcement is the main right. But to make such a rule rigid as to separate it from the other rules as to order, and say that, whilst the judge may modify them as justice and the public convenience may require, he must be held to this with an iron grip, seems to us absurd. If injustice has come from a deviation from the rule, we would interfere; but there is no pretence here of that. . . . The order of business ought as a general rule to be pursued by both parties; and the Court ought to have the power, when a proper case presents itself, to modify the rule where no injustice will occur and the public interests be subserved."²

It follows that an error in the allowance of such a variation should rarely be treated as sufficient ground for a new trial.³ There may occur instances where an opponent has been unfairly deprived of showing the truth by reason of such a variation of the customary order of evidence; but the trial Court can better be trusted to understand the situation. The doctrine of new trials is not within the present purview; but no opportunity should be lost to rebuke the abuse by which these rules of customary order are sought to be turned into inflexible dictates of absolute justice, and new trials are asked merely because an unusual sequence of evidence was adopted.⁴ Courts often

² The following cases and statutes declare this general principle, but almost every case cited for a specific rule in the following sections contains also such utterances: 1887, *Drum v. Harrison*, 83 Ala. 384, 386, 3 So. 715; *Alaska, C. C. P.* 1900, § 659 (like Or. Annot. C. 1892, § 830); *Ark. Stats.* 1894, § 2954 ("The order of proof shall be regulated by the Court so as to expedite the trial and enable the tribunal to obtain a clear view of the whole evidence"); 1857, *Gordon v. Searing*, 8 Cal. 49; *Cal. C. C. P.* 1872, § 2042 ("The order of proof must be regulated by the sound discretion of the Court"); 1901, *Mist v. Kawelo*, 13 Haw. 303, 308; 1896, *Board v. Harlow*, 174 Ill. 412, 51 N. E. 754; 1836, *Throgmorton v. Davis*, 4 Blackf. 174, 175; 1860, *Rutledge v. Evans*, 11 Ia. 288; 1896, *Kassing v. Walter*, — id. —, 65 N. W. 832; 1891, *Blake v. Powell*, 26 Kan. 320, 327; 1856, *Robinson v. R. Co.*, 7 Gray 92, 24; 1899, *Smith v. Bye*, 116 Mich. 84, 74 N. W. 303; 1877, *State v. Jones*, 64 Mo. 391,

397; 1892, *McCleneghan v. Reid*, 34 Nebr. 472, 478, 51 N. W. 1037; 1892, *Consaul v. Sheldon*, 25 id. 247, 251, 52 N. W. 1104; 1895, *Bayne v. State*, 45 id. 261, 63 N. W. 811; 1891, *Shahan v. Swan*, 48 Oh. 25, 26 N. E. 222; Or. Annot. C. 1892, § 830 (like Cal. C. C. P. § 2042); 1895, *Cosa v. Weber*, 167 Pa. 153, 31 Atl. 481; 1896, *Doch v. Diem*, 176 id. 603, 35 Atl. 207.

³ 1843, *Scott, J.*, in *Brown v. Barrus*, 8 Mo. 26, 30 ("Even did we interfere and reverse the judgment for this cause, how would the party complaining be benefited by a new trial? Would not the evil consequences of the introduction of which he complains, come out in an unexceptionable manner on another trial?"); 1871, *Day, C. J.*, in *Crane v. Ellis*, 31 Ia. 510, 513 ("No good end is to be accomplished by reversing this case and sending it back for a new trial and for the admission of the same evidence at a different stage of the trial").

⁴ Compare § 21, ante.

lend ear to such appeals, and thereby partake in the abuse of such a practice. To purport to preside over the investigation of truth, and then, at an inordinate expense of time, labor, and money, to insist on reopening the entire investigation because a minor witness has been asked a minor question some half-hour before he should have been asked, is to furnish a spectacle fit to make Olympus merry over the serious follies of mortals. And yet such decisions are not uncommonly rendered by the professed ministers of truth and justice. Therein they do violence to the spirit of the rules which are now to be examined.

A. STAGES OF PRESENTATION FOR THE WHOLE CASE.

1. Putting in the Case at Large.

§ 1869. **Proponent's Case in Chief; Order of Topics and Witnesses in general; Party testifying First.** (1) For the order of *topics* within the proponent's case in chief, the general principle leaves the arrangement to the trial Court to determine. No specific rules exist as to the customary order (except those noted in the next two sections); nor, in the nature of things, can a regular order be prescribed for that which must depend so much on the varying complications and exigencies of each case. The matter therefore remains practically in the unhampered control of counsel, who employs, subject to the judge's prohibition, such an order as the dictates of intelligent tactics require.¹ He may even, in certain circumstances, advance *rebuttal evidence* by anticipation, during the case in chief.² Whether the *opponent's* case may be put in *during cross-examination* of the proponent's witnesses is more conveniently dealt with later (*post*, § 1885).

(2) For the order of *witnesses* also, there are no specific rules as to the customary sequence. The sole exception is that, at common law, where a party claims the right not to go out when his witnesses are sequestered, he may be required, as a condition of remaining, to take the stand first of his own witnesses;³ and that, by statute in a few jurisdictions, for analogous reasons, the party, if he is to be a witness for himself, must always take the stand before his other witnesses.⁴

§ 1870. **Same: Treason; Corpus Delicti; Conspiracy; Document's Loss and Execution; Reading Documents.** The special rules in regard to the quantity of evidence sufficient for proof of acts of *treason*, and of the *corpus delicti* of any crime, give rise to questions about the order of this required

¹ 1886, Chitty, General Practice, 2d ed., III, 206; 1892, McDaniel v. Logg, 143 Ill. 487, 32 N. E. 423.

² 1899, Mayer v. Brenninger, 190 Ill. 110, 64 N. E. 159; and cases cited *post*, § 1873.

³ *Ante*, § 1841.

⁴ *Ont. Rules of Court 1897*, § 547 (quoted *ante*, § 1837); Ky. C. C. P. 1896, § 606 (4) (civil cases); *Stata*, 1899, § 1646 (accused); Tenn. Code 1896, § 5601 (accused); see these statutes quoted in full *ante*, § 496, and referred to *ante*,

§ 579. Some of these statutes, making civil or criminal parties competent, stipulated originally as a condition that the party should testify first of the witnesses on his side: Ky. id. § 606 (4); applied in *Barkley v. Bradford*, 1896, 100 Ky. 304, 38 S. W. 432 (held to be merely a "rule of practice, not of right"); Tenn. St. 1887, c. 79; applied in *Clemmons v. State*, 1892, 92 Tenn. 204, 286, 21 S. W. 535; but this has been abandoned in later statutes of Tennessee.

evidence; these are better considered under the respective rules (*post*, § 2038, and § 2079). So, too, in using a *conspirator's admissions*, the proof of the conspiracy may be required to be made before the one party's admissions can be usable against the other (*ante*, § 1079).

Whether a *document* may be *proved lost* before evidence of execution is offered, so as to allow the use of a copy, has been already considered in dealing with the subject of lost documents (*ante*, § 1189). Whether a *document produced* may be read before any evidence of execution raises the general question treated in the next section. Whether a *document proved* by a witness must be read *before his cross-examination* is a question of the order of examination of witnesses (*post*, § 1883).

§ 1871. **Same: Conditional Relevancy; Facts offered before their Relevancy appears; Stating the Purpose of a Question.** (1) It constantly happens that an evidential fact is relevant, not with direct reference to an allegation in the pleadings, but only through its connection with other subordinate facts (*ante*, § 2). Without them, it is irrelevant, and therefore inadmissible. So far, then, as concerns the time of its introduction in evidence, one might expect a rule requiring such a fact not to be given in evidence until the connecting facts, by reason of which it becomes relevant, have first been put in evidence. No such rule, however, would be practicable; for those same connecting facts would themselves often be irrelevant apart from the fact in question; in other words, the relevancy appears only when all are considered together. Now it is obviously impossible to present all the facts at precisely the same moment or in the testimony of a single witness. Hence, some of the connected facts must be allowed to be presented before the others, even though the former, standing alone, are irrelevant. Thus the fundamental rule, universally accepted, is that, with reference to facts whose relevancy depends upon others, the *order of presentation is left to the discretion of the party himself*, subject of course to the general discretion of the trial Court (*ante*, § 1867) in controlling the order of evidence. In other words, if an evidential fact offered *has an apparent connection* with the case on the assumption that other facts shall also be proved, it may be admitted, and no objection can be made merely on the ground that the other facts have not yet been evidenced. The possibility that the other facts may not be made good is a necessary risk to be taken, and in case of a failure to make them good, the subsequent striking out of the evidence now offered is regarded as an adequate remedy:

1840, *Caton, J.*, in *Rogers v. Brent*, 10 Ill. 573, 587 (holding improper the exclusion of a certain land-certificate, assignment, and judgment and execution-deed): "Most cases have to be proved by a succession of distinct facts, neither of which standing alone would amount to anything, while all taken together form a connected chain and establish the issue; and from necessity a party must be allowed to present his case in such detached parts as the nature of his evidence requires. It would be no less absurd than inconvenient, when proof is offered in its proper order, of one necessary fact, to require the party to go on and offer to prove at the same time all the other necessary facts to make out the case. Such a practice would embarrass the administration of justice and prove

destruction to the rights of parties. It may be that Rogers was bound to connect himself with Southwick's title before he could insist that the patent was void because obtained in fraud of such title; but he must first prove such title to exist before he could connect himself with it; and this he was not allowed to do. If he was bound to connect himself with Bowman's creditors, to avail himself of the fraud practiced upon them, he must first show that there were such creditors; and the judgment which proved this was ruled out by the Court. It is the right of the party, when he offers evidence in its proper order which proves or tends to prove any necessary fact in the case, to have it go to the jury; for the reasonable presumption is that it will be followed by such other proof as is necessary for its proper connection, and if it is not, it then becomes irrelevant, and as such, if desired, may be withdrawn from the jury. If there is anything to induce the suspicion that the time of the Court is being trifled with, it may be proper to call upon counsel to state the connection which they expect to give the proposed evidence; but this should ordinarily be avoided, as it is often embarrassing for counsel to anticipate their case in the presence of the opposite party. It may sometimes happen that evidence is offered so out of its proper place as to authorize the Court to exclude it for want of a proper foundation; as, in this case, had the sheriff's deed been offered without the previous proceedings, it might have been properly excluded till the proper foundation for it was shown. No such objection, however, existed in this case. The party commenced at the foundation of his case, and offered to establish the first necessary fact; and, when that was ruled out, he still persisted in offering to prove subsequent parts of his case dependent upon those previously offered and rejected, till his repeated offers had almost the appearance of wrestling with the opinion of the Court. He proceeded as far as duty or propriety required."

1860, *Baldwin, J.*, in *Palmer v. McCafferty*, 15 Cal. 334, 335: "The counsel offering the deposition and the agreement [excluded by the trial Court] explained that it was the intention of the plaintiff to show in connection with it that the defendant claimed the premises under one Wooster who was a party to the agreement. It seems that Wooster executed a mortgage of these premises to the defendant, and that the latter foreclosed the mortgage and went into possession under the decree of foreclosure. The object of the plaintiff was to show that he had succeeded to the estate of Scoggs and Co. who made this executory agreement, and that Wooster and his assigns having failed to comply with the contract on their part forfeited all their rights under the same, and that by force of this Scoggs and Co. became reunited to their original title, of which plaintiff was the assignee. . . . *Prima facie* the plaintiff's proof thus offered was relevant to the issue, and that was enough to entitle him to introduce it. The plaintiff was entitled to introduce his proofs in his own order. He was not bound to make his whole case complete by any one item of proof. A case consists frequently of various facts, neither one of which makes it out; and to hold that a party is not entitled to introduce any part until he establishes the whole is to require an impossibility. All that the Court can ask is that the particular evidence offered conduces to establish any one proposition involved in the issue. It is time enough to pass upon the sufficiency of the proofs after they are all in the cause. There must be a starting-place somewhere; and the Court should never reject evidence merely because unaided by other testimony it is insufficient, if it tend legally to prove any part of the case."

1900, *Loring, J.*, in *O'Brien v. Keefe*, 175 Mass. 274, 53 N. E. 563: "The possibility of testimony admitted *de bene* not being subsequently made competent is one of the considerations to be passed upon by the presiding magistrate in determining whether to admit such evidence at the time it is offered or not, and it is necessary, in the conduct of trials, that such discretion should be exercised. If evidence admitted *de bene* is not subsequently made good, the only remedy that can be given is, on the proper application being subsequently made, to rule out the testimony. Whether, in such a case, the party who produces the witness whose testimony has been confused, or the party who has undertaken to assert that the witness is not to be believed because he is a criminal, and

It turns out that that assertion is unfounded, is the greater sufferer, is open to question. If he has suffered an injury: it is one inherent in the trial of causes; and it is well settled, when such evidence is admitted in a jury trial, that the objecting party cannot be heard to complain, if the evidence is ruled out and the jury are instructed to disregard it."¹

(2) But if the evidential fact thus put forward has on its face no apparent connection with the case, an accompanying statement of the connecting facts must be made by counsel, and a promise to introduce them at a later time if they have not already been introduced; for this much is indispensable as a safeguard against the indiscriminate use of irrelevant evidence and as a measure to enable the adversary to discover any objection that might be appropriate. How specific the counsel's statement must be will depend on the circumstances:

1886, *Coleridge, J.*, in *Haigh v. Belcher*, 7 C. & P. 380, 390: "I think I must receive evidence of it, and trust to the statement of the counsel in the cause that by some further evidence it will be shown to be relevant; . . . and the discernment of the jury must be trusted so far, in case it should turn out to be immaterial."

1888, *Parnell Commission's Proceedings*, 83d day, *Times' Rep.* pt. 9, p. 104; the Irish Land League and its leaders being charged with complicity in crime, the doings and admissions of various known criminals were offered, with the purpose of connecting with them the League leaders; Sir Richard Webster, Attorney-General, having asked a witness what one Carey said about Egan, one of the leaders, Sir Charles Russell objected; Sir R. Webster: "I think, if your lordships trust me for a moment, you will see that it is in the interests of justice that this man should make his statement. I will undertake to connect it with Egan"; Sir C. Russell: "I do not think that is a reason"; President Hannen: "Well, if the Attorney-General does not fulfil his pledge, I shall strike out what is said"; Sir C. Russell: "We have had so many of these pledges which have been broken"; Sir R. Webster: "I beg your pardon; no pledges that I have given have been broken"; Sir C. Russell: "Well, left unfulfilled"; Sir R. Webster: "Or left unfulfilled"; President Hannen: "Counsel can only say what they anticipate will be the case; if this is not made evidence, I will strike it out."

1824, *Gibson, J.*, in *Weidler v. Farmers' Bank*, 11 S. & R. 184, 189: "The plaintiff contends that this may have been only a part of the chain of his evidence, and that what was deficient might afterwards have been supplied. If this were admitted, no Court could without error ever reject for irrelevancy, as there is no fact so entirely irrelevant as to be incapable of being connected with the question, however remotely, by a chain of possible circumstances. But the question is, How did the matter stand as it was proposed to the Court? If it was altogether irrelevant, the Court might reject it (although it might not perhaps be error to admit it). If it would be relevant when taken in connection with other facts, it ought to be proposed in connection with those facts, on an offer to follow the evidence proposed with proof of those facts at the proper times. But the Court is not bound to spend its time in an inquiry which from the showing of the party can produce no results. . . . The proposal of evidence must contain in itself, by reference to something that has preceded it or that is to follow, information of the manner in which the evidence is to be legitimately operative."

1842, *Collier, C. J.*, in *Mardie v. Shackelford*, 4 Ala. 488, 501: "If evidence be irrelevant

¹ Accord: 1888, *Davis v. Culvert*, 8 G. & J. 290; 1890, *Hoffman v. Harrington*, 44 Mich. 183, 184, 6 N. W. 225; 1834, *Stewart v. Bank*, 11 S. & R. 267; 1890, *Zell v. Com.*, 94 Pa. 289.

274; 1870, *Marshall v. State*, 5 Tex. App. 273, 291.

For the specific rule in using a copy of a lost document, as between the loss of the original and its execution, see ante, § 1109.

at the time it is offered, it is not error to reject it because other evidence may afterwards be given in connection with which it would become competent. If it would be relevant in conjunction with other facts, it should be proposed in connection with those facts and an offer to follow the evidence proposed with proof of those facts at a proper time."³

Yet it is often difficult to apply this principle. The statement of intention to prove the other facts, or of reference to the preceding facts, will usually be expressly made, when objection is raised; but the circumstances may have been such that a statement of the necessary kind may be sufficiently implied, without formal words. Much depends on the issues in controversy, the stage of the trial, the terms of the offer, and the point of the objection. The trial Court's discretion ought to have free play.⁴ It is clear that a Court of appeal will sometimes treat the evidence as properly admitted where it finds by implication some understanding in fact as to the later proof of the connecting circumstances;⁵ and it is also clear that it will sometimes treat it as properly excluded because it refuses to see such an understanding or promise at the time of the offer.⁶ The principle that governs is, however, clear enough; and the following may serve as an illustration of one variety of such cases:

1863, *Ormond, J., in Branch Bank v. Kinsey*, 5 Ala. 9, 12: "It is certainly the privilege of a party to present his testimony in the mode his judgment or fancy may dictate; and, if relevant, it cannot be objected to, although it may be of no avail without further proof. So, in this case, the defendant could have proved the execution of his conveyance, and read it to the jury and afterwards have proved its consideration; and indeed this would seem to be the natural order in which to present it. But we do not understand this to be the point raised on the bill of exceptions. The statement is that . . . '[the Court] ad-

³ Accord: 1898, *Parnell Commission's Proceedings*, 54th day, *Times' Rep.* pt. 14, p. 149; 1899, *Key v. Thomson*, 1 Han. N. Br. 295, 303; 1842, *Mardie v. Shackelford*, 4 Ala. 493, 501; 1846, *Sorrelle v. Craig*, 9 id. 538; 1846, *Abney v. Kingsland*, 10 id. 360; 1897, *Bischhof v. Mikala*, 147 Ind. 115, 46 N. E. 348; 1884, *Warner v. Hardy*, 6 Md. 583, 588 ("the testimony, as proposed, must appear to be pertinent to the matter in controversy, or be accompanied by an offer to show its relevancy in the progress of the cause"); 1897, *Lane v. Agric. Soc.*, 67 Minn. 65, 69 N. W. 463; 1875, *Tilton v. Beecher*, N. Y., *Abbott's Rep.* II, 35; 1869, *State v. Cherry*, 63 N. C. 498, 494; 1877, *State v. Hopkins*, 50 Vt. 316, 330.

Examples of an offer properly so made are the following: 1874, *McCoy v. Watson*, 51 Ala. 464, 467 (deeds; evidence of the grantor's title at time of execution was not yet offered; deeds admitted, subject to later proof of the title); 1875, *Cramer v. Burlington*, 42 Ia. 315, 319; 1876, *Ober v. Carson*, 63 Mo. 209, 213; 1851, *Garrigue v. Harris*, 16 Pa. St. 344, 350 (a deed may be read before proof of execution).

Even where the evidence is properly rejected for irrelevancy at the time it is offered, it may be admitted if afterwards offered when its relevancy appears: 1844, *Lyford v. Thurston*, 16 N. H. 399, 405 (even where it becomes relevant through the introduction of evidence by the opponent).

For the order of proof, see a copy of a last dec-

ment, as between the loss of the original and its execution, see ante, § 1189.

⁴ Cases cited ante, § 1867, and the following: 1876, *Davidson v. King*, 16 N. Br. 396; 1903, *Ellis v. Thayer*, 183 Mass. 309, 67 N. E. 325 (good opinion, by Knowlton, C. J.); 1880, *Hoffman v. Harrington*, 44 Mich. 183, 184; 1900, *Bradley v. Dinneen*, 86 Minn. 334, 93 N. W. 116.

It was the strict enforcement of the rule that evoked one of Burke's chief complaints in his criticisms of the management of Warren Hastings' Trial (Report of the Commons Committee, 1794, 31 Parl. Hist. 344-347); his contention was that, according to the prior practice, the judges had been content to rely upon a subsequent direction to the jury for curing the effect of admitted evidence which had not been afterwards properly connected with the case. It was about this same rule, in 1794, as Tooke's Trial (24 How. St. Tr. 367) that John Horne Tooke had his well-known passage with C. B. Eyre about the "links of a chain."

⁵ Examples: 1896, *Reed v. Brashers*, 3 Port. 375; 1842, *Lynch v. Benton*, 3 Rob. La. 105; 1844, *State v. McAllister*, 24 Ma. 139, 143.

⁶ Examples: 1890, *Jenkins v. Noel*, 3 Stew. 60, 63, 64; 1833, *Clendenning v. Ross*, 3 Stew. & P. 267; 1837, *Wiswall v. Ross*, 4 Port. 321, 330; 1838, *Innerarity v. Byrne*, 8 id. 176, 179; 1874, *Cones v. Binford*, 54 Ind. 516, 517; 1838, *Caton v. Carter*, 9 G. & J. 476; 1884, *Stewart v. Spedden*, 5 Md. 433, 444.

mitted the same to be read to the jury as *prima facie* evidence of the consideration therein specified, without further proof thereof.' It would be doing great violence to the language here employed and to the ordinary rules of interpretation to understand the objection here raised to be to the time merely when the instrument was offered to be read as evidence. . . . [The Court in fact ruled that] it was read to the jury for that purpose [of presuming a consideration] without further proof."⁶

(3) Nevertheless, a *cross-examination* is generally conceded to be exempt from the foregoing rule. In other words, the *cross-examiner* need not state beforehand the connection of a question which appears to be irrelevant, unless exceptionally, under the trial Court's determination. The chief reason is that the advantages of brevity and relevancy, which might otherwise be insisted on, are in experience found to be far overbalanced by the danger of destroying the effectiveness of the great weapon of cross-examination; for it would often be made useless by requiring in advance a betrayal of its purpose to the wary witness whose falsities are desired to be exposed:⁷

1806, Mr. W. D. Evans, Notes to Pothier, II, 230: "The benefits of cross-examination are sometimes defeated by the interposition of the Court to require an explanation of the motive and object of the questions proposed, or to pronounce a judgment upon their immateriality; whereas experience frequently shows that it is only by an indirect and apparently irrelevant inquiry that a witness can be brought to divulge the truth which he prepared himself to conceal. The explanation of the motives and tendency of the question furnishes the witness with a caution that may wholly defeat the object of it, which might have been successfully attained if the gradual progress from immateriality to materiality was withheld from his observation."

1861, *Christiansy, J., in Campau v. Dewey*, 9 Mich. 351, 422: "On the direct examination, it is true, if the relevancy of a proposed inquiry does not appear, the Court have a right to call on the counsel to state the object of the proposed testimony and the manner in which it is to be made relevant; and the Court may in the exercise of its discretion require a particular statement of the substance of the evidence in connection with which the proposed inquiry is to be rendered pertinent, and, if refused, may reject the evidence. . . . But on a cross-examination the rule as to relevancy is not so strict; and it would be a very unsafe rule which should allow the Court to reject evidence which may in any manner be rendered material, because the party proposing it has not volunteered to preface it with a statement of its precise object and of the other facts in connection with which it is to be rendered material. The Court may doubtless, in its discretion, when a question is asked on cross-examination which he thinks cannot be rendered pertinent, require an intimation of its object, and reject the evidence if not given. But this is a discretion which should be very sparingly exercised, and nothing further than a bare intimation should generally be required; for, in many cases, to state the precise object of a cross-examination would be to defeat it."⁸

⁶ For the doctrine that the construction of the terms of the offer is for this purpose to be made most strongly against the offeror, see the following opposed opinions: 1877, *Graves, J., in Reynolds v. Ins. Co.*, 36 Mich. 131, 144; 1842, *Collier, C. J., in Mardis v. Shackelford*, 4 Ala. 499, 501.

Compare also the doctrine of *multiple admissibility*, ante, § 13, and the general rules as to mode of offering and objecting to evidence (ante, §§ 17, 18). It has been held that on the subsequent failure of the promised evidence, the opponent must take advantage by a motion to

strike out: 1862, *Seane v. State*, — Ga. —, 45 S. E. 630.

⁷ "An experienced equity judge once said to me in relation to a question I had asked, 'Really, this is a long way from the point.' 'I am aware of that, my lord,' was my answer; 'if I were to begin any nearer, the witness would discover my object'" (*Serjeant Ballantine's Experiences of a Barrister's Life*, 137).

⁸ Accord: 1876, *City Bank v. Kent*, 57 Ga. 263, 285, 290 ("even when a party is under cross-examination, the Court may exercise a sound discretion in requiring counsel to make the relevancy

§ 1872. *Opponent's Case in Reply; Order of Topics and Witnesses in general.* The opponent's presentation of his case in reply is no more subject to detailed rules than was the proponent's in chief. The special practices as to conditional relevancy, lost documents, and party witnesses, as noted in the preceding sections, apply equally to the opponent's case where those topics present themselves.¹

The questions peculiar to the opponent's case alone are few. Whether he may, on cross-examination of the proponent's witnesses, introduce his *own case in advance* is here the great problem, but it also involves a consideration of the function of cross-examination and can be examined under that head (*post*, § 1885).² The opponent may, however, in the trial Court's discretion, put in his case in advance, by *calling a witness during the proponent's case in chief*, if the exigency requires it;³ so too, being entitled under the principle of Completeness (*post*, § 2115) to read the *whole of a deposition* of which the proponent reads a part only, the opponent may do this, if allowed by the trial Court, during the proponent's case in chief.⁴ Whether he may at that time read a *document proved by cross-examination* of the proponent's witnesses involves the rule for cross-examination (*post*, § 1884).

On the other hand, the *proponent himself*, in connection with his *cross-examination* of a witness of the *opponent*, and before the latter has rested his case in reply, may be allowed in advance to put in a part of his case in rebuttal.⁵ Conversely, he may be *compelled*, in the trial Court's discretion, to open his *evidence in reply*, before the close of the proponent's case in chief, when (for example) the latter is obliged to await the arrival of a tardy witness.⁶

§ 1873. *Proponent's Case in Rebuttal; Limited to Evidence made Necessary by Opponent's Reply.* It is perfectly clear that the orderly presentation of each party's case would leave the proponent nothing to do, in his case in rebuttal, except to meet the new facts put in by the opponent in his case in reply. Everything relevant as a part of the case in chief would naturally have been already put in; and a rebuttal is necessary only because, on a plea in denial, new subordinate evidential facts have been offered, or because, on an affirmative plea, its substantive facts have been put forward, or because,

of his questions apparent"); 1877, *Harness v. State*, 57 Ind. 1, 7 (good opinion by Worden, J.); 1882, *Wood v. State*, 22 Id. 269, 273; 1884, *Hyland v. Miller*, 99 Id. 306, 310; 1872, *O'Donnell v. Regar*, 25 Mich. 267, 271 (good opinion by Christianity, J.); 1873, *Bart v. State*, 23 Oh. 34, 39, 40 ("I know of no case where the rule requiring such a disclosure has been applied to a cross examination; whether such a case might arise need not now be decided"); 1877, *Martin v. Elden*, 32 Id. 252, 259; 1890, *Knapp v. Wing*, 73 Vt. 334, 47 Atl. 1075.

¹ For the order of evidence as between co-defendants see the following: 1894, *R. v. Cooke*, 1 C. & P. 322; 1893, *Grandy v. Janesville*, 84 Wis. 574, 54 N. W. 1085.

² When the admissibility of the proponent's evidence depends on a question of fact, to be de-

cided by the judge (*post*, § 2350), the opponent is entitled to put in his counter-evidence then and there: 1843, *Bartlett v. Smith*, 11 M. & W. 483 (whether a bill was inadmissible for lack of stamp; leading case); 1855, *Boyle v. Wiseman*, 24 L. J. Exch. 284 (whether a letter offered was the original; repudiating *Jones v. Fort, Moor & M.* 193); 1859, *Cooper v. Dawson*, 1 F. & F. 250 (whether a contradicting letter was genuine). For this rule as applied to confessions and dying declarations, see *ante*, §§ 861, 1451).

³ 1877, *Huston v. Plato*, 3 Colo. 402, 407.

⁴ 1882, *Herring v. Skaggs*, 73 Ala. 446, 452.

⁵ 1890, *Ranney v. R. Co.*, 67 Vt. 594, 33 Atl. 510.

⁶ 1890, *Townsend's Succession*, 40 La. An. 67, 73, 3 So. 426.

on any issue whatever, facts discrediting the proponent's witnesses have been offered. To discriminate between the first of these classes and the opponent's testimony merely denying the same facts that the proponent's witness had originally affirmed, is no doubt often difficult, and it is then not easy to say whether the proponent's testimony in rebuttal might or might not as well have been put in originally. Yet the principle involved is clear. Moreover, practical disadvantages that would result from abandoning the natural order of evidence are, first, the possible unfairness to an opponent who has justly supposed that the case in chief was the entire case which he had to meet, and, secondly, the interminable confusion that would be created by an unending alternation of successive fragments of each case which could have been put in at once in the beginning. Accordingly, it is well settled that, while the occasional difficulty of discrimination, and the frequency of inadvertent omissions and unexpected contests, add emphasis to the general principle of the trial Court's discretion (*ante*, § 1867), yet the usual rule will exclude all evidence which has not been made necessary by the opponent's case in reply:

1848, *Shaw, C. J.*, in *Cushing v. Billings*, 2 Cush. 158, 160: "We take it to be well settled that the order in which witnesses shall be called is a matter of discretion with the Court. . . . The orderly course of proceeding requires that the party whose business it is to go forward should bring out the strength of his proof in the first instance; but it is competent for the judge, according to the nature of the case, to allow a party who has closed his case to introduce further evidence. This depends upon the circumstances of each particular case, and falls within the absolute discretion of the judge, to be exercised or not, as he may think proper."

1850, *Frost, J.*, in *Clinton v. McKenzie*, 5 Strobb. 36, 42: "The rule is most salutary in its fitness to prevent trickery, and is necessary in many cases to prevent surprise and injustice. Witnesses can with difficulty be kept in attendance on the Court after they have given their testimony, and the defendant might be taken at great disadvantage if the plaintiff were permitted to return to his evidence in chief and renew the attack after the defendant had closed his case and his witnesses had left the court. This rule, like many others for the conduct of a trial, cannot however be rigorously and uniformly enforced; much must of necessity be left to the discretion of the judge. Whenever evidence has been inadvertently omitted, the uniform practice of our Courts is to permit the party to supply the omission, unless it is apparent that it will operate injustice to his adversary."

1860, *Waite, J.*, in *Hathaway v. Hemingway*, 20 Conn. 191, 195: "The rule upon this subject is a familiar one. When, by the pleadings, the burden of proof of any matter in issue is thrown upon the plaintiff, he must in the first instance introduce all the evidence upon which he relies to establish his case. He cannot, as said by Lord Ellenborough, go into half his case and reserve the remainder. The same rule applies to the defence. After the plaintiff has closed his testimony, the defendant must then bring forward all the evidence upon which he relies to meet the claim on the part of the plaintiff. He cannot introduce a part and reserve the residue for some future occasion. After he has rested, neither party can as a matter of right introduce any farther testimony which may properly be considered testimony in chief. . . . But this rule is not in all cases an inflexible one. There is and of necessity must be a discretionary power, vested in the Court before which a trial is had, to relax the operation of the rule, when great injustice will be done by a strict adherence to it. If a party, by a mere mistake or inadvertence, omit to introduce a piece of testimony constituting an essential link in his chain of evidence, and does not discover the mistake until after he has closed his

testimony, the Court in its discretion will, rather than that his cause should be sacrificed, permit him to supply the omission; taking care, however, to see that the adverse party is not prejudiced by the relaxation of the rule. This discretionary power, however, is to be exercised with great caution. While the rule may be departed from for the sake of preventing great and manifest injustice, it ought not to be so frequently disregarded as to render it a rule in name and not in reality."

1879, *Dickey, J.*, in *Mueller v. Rebhan*, 94 Ill. 142, 150 (testamentary sanity; the proponent of the will had been refused a further opportunity for evidence of sanity): "As a matter of practice, the rulings of Courts are not uniform upon this question. In some Courts it is held that neither party is called upon to produce all his testimony in support of any allegation in issue until it has been developed on the trial that an issue in the evidence is made upon that question. . . . That rule has not prevailed in the Courts of this State; but the more usual rule is, that the party upon whom the burden of proof rests must, in the first instance, produce all the proof he proposes to offer in support of his allegation; and after his adversary has closed his proof, he may only be heard in adducing proof directly rebutting the proofs given by his adversary. This question of practice must, to a greater or less degree, be left to the discretion of the Court trying the case. This discretion should be exercised in such a manner that neither party shall be taken by surprise and deprived, without notice, of an opportunity of producing any material proof."¹

¹ Accord (compare with these citations the case under Re-direct examination, post, § 1896, and Recall, post, § 1898): ENGLAND: 1796, *Warren Hastings' Trial*, Debre's History of the Trial, Pt. V, pp. 85-88, 97; 1826, *R. v. Stimpson*, 3 C. & P. 415; 1838, *Rowe v. Brenton*, 3 M. & Ry. 133, 139, 204; 1831, *Knapp v. Haskell*, 4 C. & P. 590; 1831, *Whittingham v. Bloxham*, ib. 597; 1833, *R. v. Hilditch*, 5 id. 299; 1834, *R. v. Nicholson*, 3 Low. Cr. C. 181; CANADA: 1885, *Harvey v. R. Co.*, 3 Man. 266 (negligence); 1888, *Adams v. Ferguson*, 4 All. N. Br. 102; 1863, *Beary v. Odell*, 5 id. 524; 1850, *Devlin v. Crocker*, 7 U. C. Q. B. 396; UNITED STATES: *Alaska*: C. Cr. P. 1900, § 137; C. C. P. 1900, § 187; *Ariz.*: P. C. 1887, § 1643; *Ark.*: *Stata*, 1894, §§ 2324, 2630; 1901, *Blair v. State*, 69 Ark. 338, 64 S. W. 948; *Cal.*: C. C. P. 1872, § 607, P. C. 1872, § 1093; 1854, *Mowry v. Starbuck*, 4 Cal. 274; 1856, *Priest v. Union Canal Co.*, 6 id. 170; 1860, *Lisman v. Early*, 15 id. 169; 1863, *Brooks v. Crosby*, 22 id. 43, 46, 50; 1864, *Union Water Co. v. Cray*, 25 id. 804, 509; 1864, *Kohler v. Wells Fargo & Co.*, 26 id. 608, 613; 1869, *Conline v. Partridge*, 79 id. 234, 236, 21 Pac. 745; 1892, *Young v. Brady*, 94 id. 128, 130, 29 Pac. 689; 1897, *People v. Hill*, 116 id. 563, 48 Pac. 711 (expert evidence as to a defendant's insanity, not allowed in rebuttal for the defendant); *Colo.*: C. C. P. 1891, § 187; 1873, *Brown v. Stock*, 3 Colo. 79; 1874, *Kanana P. R. Co. v. Miller*, ib. 442, 469; 1877, *Smith v. Mayer*, 3 id. 207, 210; 1882, *Nuttall v. O'Donnell*, 6 id. 253, 259; 1887, *Buckingham v. Harris*, 10 id. 455, 463, 15 Pac. 517; 1893, *DeRemer v. Parker*, 19 id. 242, 245, 34 Pac. 900; *D. C.*: 1894, *Olmstead v. Webb*, 5 D. C. App. 88, 57, *semble*; 1899, *Throckmorton v. Hok*, 12 id. 552, 562, 564; *Fla.*: 1891, *Jacksonville T. & K. W. R. Co. v. Pennington*, L. T. & M. Ca. 27 Fla. 1, 187, 9 So. 621; *Ga.*: 1854, *Bryan v. Walton*, 20 Ga. 490, 498, 510; 1860, *Choice v. Stone*, 21 id. 424, 465; 1897, *White v. State*, 100 id. 620, 28 S. E. 423; 1899, *Milam v. State*, 100 id. 22, 33 S. E. 516; 1902, *Green v. State*, — id. —, 45 S. E. 990; *Ida.*: *Rev. St.* 1887, §§ 4383, 7855; *Ill.*: 1879, *Mueller v. Rebhan*, 94 Ill. 142, 150 (quoted *supra*); 1896, *Chytrans v. Chicago*, 160 id. 13, 43 N. E. 335 (liberal range in rebuttal is a policy specially sanctioned in assessment cases, where the municipality cannot clearly know beforehand what parts of its case will be disputed); 1899, *Washington Ice Co. v. Bradley*, 171 id. 255, 49 N. E. 519; 1903, *Hartrich v. Hawes*, 208 id. 334, 67 N. E. 13; *Ind.*: *Rev. St.* 1897, § 1914 (criminal cases); 1870, *State v. Parker*, 33 Ind. 285; 1876, *Holmes v. Hinkle*, 63 id. 519, 523; 1881, *Pittsburg C. & St. L. R. Co. v. Noel*, 77 id. 110, 123; 1883, *Perrill v. Nichols*, 69 id. 444, 447; 1888, *Kahlenbeck v. State*, 119 id. 118, 122, 21 N. E. 460; 1899, *Brown v. Marshall*, 120 id. 323, 325, 23 N. E. 312; 1896, *Ransbottom v. State*, 144 id. 250, 43 N. E. 218; 1899, *Ellison v. Branstrator*, 153 id. 146, 54 N. E. 433; *Ia.*: *Code* 1897, §§ 3700, 5372; 1862, *Samuels v. Griffith*, 13 Ia. 106; 1868, *Donaldson v. R. Co.*, 16 id. 280, 290; 1871, *Hubbell v. Ream*, 31 id. 289, 295; *Crane v. Ellis*, ib. 510; 1872, *Boals v. Shields*, 35 id. 231; 1876, *McNichols v. Wilson*, 42 id. 385, 392; 1882, *Hess v. Wilcox*, 59 id. 380, 383, 10 N. W. 347; *Kan.*: 1874, *Rheinhardt v. State*, 14 Kan. 318, 323; *Ky.*: C. C. P. 1895, §§ 317, 592, C. Cr. P. § 224; 1900, *Oldham v. Com.*, — Ky. —, 59 S. W. 418; 1900, *Wilson v. Hays' Ex'r*, 109 id. 321, 58 S. W. 773; *La.*: 1897, *State v. Pruett*, 49 La. An. 283, 21 So. 843; 1904, *Southern R. Co. v. Wilson*, 111 La. —, 35 So. 561; *Mass.*: 1848, *Cushing v. Billings*, 2 Cush. 158; 1855, *Com. v. Monton*, 4 Gray 29 (alibi); 1871, *Com. v. Dam*, 107 Mass. 210; 1878, *Com. v. Blair*, 126 id. 40; 1890, *Com. v. Kennedy*, 170 id. 18, 48 N. E. 770; 1899, *Lansky v. R. Co.*, 173 id. 20, 53 N. E. 128; *Mich.*: 1872, *Danielson v. Dyckman*, 26 Mich. 169, 170; 1877, *Somerville v. Richards*, 37 id. 229, 308; 1883, *Brown v. Marshall*, 47 id. 578,

In applying this customary rule of order, however, certain distinctions must be noted:

(1) In the first place, it is not always easy to determine, in a given instance, whether the situation before the Court was one of the present sort, or involved evidence offered after the whole case is closed (*post*, § 1876), or evidence offered on a re-direct examination but during the case in chief (*post*, § 1896), or evidence offered on a recall, but still during the case in chief (*post*, § 1898); the lack of a uniform and clear nomenclature leading to frequent ambiguity in judicial language. But, as the principle of the trial Court's discretion applies in all these situations, the obscurity does no serious practical harm.

(2) In the next place, the evidence offered thus tardily may consist in *new facts* which ought to have been put in before, or in a repetition (either by a new witness or by the same former witness²) of *former facts already once evidenced*. The customary rule will equally forbid both. But, on the other hand, the principle of the trial Court's discretion will equally sanction either; though the reasons in a given instance for thus permitting a departure would differ in the two cases, since for the former an inadvertent omission might be

576, 11 N. W. 392; 1886, *People v. Wilson*, 55 id. 506, 515, 21 N. W. 905; 1895, *Maier v. Benefield Am'n*, 107 id. 687, 65 N. W. 552; *Miss.*: 1896, *Winterton v. R. Co.*, 73 Minn. 531, 20 So. 157; 1897, *King v. State*, 74 id. 576, 21 So. 233; *Me.*: *Rev. St.* 1899, § 2627; 1870, *Babcock v. Babcock*, 46 Mo. 243, 246; 1873, *State v. Linney*, 52 id. 40; 1898, *Fullerton v. Fordyce*, 144 id. 519, 44 S. W. 1053; 1900, *State v. Weber*, 156 id. 349, 56 S. W. 729; 1903, *Bayer v. Hermann*, 173 id. 235, 73 S. W. 164; *Mont.*: C. C. P. 1898, § 1080, P. C. § 2070; *Nebr.*: *Comp. St.* 1899, § 7204; 1897, *Davis v. State*, 51 *Nebr.* 301, 70 N. W. 984; 1897, *Ream v. State*, 52 id. 727, 73 N. W. 227; 1900, *Boer v. State*, 59 id. 655, 61 N. W. 856; *Nez.*: *Gen. St.* 1898, § 4235 (criminal cases); 1893, *McLeod v. Lee*, 17 *Nev.* 103, 118, 23 *Pac.* 124; *Lance v. Byrnes*, ib. 197, 202, 30 *Pac.* 700; *N. Mex.*: *Comp. L.* 1897, § 2990; *N. Y.*: C. Cr. P. 1891, § 388; 1838, *Hastings v. Palmer*, 20 *Wend.* 225; 1859, *Stephens v. People*, 19 *N. Y.* 549, 573; 1882, *Leighton v. People*, 88 id. 117, 119; 1897, *People v. Strait*, 154 id. 165, 47 *N. E.* 1090 (sanity); 1897, *People v. Koerner*, 154 *N. Y.* 355, 48 *N. E.* 730; *N. C.*: 1874, *State v. Haynes*, 71 *N. C.* 79, 83; 1881, *State v. King*, 84 id. 737, 741; *N. D.*: *Rev. C.* 1895, §§ 5431, 5175; *Ok.*: *Rev. St.* 1898, § 7300 (prosecution in criminal cases); 1876, *Webb v. State*, 29 *Oh. St.* 351, 356; *Ok.*: *State* 1893, §§ 4165, 5196, 5375; *Or.*: C. C. P. 1892, § 196; 1868, *State v. Hunsaker*, 16 *Or.* 497, 498, 19 *Pac.* 605; *Pa.*: 1865, *Gaines v. Com.*, 60 *Pa.* 319, 329; 1897, *Campbell v. Brown*, 183 id. 112, 38 *Atl.* 516; 1902, *Acklin v. McCalmont Oil Co.*, 201 id. 257, 50 *Atl.* 955; *R. I.*: 1898, *State v. Ballou*, 20 *R. I.* 607, 40 *Atl.* 861; *S. C.*: 1881, *State v. Clyburn*, 16 *S. C.* 378; 1887, *State v. Jacobs*, 28 id. 30, 37; 1896, *Ludden & Bates S. M. H. v. Sumter*, 47 id. 335, 25 *S. E.* 150; *S. D.*: *State* 1899, §§ 6234, 6639; *Tenn.*: 1848, *Scory v. Saunders*, 8 *Humph.* 467; 1900, *Jones v. Galbreath*, — *Tenn.* —, 59 *S. W.* 350; *Tex.*: 1897,

Burt v. State, 36 *Tex. Cr.* 397, 420, 40 *S. W.* 1000, 43 *S. W.* 344; *U. S.*: 1813, *Gilpin v. Consequa*, 1 *Pet. C. C.* 85, 89; 1861, *Johnston v. Jones*, 1 *Black* 209, 226; 1895, *Goldsbey v. U. S.*, 160 *U. S.* 70, 74, 16 *Sup.* 216; 1901, *Throckmorton v. Holt*, 180 id. 552, 21 *Sup.* 474; 1903, *Atchison T. & S. F. R. Co. v. Phipps*, 60 *C. C. A.* 314, 125 *Fed.* 478; *Utah*: *Rev. St.* 1898, §§ 3147, 4845; 1899, *State v. Webb*, 10 *Utah* 441, 56 *Pac.* 159 (unless the opponent clearly appears to have been put at a disadvantage); *Vt.*: 1826, *Pingry v. Washburn*, 1 *Aik.* 264, 267; 1839, *Clayes v. Ferris*, 10 *Vt.* 112; 1849, *Goss v. Turner*, 21 id. 437, 439; 1860, *Kent v. Lincoln*, 32 id. 591, 598; 1883, *Stevens v. Dudley*, 56 id. 158, 164 (in this State the original practice, subject always to the trial Court's discretion, was to allow the plaintiff "to rest on making a *prima facie* case, and afterwards to adduce additional as well as rebutting testimony"; but under later rules this practice was abandoned, though the principle as to discretion remains the same; see *Clayes v. Ferris*, *Kent v. Lincoln*, *Stevens v. Dudley*); 1877, *State v. Magoon*, 80 id. 323, 335 (applicable equally to the prosecution in a criminal case); 1883, *Stevens v. Dudley*, 56 id. 158, 164; 1896, *Watkins v. Rist*, 68 id. 498, 85 *Atl.* 431; 1898, *State v. Lawrence*, 70 id. 524, 41 *Atl.* 1027 (even in a criminal case, provided the defendant has had a fair opportunity to meet the evidence); *Va.*: 1854, *Brooks v. Wilcox*, 11 *Gratt.* 411, 413, 417 (even after express notice by the opponent during the case in chief); 1900, *Read v. Com.*, 98 *Va.* 817, 26 *S. E.* 399; *Wash.*: C. & *Stata* 1897, § 4993; *W. Va.*: 1897, *McMannus v. Mason*, 43 *W. Va.* 196, 27 *S. E.* 298; 1901, *State v. Williams*, 49 id. 220, 38 *S. E.* 486; *Wis.*: 1895, *McGowan v. R. Co.*, 91 *Wis.* 147, 84 *N. W.* 991; 1897, *Stanliber v. Graves*, 97 id. 515, 73 *N. W.* 46; *Wyo.*: *Rev. St.* 1887, §§ 2552, 2900.

² The latter situation may coincide with those of § 1896 (re-direct examination) and § 1898 (recall), *post*.

a sufficient excuse, while for the latter a just cause would be found in the need of clearing up an obscurity or emphasizing a disputed point upon which substantial contest had not been anticipated; moreover, the danger of unfair surprise might be present in the former case, but could hardly exist in the latter case.

(3) The nature of the issues in each case will usually vary so that no more detailed rules can be laid down for determining whether a particular fact belongs in the case in chief or in the case in rebuttal. But the distribution of the burden of proof and the bearing of the rule as to a *prima facie* case (*post*, § 2494) will often specially aid in determining. For example, where, in contesting a will, the proponent of the will is by those rules not required to introduce evidence of sanity, and the contestant has the duty of producing evidence of insanity, it is clear that the proponent's evidence of sanity is no part of his case in chief, and that it is therefore properly reserved until it becomes necessary in his case in rebuttal. But in a jurisdiction where the proponent is required to raise the presumption of sanity by producing some evidence of it in his case in chief, then it may conceivably (though not wisely, it would seem) be held that he must introduce it all at that time, and that he may not properly reserve it for his case in rebuttal.³

(4) For matters properly not evidential until the rebuttal, the proponent has a right to put them in at that time, and they are therefore not subject to the discretionary exclusion of the trial Court.⁴ Matters that should have been put in at first may by that discretion be refused later, because this is but the denial of a second opportunity. But matters of true rebuttal could not have been put in before, and to exclude them now would be to deny them their sole opportunity for admission. Hence, while the trial Court's determination of what is properly rebutting evidence should be respected, yet, if its nature as such is clear, the proponent does not need the trial Court's express consent to admit it as involving a departure from the customary rule.⁵ This will always be the case for evidence offered to impeach the opponent's witnesses by way of moral character, bias, self-contradiction, or the like.⁶ This doctrine is justly applied also where the proponent has found it necessary or desirable, by reason of the opponent's cross-examination, partly to anticipate his case in rebuttal by going into it during his case in chief, — for example, on a re-direct examination; here he may take up the same subject again during the rebuttal;⁷ and it has also sometimes, by discretion, been extended even to the

³ See examples in note 7, *supra*, and *post*, § 2500.

⁴ Whether an error in this respect should be adequate ground for a new trial is a different question, and of course a rational liberality would seldom find here such a ground: *ante*, § 1867, note 3.

⁵ 1871, *Wade v. Thayer*, 40 Cal. 573, 584; 1872, *Farmers & M. Bank v. Young*, 38 Ia. 43, 44, *semble*; 1902, *Glenn v. Stewart*, 157 Mo. 584, 67 S. W. 237; 1903, *Anacosta C. M. Co. v. Heims*, 27 Mont. 161, 69 Pac. 906.

⁶ For example, a self-contradiction: 1886, *Winchell v. Winchell*, 100 N. Y. 163, 2 N. E. 897; 1889, *Ankersmit v. Tuck*, 114 Id. 54, 20 N. E. 819.

For the general principles as to evidence in supporting an impeached witness, see *ante*, §§ 1104-1144. For the doctrine that one irrelevant fact may justify another irrelevancy in rebuttal, see *ante*, § 15. For the doctrine as to impeaching an impeaching witness, see *ante*, § 894.

⁷ 1838, *Briggs v. Ainsworth*, 2 Mo. & Rob. 168.

case where this partial anticipation of the rebuttal during the case in chief has been voluntary and irregular on the proponent's part, i. e. where he has not had the excuse of necessity.⁸ In general, such discretionary variations should be liberally dealt with; for nothing can be more irrational or more unjust than to apply the judicial lash of a new trial to errors of trivial importance.

§ 1874. *Opponent's Case in Surrebuttal.* For the opponent's case in surrebuttal there remain properly only two sorts of evidence, namely, evidence explaining away the effect of new facts brought forward by the proponent in rebuttal, and evidence impeaching the witnesses testifying in rebuttal. All other evidence could and should have been put in during the case in reply. Accordingly, evidence of the latter sort is ordinarily not to be received in the case in surrebuttal; though, here as elsewhere, the trial Court in discretion may allow it to be brought forward at this time;¹ and it is here immaterial, subject to limits above noted (*ante*, § 1873, par. 2), whether the evidence consists in new facts or in a repetition of facts already once put in.

On the other hand, for evidence legitimately receivable in surrebuttal—in particular, evidence impeaching rebuttal witnesses—, there has been no prior opportunity to adduce it, and hence it is here entitled to be received, without depending on the Court's discretion to relax the usual order;² for this class of evidence, what has been said in the foregoing section (§ 1873, par. 4) is equally applicable.

§ 1875. *Stages after Surrebuttal.* It is not conceivable that, after a surrebuttal, there can be any evidence for which there has not already been an opportunity of admission, except evidence impeaching witnesses in the preceding stage; and even for this excepted class it can hardly be worth while to confuse the issues by new evidence of such relatively minor importance.

⁸ 1854, *York v. Pease*, 2 Gray 282 (here the plaintiff had anticipated a defence of privileged communication); 1820, *Harrison v. Rowan*, 3 Wash. C. C. 582 (questions as to testator's sanity, improperly asked in chief by the proponent of the will, allowed again in re-examination).

It would seem that rebutting facts which could have been obtained from the opponent's witness on cross-examination, but are postponed and are sought by calling the same witness in rebuttal, do come within the present allowance; there was a fair opportunity to bring them out and it was not availed of; hence, any later power of inquiry should be within the trial Court's discretion. *Contra*: 1901, *Hamilton v. Smith*, 74 Conn. 374, 60 Atl. 384.

¹ In the following cases it is sometimes impossible to learn whether the Court is dealing with the present case, or with the situation involved in §§ 1897, 1899, *post* (re-cross-examination), or with that of the next note: 1895, *Wilkinson v. State*, 106 Ala. 23, 17 So. 457; 1887, *Barkly v. Copeland*, 74 Cal. 1, 8, 18 Pac. 307; 1889, *First National Bank v. Wolf*, 79 Id. 69, 73, 21 Pac. 531, 748; 1880, *Hathaway v. Hemingway*, 20 Conn. 191, 195; 1891, *Belden v. Allen*, 61 Id. 173, 26 Atl. 949; 1883, *Walker v. Walker*, 14 Ga.

243, 250; 1895, *Willard v. Pettitt*, 159 Ill. 663, 39 N. E. 991; 1865, *Donaldson v. R. Co.*, 18 Ia. 280, 290; 1873, *Cannon v. Iowa City*, 34 Id. 303; 1879, *State v. Woods*, 31 La. An. 267; 1896, *State v. Goncalves*, 36 Id. 490, 492; 1892, *State v. Lyons*, 44 Id. 104, 10 So. 409; 1893, *State v. Spencer*, 45 Id. 1, 9, 12 So. 135; 1895, *Devonshire v. Peters*, 104 Mich. 501, 63 N. W. 973; 1898, *Argabright v. State*, 56 Nebr. 343, 76 N. W. 876; 1859, *Stephens v. People*, 19 N. Y. 573; 1867, *State v. Dilley*, 15 Or. 75, 13 Pac. 648; 1868, *Koenig v. Bauer*, 57 Pa. 168, 172; 1850, *Clinton v. McKensic*, 5 Strobb. 36, 41; 1874, *Rittick v. State*, 40 Tex. 117, 120; 1868, *Pratt v. Rawson*, 40 Vt. 183, 185. For the doctrine as to impeaching on impeaching witness, see *ante*, § 894.

² 1882, *Nutter v. O'Donnell*, 6 Colo. 253, 259, *semble*; 1859, *Thomas v. State*, 27 Ga. 287, 298, *semble*; 1899, *State v. Sumner*, 55 S. C. 32, 33 S. R. 771 (after new witnesses called in rebuttal, the surrebutter is entitled to impeach their character; three judges dissenting); 1860, *Kent v. Lincoln*, 32 Vt. 551, 599; 1899, *State v. Staley*, 45 W. Va. 793, 32 S. E. 196 (the surrebutter is entitled to impeach character of witness first called on rebuttal). *Contra*: 1903, *Kaffer v. State*, — Wyo. —, 73 Pac. 556.

Accordingly, it would seem that the trial Court's discretion should determine whether there may be any case at all re-rebuttal or re-surrebuttal. There is, however, little authority upon these rare stages of the cause.¹

2. After Case Closed.

§ 1876. *Case Closed*: (1) *Offeror's Case alone Closed*. After a party has declared his presentation of evidence to be completed, there is thenceforth no proper occasion for the introduction of evidence by him. Nevertheless, inadvertences of counsel and inevitable delay of witnesses occur constantly in trials, and it would be unnecessary and unjust to hold that from the moment of that utterance there is to be an invariable rule of exclusion. Courts are therefore agreed that, in the trial Court's discretion, evidence may none the less be subsequently admitted:

1826, *Abbott, C. J.*, in *Giles v. Powell*, 2 C. & P. 259, 261, said "that he would never allow a witness to be called back to get rid of any difficulty on the merits or on anything that went to the justice of the case, but that he always allowed it to be done to get rid of objections which were beside the justice of the case and little more than matter of form."

1891, *O'Neal, J.*, in *Browning v. Huff*, 2 Bail. 174, 179: "It has been a long and well settled practice to allow a plaintiff, when evidence essential to support the issue had been omitted accidentally or from supposing that before the Court sufficient, to adduce it even after the evidence had been closed, a motion for nonsuit made and argued, and even the opinion of the presiding judge pronounced in favor of the motion. The application of this rule of practice must always be left to the discretion of the presiding judge; though it ought never to be allowed to surprise or weigh in delay or loss to the defendant. I am, however, unable to see that the discretion allowed to the presiding judge was improperly exercised here. For if the plaintiff could, without delaying the Court or the party, make out a fact on which the proceedings themselves informed the defendant the plaintiff did rely, and which she had omitted to prove from supposing that in point. It could not be questioned, surely she ought to have been permitted to do so. The attainment of speedy justice is one great object of a suit at law; and it would be a bad way of attaining this end to say to a party situated as the plaintiff was in the court below, 'Your case must fail, and you must begin *de novo*, because you did not offer evidence before you closed which you can now obtain in a few moments.'"¹

¹ 1862, *State v. Alford*, 31 Conn. 46, 46 (rebuttal allowable in discretion).

Compare the rule as to impeaching an impeaching witness, ante, § 694.

² In the following rulings, it is often impossible to learn whether the Court is dealing with the situation here involved, or with that of the next section (both cases closed), or with that of § 1872, ante (case in chief ended); but the same general principle of the trial Court's discretion applies to all. Furthermore, the rulings and statutes under the next four sections (§§ 1877-1900), admitting evidence in discretion, would of course apply the same rule for the present situation: ENGLAND: 1823, *Brown v. Giles*, 1 C. & P. 115 (Park, J., allowed it; but intimated a stricter rule for criminal cases); 1826, *Giles v. Powell*, 2 id. 259, 261 (quoted *supra*); 1841, *Johann v. Clinton*, A. M. & O. 123, 124 (Brady, C. B.: "It is very objectionable to be recalling witnesses to patch up a case, and if I thought there were the slightest danger of perjury I

should not think of it"); 1841, *Murray v. Dublin*, ib. 130, 132 ("There may be cases where such a course would be expedient"); *Kelly v. Smith*, ib. 180; 1842, *Bell v. Stewart*, ib. 401; 1849, *Middleton v. Bamed*, 4 Exch. 241, 243; UNITED STATES: Ark.: *State*, 1894, § 2963; Cal.: 1859, *Fairchild v. Stage Co.*, 13 Cal. 599, 605; 1872, *Barry v. Bennett*, 45 id. 80, 83 (refused); 1874, *Abbey H. Am'n v. Willard*, 43 id. 614, 618; *Ind.*: 1872, *Williams v. Allen*, 40 Ind. 293, 297; *Id.*: 1868, *Huey v. Huey*, 26 Id. 525; 1885, *Meadows v. Ins. Co.*, 67 id. 57, 59; 1889, *Randolf v. Bloomfield*, 77 id. 50, 52; 1901, *Oathart v. Rogers*, 115 id. 80, 87 N. W. 738 (after motion for a verdict); Kan.: 1893, *Hill v. Miller*, 50 Kan. 639, 643; *La.*: 1836, *Richardson v. Debuyn*, 4 Mart. n. s. 127; 1833, *Stone v. Carter*, 5 La. 443, 450; 1855, *Labarre v. Hopkins*, 10 La. An. 466; 1875, *State v. Coleman*, 27 id. 691, 694; 1881, *State v. Rose*, 33 id. 932; 1901, *State v. Sims*, 106 La. 443, 31 So. 71; Mass.: 1843, *Com. v. Eastman*, 1 Cranch. 186, 187,

§ 1877. *Same*: (2) *Case of Both Parties Closed*. Where both parties have finally closed their cases, the possibility of unfair disadvantage to the opponent by the admission of further evidence is no doubt greater; yet the same exigency, for honest purposes and with no unfair consequences, may equally exist; and therefore all Courts agree that the trial Court may in discretion sanction its admission:

1801, *Kent, J.*, in *Alexander v. Byron*, 2 John. Cas. 318, 319: "It can never be claimed by either party at trial as a matter of strict right, to open the cause to proof after full opportunity has been given to each side to be heard, and the testimony has been regularly and by mutual consent closed. It was therefore properly admitted, upon the argument of this motion, that the subsequent admission of testimony must rest upon the discretion of the Court, duly exercised according to the circumstances of the case. The parties must come to trial prepared, at their peril; and if either party has any good excuse for not being prepared, he is entitled of right to a postponement of the trial. . . . [Here the witness desired arrived during the argument of the defendant, who then offered him.] After the counsel for the defendant had declared that they had done with the examination of witnesses, and the plaintiff and his witnesses had in consequence of it left the court, it would then have been unreasonable to have received the witness, unless the plaintiff with his witnesses had been recalled. I do not think that witnesses are bound to stay, after the parties have declared they have done with the proofs; for this is equivalent to a discharge of the parties. If the witness had been received and had testified what he was offered to prove, it might have made a decisive change in the weight of the proofs; it would in fact have been a fresh trial of the cause; and unless the plaintiff had full opportunity to have been present with his witnesses, to have repelled the testimony if in his power, he would have had just cause to complain on the ground of surprise. . . . I cannot therefore say that in the present case the judge has not exercised a due discretion."

1811, *Tugman, C. J.*, in *Richardson v. Stewart*, 4 Binn. 106, 200: "I should be very tender in rejecting material testimony because offered at the last hour, unless it had been kept back by trick and the adverse party had been deceived and injured by it."

1818, *Chase, J.*, in *Price v. Jenkins*, 1 Nott & McC. 153: "[To allow such tardy introduction of evidence] would frequently be a surprise on the opposite party which would be highly unjust. He probably would regulate his testimony by that of his opponent. He would dismiss his witnesses, when the testimony was closed in the usual manner; and, if allowed to reply, would be unable by reason of their absence. If allowed to reply and he should be prepared, it would open the cause again fully as to him, to adduce any testimony in his power. The irregularity and confusion in the trial, and danger of frequent perjury, under such a practice, would be intolerable."¹

217; 1901, *Cushing v. Cushing*, 180 Mass. 180, 61 N. E. 614; *Mo.*: 1837, *Mary v. State*, 5 Mo. 71, 80 (here on the facts, involving an agreement of counsel, the allowance was held improper); *New*: 1874, *State v. Murphy*, 9 Nev. 394, 397; *N. H.*: 1903, *Stone v. Boscawon Mills*, 71 N. H. 268, 52 Atl. 119 (after argument for a motion for a nonsuit); *N. Y.*: 1842, *Shepard v. Potter*, 4 Hill 208 ("No case gives a discretion to cut off further testimony, if it be pertinent, unless the party be left to the evidence as it stood when he declared his case closed"; here the Court, by calling again one of the plaintiff's witnesses, had virtually changed for the opponent the situation); *N. C.*: 1886, *Olive v. Olive*, 85 N. C. 485, 486; *Or.*: 1896, *State v. Isenhart*, 32 Or. 549, 52 Pac. 349; *Pa.*: 1901, *Com. v. Biddle*, 200 Pa. 640, 50 Atl. 263; *R. I.*: 1860, *Hopkinton v. Waite*, 6 R. I. 374, 399; *S. C.*: 1906, *State v. Derrick*,

44 S. C. 344, 22 S. E. 336; *U. S.*: 1840, *Philadelphia & T. R. Co. v. Stimpson*, 14 Pet. 448, 449; 1892, *Omaha Bridge Cases*, 10 U. S. App. 98, 191, 2 C. C. A. 174, 51 Fed. 309; *Vt.*: 1883, *State v. Hopkins*, 56 Vt. 250, 262; *Wis.*: 1891, *Humphrey v. State*, 78 Wis. 570, 572, 74 N. W. 684.

Distinguish the rule (*post*, § 2496) that after a motion for a verdict the party, if overruled, loses the benefit of the motion by putting in evidence.

¹ The remarks preceding note 1, § 1876, *ante*, apply equally to the following rulings: *England*: 1725, *L. C. Macclesfield's Trial*, 16 How. St. Tr. 767, 1261; 1828, *George v. Radford*, 3 C. & P. 444, 446; 1896, *Wilkes v. Heston*, 17 U. C. Q. B. 95; *United States*: *Ala.*: 1841, *Towne v. Biddle*, 2 Ala. 694; 1848, *Gayle v. Bishop*, 14 id. 552; *Alaska*: C. C. P. 1900, § 668

The practice in Chancery, as to *enlarging publication* by taking testimony after publication had passed (publication being supposed to mark the closing of the testimony on both sides) recognized also the same broad principle of discretion as controlling; but its examination is without the present purview.²

§ 1878. *After Argument Begun.* The presentation of evidence has naturally no place after argument on either side has begun. Moreover, a special danger of abuse for such a situation lies in the opportunity which it would afford for the deliberate coloring or manufacture of testimony to suit some specific need which may be apparent only after the opposing counsel's argument has revealed where the emphasis of his claim is placed and what conclusions he founds upon the evidence as already presented. Nevertheless, situations may easily arise in which an honest purpose may justly be served, without unfair disadvantage, by admitting evidence at this stage; and it has always been conceded that the trial Court's discretion should not be hampered by an inflexible rule:

1811, *Locks, J., in Parish v. Fite*, 2 N. C. Law Repos. 238: "It must be admitted that the regular and proper practice would be never to suffer witnesses to be introduced after the first examination, but especially after the arguments of counsel are closed; yet we are of opinion that the discretion of the judge must govern this rule of practice. The reason of the rule is grounded on the temptation it holds out for committing the crime of perjury; that when the cause has been argued and the party discovers the points on which it is to rest, the Court will not permit a party to support the weak parts of his case by a re-

(like *Or. Annot. C. 1892, § 539*); *Cal.*: C. C. P. 1872, § 2050, *semble* (quoted *post*, § 1896); 1871, *Foot v. Richmond*, 42 Cal. 439, 442; *Cal.*: 1873, *Sellar v. Cleveland*, 2 Colo. 532, 551; 1894, *Plummer v. Mercantile Co.*, 23 id. 190, 47 Pac. 234; 1897, *Brooke v. People*, 23 id. 375, 48 Pac. 502; *Fla.*: 1902, *Anthony v. State*, — *Fla.* —, 32 So. 818; 1903, *Ferrill v. State*, — *Id.* —, 34 So. 230; *Ga.*: 1898, *Huff v. State*, 104 Ga. 221, 30 S. E. 906; 1898, *Hunley v. State*, *ib.* 753, 30 S. E. 958; 1900, *Ward v. State*, 112 id. 73, 37 S. E. 111; *Haw.*: 1885, *R. v. Halehill*, 5 Haw. 16, 19; *Ida.*: *Rev. St.* 1887, § 6081; *Ill.*: 1842, *Young v. Bennett*, 5 Ill. 47; 1903, *Chicago City R. Co. v. Carroll*, 306 id. 313, 68 N. E. 1067; *Ind.*: 1882, *McNutt v. McNutt*, 116 Ind. 543, 545, 19 N. E. 115; *Id.*: 1869, *Tisdale v. Ins. Co.*, 26 Ia. 12, 17; 1897, *Cowan v. Musgrave*, 73 id. 384, 387, 35 N. W. 496; 1899, *Gorman v. R. Co.*, 78 id. 609, 513, 43 N. W. 308; 1902, *Kimball v. Saguin*, 86 id. 184, 192, 53 N. W. 116; 1899, *Des Moines S. Bank v. Colfax E. Co.*, 68 id. 4, 53 N. W. 67; 1894, *Hartley S. Bank v. McCorkell*, 91 id. 660, 665, 40 N. W. 197; *Kan.*: 1875, *Rheinhardt v. State*, 11 Kan. 318, 323; *Ky.*: C. C. P. 1895, § 600; 1893, *Natural L. Ins. Co. v. Thomson*, 34 Ky. 253, 23 S. W. 87; 1897, *Froman v. Com.*, — *Id.* —, 42 S. W. 728; *La.*: 1841, *Beel v. New York Steamer*, 17 La. 541, 544; 1847, *Le Blanc v. Nolan*, 2 La. An. 223; 1877, *State v. Colbert*, 20 id. 715; 1897, *State v. Gaubert*, 49 id. 1692, 72 So. 930; 1898, *State v. Jones*, 51 id. 103, 24 So. 304; 1903, *State v. Robertson*, 111 La. —, 35 So. 379; *Mo.*: 1841, *Rucker v. Eddings*, 7 Mo.

113, 117 (here, the trial Court's refusal to allow the other party also to put in new evidence, after one had been so allowed, was held improper on the facts); 1873, *St. Louis v. Foster*, 52 id. 513, 517; 1873, *German Sav. Bank v. Kerlin*, 53 id. 382, 384; 1883, *State v. Smith*, 80 id. 516, 520; 1888, *Taylor v. Cayce*, 97 id. 242, 251, 10 S. W. 927; 1894, *State v. Pennington*, 124 id. 388, 391, 37 S. W. 1106; 1898, *State v. Eisenhower*, 132 id. 140, 33 S. W. 783; 1897, *State v. Laycock*, 141 id. 374, 42 S. W. 723; 1903, *Joplin Waterworks Co. v. Joplin*, 177 id. 493, 76 S. W. 960; *Mont.*: C. C. P. 1895, § 3378 (like *Cal. C. C. P. § 2050*); *Nev.*: 1897, *Sweeney v. Hjul*, 23 Nev. 409, 48 Pac. 1096; *N. Y.*: 1801, *Alexander v. Byron*, 2 John. Cas. 318 (quoted *supra*); 1810, *Mercer v. Sayre*, 7 John. 306; 1825, *Jackson v. Tallmadge*, 4 Cow. 450; 1839, *Williams v. Hayes*, 30 N. Y. 58, 60; 1890, *Carradine v. Hotchkiss*, 120 id. 608, 613, 24 N. E. 1020; *N. C.*: 1892, *Gregg v. Mallett*, 111 N. C. 74, 79, 15 S. E. 296; 1896, *Sutton v. Walters*, 115 id. 495, 24 S. E. 357; *Or.*: C. C. P. 1892, § 539 (like *Cal. C. C. P. § 2050*); *Pa.*: 1811, *Richardson v. Stewart*, 4 Binn. 193, 200 (quoted *supra*); *U. S.*: 1898, *Hart v. U. S.*, 28 C. C. A. 612, 84 Fed. 799; *Va.*: 1895, *Bertha Zinc Co. v. Martin's Adm'r*, 93 Va. 791, 23 S. E. 849; *W. Va.*: 1895, *Perdue v. C. C. C. Co.*, 40 W. Va. 372, 21 S. E. 670; *Wis.*: 1890, *Elwett v. Gaynor*, 77 Wis. 378, 393, 46 N. W. 547.

² See a full and clear exposition of principle and authorities by Chancellor Kent, in *Hamerly v. Lambert* (1817), 2 John. Ch. 432.

examination of the case. And we think it is right in every case to adhere to such a practice, unless the Court discovered the necessity of a re-examination and that it will not be productive of the evil on which the rule is founded."

1818, *Tilghman v. C. J.*, in *Duncan v. McCullough*, 4 S. & R. 480, 482: "To make a general practice of introducing new evidence when, from the argument of the adversary, it is found where the shoe pinches, might lead to perjury, and at all events it would be productive of confusion in trials."

§ 1879. *After Judge's Charge Given.* For this situation, it is equally true, on the one hand, that the production of evidence after the judge has given his instructions, either in part or in whole, is untimely and should in general be refused; and on the other hand, that the trial Court may in its discretion properly allow an exception to be made; and this is the conceded principle:

1824, *Mills, J.*, in *Brayden v. Goulman*, 1 T. B. Monr. 115, 118: "Neither side ought to be permitted to give evidence by piecemeal, then to apply for instructions, and again to mend and add to his proof until by repeated experiments he shall make it come up to the opinion of the Court. An adherence to these rules, generally, will be found necessary in all Courts of original jurisdiction; and without them confusion, loss of time, and captious and irritable conduct will follow. 'We say generally; for it will often be found necessary and proper for the presiding Court for good reasons to depart from them to attain complete justice; and where they ought or ought not to be varied must in a great measure be left to the sound discretion and prudence of the inferior Court, and this Court for such departure ought never to interfere, except injustice is done by that departure.'"

¹ To the following cases, add those of the next two sections, which would of course recognize the same principle of discretion for the present situation: *England*: 1836, *Wells v. Atcheson*, 2 C. & P. 268, 269 ("It is better not to lay down any particular rule, but to leave it to the discretion of the judge who tries a cause, under the particular circumstances"); *Canada*: 1849, *Scribner v. McLaughlin*, 1 All. 379, 384; 1854, *Doe v. Connolly*, 3 id. 337; *United States v. Ala.*: 1863, *Hobbs v. State*, 75 Ala. 1, 6; 1889, *Dyer v. State*, 88 id. 225, 229, 7 So. 267 (here, after charge given); *Ariz.*: *Rev. St.* 1887, § 763 ("at any time before the conclusion of the argument," the trial Court may "where it appears to be necessary to the due administration of justice," allow omissions to be supplied, and prescribe terms); *Ga.*: 1860, *Bigelow v. Young*, 30 Ga. 121, 125; 1873, *Eberhart v. State*, 47 id. 598, 604, 607; 1888, *Blackman v. State*, 80 id. 785, 791, 7 S. E. 636; 1902, *Duggan v. State*, 116 id. 846, 45 S. E. 253; 1908, *Jackson v. State*, — id. —, 45 S. E. 604; *Haw.*: 1892, *Herblay v. Norris*, 8 Haw. 335, 336; *Ill.*: 1887, *Tucker v. People*, 123 Ill. 583, 593, 13 N. E. 602; 1900, *Bolen v. People*, 184 id. 336, 56 N. E. 408; *Ind.*: 1887, *Tress v. Fakia*, 9 Ind. 534, 537; 1858, *Coats v. Gregory*, 10 id. 345, 346; 1889, *Stipp v. Claman*, 123 id. 533, 538, 24 N. E. 131; 1900, *Roush v. Roush*, 154 id. 542, 55 N. E. 1017; *Ia.*: 1856, *McMannus v. Finan*, 4 Ia. 283, 287; 1862, *Wheeler v. Smith*, 18 id. 544; 1867, *McCormick v. Holbrook*, 22 id. 487, 491; 1871, *State v. Shearn*, 32 id. 88, 93; 1880, *Kemerer v. Bourne*, 53 id. 172, 175, 4 N. W. 921; 1881, *Darland v. Rosencrans*, 56 id. 122, 124, 6 N. W. 776; 1882, *Smith v. Ins. Co.*, 58 id. 487, 12 N. W. 542; 1884,

McDonald v. Moore, 65 id. 171, 175, 21 N. W. 504; 1891, *McComb v. Ins. Co.*, 83 id. 247, 48 N. W. 1088; 1892, *Kimball v. Saguin*, 86 id. 186, 53 N. W. 116; 1893, *Hamilton Baggy Co. v. Iowa B. Co.*, 88 id. 364, 373, 55 N. W. 495; 1893, *State v. Burke*, 116 id. 661, 665, 56 N. W. 180; 1900, *State v. Wright*, 112 id. 424, 84 N. W. 541; *Ky.*: 1837, *Vicars v. Com.*, 5 Dana 504, 509; 1849, *Hendron v. Robinson*, 9 B. Monr. 503, 505 (if it is granted to one party, the other party should be allowed to impeach); *La.*: *C. Pr.* 1894, § 484 (after argument begun, no evidence admissible except by consent); 1884, *Psyche v. Paradol*, 6 La. 366, 378 (discretion intimated to exist); 1845, *Thomas v. Kean*, 10 Rob. 83, 85 (Code rule enforced); 1862, *Hill v. Miller*, 7 La. An. 621 (allowed on the facts); 1855, *New Orleans v. Locke*, 10 id. 730 (same); *Ma.*: 1836, *McDonald v. Smith*, 2 Shepl. 99; 1860, *Ruggles v. Coffin*, 70 Mo. 468, 472; 1864, *State v. Martin*, 69 id. 117; *Mo.*: 1844, *Freisigh v. State*, 8 Mo. 605, 612 (here allowing it to the prosecution); *Nebr.*: 1879, *Tomer v. Denamore*, 9 Nebr. 384, 388; *N. C.*: 1816, *Kelly v. Goodbread*, 2 Taylor 28; 1824, *Williams v. Averitt*, 3 Hawks 306 (disapproving *Kelly v. Goodbread*, because there the Supreme Court interfered with the trial Court's discretion); 1851, *State v. Rash*, 12 Ired. 382, 385; *Pa.*: 1818, *Duncan v. McCullough*, 4 S. & R. 480 (quoted *supra*); *S. C.*: 1845, *Colclough v. Rhodus*, 2 Rich. 76, 78; *Tex.*: *Rev. Civ. Stats.* 1895, § 1298 ("allowable, where it appears to be necessary to the due administration of justice"); 1872, *Cotton v. Jones*, 37 Tex. 34; *Vt.*: 1897, *Buchanan v. Cook*, 70 Vt. 168, 40 Ad. 168.

1890, *Boardsley, Sen., in Law v. Merrill*, 6 Wend. 268, 261 (dealing with a trial Court's refusal to recall a witness to re-state or to amend his testimony): "It seems to be conceded by the Supreme Court, and the law undoubtedly is so, that it is matter of discretion with the Court whether to admit a re-examination or not; and as a general rule it will be conceded that such re-examinations should be discouraged. If such discretion exists, it can most properly be exercised by the Court trying the cause. The judges decided that they considered it improper to call him. They might have discovered a readiness on the part of the witness to testify for one side only, and very properly might have refused a re-examination on that ground; they might have refused it from the manner of testifying on the part of the witness; they might also have refused it on the ground that they were satisfied that the witness did not testify as he pretended he did. Now what tribunal is so competent to decide on these questions as the Court trying the case? It appears to me that the propriety of a re-examination must depend in a great measure upon facts and appearances discoverable only to the tribunal before whom the witness is examined, and that no other is so competent to exercise this discretion. . . . It cannot be tolerated as a legal right that parties, after they have examined and cross-examined a witness and discharged him, shall be allowed as a matter of right to call him again after the cause is submitted and he has discovered from the charge of the Court what new testimony is required, or what part must be qualified to serve the interest of the party he wishes to favor. I can readily imagine cases where it would be proper to call a new witness or adduce new testimony, after the cause had been summed up, and yet that it would be very improper to allow a witness to be re-examined for the purpose of re-stating what he had previously said. . . . If it is matter of right, it destroys all discretion; and if it may be claimed as a legal right in one case, it may be in all cases similarly situated. . . . This cannot be tolerated as matter of right."¹

§ 1880. *After Jury Retired.* It is clear that the reception of evidence after the jury has retired to consider a verdict reaches the extreme of irregularity. The normal time for finally closing all evidence is the time when the tribunal proceeds to deliberate upon its effect:

1842, *Lord Stauford's Trial*, *Lords' Journals*, April 10: "The Lords . . . propounded this question to the Judges: 'Whether it be according to the course of practice and common justice, before the Judges in their several Courts, for the prosecutors in behalf of the King, during the time of trial to produce witnesses to discover the truth, and whether the prisoner may not do likewise?' The Lord Chief Justice delivered this as the unani-

¹ Add the rulings in the following section, whose principle would apply equally to the present situations: *Ala.*: 1860, *Dyer v. State*, 38 Ala. 223, 7 So. 267; *Cal.*: 1872, *Keys v. Warner*, 42 Cal. 60, 63 (cases submitted on stipulations); *Id.*: Code 1897, § 3719 ("At any time before the case is finally submitted to the Court or jury, either party may be permitted by the Court to give farther testimony to correct an evident oversight or mistake," but terms may be imposed); 1862, *Samuels v. Griffith*, 13 Ia. 103, 104 (here, after bill of exceptions prepared); 1867, *Eggspiller v. Nockles*, 58 Id. 649, 652, 13 N. W. 700 (here, after cause decided by the Court on depositions); 1867, *Baker v. Jamison*, 73 Id. 606, 702, 36 N. W. 647 (after chancery cause submitted); 1869, *Seckel v. Norman*, 75 Id. 254, 262, 43 N. W. 190; 1890, *Stekles v. Dallas C. Bank*, 81 Id. 408, 411, 46 N. W. 1089 (after chancery cause submitted and taken under advisement; under the Code, after actual final submission, no evidence can be received, but the trial Court determines

what is a final submission, and where its action is equivalent to setting aside the submission, this will be sanctioned); 1891, *Dunn v. Wolf*, ib. 688, 691, 47 N. W. 887 (rule of preceding case applied); 1893, *Thatcher v. Stickney*, 88 Id. 454, 457, 56 N. W. 489 (same); *Ky.*: 1894, *Braydon v. Goulman*, 1 T. B. Monr. 116; *N. Y.*: 1890, *Law v. Merrill*, 6 Wend. 268, 276 (quoted *supra*; but per Walworth, C., a recall to allow a witness to re-state his alleged testimony in terms denied by the bill of exceptions is improper, the bill being conclusive); *W. Va.*: 1889, *Lewis v. Alkire*, 33 W. Va. 504, 9 S. E. 990 (after cause taken for decision by Court sitting without jury).

Where a cause is submitted to a Court sitting without a jury (either under Chancery practice or in a special case at common law), it is not easy to say whether the situation is to be regarded as of the present sort or of that dealt with in the next section; but the principle would probably not differ in the two cases; the authorities are placed above.

mons opinion of himself and all the rest of the Judges: 'That according to the course of practice and common justice, before them in their several Courts, upon trial by jury, as long as the prisoner is at the bar and the jury not sent away, either side may give their evidence and examine witnesses to discover truth.'"

1784, Mr. Edmund Burke, Report of Committee of House of Commons, Debreutt's History of Hastings' Trial, 1784, Part VII, Suppl. xxxvii: "Your Committee observes that if the rules which respect the substance of the evidence are (as the great lawyers on whose authority we stand assert they are) no more than rules of convenience, much more are those subordinate rules which regulate the order, the manner, and the time of the arrangement. These are purely arbitrary, without the least reference to any fixed principle in the nature of things or to any settled maxim of jurisprudence; and consequently are variable at every instant, as the convenience of the cause may require. We admit that, in the order of mere arrangement, there is a difference between examination of witnesses in chief and cross-examination; and that in general these several parts are properly cast according to the situation of the parties in the cause. But there neither is nor can be any precise rule to discriminate the exact bounds between examination and cross-examination. So as to time, there is necessarily some limit, but a limit hard to fix; the only one which can be fixed with any tolerable degree of precision is when the judge, after fully hearing all parties, is to consider of his verdict or his sentence."

Nevertheless, here too it may occur that evidence excusably omitted at an earlier stage may be honestly offered and justly received without unfair disadvantage to the opponent. In respect to the danger of such an exception, there is no radical difference between the preceding situation and the present one; for the chief danger lies only in the opponent's dismissal of his witnesses and in the unfair use of hints derived from the argument of counsel and the judge's charge. If an exception may be allowed after those stages have been reached, it requires no stretch of principle or of policy to allow it in the present stage. Accordingly, it is generally agreed that the trial Court, in its discretion determining the exigency, may exceptionally admit evidence at this stage.¹

§ 1881. *After Verdict Rendered.* It has never been supposed that after the rendering of a jury's verdict at common law the admission of further evidence would be justified by any exigency.² In Chancery, however, where the jury are merely an advisory body whose report on questions of fact does not form a part of the judgment nor bind the Chancellor in his action, the cause may of course in his discretion be further investigated by him, either by rejecting the verdict entirely or by supplementing it, and the admission of other evidence after receiving the jury's verdict is therefore allowable if he considers it necessary.³

¹ 1480, Hale, Pl. Cr. II, 307 (at the jury's request); 1767, Buller, Trials at Nisi Prius, 508 (same); 1885, *Meadows v. Ins. Co.*, 67 Ia. 57, 59, 34 N. W. 361 ("at any time before verdict"); 1891, *McComb v. Ins. Co.*, 83 id. 247, 48 N. W. 1058, *same*; 1911, *Parish v. Fife*, 2 N. C. Law Repos. 283; 1945, *Van Hise v. Reinbolt*, 2 Coldw. 129, 141 (re-stating his testimony); 1949, *Macerve v. Folsom*, 62 Vt. 504, 505, 511, 20 Atl. 226; 1951, *Livingston v. Com.*, 7 Gratt. 658. Compare the cases cited in the preceding section.

tion, of evidence offered after submission to a Court sitting without a jury.

² A radical and perhaps useful expedient, helping to flexibility, has been inserted into some Canadian codes: Man. Rev. St. 1902, c. 40, Rule 564 (like Ont. Rule 549); Ont. Rules of Court 1907, § 549 (rule for allowing a verdict to be rendered conditionally on subsequent proof of a fact omitted).

³ 1901, *Clancy v. Lord*, 87 Cal. 413, 416, 418, 21 Pac. 271.

B. STAGES OF EXAMINATION FOR THE INDIVIDUAL WITNESS.

§ 1862. *Order of Examination in General.* Where there are opposing parties, it is obvious that both cannot examine a witness at the same moment. There are therefore three conceivable ways of arranging the order of questions as between the parties. (a) The calling party and the opposing party might put questions, one after the other, on each topic as it came up, with no regularity or restriction, until each had asked as many questions as he chose; this plan would secure the minimum of restriction and would tend to the maximum of confusion. (b) Or, going to the other extreme, it might be required that the calling party examine all his witnesses before the other party asks any questions of any of them, the other party then examining all the original witnesses, together with his own additional ones, without interruption; this plan would avoid all confusion due to the opposing party's interruption of the order of questions, but it would increase the confusion which arises from the separation of topics naturally connected in each witness' testimony. (c) Or, taking a medium course, the calling party might be required to examine each witness originally without interruption, and then the other party, at the close of each single examination, be required and allowed to put such questions as he desired, so as to dispose entirely of each witness, by a double examination, before another witness was called; this plan avoids the extreme of confusion due to either of the above

It is this third plan that the common law fixed upon long ago, as embodying practically the greatest advantages and the fewest disadvantages:

1736, C. B. *Gillert*, *Evidence*, 146: "The witness produced must first be examined on the part of the producer, and then the other side may examine him; and this is a regulation that naturally follows the true order of things; for it is proper first to enquire what a witness can prove, before you are to examine what hath not fallen under his knowledge."

1746, L. C. *Hardwicke*, in *Lord Leves's Trial*, 18 How. St. Tr. 656: "My lords, the rule for the examination of witnesses in this Court, in either House of Parliament, and everywhere else, is that . . . all questions that are asked, whether touching the matter of fact to be tried or the credibility of the witness, are to be asked at the proper time. The party who produces a witness has a right to go through the examination first, and then the other side cross-examines him; and after that is over, the judge asks him such questions as he thinks proper; unless, as I said before, there be any objections to the questions, or any doubtful matter arises that wants immediately to be cleared up. The same method is to be observed here; and the reason of it, my lords, is that unless your lordships observe this method, you will be in perpetual confusion."

The peculiar effects of the common-law arrangement, as contrasted with the other two modes, is on the one hand, that it secures to each party the unrestrained pursuance of his own line of proof in the handling of each witness, and, on the other hand, that it provides for the exhaustion of the entire knowledge of each witness at a single occasion by the successive examination of both parties before he leaves the stand, and thus secures the

concentrated attention of the tribunal to the significance of his testimony as a whole and the bearing of his general credit on his whole testimony. This general purpose and spirit of the common-law method will be of importance in assisting to solve the much-mooted problem of the scope of cross-examination.

Thus the questions that arise for consideration involve mainly the propriety of exceptionally allowing a second examination by either party while the witness is still on the stand, and of allowing his recall after he has left the stand when the parties have once declared their examinations ended, as well as of determining the allotment of topics to these various stages of examination. The stages may therefore be grouped under the following heads: 1. Original Call: *a.* Direct examination; *b.* Cross-examination; *c.* Re-direct examination; *d.* Re-cross-examination; *e.* Subsequent examinations; 2. Recall: *a.* for direct examination; *b.* for cross-examination; 3. Re-recall, for either party.

1. Original Call.

§ 1883. *Direct Examination, in general; Putting in Documents.* There are in general no detailed rules limiting the topics appropriate for the direct examination. The party at that time puts in the evidence constituting his own case; but the rules that affect him therein have reference to the stage of the case at large, and not to the stage of examination of the individual witness; accordingly, all the rules already dealt with (*ante*, §§ 1869-1872), though they find usual application during a direct examination, have no essential connection with it. Furthermore, it is of course expected that the first or direct examination will be utilized for obtaining all that the witness knows in the party's favor, so that no further examination will be needed for the same party; and this assumption is the foundation of the rules that apply when a re-direct examination (*post*, § 1896) or a recall (*post*, § 1898) is desired.

There seems to be but one rule distinctively affecting the direct examination as such, namely, that in *proving a document's execution*, the document must be formally put in evidence and read to the jury *before the close of the direct examination* of the proving witness; otherwise, a party might unfairly postpone putting in the document until the witness had left the stand, and the opponent would thus be deprived of the opportunity of cross-examining the witness as to its contents.¹ This rule is in spirit akin to that already noted (*ante*, § 1858) requiring the document's exhibition to the opponent; and it may profitably be compared with the rule for documents proved on cross-examination (*post*, § 1884), the rule in *The Queen's Case*, for documents used

¹ This rule has been laid down in only a few jurisdictions, but it deserves wider acceptance: Ark. Stats. 1894, § 2966 (if a writing is "proved by the witness and allowed by the Court, it must be read to the jury before his testimony is closed; otherwise, it cannot be read unless the witness is recalled"); Cal. C. C. P. 1872, § 2064 (writing

proved by a witness "must be read to the jury before his testimony is closed, or it cannot be read except on recalling the witness"); *Ida.* Rev. St. 1887, § 6065 (like Cal. C. C. P. § 2064); Or. C. C. P. 1888, § 843 (like Cal. C. C. P. § 2064).

in contradiction of a witness (*ante*, § 1259), and the rule for documents lost, and the like (*ante*, §§ 1870-1872).

§ 1884. *Cross-examination, in general; Postponement and Waiver; Putting in Documents.* The cross-examination, or examination by the party not calling the witness, follows immediately the direct examination, in customary order prescribed by the common law (*ante*, § 1882). Since the purpose of this immediate sequence is to furnish the tribunal with the means of fixing the net significance of the witness' testimony while the tenor of his direct testimony is fresh in their minds, it seems proper enough to hold that the opponent is entitled to this immediate sequence, in order to expose without delay the weak points of the testimony against him.¹ Yet it can hardly be doubted that, upon the general principle of the trial Court's discretion (*ante*, § 1867), a postponement may be granted where fairness seems to require it.² Conversely, the calling party is entitled ordinarily to insist that the cross-examination be had immediately; though here also the trial Court's discretion may postpone it, in part or in whole, at the opponent's request;³ especially since the full significance of the cross-examination can often not be brought out until other witnesses of the calling party have testified. But where the opponent has once entirely waived cross-examination, he may not later claim the privilege without the Court's consent given in discretion.⁴ When there are two or more opponents, the order of their respective cross-examinations must rest with the trial Court to determine.⁵

Where the cross-examiner proves a document by the witness, under the orthodox rule allowing him to put in his own case on cross-examination (*post*, § 1885), it would seem that he ought to be obliged to put it in formally as evidence before closing his cross-examination, so as to enable the calling party to re-examine the witness as to the document,⁶ for reasons much the

¹ 1886, *Frank v. Pringle*, 29 Ala. 467, 461; 1872, *State v. McNinch*, 12 S. C. 89, 95 (the Court allowed the prosecution to withdraw a witness at the close of his direct testimony, because of his intonation, intimating that he could be later recalled for cross-examination; held improper).

² 1886, *Parnell Commission's Proceedings*, 7th day, *Times' Rep.* pt. 2, pp. 48, 66.

³ 1830, *Queen Caroline's Trial*, Linn's ed., 1, 267; s. c., 2 B. & B. 267; 1874, *Hugh v. French*, 1 Ala. 99, 140, 25 Pac. 916 ("The party entitled to cross-examine may waive his right to do so at the time, and recall the witness and cross-examine him after he opens the case").

⁴ 1886, *Chapman v. James*, 26 La. 268, 64 N. W. 796.

For the consequences of a loss of the opportunity to cross-examine, through postponement or through the witness' illness or death, with reference to the inadmissibility of the direct testimony, see *ante*, §§ 1391, 1392.

⁵ 1892, *State v. Howard*, 25 S. C. 197, 14 S. E. 481.

For the rule against using more than one

counsel to cross-examine for the same party, see *ante*, § 783. For the restriction of the length of time of a cross-examination, see *ante*, § 783.

⁶ *Accord*: the statutes cited *ante*, § 1886. *Contra*: 1883, *Holland v. Reeves*, 7 C. & P. 26, 28.

Conversely, the cross-examiner is entitled to put it in then: 1833, *Stephens v. Foster*, 6 C. & P. 200 (paper referred to in cross-examination of a deponent; cross-examiner is entitled to read it as a part of the cross-examination). *Contra*: 1816, *Graham v. Dyster*, 2 Stark 21, 23 (the plaintiff having failed to produce letters on notice from the defendant, the latter was not allowed to cross-examine the plaintiff's witnesses to the contents; such proof being properly reserved till the time when the originals would have been produced); 1817, *Sideways v. Dyson*, 1b. 49 (the plaintiff having refused to produce his books during cross-examination of his own witnesses, the defendant was not allowed to give evidence of their contents at that stage, although the rule was conceded to be "rigorous"); both of these rulings were by L. C. J. Ellenborough.

same as in the case (*ante*, § 1883) of a document proved on direct examination; and the only conceivable (but hardly sufficient) ground for distinction is that in the present case the witness is under the calling party's control and may therefore be kept in court for a prospective re-examination when the cross-examiner shall have later put in the document. Where the document is one containing a *self-contradictory statement used to impeach the witness*, it seems that this result is indeed reached by the rule in *The Queen's Case* (*ante*, §§ 1259).¹

§ 1885. *Putting in One's Own Case on Cross-Examination*: (1) *Orthodox Rule*; (2) *Federal Rule*. The great question that arises as to the scope of the cross-examination is whether the opponent may upon the cross-examination elicit the witness' knowledge as to *facts that constitute part of the opponent's own case*, or whether he is confined to the matters already dealt with in the direct examination or at least to the topics connected therewith.

(1) In England, and in the United States down through the first quarter of the 1800s, there was apparently but one view upon this subject. There seems, indeed, to have been no question at all; so that in English judicial opinions an express statement of the rule is scarcely to be found.¹ That rule — which may be termed the orthodox one — adopted the former of the above alternatives:

1820, *Sutherland, J.*, in *Fulton Bank v. Stafford*, 2 Wend. 483, 485: "When a witness has been sworn in chief, the opposite party may not only cross-examine him in relation to the point which he was called to prove, but he may examine him as to any matter embraced in the issue. He may establish his defence by him without calling any other witnesses. If he is a competent witness to the jury for any purpose, he is so for all purposes."

(2) But in the year 1827, Chief Justice Gibson, of Pennsylvania, in dealing with a related point, chanced to remark (without citing an authority), that, as the ordinary rule, the cross-examining party should not "prove his case by evidence extracted on cross-examination," and also that a witness may not be cross-examined to facts which are "wholly foreign to what he has already testified":

1827, *Gibson, C. J.*, in *Ellmaker v. Buckley*, 16 S. & R. 72, 77: "A witness may not be cross-examined to facts which are wholly foreign to the points in issue (and I would add, to what he has already testified) for the purpose of contradicting him by other evidence. . . . In ordinary cases, the witness may be cross-examined by the party adverse to him whose witness he is at the time, and even then only to discredit him or to bring out something supposed to be withheld; . . . [but this is subject to enlargement in the Court's discretion in special cases], and for myself, I would not without further consideration pronounce the exercise of the discretion, depending as it does on circumstances which cannot be fully made to appear in a court of error, to be a legitimate subject of a bill of exceptions. If, then, a party may not prove his case by evidence extracted on a cross-examination after he has proposed his case to the jury, *a fortiori* he may not do so before."

¹ Compare also the other rules as to documents (*ante*, §§ 1878, 1883), and the rule for showing the document to the opponent (*ante*, § 1861).

² See the English cases applying it, *post*, §§ 1891-1893.

The remarks put forth in this opinion (which were by no means consistent with themselves, and contained the germs of a practice that would have been repudiated by the great Chief Justice) seem to have received no further attention at the time in other Courts. But in 1840, Mr. Justice Story (also speaking *obiter*, and also without citing a single authority) was found to lay down in the Federal Supreme Court a rule of similar purport, though of slightly different phraseology, — a difference, nevertheless, which has served more than anything else to introduce the extreme rule (equally unanticipated by the learned Federal judge) which now prevails in many jurisdictions. This rule — which may be termed the Federal rule, because through Mr. Justice Story's sponsorship it lost its local character and obtained its wide currency — was as follows:

1840, *Story, J., in Philadelphia & T. R. Co. v. Stimpson*, 14 Pet. 448, 461: "[The answers in controversy were inadmissible] upon the broader principle (now well established, although sometimes lost sight of in our loose practice at trials) that a party has no right to cross-examine any witness except as to facts and circumstances connected with the matters stated in his direct examination. If he wishes to examine him to other matters, he must do so by making the witness his own, and calling him as such in the subsequent progress of the cause."

Where the great Federal judge — the most versatile and encyclopedic mind among American jurists — obtained the "settled" rule thus first introduced into circulation, it is difficult to say.² He did not find it in the orthodox and accepted common-law practice either of England or of the United States; for there appear to have been up to that time (except in Pennsylvania) no other rulings to that effect. It is clear that the earlier practice, as ascertainable from prior rulings in half a dozen jurisdictions,³ had been in harmony with the orthodox English practice. It is possible that Mr. Justice Story was merely expounding the Pennsylvania rule, as he was bound to do (*ante*, § 6) for a Federal trial Court sitting in Pennsylvania.⁴ It is also possible, and even probable, that he had in mind a passage, uttered just a hundred years before, in which Lord Hardwicke's recollection, when sitting as Chancellor, of the practice at the common-law bar, is made to serve as authority:

1746, L. C. *Hardwicke*, in *Dean of Ely v. Stewart*, 2 Atk. 44, "laid down the following rule in this cause: . . . Where at law a witness is produced to a single point by the plaintiff or defendant, the adverse party may cross-examine as to the same individual point, but not to any new matter; so in equity, if a great variety of facts and points

² 1874, *Dunne, C. J., in Rush v. French*, 1 Ark. 99, 133, 25 Pac. 816: "We cannot know what the Court meant by saying that the principle involved in the second declaration was 'well settled.' They could not have meant well settled in England, for such had never been the rule there; nor in Massachusetts, Vermont, New York, Ohio, Wisconsin, or Missouri. The one they had in hand was from Pennsylvania, and the rule in that State was, it is true, set-

tled, as the Supreme Court says; but whether they meant that, or that it was settled in the United States circuit court for Pennsylvania, or what they meant, we cannot tell."

³ See the rulings cited *post*, § 1890, in Maryland, Louisiana, Massachusetts, Missouri, New Jersey, New York, North Carolina, South Carolina, and the Federal Court.

⁴ Compare the remark of C. J. Dunne, in note 2, *supra*.

arise, and a plaintiff examines only as to one, the defendant may cross-examine to the same point, but cannot make use of such witness to prove a different fact."⁶

The practice at common law at the time when the Chancellor spoke does not bear him out in his assertion;⁶ nor can his authority to speak of the common-law rule be regarded as weighty, for his experience at that bar had been comparatively scanty.⁷ So far as the practice in chancery may have seemed to Justice Story to have a bearing, it was hardly fitted to come into competition with the common-law rule as a claimant for favor. The rule in chancery was indeed apparently what Lord Hardwicke declared it to be (though, oddly enough, there appears to have been no other ruling than his own during the course of a century).⁸ But the system of cross-examination in chancery had long been notoriously a failure, and was already practically abandoned as a weapon of defence.⁹ It was therefore singular that Justice Story (if indeed he was thinking of the chancery rule) should not merely have deviated without precedent into a practice having in this respect conditions peculiar to itself and differing radically from the common law, but should have gone for guidance to a system of cross-examination which had for a generation or more been stunted and devitalized. In any event, the rule thus presented by him to the country at large must be regarded as a sudden innovation upon the hitherto general and accepted practice of the common law, both in England and in the United States. Whatever its later currency, it came before the profession at that time as an interloper, with all the weight of experience against it. It was bound to justify itself, in reason and in policy. Whether it has done so may now be considered.

§ 1886. *Same: Original Form of the Federal Rule; Trial Court's Discretion; Cross-Examiner's own Affirmative Case excluded.* Before considering the respective policies of these opposing rules, it is necessary to keep in mind that in their original form they were never put forward by their eminent sponsors as anything but rules of customary and normal practice, subject always to the general principle (*ante*, § 1867) that the *trial Court may in its discretion allow exceptions*. Chief Justice Gibson, the very progenitor of the

⁶ The same judge is elsewhere reported as follows: 1743, L. C. Hardwicke, in *Vaillant v. Dodemead*, 2 Atk. 524 (said that "wherever at law the party calls upon his own attorney for a witness, the other side may cross-examine him, but that must be only relative to the same matter, and not as to other points of the cause"; but this is explained easily enough as stating the limited effect of the waiver of the privilege, *post*, § 2324).

⁷ Of the later practice there can be no doubt whatever; see §§ 1891-1893, *post*.

⁸ He was only three years at the common-law bar, then fifteen years at the chancery bar, then Chief Justice of the King's Bench (mainly in criminal cases) for three years; and had been four years Lord Chancellor in 1740.

⁹ Grealey, *Evidence in Equity*, 50, and Daniell, *Chancery Pleading and Practice*, I, 222, cite only this case of *Ely v. Stewart*.

⁹ 1837, Gräley, *Evidence in Equity*, 50, note ("Cross-examination, except on this point [to credit], has fallen very much into disuse"); Plumer, V. C., quoted in Grealey, *ubi supra*, 75 ("The glaring defect in the system of taking evidence in chancery, and that which renders it insufficient for the elucidation of truth, is the total exclusion of anything like an effective cross-examination. Each party is ignorant, not only of what the witnesses on the other side have said, but of what they have been asked. In such total darkness, a cross-examination is seldom attempted; the most experienced practitioners, I believe, recommend it only in cases where the witness is one whom it would be necessary or prudent to have examined in chief; . . . [this] leaves the examination in Chancery a mere *ex parte* proceeding, and little better than evidence by affidavit"). Compare the authorities cited *ante*, § 1867.

Federal rule, declared radically that he "would not without further consideration pronounce the exercise of the discretion, depending as it does upon circumstances which cannot be fully made to appear in a court of error, to be a legitimate subject of a bill of exceptions." In the Pennsylvania and the Federal Supreme Courts — the two most notably associated with this rule — this controlling principle of discretion has from time to time been expressly emphasized.¹ In this pure form of these rules, then, the supposed disadvantages, which have been by the champions of either put forward as marking the enforcement of the other rule in extreme cases, are reduced to a minimum, and may often be practically inconsiderable. The trial Court's discretion is intended to give a flexibility that will obviate these occasional disadvantages. Thus the only question of controversy that would properly have remained would be whether the one or the other is better suited to be the foundation for the usual (not the necessary or invariable) order of evidence. But unfortunately this same qualification, always assumed by the inventors of the rule as an inseparable part of it, has usually been lost sight of by their followers, — at least among the adherents of the Federal rule. While seldom expressly denying the principle of discretion, they have come practically to ignore it. By ignoring it, they have reduced the rule itself to a fixed and deadened formula; and they have thus emphasized and made actual and frequent the possibilities of practical harm which were otherwise only latent in it. In considering, therefore, the policy of the Federal rule as actually administered by most of the Courts adhering to it, account must be taken of the drawbacks which attend its actual workings in this extreme form, even though they were not inherent in the rule as originally advanced and correctly applied.

Furthermore, the rule has suffered degeneration in another respect, in the hands of most of its modern adherents. For it would seem that both of the eminent judges, Gibson and Story, who promulgated it, understood it to exclude only the putting in of the opponent's *own case*, i. e. the new facts constituting his affirmative defence (whether strictly appropriate to an affirmative plea or not); yet their language made it possible for their followers to forbid an examination to anything but the *precise matters testified by the witness on the direct examination*, even to matters which properly concerned the calling party's own case under the allegations of his pleading. This extreme interpretation of the rule has also led to the emphasizing of special disadvantages, which must be reckoned with in weighing the respective policies of the two rules as actually administered. The arguments against the Federal rule (set forth *post*, § 1888) are both entitled and obliged to deal with it in the degenerate form in which to-day it is practised in most of its jurisdictions.

§ 1887. *Same: Policy of the Federal Rule.* The Federal rule has labored under one notable disadvantage, namely, it has never found, among judges of accepted eminence, a single defender other than its progenitor, Chief Justice Gibson. In searching the reasons upon which the rule is supposed to be

¹ See the citations *post*, § 1888.

founded, attention is attracted by the circumstance that the greatest names are found as expositors of the reasons against the rule. The best that can be said on behalf of the rule seems to be contained in the following passages:

1848, *Gibson, C. J.*, in *Floyd v. Beaman*, 16 W. & S. 75, 76: "The difficulty is to find a reason for those English decisions which hold the party to a different course, and allow the witness to be cross-examined to every transaction within his knowledge in the hands of the party who is first compelled to call him. This would seem to be foreign to the end of a cross-examination, which is not to give the party an advantage in the manner of introducing the facts of his case; but to test the credibility of the witness as to what he has testified; . . . and I may add that to reward a party with the privilege of putting leading questions for bringing forward a branch of his case out of order would reward him for throwing the cause into confusion. Where the testimony of a witness is required to establish a fact which is part of the defence, it is a dictate of justice that no advantage be given to either party in the manner of eliciting it. But an advantage is in truth given, and for no adequate reason, when a party is allowed to bring out his part of the case by cross-examination, merely because the opposite party had been compelled to call the witness in the first instance. . . . It would be better to say that each party should call the witness to serve his turn, and make him his own for the time being, than to entangle the justice of the case in those distinctions with which the English judges have surrounded it. A plaintiff may be compelled to call the defendant's principal witness to some matter of formal proof, and it is easy to see that the justice of the case would not be promoted by allowing the defendant for that reason to break in on the plaintiff's order of proof by introducing his defence and eliciting the testimony in support of it by leading questions."

1856, *Bacon, J.*, in *People v. Horton*, 4 Mich. 67, 82: "It is certainly desirable not to mingle up and thus confuse the testimony of the opposing parties. If the plaintiff first presents all his testimony which he considers necessary to support his case, without allowing the defendant at the same time to offer a part or all of the testimony upon which he relies, and then the defendant presents the evidence which properly pertains to his defence, the line of separation is well kept up. No confusion is likely to follow; and the jury, if there be one, will be less likely to fall into mistakes or to overlook material facts. Nor do we see any objection whatever to this rule. It certainly tends to promote method and order, — two cardinal points in presenting evidence to a judge. The rule merely regulates the manner of the examination. The party loses no rights; he only postpones the time of introducing his witnesses."

1856, *Hendy, J.*, in *Mack v. State*, 32 Miss. 405, 480: "I consider this latter [or Federal] rule as founded on the sounder reason and as establishing the better practice. Cross-examination, *ex vi termini*, must relate to what has been stated by the witness on his examination in chief, and it could not properly be denominated cross-examination when it extended to new matter, about which the witness had given no testimony. Suppose the first witness introduced by the plaintiff testifies only to an isolated fact, as, for example, the execution of a document relied on by the plaintiff as evidence; would it be competent for the defendant to anticipate the merits of the case to be developed by the plaintiff, and, by way of cross-examination, to examine the witness as to matters which he supposed to be involved in establishing the plaintiff's case, and go into the merits of the whole case? Such a course would scarcely be sanctioned or tolerated by any court. And why? Because it would tend to subvert the regular order of presenting the case, and lead to confusion. . . . The same principle which governs the pleadings between the parties should regulate the exhibition of the proof upon the trial; and as each pleading should be strictly in answer to that to which it applies, so the cross-examination of each witness should be confined to the matter testified to in his examination in chief, in order to produce certainty and distinctness in ascertaining the facts to be proved. This course, while it is sanctioned by the rules of logical proceeding, can be productive of no prejudice to a party desiring to prove by the witness other matters than such as are embraced in

the examination in chief; for it is well settled that he may, afterwards, introduce him as his own witness, to prove any matters pertinent to the merits of the case, and that the adverse party having called him, is thereby precluded from objecting to his competency, or from impeaching his credibility. It is no just objection to this view of the subject, that the party against whom the witness is originally called should not be compelled to introduce him as his own witness to the new matter, and thereby preclude himself from impeaching his credit. For if he would rely upon the new matter proved by the witness, it would be against his interest to impeach him; and it is to be presumed that if he wished to impeach him, he would not introduce him to prove material facts in his case."

1884, *Walker, C. J., in Stafford v. Fargo*, 35 Ill. 481, 486: "[The opponent] has only the right to cross-examine upon the facts to which he [the witness] testified in chief. If he can give evidence beneficial to the other party, he should call him at the proper time and make him his own witness and examine him in chief, thereby giving the other party the benefit of a cross-examination on such evidence in chief. Otherwise the party calling the witness would be deprived of a cross-examination as to evidence called out by the other side, and the party against whom the witness was first called would obtain the advantage of getting evidence under the latitude allowed in cross-examination."

These reasons suggest the following comments: (a) A reason advanced by Chief Justice Gibson is that it is "*foreign to the end of cross-examination* . . . to allow the witness to be cross-examined to every transaction within his knowledge." This, however, is a mere begging of the very question at issue. Furthermore, the general nature of the common-law arrangement of examinations (*ante*, § 1882) suggests precisely the contrary, namely, that the function of cross-examination is to exhaust the witness' knowledge on all points on which he has any that is relevant to the trial. A much more natural assumption is the one made by the judges later quoted (*post*, § 1887),¹ namely, that the "primary obligation of the oath is to elicit the whole truth."

(b) Another reason put forward is that this rule "tends to *promote order and method*." If by this be meant that the rule is in theory more orderly, in that it aims to keep the facts of the opponent's case from confusing the jury and complicating the proceedings until the proponent has fully set forth his own case, this much may be conceded for the rule in its pure form,² although in its usual form there is not even the semblance of such a scientific demarcation, since the rule turns on whatever line of facts the proponent may have chosen to take up in the direct examination. But if it be meant that simplicity is actually attained and that confusion is in fact avoided, the precise contrary has been shown by experience.

(c) Another suggested reason is that the *calling party otherwise loses the benefit of cross-examination* on the facts forming part of the opponent's case. But why should he not lose the benefit of cross-examination? He has called the witness, and the sole purpose of cross-examination (*ante*, § 1368) is to

¹ For example, Mr. J. McIver and Mr. J. Campbell.

² Even this reason would substantially disappear if sanction were given to the recent notable proposal of an experienced judge of the New York Supreme Court, Mr. Justice Levenson (The *Brief*, vol. II, p. 220, June, 1900),

namely, that the defendant be allowed a concise opening statement of his case in opposition, immediately after the plaintiff's opening. Moreover, this reason hardly applies at all to a plaintiff's cross-examination of a defendant's witness.

enable the non-calling party to bring out facts ignored or suppressed by the calling party's examination. By direct examination and by re-direct examination the calling party may bring out any fact whatever that assists his case. The notion that he has any need for a cross-examination is simply unfounded. The re-direct examination is for him a cross-examination to all intents and purposes.

(d) A fourth reason, and the one most frequently reiterated, is the apprehension that "if a defendant could make out his case on cross-examination, he might employ *leading questions* for the purpose." This is indeed a lamentable bugbear; for it is purely the creature of imagination. The adoption of the Federal rule will not of itself muzzle the opponent and stifle his obnoxious leading questions; for it is clear (*ante*, § 773) that he may ask them in any event. The prohibition of leading questions is designed to prevent a willing witness from accepting the suggestions put into his mouth by counsel; it applies, therefore, *prima facie*, to the counsel of the calling party, and it does not apply, *prima facie*, to the cross-examining party (*ante*, § 769). The rule as to asking about one's own case on cross-examination is purely a matter of the order of presenting facts. But the rule as to leading questions concerns the partisan disposition of the individual witness, and depends on the supposed willingness of a partisan witness to assist his party. Thus the rule exceptionally may be relaxed if the witness appears hostile to the calling party, and exceptionally may be enforced if he appears eager to befriend the cross-examining party (*ante*, §§ 773, 774). Its criterion is solely the individual witness' state of mind,—not the kind of fact that is to be asked, nor the stage of asking. The very same fact may be asked of witness Doe on cross-examination by a question leading in form, but may not be asked of witness Roe in that form. It is therefore a complete misconception of the principle of leading questions to suppose that the use of leading questions on cross-examination furnishes any objection to the opponent's asking at that stage about the facts of his own case, or that it supplies any reason for favoring the calling party by forcing the cross-examiner to call the witness again so that the former may ask leading questions. If the witness is hostile to the opponent, he should be and would be allowed to put his questions in leading form whether he asked them on cross-examination or whether he called the witness anew at a later stage; and conversely, if the witness is hostile to the original calling party, the opponent should not and could not ask leading questions any the more on this cross-examination than on a direct examination at a later stage. This objection, then, may be dismissed as founded on a fallacy.³

(e) Another objection, analogous to the preceding one, but less often mentioned, is that, but for this Federal rule, the cross-examining party could, on cross-examination or otherwise, *impeach the witness* through whom the facts of his own case are thus proved, though he could not do so if he had been compelled to call him for the purpose at a later stage. But, again, the question

³ See its appearance in a practical form, *ante*, § 915 (impeaching one's own witness).

occurs. Why should he not? The cross-examiner has not called the witness, nor, by calling, represented him as worthy of credit (*ante*, § 896). Why should he not expose his lack of credit, while at the same time utilizing the testimony in his favor for what it may be worth? Furthermore, the opponent, even after calling the witness himself, may still show his specific falsities (*ante*, § 907) and probably his self-contradictions (*ante*, § 905); and thus but little of real service has been accomplished. The appearance in this connection of the unreasoning and ill-deserving rule against impeaching one's own witness is merely another illustration (*ante*, § 899) of its power to make disturbance and confusion without profit to any one.

§ 1888. *Same*; *Policy of the Orthodox Rule*. The Federal rule was introduced by two great judges into a system of practice which had apparently up to that time known it not. On the names of those judges, however, it speedily was carried into favor in many Courts.¹ Its original attraction to its propounders lay probably in its apparently scientific allotment of *summae* in the presentation of the respective cases. But it remained to be tested by experience and to be compared in operation with the original and orthodox rule. Within a generation it had ample opportunity for this test; and its practical weaknesses soon became apparent enough. In the following passages will be found the expositions of these defects as noted in experience by some of the most eminent names in the law of Evidence, as well as some *a priori* suggestions, shrewd in their prophetic tenor, by judges who wrote before the Federal rule had been promulgated or had obtained any footing. The names of Shaw, Bigelow, Martin, Campbell, Christiancy, and Cooley form a brilliant list; and the weight of their opinions counts heavily against an unfortunate rule which has threatened to dominate our entire system of practice:

1808, *Per Curiam*, in *Sawrey v. Murrell*, 2 Hayw. 397: "It would be a very dangerous consequence if when produced by the plaintiff the defendant could not interrogate the witness except as to the facts which she had deposed for the plaintiff; for then all distinct facts within her knowledge, however much they would operate for the benefit of the defendant if brought out, must remain undrawn from the witness, for fear of the defendant's being precluded from the advantage of proving her want of credit."

1811, *Martin, J.*, in *Dunford v. Clark*, 1 Mart. La. 202 (on Lord Hardwicke's opinion, *supra*, being cited): "I have never known this practice to prevail, and I cannot on this dictum set the verdict of the jury aside. It must be understood as a rule of discipline, introduced for the purpose of preserving regularity in the admission of testimony. Every witness must be sworn to tell the whole truth; and if the defendant is not allowed to examine the plaintiff's witness at first to any point material to the defence, he has certainly a right to call back the witness and examine him while introducing his own testimony. If therefore the defendant's counsel in the present case might at any [*i. e.* some] stage of the trial have compelled the witness to disclose the fact which has been

¹ Professor Greenleaf's treatise appeared in 1842, two years after Mr. J. Story's opinion was rendered; and no doubt the former's treatise served as an efficient medium for propagating the latter's rule. "The rule is now considered by the Supreme Court of the United States to be well established," is its language (§ 445);

and yet the author was unable to cite a single other authority than the rulings of *Floyd v. Bovard* and *Phila. & T. R. Co. v. Stimpson*. Thus the great judge's name and the author's reverence for his opinion (the treatise was dedicated to him) combined to manufacture the rule almost out of whole cloth.

drawn during the cross-examination, no injury has been done to the plaintiff by obtaining this part of the evidence a little earlier than in the regular way."

1885, *Shaw, C. J.*, in *Moody v. Rosell*, 17 Pick. 490, 499: "Where a witness is called to a particular fact, he is a witness to all purposes, and may be fully cross-examined to the whole case. . . . It is most desirable that rules of general practice, of so much importance and of such frequent recurrence, should be as few, simple, and practical as possible, and that distinctions should not be multiplied without good cause. It would be often difficult, in a long and complicated examination, to decide whether a question applies wholly to new matter or to matter already examined to in chief."

1884, *Bigelow, J.*, in *Beal v. Nichols*, 2 Gray 262, 264: "A party calling a witness, even for formal proof of a written instrument or other preliminary matter, thereby makes him his witness. . . . It follows that the adverse party has the right to cross-examine upon all matters material to the issue. Experience has shown that this rule is convenient and easy of application in practice, and works no disadvantage to the party who produces a witness. On the other hand, a different rule, by making it necessary for the Court during the examination of a witness constantly to determine what is or is not new matter upon which the opposite party has the right to put leading questions, leads to confusion and delay in the progress of trials."

1861, *Messrs. Douglass, Fenton, Sutherland, and Avery*, arguing in *Cumpey v. Dewey*, 9 Mich. 381: "In our judgment it [the English rule] is the only rule which leaves the course of cross-examination sufficiently free and unobstructed to make it effective for the attainment of truth in respect to the matters in controversy. The rule laid down in *People v. Horton* [quoted *supra*, § 1887], however plausible in theory, is exceedingly mischievous in practice. It is altogether too nice and refined for practical application. Under it, in most litigated cases, questions of relevancy, often of the most difficult and perplexing nature, are perpetually springing up during the progress of the trial, occupying the time of the Court, and distracting the jury with their discussion; and each of these questions must be decided by the presiding judge upon the spot, at the peril of a reversal of the judgment, to the great injury of the party if, from misrecollection of the witness' testimony in chief, misapprehension of the nature of the issue, or any other cause, he commits an error, although the error, if in the way of overruling an objection, in most instances works no practical injustice. But this is not all. The worst effect of the rule is that it greatly impairs the efficiency of cross-examination. If there are any evils in the practical working of the English rule of sufficient magnitude to call for its modification or abandonment, they are all avoided, as well as the evils of the rule laid down in *People v. Horton*, by adopting the rule that whether a party shall be allowed to cross-examine his adversary's witness as to the whole case, or by leading questions, rests in the sound discretion of the Court."

1861, *Christiancy, J.*, in *Cumpey v. Dewey*, 9 Mich. 381, 417: "[1] When a witness is called and examined by a party, the law and the oath impose the obligation to state the whole truth, — all the facts within the knowledge of the witness bearing upon the question in controversy upon which his testimony is sought. The witness may be cognizant of some facts which, considered without reference to others equally within his knowledge, would tend strongly to prove the issue in favor of the party calling him; while at the same time there may be other facts equally within his knowledge, which, considered without reference to the former, would have an opposite tendency, or which, considered in connection with them, would explain away or modify the former and give a very different effect to the whole. Should a witness in such a case disclose only that class of facts which operated in favor of the party calling him, his testimony, though true in the detail, would be false in the aggregate, and have all the effect of intentional falsehood; and, if aware of the nature of the controversy in which he is called to testify, he would be guilty of perjury as much as if he had wilfully falsified the facts stated by him; and this whether he were cross-examined or not. It is the disclosure of the facts known to the witness (bearing on the issue) as a whole which the law seeks; and a direct examination

which should be perfectly fair would in such a case disclose both classes of facts and present the witness' knowledge as a whole. But the party calling the witness may so skilfully direct the examination in chief as to disclose only that class of facts which tend to establish the issue in his favor and to conceal those which would destroy or modify their effect. And as Courts, from their ignorance of the extent of the witness' knowledge and of the plan arranged by the party calling him, have no means of enforcing the perfect fairness of a direct examination, the law has given to the opposite party the right to cross-examine the witness, for the purpose, among others, of bringing out the facts thus concealed, which tend to explain away or modify the effect of those stated on the direct examination or to rebut the inference which would otherwise result from them. . . . Such I think are the purely logical principles of cross-examination. . . . But there are many objections to the rule as applied in *People v. Horton*. [2] It impairs the efficiency of cross-examination as a means of detecting error and exposing falsehood, and renders it comparatively easy for a corrupt party, by the aid of corrupt witnesses, to fabricate fictitious cases without the risk of impeachment, compelling the opposite party to make the witness his own as to facts which might tend to modify the effect of his evidence; thus precluding the power of impeachment. [3] It tends to break up into detached and widely separated fragments the state of facts within the knowledge of the witness bearing upon the same main point, and which would be much better understood if stated as one connected whole. The testimony of other (and perhaps many other) witnesses intervening between the parts of the witness' testimony, the jury are more likely to confound the testimony of one witness with that of another. The bearing of the different parts of the witness' testimony upon each other, and any discrepancies which may exist, are not so easily discovered, and consequently the credit of the witness is not so correctly estimated. [4] But there is a practical difficulty in the application of this rule (as understood in *People v. Horton*), inherent in the rule itself, and which can only be avoided by getting rid of the rule as there applied. It adopts, as the test of the relevancy of a cross-examination, the bearing of the particular facts sought to be elicited by it upon the particular facts brought out on the direct examination; instead of the main fact or facts which these particular facts tend to prove; and as these particular facts are often very numerous, and their number and character incapable of restriction, and the question of relevancy may arise upon any two of them, and as the degree of relation between them may be as numerous and varied as the facts themselves, it is easy to see that questions of this kind must be constantly arising, till the case bristles with points of relevancy. The rule therefore leads to almost infinite embarrassment; and it must and often does require more time to dispose of these questions of relevancy (under this rule thus understood) than would otherwise be required for the trial of the case."

1862, *Campbell, J.*, in *Chandler v. Allison*, 10 Mich. 477: "The only object of this process is to elicit the whole truth concerning transactions which may be supposed to have been only partially explained, and where the whole truth would represent them in a different light. Whenever an entire transaction is in issue, evidence which conceals a part of it is defective, and does not comply with the primary obligation of the oath, which is designed to elicit the whole truth. If the witness were (as he always may be) requested to state what he knows about it, he would not do his duty by designedly stopping short of it. Any question which fills up his omissions, whether designed or accidental, is legitimate and proper on cross-examination. . . . A party cannot glean out certain parts, which alone would make out a false account, and save his own witness from the sifting process by which only those omissions can be detected. There could be no such thing as cross-examination if such a course were allowed. . . . No one can be compelled to make his adversary's witness his own to explain or fill up a transaction he has partially explained already."

1878, *Cooley, J.*, in *New York Iron Mine v. Niagara Bank*, 30 Mich. 644, 650 (after quoting Mr. J. Campbell's words *supra*): "One might suppose, after reading this lan-

guage, that it was written in anticipation of the proceedings in this very case. . . . Here the matter in issue was confined to the single point of Wetmore's authority to make and indorse the paper read upon.⁶ . . . But although he was the first witness called, and the case involved nothing but paper made or indorsed by himself, he was not asked respecting his signatures, and the notes were not offered in evidence while he was upon the stand. The reason for this was apparent as soon as the cross-examination commenced; for when the witness was asked any questions concerning the notes, the purpose of which was to show that he had signed or indorsed them without authority and in fraud of defendant, and that he had admitted that such was the fact, objection was at once interposed on behalf of the plaintiff; and the circuit judge, remarking that the witness had given no testimony in reference to the notes nor had any testimony been introduced by any other party in reference to them nor had the notes been put in evidence, sustained the objection. The questions on behalf of the plaintiff had been carefully restricted to that part of the facts which it was supposed would tend in its favor, and in respect to which a cross-examination could not be damaging, and were intended, instead of eliciting the whole truth, to conceal whatever would favor the defense. The witness, instead of being required, according to the obligation of his oath, to tell the whole truth, had been carefully limited to something less than the whole; and when questions were asked calculated to supply his omissions, they were ruled out because they did not relate to the precise circumstances which the plaintiff had thought it for his interest to call out. It would be difficult to present a more striking illustration of the error in the rule in *People v. Horton* than is afforded by this case. For here was the principal actor in the transaction under investigation brought forward as a witness to support his own acts, but carefully examined in such a manner as to avoid having him utter a single word regarding the main fact — though it was peculiarly within his own knowledge — and even his handwriting was left to be proved by another. In that manner he was made to conceal not merely a part of the transaction but a principal part, and made to tell, not the whole truth according to the obligation of his oath, but a small fraction only, — a fraction, too, that was important only as it bore upon the main fact which was so carefully kept out of sight while this witness was giving his evidence. It is true, the defense was at liberty to call the witness subsequently; but this is no answer; the defense was not compellable to give credit to the plaintiff's witness as its own for the purposes of an explanation of facts constituting the plaintiff's case and a part of which the plaintiff had put before the jury when examining him. One of the mischiefs of the rule in *People v. Horton* was that it encouraged a practice not favorable to justice, whereby a party was compelled to make an unfriendly witness his own, after the party calling him had managed to present a one-sided and essentially false account of the facts, by artfully aiding the witness to give such glimpses of the truth only as would favor his own side of the issue. What has been said on this point has in substance been said many times before. The necessity of repeating it is a singular illustration of the difficulty with which a mischievous but plausible precedent is sometimes got rid of."⁷

The chief objections to the Federal rule may be summarized as three in number; and although these apply in aggravated degree to its degenerate form only, and not to its original and pure form, nevertheless, as already suggested (*ante*, § 1896), the rule must be reckoned with as it usually is applied, and not as it might be. (1) The necessity of determining, for each question on cross-examination, whether the fact inquired for is properly a part of the case of one or the other party produces delay, propagates confusion, and increases the opportunities for securing a re-trial on trifling errors of ruling which do

⁶ The next two sentences are for clearness' sake transferred here from the preceding page of the opinion.

⁷ In *Detroit & M. R. Co. v. van Steinberg*, 17 Mich. 99, 109, the same judge had forcibly expounded the evils of the rule here repudiated.

not affect the merits of the cause or the truth of the facts. Even under a strict system of pleading, this possibility is great; but under the prevailing loose system of pleading they are legion. Moreover, under the degenerate form of the rule (*ante*, § 1886), not even the rules of pleading can furnish a guide; the line of distinction changes with every witness, it is both variable and uncertain; and it requires either an impossible feat of memory or a constant perusal of a stenographic report to ascertain the standard of decision. These are caused additional labor in preparation for trial, delay and confusion in its progress, and an increased contingency that the work must be done over again at a new trial. (2) The opportunities for successful unfair tactics are increased, by enabling the calling party to suppress part of the facts, so as to oblige the cross-examiner to call the witness later as his own.⁴ The latter's right to do this is for him usually no just equivalent; first, because the proper time to extract the desired facts effectively is the time immediately after the direct examination; and, secondly, because with a hostile witness it is often dangerous, if not impossible, to attempt to obtain the facts fully at the later stage. The result is (as the calling party hopes) often to prevent the cross-examiner from obtaining the desired facts at all, because he does not feel justified in risking the exercise of his right to call the witness subsequently; and this evil is the more emphasized where the witness is himself the party opposed to the cross-examiner. (3) It hampers the cross-examiner subjectively in exercising the fundamental right of cross-examination; because, in many jurisdictions following this rule, the erratic corollary is enforced that, by asking about his own case on cross-examination, the opposing party makes the witness his own and therefore becomes unable to discredit him (*ante*, § 914); the consequence being that the cross-examiner feels himself in constant danger of overstepping the line and losing his right to expose a false witness, and thus is obliged to leave a large margin for safety. That this produces an unnecessary labor and responsibility, and has inevitably a dulling effect upon what should be the sharp weapon of cross-examination, must be apparent. In this respect the rule has a vicious indirect effect in helping to disarm the opponent of his greatest protection against fraud and perjury. A perusal of some of the modern rulings enforcing this pedantic application discloses better than anything else the degenerate and pettifogging influence of the rule in question.

These objections, together with other minor ones noted by the various judges, ought to be enough to stem the progress of this rule. In its two generations of existence it has gone into many Courts; but in most of these it is not too late to turn, — if not to repudiate the rule, at least to revise and restore it to its original and pure form. It was accepted in almost every instance merely upon authority, and under the belief that it was, in the eminent jurist's language, "well established." Since the test of experience has passed, few have been found to defend it; nor can it be successfully defended. It

⁴ Particularly in the case of an accused offering himself as a witness; see the citations *post*, § 1869.

has sometimes been called the American rule. It is not yet entitled to that name, and it is to be hoped that it never will be.

§ 1889. *Same: (3) Michigan Rule: Cross-examination to Facts Modifying the Direct Examination.* It has already been noted (*ante*, § 1886) that, so far as the Federal rule has any claim to scientific orderliness, it rests on the assumption that to each party is apportioned a stage of the trial for the presentation of the facts supporting his own case, and that it is proper for him to present the evidence of those facts in that stage only. Hence, the extent of the prohibition, as it affects the cross-examiner, is limited to those facts which would have formed a part of his own affirmative case at a later stage. In this, the pure and only plausible form of the rule, the cross-examiner may still inquire as to all facts which *modify or explain away the effect of the facts brought out on the direct examination*; and the prohibition applies only to his own affirmative case, since the former class of facts would not in themselves be a part of the cross-examiner's own case. This form of the rule is still open to the first and perhaps other objections already noted (*ante*, § 1880). But unfortunately the originating words of Justice Story and of Chief Justice Gibson (quoted *ante*, § 1885), prohibiting all except "facts connected with the matters stated in his direct examination," gave to the rule a much broader and a wholly unscientific form. In the result (contrary, perhaps, to their real expectations) the latter form, based upon their literal expressions, came to be accepted in most of the Courts following their rule, producing in its application the most serious of the disadvantages latent in it. Against this degenerate form and its practical results, a number of Courts have earnestly protested. These have striven, while accepting the rule, to enforce it in its pure and only defensible form, and to diminish its rigor by a generous interpretation. There is a difficulty in defining the line of distinction, especially under a loose system of pleading; but the general purpose and theory is plain enough. This form of the rule may be termed the Michigan rule, since the Court of Michigan has not only most fully expounded it but has by its sound exposition done particular service in arresting the progress of the inferior form:

1861, *Christeney, J.*, in *Compton v. Doney*, 9 Mich. 361, 419: "It is further essential to the development of the true logical idea of cross-examination to observe that it is the tendency of the direct examination which determines the subject of it of a test of cross-examination. For example, it is that essential or ultimate fact in the plaintiff's case which determines the logical limits of the cross-examination, and not merely the particular minor facts and circumstances tending to the proof of that fact. As the plaintiff is at liberty to adduce any number of these particular or secondary facts, however disconnected with each other, so that they tend to the proof of the essential resultant fact which he is bound to establish; so must the defendant be equally entitled on cross-examination to elicit any number of such particular facts as may tend to disprove that resultant fact or to weaken the tendency in its favor of the particular facts stated on the direct examination.¹ . . . But these remarks must be confined to such facts on cross-examination as go to controvert so much of the plaintiff's case as the direct testimony tended to prove. The party against whom the witness is called has no right (and, I think, should not have,

¹ The next two sentences are here inserted from the preceding page of the opinion.

under any rule) on cross-examination to go into an independent or affirmative case on his own part, which does not controvert the *prima facie* case which the direct testimony tended to prove, but seeks to meet it by matter substantially in the nature of confusion and evidence; as to the facts constituting such a defense, the onus of proof is on the defendant. And where two or more main facts are essential to the plaintiff's *prima facie* case, such as the title of the plaintiff and conversion by the defendant in trover, and the direct examination has been confined to matters tending only to the proof of one of these main facts, the defendant should not be allowed to cross-examine as to the other;³ as this would have no relation to the evidence in chief, and could not therefore in any logical sense be denominated a cross-examination. Such, I think, are the purely logical principles of a cross-examination. To apply these principles to the case before us. The main question in controversy was the identity of the person under whom the plaintiffs claimed with the person described in the treaty by the name of Tancumagoqua. The burden of proving this identity rested with the plaintiffs throughout the case. This fact was proper to constitute a *prima facie* case for the plaintiffs, and without it the defendants needed no defense. It was a fact, then, which belonged to the plaintiffs', not the defendants' case. . . . From the peculiar nature of the question, anything which tended to show some other person was the reserve intended by the treaty would also tend to show that the person under whom the plaintiffs claimed was not. It is therefore a mistake to suppose that this could only be shown for the purpose of proving title in the defendants; it would defeat the title of the plaintiffs, and this was all that the defendants were required to do; [and questions as to the provenance at the treaty-making of another person of the same name were proper on cross-examination]."

1862, Campbell, J., in *Chandler v. Allison*, 10 Mich. 460, 477: "The principal point in controversy was whether Allison had an unqualified present interest as a tenant of Chandler. That he was a tenant was conceded, and the only point in issue on that subject was whether, under the terms of his holding, Chandler had a right to require him to leave, in order to rebuild upon the premises. The questions put to the witness [Allison, the plaintiff, testifying for himself in an action of trespass against Chandler for expelling him,] were aimed at ascertaining the precise terms of the letting. . . . It is difficult to perceive any principle upon which such questions can be held improper on cross-examination. The only object of this process is to elicit the whole truth concerning transactions which may be supposed to have been only partially explained, and where the whole truth would present them in a different light. Whenever an entire transaction is in issue, evidence which conceals a part of it is defective, and does not comply with the primary obligation of the oath, which is designed to elicit the whole transaction. . . . When the answers are given, the nature and extent of the transaction becomes known from a comparison of the whole, and each fact material to a comprehension of the rest is equally important and pertinent."

1874, *Ruel v. French*, 1 Ariz. 96, 124, 133, 139, 25 Pac. 616, the following rule was laid down by the majority, per Garber, J.: "1. When an adverse witness has testified to any point material to the party calling him, he may then and there be fully cross-examined and led by the adverse party upon all matters pertinent to the case of the party calling him, except exclusively new matter; and nothing shall be deemed new matter except it be such as could not be given under a general denial; 2. The fact that evidence called forth by a legitimate cross-examination happens also to sustain a cross-action or counterclaim affords no reason why it should be excluded"; upon this the following comments were made by Dunne, C. J.: "[The rule as stated by Justice Story] is very broad; it covers an inquiry into 'all the facts and circumstances connected with the matter stated

³ Notice that this sentence represents a qualification or sub-variety of the foregoing proposition; and is lacking in some statements of the rule, e.g. in *Ruel v. French*, post. It embodies the really vicious feature of the inferior practice,

namely, making the rule depend not on the nature of the issues under the pleadings, but on the topics which the direct examiner has pleased to mention in his questions.

in the direct examination.' But while it is broad, it is also uncertain, and uncertainty is almost the greatest defect a rule can have. Whatever may be urged against the English rule, it cannot be charged with uncertainty. It possesses certainty even to my lord Coke's celebrated third degree. There is little danger of trenching upon its limitations; for it is practically without any. We do not wonder that it is popular with judges; for it relieves them of all anxiety upon one of the most intricate and delicate branches of their duty. But it seems very hard that a party may be allowed to set up new matter in defense and draw the proof to support it out of the plaintiff's witnesses by cross-examination; doubtless it is the apprehended hardship of this part of the rule which has tempted Courts to depart from it. But whenever they have done so, and have failed to adopt some other definite rule, great trouble and difficulty have followed. . . . We have only one objection to the [Federal] rule as stated by Judge Garber [being in substance the rule quoted *supra*], and that is the difficulty of applying it with certainty in the hurry of *nisi prius* trials. The test as to whether matter is or is not new matter of defense is, Can it be given in evidence under a general denial? and very often it is not easy to say at a moment's notice whether the matter is new or not in this sense. The rule would hardly forward business on the trial; there would be the same objection by counsel as to admissibility, the same consumption of time in argument, and the same hesitation on the part of the Court to decide. But there is this advantage [over the looser form of the Federal rule]: after the trial is over, all parties know just what is necessary to determine whether an appeal will lie or not; they know where the line is drawn; they can look for it, and when they find it they know that they have struck 'wall rock,' and that it is useless to go further; this is a great deal better than trusting to some other man's idea of the general equities of the case. Still, it is a very poor substitute for the plain, simple, English rule, which avoids all possibility of dispute, saves all contention at the trial, dispatches the business at once, and yet, according to the testimony of our oldest and wisest State, hurts nobody."

1881, *Brewer, J., in Blake v. Powell*, 26 Kan. 320, 326: "A cross-examination is not limited to the very day and exact fact named in the direct examination. It may extend to other matters which limit, qualify, or explain the facts stated on the direct examination, or modify the inferences deducible therefrom, providing only that such matters are directly connected with the facts testified to in chief."

§ 1890. *Same: State of the Law in the Various Jurisdictions.* 1. With reference to the *discretionary power of the trial Court* to allow variations from the customary order, it is clear (*ante*, §§ 1867, 1885, 1886) that this is an inherent assumption in each rule as properly understood. The Courts following the orthodox rule seldom forget this; and the Courts in which the Federal rule originated (Pennsylvania and the Federal Court) are still found recognizing it fully, and declining ordinarily to consider as an error any variation sanctioned by the trial Court. But in many of the Courts following the latter rule the qualification as to discretion is usually ignored, and the rule is enforced in its most bigoted form.

2. With reference to the *customary scope of the facts* that may be sought on cross-examination, the inferior form of the Federal rule is found now applied in the majority of jurisdictions. In a large minority the orthodox rule prevails. In a small minority (notably Michigan and California) the better form of the Federal rule (termed above the Michigan rule) is carefully enforced. As between the two forms of the Federal rule it is sometimes difficult to ascertain which has been adopted, and there are sub-varieties of it. As applied to the *party-opponent* testifying in a civil case, the extreme

rule is apt to be modified;¹ as applied to an *accused* taking the stand in his own favor, the rule is often attempted to be juggled with,² and is also subject to confusion with other principles to be later discriminated (*post*, § 1895).³

¹ Compare the cases cited *ante*, § 916.

² Compare the rulings in California and Missouri, intended to prevent this. As applied to an *accused* the rule is particularly absurd, because the prosecution cannot call him as its own witness.

³ The rulings in the various jurisdictions are as follows; but for an *accused* or a civil opponent as witness the rulings are sometimes affected by the statutes quoted *ante*, § 488 (making parties competent), and the rulings as to an *accused's* waiver of privilege against self-crimination (*post*, § 2376) are sometimes not to be distinguished from those under the present rule: ENGLAND (the cases are cited *post*, §§ 1891-1898).

CANADA: *British Columbia*: BR. 1903, c. 22, § 6 ("in cross-examination questions may be asked with regard to any matter referred to in the evidence of the witness while under examination in chief"); *New Brunswick*: 1859, *Athinson v. Smith*, 4 ALL. 300 (defendant not allowed to cross-examine to an affirmative defense; good opinion by Parker, J.); 1870, *Fredrickson Boom Co. v. McPherson*, 2 HAN. 9 (defendant allowed to prove payment on cross-examination, but not a set-off); 1870, *Gilbert v. Campbell*, 13 N. BR. 55, 58 (English rule followed); 1892, *Schofield v. Anderson*, 31 ID. 518; *Ontario*: 1863, *Lamb v. Ward*, 18 U. C. Q. B. 304, 313 (per Barnes, J.: "That rule [of England] has always prevailed in this country until questions have been made at Nisi Prius within the last year"; but limiting the examination of an opponent as a witness, under statutory implication); 1861, *Dickson v. Puch*, 11 U. C. C. P. 148 (treating the party like other witnesses; good opinions by Draper, C. J., Richards and Hagarty, JJ.; per Richards, J.: "The rule which prevails in England and Ireland, and which I have always understood to be in force here," permits a witness to be called on "to state all he knew about the matters in dispute").

UNITED STATES: *Alabama*: 1854, *Kelly v. Wanda*, 25 ALA. 523, 527 (may examine as to "all material in the case"); 1856, *Fralick v. Pringle*, 39 ALA. 157, 461 (same); 1869, *Toole v. Nichol*, 43 ID. 406, 419 (contra: Federal rule chief approved, without citing the above precedents); 1892, *Johnson v. Armstrong*, 97 ID. 731, 723, 12 SO. 72 (orthodox rule applied); 1892, *Hasterville R. Co. v. Corpening*, 1b. 681, 687, 12 SO. 293 (in the trial Court's discretion, opponent may cross-examine to his own case); *Alaska*: C. Cr. P. 1900, § 149 (quoted *ante*, § 488); § 666 (like Or. Annot. C. 1892, § 837); *Arizona*: 1874, *Rush v. French*, 1 ARIZ. 90, 134, 139, 25 PAC. 816 (quoted *ante*, § 1899); *Arkansas*: 1854, *Austin v. State*, 14 ARK. 555, 563 (confining cross-examination to "those facts and circumstances only connected with the matters actually stated in the direct examination of a witness"); *California*: C. C. P. 1872, § 2048 (this dates after the case in 36 CAL., *infra*; "The opposite party may cross-examine the witness as to any facts

stated in his direct examination or connected therewith, and in so doing may put leading questions; but if he examine him as to other matters, such examination is to be subject to the same rules as a direct examination"); for witnesses in general, the rulings are as follows: 1855, *Landsberger v. Gorham*, 5 CAL. 450, 452 (Mr. J. Story's rule adopted, by two to one); 1857, *Thornburgh v. Hand*, 7 ID. 554, 561 ("A witness cannot be cross-examined, except in reference to matters concerning which he has been examined in chief"); 1859, *Jackson v. Feather River W. Co.*, 14 ID. 18, 23 ("Courts are apt to take too narrow a view of the rights of the examiner in such cases"; the rule goes only to this, that "if the defendant sets up a defense not necessarily involved in the denial of the plaintiff's case, but consisting of new matter, then the defendant must wait until after his opening before he offers proof of this new matter"); 1864, *Aitken v. Mendenhall*, 25 ID. 213 (cross-examination held properly limited); 1867, *Wetherbee v. Dunn*, 32 ID. 106, 108 (same); 1867, *Harper v. Lamping*, 33 ID. 641, 647 (Jackson case followed); 1868, *Thornton v. Hook*, 36 ID. 233, 238 ("It frequently happens that both sides of a case stand in part upon common territory, or are founded in part upon the same or cognate facts; . . . where such are the conditions, the course to be pursued must inevitably be left to the discretion of the Court below"); 1879, *Steinburg v. Meany*, 53 ID. 425 (cross-examination held improperly restricted); 1882, *McFadden v. Mitchell*, 61 ID. 148; 1882, *Girdley v. Boggs*, 62 ID. 190, 200 (here held properly restricted); 1888, *Brady v. Henry*, 77 ID. 324, 19 PAC. 529 (same); 1890, *Graham v. Larimer*, 33 ID. 173, 180, 23 PAC. 386 (here held improperly restricted); 1891, *McFadden v. R. Co.*, 57 ID. 464, 470 (same); *Wisom v. Goodcell*, 90 ID. 622, 626, 27 PAC. 419 (same); 1892, *Westerfield's Estate*, 96 ID. 113, 116, 30 PAC. 1104 (here held properly limited); 1893, *Townsend v. Briggs*, — ID. —, 32 PAC. 307 (same); 1897, *Taggart v. Bosch*, — ID. —, 43 PAC. 1092 (liberal rule applied); 1901, *Clarke v. Clarke*, 133 ID. 647, 66 PAC. 10 (same); 1901, *People v. Altmeyer*, 135 ID. 80, 66 PAC. 974 (cross-examination held not to relate to the same subject as the direct examination); 1902, *People v. Keith*, 136 ID. 19, 68 PAC. 816 (rule applied liberally); in the following cases the rule was applied to an *accused* taking the stand (compare § 25, *post*): 1870, *People v. Dennis*, 39 ID. 625, 634; 1871, *People v. McGungill*, 41 ID. 429; 1873, *People v. Russell*, 46 ID. 121; 1887, *People v. Sutton*, 73 ID. 243, 15 PAC. 96; 1888, *People v. Meyer*, 75 ID. 383, 386, 17 PAC. 431; 1888, *People v. Roselle*, 78 ID. 64, 92, 20 PAC. 36; 1890, *People v. Mullings*, 83 ID. 136, 139, 23 PAC. 229 (an *accused* who merely testifies, "I am not guilty," may be cross-examined on all the facts); 1892, *People v. O'Brien*, 96 ID. 171, 180, 31 PAC. 45; 1901, *People v. Rodriguez*, 134 ID. 140, 66 PAC. 174; 1901, *People v. Bishop*, 1b. 682, 66 PAC. 976; *Columbia (District)*: 1875, *Cramer v. Cullinane*,

- 2 MacArth. 187, 201 (Federal rule adopted); 1888, Woodbury v. District, 16 D. C. 127, 137 (same); "an impregnable rule of practice"; *Connecticut*: 1868, State v. Gaylord, 25 Conn. 203, 208 ("in practice, such inquiries are often made on cross-examination without objection, and allowed by the Court as a matter of convenience"); 1881, State v. Smith, 49 id. 376, 380 (Philadelphia & T. R. Co. v. Stimpson followed); 1901, Murphy v. Murphy, 74 id. 198, 50 Atl. 394 (trial Court's discretion conceded); *Florida*: 1882, Savage v. State, 18 Fla. 505, 557 (cross-examination is limited to matters dealt with in the direct examination, including the whole of the details of such matters); 1891, Adams v. State, 28 id. 511, 531, 10 So. 106 (cross-examination held properly limited); 1892, Tischler v. Apple, 30 id. 132, 138, 11 So. 373 (here held improperly limited, under the rule); 1893, Williams v. State, 32 id. 315, 317, 13 So. 824 (the rule allows inquiry into "all the facts and circumstances connected with the matters of the direct examination"); 1896, Thalheim v. State, 38 id. 169, 20 So. 288 (same); 1903, Penden v. State, — Fla. —, 35 So. 204 (rule applied); 1903, Fields v. State, — id. —, 35 So. 185 (rule applied); *Georgia*: Code 1896, § 5282 ("The right of cross-examination, thorough and sifting, belongs to every party as to the witnesses called against him"); 1895, Dawson v. Callaway, 18 Ga. 573, 585 (orthodox rule followed); 1902, Ficken v. Atlanta, 114 id. 970, 41 S. E. 58 (same); *Hawaii*: 1897, Pipilani v. Houghtailing, 11 Haw. 100 (cross-examination must "relate to matters brought out on the direct examination"); 1898, Kalanoka v. Henry, ib. 430, 431 (similar); Booth v. Beckley, ib. 518, 531 (the trial Court has discretion); *Idaho*: Rev. St. 1887, § 6079 ("The opposite party may cross-examine the witness as to any facts material to the issues in the action"); St. 1889, Jan. 10 (in the cross-examination, "if he examine him as to other matters [than facts stated in his direct examination or connected therewith], such examination is to be subject to the same rules as a direct examination"; amending Rev. St. 1887, § 6079); 1897, State v. Larkins, 5 Ida. 200, 47 Pac. 945 (defendant in a criminal case taking the stand; statute applied); *Illinois*: 1864, Stafford v. Fargo, 25 Ill. 481, 489 (cross-examination is confined to "the facts to which he testified in chief"; yet "it may be that unless the Court could see that such an examination had resulted in injury to the opposite party, the judgment would not be reversed for that reason alone; but being calculated to work injury, such a practice should be discouraged"; quoted ante, § 1887); 1864, Chicago & E. L. R. Co. v. Northern Ill. C. & I. Co., 26 id. 60 (cross-examination is limited to the subject of the testimony in chief, "except by the exercise of the discretionary power of the Court"); 1872, Hall v. Prewitt, 52 id. 361, 367 (cross-examination on new matter, held improperly allowed); 1875, Drohn v. Brewer, 77 id. 260, 263 (cross-examination held properly limited); 1897, Bonnet v. Slattfeldt, 120 id. 164, 172, 11 N. E. 250 (same); 1897, Erie & Pac. Despatch v. Stanley, 123 id. 158, 14 N. E. 212 (same); 1899, Anheuser Busch B. Ass'n v. Hutmacher, 127 id. 682, 684, 21 N. E. 636 (same); Hanks v. Rhoads, 128 id. 404, 407, 21 N. E. 774 (same); 1892, Hansen v. Miller, 145 id. 536, 33 N. E. 548 (rule applies equally to a party-witness); 1896, Wheeler & W. M. Co. v. Barrett, 172 id. 610, 50 N. E. 825; *Indiana*: 1855, Wright v. Gaff, 6 Ind. 416, 430 (Federal rule adopted in this and the following cases); 1859, Patton v. Hamilton, 12 Ind. 254; Dearmond v. Dearmond, ib. 455, 457; 1863, Aurora v. Cobb, 21 id. 492, 511; 1874, Steinhouse v. State, 47 id. 17; 1881, Johnson v. Wiley, 74 id. 233, 237 ("A cross-examination must be confined to the subject-matter of the original examination"); 1886, Hunsinger v. Hofer, 110 id. 390, 394, 11 N. E. 463 (cross-examination held properly limited); 1887, Clucinnati C. I. & St. L. R. Co. v. Lutze, 112 id. 276, 284, 11 N. E. 784, 14 N. E. 706; 1888, Britton v. State, 115 id. 55, 61, 17 N. E. 254 (same); 1892, Chandler v. Beal, 132 id. 596, 598, 22 N. E. 597; *Iowa*: 1862, Wilhelmi v. Leonard, 13 Ia. 530, 335, *semble* (Federal rule applied); 1862, Davis v. Simma, 14 id. 154 (the "sound discretion" of the trial Court held to control; no cases cited); 1876, Arta v. R. Co., 44 id. 254, 266 (Federal rule applied in this and in ensuing cases); 1883, Glenn v. Gleason, 61 id. 28, 32, 15 N. W. 659 (but "much must be left to the discretion of the trial Court"); 1885, Citizens' Bank v. Rhtamal, 67 id. 316, 320, 22 N. W. 261; 1887, Krager v. Pierce, 73 id. 359, 363, 35 N. W. 477; 1888, Riordan v. Guggerty, 74 id. 690, 39 N. W. 107 (rule liberally construed where fraud is to be got at); 1888, Bulliam v. R. Co., 76 id. 640, 661, 39 N. W. 245; 1894, State v. Farrington, 90 id. 673, 57 N. W. 606; *Kansas*: 1872, Sumner v. Blair, 9 Kan. 531, 536 (cross-examination held too broad, but apparently on the ground of irrelevancy); 1873, La Lee v. Blackburn, 11 id. 190, 202 (Federal rule applied); 1878, Callison v. Smith, 20 id. 28, 37 (same); 1881, Blake v. Powell, 26 id. 320, 326 (see quotation *supra*, § 1889); 1887, Lawder v. Henderson, 36 id. 754, 757, 14 Pac. 164 (must be confined "to the facts and circumstances given by the defendant in his evidence in chief"); *Kentucky*: C. C. P. 1895, § 595 (leading questions not allowable on "new matters"); *Louisiana*: St. 1886, No. 29, § 2 (quoted ante, § 488); 1811, Durnford v. Clark, 1 Mart. 202 (English rule maintained; quoted *supra*, § 1888); 1859, Nicholson v. Desobry, 14 La. An. 81, 84 (same); 1878, State v. Swynna, 50 id. 1323, 1327, *semble* (Federal rule applied, but not applicable to the defendant in a criminal case); 1881, King v. Atkins, 33 id. 1087, 1084 (orthodox rule applied); *Maryland*: 1815, Shields v. Millet, 4 H. & J. 1, 6, *semble* (orthodox rule applied); 1878, Griffith v. Diffenderfer, 50 Md. 466, 478 (Phila. & T. R. Co. v. Stimpson followed); 1881, Herr v. Swomley, 56 id. 439, 455; 1903, Black Bank, 26 id. 309, 84 Atl. 98 (subject to the trial Court's discretion); *Massachusetts*: 1809, Webster v. Lee, 5 Mass. 324 (the opponent "might very properly cross-examine him as to all matters pertinent to the issue on trial"); 1831, Merrill v. Berkshire, 11 Pick. 269, 273 ("He was sworn generally in the suit, and cannot be restricted in his testimony to facts relating to such individual or such parts of the case as the party calling him may choose to select"); 1835,

Handy v. Rowell, 17 id. 430, 439 ("Where a witness is called to a particular fact, he is a witness to all purposes"; quoted *ante*, § 1888); 1864, *Com. v. Eastman*, 1 Cash. 189, 197, 217 (here, by allowing the prosecution to cross-examine the defendant's witnesses); 1851, *Burke v. Miller*, 7 id. 547, 549 (declares that there has been "some diversity of practice" in the local courts, but intimates that "the strict rule does not permit a party who has not opened his own case to introduce it to the jury by cross-examining the witnesses of the adverse party"; leaving it, however, to the trial Court's discretion; no precedents cited); 1854, *Beal v. Nichols*, 2 Gray 166 ("The adverse party has the right to cross-examine the witness upon all matters material to the issue"; here applied to an attesting witness; quoted *ante*, § 1888); 1858, *Com. v. Hudson*, 11 id. 64 ("A witness, when called by one party, is liable to be examined and bound to answer as to all facts material to the case, whether examined upon that subject by the party calling him or not"); 1871, *Com. v. Morgan*, 107 Mass. 199, 205 (cross-examination is "not confined to the matters inquired of in chief"); 1878, *Blackington v. Johnson*, 125 id. 21, 23 (similar; but said to be "within the discretion of the presiding judge"); 1903, *O'Connell v. Dow*, 183 id. 541, 55 N. E. 788 (rule applied even to an attesting witness required to be called); *Michigan*: 1855, *People v. Horton*, 4 Mich. 67, 80 (Justice Story's rule adopted; quoted *supra*, § 1887); 1861, *Campan v. Dewey*, 9 id. 381, 414, 430 (same; by Martin, C. J., and Manning, J., against Christianity, J.; quoted *ante*, § 1888); 1863, *White v. Bailey*, 10 id. 155, 156 (rule applied); 1863, *Chandler v. Allison*, 18 id. 460, 477 (scope of the rule examined as to "facts connected with the matters stated in chief"; quoted *ante*, § 1888); 1865, *Dann v. Cutney*, 13 id. 339, 343 (cross-examination held improperly restricted under the rule); 1866, *Thompson v. Richards*, 14 id. 173, 183 (same); 1873, *Detroit & M. R. Co. v. van Steinburg*, 17 id. 99, 100 (negligent injury; plaintiff's witnesses allowed to be cross-examined as to his contributory negligence; "the case of *People v. Horton*, we think, is overruled, so far as it has any bearing upon the present question, by the case of *Chandler v. Allison*" and the ensuing case; quoted *ante*, § 1888); 1869, *Turner v. Grand Rapids*, 20 id. 390, 394 (testimony concerning matters in chief, held improperly excluded; "see *Campan v. Dewey*, where the rule of cross-examination, as applied in *People v. Horton*, was first brought in question in this State, and which has since been overruled by all the other cases above cited"); 1873, *O'Donnell v. Segar*, 25 id. 367, 371 ("The only safe general rule upon cross-examination is to allow the party cross-examining to go over the whole subject or subjects to which the direct examination related"; scope of cross-examination further phrased in terms similar to the next case); 1873, *Wilson v. Wagar*, 26 id. 452, 457 ("The defendant had the right on cross-examination, not only to call out any fact which would contradict or qualify any particular facts stated on the examination in chief, but anything which would tend to rebut or modify any conclusion

or inference resulting from the facts so stated"); 1874, *Hamilton v. People*, 29 id. 173, 181 (cross-examination held improperly limited); 1876, *Haynes v. Ledyard*, 33 id. 319 (rule of *Chandler v. Allison* applied to allow a cross-examination); 1876, *Jacobsen v. Metzger*, 35 id. 103 (cross-examination held properly allowed; "much must be left to the discretion of the trial judge"); 1878, *New York Iron Mine v. Negaunee Bank*, 39 id. 644, 658 (Cooley, J.; "These cases [*of People v. Horton* and *Campan v. Dewey*] have been repeatedly overruled; . . . the necessity of repeating it is a singular illustration of the difficulty with which a mischievous but plausible precedent is sometimes got rid of"; quoted *ante*, § 1888); 1880, *Lichtenberg v. Mair*, 43 id. 387, 5 N. W. 455 (cross-examination held improperly limited); 1882, *Stearns v. Vincent*, 50 id. 209, 221, 15 N. W. 86 (rule of *Chandler v. Allison* applied); 1886, *People v. Barker*, 60 id. 377, 392, 37 N. W. 539 (cross-examination broadly allowed; orthodox rule apparently approved); 1890, *Ireland v. R. Co.*, 79 id. 163, 164, 44 N. W. 426 ("The rule is well established that a witness may be cross-examined upon all points material to the issue, whether the party has called them out upon direct examination or not"); 1893, *Hemminger v. Assur. Co.*, 95 id. 355, 54 N. W. 949 (preceding case approved); *Mississippi*: 1856, *Mask v. State*, 33 Miss. 406, 426, 429 (orthodox rule followed in a good opinion by Fisher, J.; *Handy, J.*, diss., quoted *ante*, § 1887); *Missouri*: 1840, *Fargo v. Kankey*, 6 Mo. 433 (witness called to prove a signature; allowed to be cross-examined generally); 1843, *Brown v. Barrus*, 8 id. 36, 30 (witness "introduced to prove a single insulated fact," allowed to be cross-examined "to all matters involved in the issue"); 1874, *St. Louis & I. M. R. Co. v. Silver*, 56 id. 264 ("This Court at an early day adopted the English doctrine"); 1875, *State v. Sayers*, 53 id. 535, 546 (same); 1875, *State v. Brady*, 57 id. 142, 145 (same); 1896, *State v. Soper*, 148 id. 217, 255, 49 S. W. 1007 (same); but for an accused, the following statute (quoted in full, *ante*, § 486) modified the general rule as before applied: Rev. St. 1891, § 1918, Rev. St. 1899, § 2637 (the accused taking the stand "shall be liable to cross-examination as to any matter referred to in his examination in chief"); applied in the following cases: 1881, *State v. McGraw*, 74 Mo. 578; 1881, *State v. Porter*, 75 id. 171, 178; 1882, *State v. McLaughlin*, 76 id. 320; 1882, *State v. Turner*, ib. 350; 1883, *State v. Douglass*, 81 id. 231, 235; 1885, *State v. Patterson*, 88 id. 83, 91; 1885, *State v. Mills*, ib. 417; 1886, *State v. Chamberlain*, 89 id. 129, 139, 1 S. W. 145; 1886, *State v. Balla*, ib. 595, 598, 1 S. W. 764; 1886, *State v. Berning*, 91 id. 82, 3 S. W. 568; 1887, *State v. Beauleigh*, 92 id. 490, 495, 4 S. W. 646; 1888, *State v. Brannum*, 95 id. 19, 23, 8 S. W. 218; 1888, *State v. West*, ib. 139, 143, 8 S. W. 354; 1888, *State v. Groven*, ib. 516, 8 S. W. 739; 1890, *State v. McKinzie*, 103 id. 620, 632, 15 S. W. 149; 1892, *State v. Turner*, 110 id. 195, 201, 19 S. W. 645; 1892, *State v. Avery*, 113 id. 475, 500, 21 S. W. 193 (a single question as to guilt or innocence permits "a wide range of cross-examination"); 1899, *State v. Hadspeeth*, 180 id. 31, 51 S. W. 483; 1900,

State v. Miller, 186 id. 70, 88, 84 S. W. 907 (similar); 1901, *State v. Mathers*, 146 id. 228, 68 S. W. 786 (repudiating the contrary ruling in *State v. Brooks*, 92 id. 542, 581, 612, 3 S. W. 257); *Montana*: C. C. P. 1906, § 2876 (like Cal. C. C. P. § 2048); 1907, *Terr. v. Rehberg*, 6 Mont. 467, 472, 13 Pac. 132 (not clear); 1897, *Harrington v. Mining Co.*, 19 id. 411, 48 Pac. 738 (may cross-examine on one's own case in the trial Court's discretion); 1901, *Kipp v. Silverman*, 35 id. 296, 64 Pac. 864 (liberal rule, like that of Michigan); 1908, *Cobban v. Becklen*, 27 id. 248, 70 Pac. 806 ("Doubt respecting the limits to which cross-examination may go ought usually if not always to be resolved against the objection"); *Nebraska*: 1878, *Davis v. Neligh*, 7 Nebr. 84, 87 ("must be restricted to the facts and circumstances drawn out on his direct examination"); so in the following: *Clough v. State*, ib. 330, 341; 1879, *Schlancker v. State*, 9 id. 241, 250, 1 N. W. 357; 1882, *Bogg v. Thompson*, 13 id. 408, 14 N. W. 293; 1883, *Cool v. Roche*, 15 id. 24, 26, 17 N. W. 119; 1888, *Grimes v. Cannell*, 23 id. 191, 36 N. W. 479; 1897, *Atwood v. Marshall*, 59 id. 173, 71 N. W. 1064 (rule liberally applied in cases of fraud); 1900, *Missouri P. R. Co. v. Fox*, 60 id. 531, 83 N. W. 744; *Nevada*: 1872, *Ferguson v. Rutherford*, 7 Nev. 336, 390 (not decided); 1877, *Buckley v. Buckley*, 12 id. 428, 441; 14 id. 262 ("Cross-examination ought to be allowed a free range within the subject-matter of the evidence in chief, but if it ranges outside of that, there is error"); *New Jersey*: 1884, *State v. Zellum*, 7 N. J. L. 220, 229 ("Even upon a cross-examination, if you examine into a substantive independent matter, you must open it," meaning apparently that a statement by counsel as to his purpose must be made; and upon the counsel making such a statement, the examination proceeded as desired); 1887, *Donnelly v. State*, 26 id. 463, 494, *see ante* (cross-examination to new matter, held properly refused); 1887, *Disque v. State*, 49 id. 249, 3 Atl. 281 (same rule for an accused); *New York*: 1904, *Jackson v. Bou*, 2 Caines 178 (opponent not allowed to cross-examine to a will without notice to produce; by cross-examining "he made the witness as much his own as if he had himself called him"; a correct enough ruling on the facts); 1827, *Jackson v. Varick*, 7 Cow. 298, 242 ("P. [after examination by the defendant] was properly admitted to his cross-examination as a competent witness for the plaintiff"); affirmed in 3 Wend. 166, 171, 205; 1829, *Fulton Bank v. Stafford*, 2 Wend. 488, 493 (orthodox rule applied; quoted *ante*, § 1965); 1834, *Bogert v. Bogert*, 2 Edw. Ch. 368, 408 (a witness "sworn generally" "may be cross-examined at large in support of the rights of the opposite party"); 1860, *Mattice v. Allen*, 38 Barb. 543, 346 (the English rule "is the rule in this State"; yet the Court goes on, perplexingly, to approve Mr. J. Story's language, and declares that "a party has no right, before he has opened his case to the jury, to introduce it and prove it on cross-examination of his adversary's witness"); 1878, *Blake v. People*, 73 N. Y. 506 (to introduce matter of defence on cross-examination is in the trial Court's discretion, being "simply a question as to the order of

proof"; no precedents cited); 1882, *Nail v. Thorn*, 38 id. 270, 375 (refers to "the general rule that a party cannot introduce his case to the jury by cross-examining the witness of his adversary," but leaves the trial Court's discretion to control; ignoring the above leading cases, and citing only two irrelevant cases); *North Carolina*: 1806, *Sawrey v. Murrell*, 3 Harw. 307 (quoted *ante*, § 1886); 1890, *State v. Allen*, 107 N. C. 208, 11 S. E. 1016 ("The rule that the cross-examination is limited to the matters brought on the direct examination has never prevailed in this country"); *North Dakota*: 1896, *State v. Kent*, 5 N. D. 516, 67 N. W. 1052 (Federal rule applied; but, in an accused's examination, motive having been touched upon, the subject may be gone into; *semble*, also, that after a mere general denial of the crime, the same may follow); *Ohio*: 1883, *Legg v. Drake*, 1 Oh. St. 203, 290 (orthodox rule said to be adopted, that cross-examination may extend "generally to the merits of the case or to any matter embraced in the cause," with the qualification that it cannot include "distinct matter of his defence by way of avoidance"; similar to the Michigan rule); *Oregon*: C. C. P. 1892, § 837 (like Cal. C. C. P. § 2048); 1893, *Ah Doon v. Smith*, 25 Or. 89, 33 Pac. 1093 (citing the Michigan case); 1894, *Sayres v. Allen*, id. 215, 35 Pac. 234 (similar); 1895, *Maxwell v. Bolles*, 26 id. 1, 4; Pac. 662 (it "may extend to any other matters connected therewith which tend to limit, explain, qualify, or rebut any inference resulting from the direct examination"); for an accused, the rule is strictly applied: 1885, *State v. Lurch*, 12 id. 99, 103, 6 Pac. 408; 1886, *State v. Saunders*, 14 id. 300, 309, 318, 12 Pac. 441; 1890, *State v. Gallo*, 18 id. 423, 23 Pac. 264; 1902, *State v. Deal*, 41 id. 437, 70 Pac. 534; *Pennsylvania*: 1837, *Ellmaker v. Buckley*, 16 S. & R. 72, 77 (Federal rule first put forward; quoted *ante*, § 1885); 1841, *Castor v. Bavington*, 2 W. & S. 555 (in *Ellmaker v. Buckley* "it was ruled that a party shall not introduce his case to the jury through a cross-examination of his adversary's witnesses"); 1843, *Floyd v. Bovard*, 16 id. 75, 76 (similar; quoted *ante*, § 1887); 1838, *Perit v. Cohen*, 2 Wheat. 81 (rule applied); 1844, *Markley v. Swastauder*, 8 W. & S. 172, 177 (cross-examination to new matter, allowed for an attesting witness, on the facts); 1846, *Schnable v. Doughty*, 3 Pa. St. 392, 396 (the rule being departed from below, "it was so much a matter of discretion in the court below that we cannot reverse on that ground"); 1848, *Bank v. Fordyce*, 9 id. 275, 276 (cross-examination to new matter, allowed on the facts); 1851, *Mitchell v. Welch*, 17 id. 329, 349 (cross-examination held properly restricted); 1855, *Turner v. Reynolds*, 21 id. 192, 202 (same); 1866, *Heber v. McGrath*, 52 id. 531 ("Cross-examination, as a general thing, is only regular when it is confined to the testimony given by the witness in chief"; but "much must still be left to the discretion of the judge," and in this case "an excess of latitude," not injuring the opponent, was held not ground for reversal); 1869, *Jackson v. Litch*, 62 id. 431, 455 (*Rhenswood, J.* "I have not been able to find a single case in which this Court has reversed on that ground;

It has generally been considered as a matter within the sound discretion of the Court below"; 1875, *Hopkinson v. Leeds*, 78 id. 396, 400 (rule enforced); 1875, *Malone v. Dougherty*, 79 id. 46, 51 (cross-examination held properly noticed); 1879, *Fulton v. Central Bank*, 93 id. 112, 115 (like *Mitchell v. Welch*); 1880, *Monongahela Water Co. v. Stewartson*, 96 id. 404, 436 (same); 1883, *Hughes v. Coal Co.*, 104 id. 267, 213 ("Cross-examination must be confined to matters which have been stated in the examination in chief"; yet "the purpose might also be defeated by a rigid enforcement of these rules in all cases," and "much must be left to the discretion of the Court below"); 1883, *Thomas v. Loose*, 114 id. 35, 47, 6 Atl. 336 (*Johnson v. Litch* approved; but here the discretion of the Court below was overruled, though unnecessarily; this case markedly illustrates the irrationality and injustice of the extreme form of this rule, the Court here ordering a new trial for a mere irregularity in the order of evidence); 1890, *McNeal v. E. Co.*, 131 id. 184, 199, 18 Atl. 1036 (cross-examination held properly allowed); 1893, *Bohan v. Avoca*, 154 id. 404, 36 Atl. 604 (trial Court's discretion must control); 1902, *Stitch's Estate*, 301 id. 303, 50 Atl. 943 (rule treated as absolute); 1902, *Smith v. Philadelphia Traction Co.*, 292 id. 64, 51 Atl. 345 (cross-examination tending to elicit facts which ought to have been brought out as a part of the opponent's case, held proper); 1903, *Glenn v. Philadelphia & W. C. T. Co.*, 306 id. 135, 55 Atl. 890 ("while this is the rule, yet the range of a cross-examination must to a very great extent be left to the sound discretion of the trial judge"); *South Carolina*: 1831, *Browning v. Buff*, 2 Hall 174, 178 (orthodox rule applied; distinguishing *Price v. Jenkins*, 1818, 1 N. & McC. 153, as properly decided on its facts); 1833, *Peto v. Mitchell*, 1 Hill 404; 1870, *Mathews v. Hayward*, 3 S. C. 239, 247; 1880, *Kairson v. Puckhaber*, 14 id. 626; 1880, *Clinton v. McKensie*, 5 Srobh. 36, 41, *semble* (the opponent may "lay the foundation of his defence in any new matter in the knowledge of the witness"); 1881, *Kibler v. McIlwain*, 16 S. C. 550, 166 (one question *supra*, § 1883); 1886, *Dillard v. Sumner*, 25 id. 318, 322; 1888, *Owens v. Contry*, 30 id. 490, 497, 9 S. E. 325; 1890, *Wilkinson v. R. Co.*, 33 id. 437, 11 S. E. 339; 1892, *Howe v. Howard*, 35 id. 197, 14 S. E. 481; 1895, *Howe v. Jones*, 43 id. 91, 20 S. E. 906; 1899, *State v. Mathee*, 55 id. 247, 33 S. E. 358; *South Dakota*: 1883, *Wendt v. R. Co.*, 4 S. D. 476, 483, 37 N. W. 236 (Federal rule applied); so in the following: 1894, *Noyes v. Belding*, 5 id. 603, 59 N. W. 1009; 1895, *First Nat'l Bank v. Smith*, 8 id. 101, 65 N. W. 439; 1896, *Novotny v. Danforth*, 9 id. 304, 66 N. W. 749; 1898, *Fisher v. Paster*, 11 id. 311, 77 N. W. 112; 1900, *Connor v. Cannon*, 23 id. 550, 69 N. W. 568 (cross-examination may in discretion be limited to the matter of the direct examination); 1900, *Boucher v. Clark Publ. Co.*, 14 id. 72, 84 N. W. 237; 1902, *Bedthey v. Bedthey*, 15 id. 310, 89 N. W. 479 (subject to the trial Court's discretion); *Tennessee*: 1891, *Sando v. R. Co.*, 106 Tenn. 1, 64 N. W. 478 (orthodox English rule definitely adopted; "We believe this rule the sounder,

in that it presents less technical difficulty, is easier of application, and tends in a larger measure to elicit the truth, the chief end of all judicial investigation"); *Texas*: 1853, *Wentworth v. Crawford*, 11 Tex. 127, 132 ("It is regular to ask a witness on a cross-examination any question that may be pertinent to the questions to be decided by the jury"); 1873, *Hassam v. State*, 38 id. 622, 636 (not clear); 1884, *Evansich v. R. Co.*, 61 id. 24, 27 (*Wentworth v. Crawford* approved); *United States*: 1838, *Harrison v. Rowan*, 3 Wash. C. C. 580 ("Upon the cross-examination of a witness, he may be asked leading questions, to draw from him a further disclosure than was made upon the principal examination and in reference to the matter testified about. But if the cross-examination respects new matter, leading questions cannot be asked"; the ruling thus shows no indication of a practice at this time to forbid questions as to new matter, but rather the contrary; the rule as to leading questions was an independent one, *ante*, § 915; note here, too, that the Court was trying a will issue directed by itself in Chancery, yet does not refer to a Chancery rule); 1840, *Philadelphia & T. R. Co. v. Stimpson*, 14 Pet. 448, 461 (Federal rule laid down; quoted *ante*, § 1885); 1861, *Johnston v. Jones*, 1 Black 209, 226 (rule of the preceding case "adhered to"); 1863, *Houghton v. Jones*, 1 Wall. 702, 706 ("the rule has been long settled"); 1878, *Rea v. Missouri*, 17 id. 532, 543 (cross-examination is "usually confined within the scope of the direct examination"; but "a greater latitude is undoubtedly allowable" for a party-opponent as witness; when the range is thus enlarged, the trial Court's discretion controls); 1879, *Wills v. Russell*, 100 U. S. 491, 635 ("A party has no right" to examine on new matter "without leave of the Court," but no precedent has declared that judgment will be reversed for a relaxation of the rule; "it clearly would not be a ground of error, unless it appeared that it worked serious injury to the opposite party"); 1883, *Gilmer v. Higley*, 110 id. 47, 49, 3 Sup. 471 (cross-examination held improperly restricted); 1899, *Montgomery v. Ins. Co.*, 3 C. C. A. 553, 97 Fed. 913 (rule applied); 1899, *Merchants' Life Ass'n v. Yeakum*, 39 C. C. A. 56, 98 Fed. 251 (rule applied); 1900, *McBride v. U. S.*, 42 C. C. A. 38, 101 Fed. 521 ("It was within the discretion of the trial judge to confine the cross-examination to matters concerning which the witness had testified on his direct examination"); 1901, *Mine & Smelter S. Co. v. Parke & L. Co.*, 47 C. C. A. 34, 107 Fed. 851, 885 (held properly limited in discretion); 1902, *McCrea v. Parsons*, 50 C. C. A. 612, 112 Fed. 917 (cross-examination held properly restricted); 1902, *Sauntry v. U. S.*, 55 C. C. A. 148, 117 Fed. 153 (confused statement, mingling both rules); 1903, *Fourth Nat'l Bank v. Albough*, 168 U. S. 734, 23 Sup. 450 (trial Court's discretion); 1903, *McKnight v. U. S.*, 122 Fed. 926 (Federal rule applied); *Utah*: 1902, *Whipple v. Procco*, 24 Utah 364, 67 Pac. 1072 (as against one charged with fraud, a wide range is permissible on cross-examination); *Vermont*: 1853, *Linsley v. Lovejoy*, 26 Vt. 122, 125 (orthodox rule applied); 1877,

§ 1891. *Same: Qualifications of Each Rule.* (1) Under the *orthodox rule*, it is of course assumed that there can be no inquiry on cross-examination as to facts not properly then in issue under the pleadings.¹ But where there are joint opponents, the facts in issue are presumably available on cross-examination by any one of them.² Where the witness is himself the party on whose behalf the counsel is cross-examining, and has been called by the first party, there seems to be no reason why the same scope of questioning should not be allowed;³ although (*ante*, §§ 773, 774) the questions should not be leading in form.⁴ Where the witness is the party-opponent to the cross-examiner, no difference is called for.⁵

(2) Under the *Federal rule*, it is clear that nothing prohibits cross-examination to one's own case where the calling party has been allowed (*ante*, § 1883) in his direct examination to bring out facts in rebuttal of a prospective defence,⁶ nor where with the trial Court's consent the opponent has postponed the cross-examination until after he has begun his own case in reply.⁶ Furthermore, it is certain that the discrediting of the witness by any allowable mode whatever (*ante*, §§ 920-1046) is not a part of the opponent's own case, within the meaning of the rule, and may therefore be pursued without restraint on cross-examination.⁷ Nevertheless, such is the latent power of confusion inherent in the rule, that even this elementary postulate is sometimes lost sight of; so that a Court is found to refuse to let the opponent on cross-examination ask about a prior self-contradiction (*ante*,

State v. Hopkins, 50 Vt. 316, 331, *semble* (*same*); *Virginia*: 1896, *Miller v. Miller's Adm'r*, 92 Va. 370, 23 S. E. 391 (Federal rule applied); *Washington*: 1897, *Bishop v. Averill*, 17 Wash. 209, 49 Pac. 237, 50 Pac. 1024 (Federal rule applied); 1901, *Coey v. Darknell*, 25 id. 518, 65 Pac. 760 (cross-examination may cover "all matters directly stated or suggested by his testimony"); *West Virginia*: 1900, *State v. Hatfield*, 48 W. Va. 561, 27 S. E. 636 (trial Court's discretion approved in allowing cross-examination to one's own case); *Wisconsin*: 1863, *Congar v. E. Co.*, 17 Wis. 477, 483 (cross-examination to "new matter," excluded); 1880, *Knapp v. Schneider*, 24 id. 70, 71 ("The rule is that cross-examination is to be confined to the matters about which the witness was examined in chief"; but an exception probably exists for a party under cross-examination); 1883, *Norris v. Cargill*, 57 id. 251, 255, 15 N. W. 148 (same exception "probably" recognized, subject to trial Court's discretion); 1885, *Youmans v. Carney*, 62 id. 580, 581, 23 N. W. 20 (cross-examination held properly restricted); 1891, *Wendock v. Kennedy*, 80 id. 449, 453, 50 N. W. 393 ("It has always been the practice to allow a party as a witness to be cross-examined fully on the whole case"); 1894, *Lueck v. Heisler*, 87 id. 644, 58 N. W. 1101 (cross-examination of a plaintiff, held not improperly restricted in the trial Court's discretion); 1900, *Sullivan v. Collins*, 107 id. 291, 83 N. W. 310 (the exception as to a party, suggested in *Wendock v. Kennedy*, apparently disapproved); 1900, *Caddy v. Foreman*, 107 id. 519, 83 N. W. 1108 (contrary to the foregoing

case); 1901, *Stubbings v. Curtis*, 109 id. 307, 85 N. W. 325 (general rule applied); 1901, *Lauterbach v. Netso*, 111 id. 323, 87 N. W. 230 (approving *Sullivan v. Collins*).

¹ 1869, *Bracegirdle v. Bailey*, 1 F. & F. 536 (matter not pleaded at all); 1830, *Hartness v. Boyd*, 5 Wend. 563 (through lack of an affidavit of merits, the case was conducted on the plaintiff's pleading as an "inquest" only); 1841, *Kerker v. Carter*, 1 Hill 101 (similar).

² 1842, *Fletcher v. Crosbie*, 2 Moo. & Rob. 417 (counsel for a defendant who had suffered judgment and was interested only as to the amount of damages was allowed to cross-examine to the whole case with a view to establishing the liability of other defendants, since he would be liable for costs on his plea in abatement if they were not guilty).

³ *Contra*: 1863, *Bell v. Chambers*, 38 Ala. 660, 664 (he does not become "a general witness in the case," and therefore cannot be examined "on any matter of defense not called out by the plaintiff in his examination"). But the cases cited in the preceding section do not make this exception.

⁴ Whether such a party-witness may be impeached by the cross-examiner is of course a different question (*ante*, § 916).

⁵ 1896, *Kenny v. Walker*, 29 Or. 41, 44 Pac. 801.

⁶ See the cases cited *ante*, § 1884.

⁷ 1891, *State v. Willingham*, 33 La. An. 537. Few counsel have been hardy enough to raise the doubt.

§ 1819); the result being that, when the opponent recalls him for the purpose, he is met by the rule against impeaching one's own witness (*ante*, § 902) and the Court is obliged to evade an unendurable ruling by the novel suggestion that if in discretion the question is excluded on the cross-examination, it must then be allowed at the later stage.⁹ Under the Federal rule, finally, is sometimes found an exception for a party-opponent as a witness.¹⁰

§ 1892. *Same: What constitutes Calling a Witness, so as to allow the Opponent to Cross-examine to his Own Case, under the Orthodox Rule; in General.* Under the orthodox rule (*ante*, § 1885), the opponent in the stage of cross-examination may inquire about any facts material to the case. But cross-examination is by hypothesis a counter-examination, — the stage subsequent to a direct examination. Hence it is not proper, if there has been no prior stage of examination at all. If the person has not become a witness for the one party, he can testify only by being called by the opponent as his own, which cannot occur until his own general stage of the whole case (*i. e.* in defence or in rebuttal) has been reached. — The question thus is: What constitutes, for the first party, calling a witness, so as to entitle the opponent to cross-examine, instead of later calling the witness under a direct examination?

It is obvious that the question can practically arise *under the orthodox rule only*. Under that rule, the opponent may ask as to any facts material to his own case, and he thus has a motive for desiring on any pretext to treat the person as already a witness under the first party's call. Under the Federal rule, on the other hand, if the person has been (for example) sworn but not questioned by the first party, the opponent cannot ask as to facts relating to his own case; he can ask only as to facts forming part of the first party's case (which of course he will hardly wish to do, except for facts modifying a former witness' testimony), or, under the inferior form of that rule, for matters about which he has already testified (that is, none at all), or for facts impeaching the witness' character or otherwise discrediting his testimony (that is, again, none at all, because he has made no testimonial assertions). Thus there remains, in effect, no field for cross-examination under the Federal rule, in the class of cases about which a question may arise under the orthodox rule. The law has therefore been developed chiefly in England; though the precedents in the American jurisdictions following the orthodox rule are singularly few.

The question, as usually phrased, is whether the opponent, in certain circumstances, has acquired the right to cross-examine, *i. e.* to certain topics of testimony. But it may be noted that the same definitions serve equally for determining another problem under an independent rule, namely, the rule against impeaching one's own witness (either on cross-examination or

⁹ An example of this is the following case: 1900, *Clary v. Hardenville Brick Co.*, 100 Fed. 111.

¹⁰ See the cases cited *passim*, *ante*, § 1890, and compare those cited *ante*, § 916 (impeaching one's own witness).

otherwise). Who is one's own witness, depends in part upon which party has first called and made use of the witness; and thus the same tests serve for that purpose. This has already been noted in dealing with that subject (*ante*, § 909). By some Courts the two principles are improperly associated, in a peculiar doctrine that an *unpermitted cross-examination to one's own case* (under the Federal rule) *makes the witness one's own* and thus prohibits his impeachment (*ante*, § 914).

§ 1893. *Same: (a) on Ordinary Subpoena, or by Deposition.* The object then is to define the point of time at which it may properly be said that the person has become the witness of the party for the purpose of forming the first stage of the examination. It would seem that the proper test is to be found in the question *whether he has given admissible testimony*. Until then, he may be potentially a witness (as are all persons having relevant knowledge), but is not actually a witness. Until he has made a contribution, by way of testimonial assertion, to the general mass of evidence, and this contribution has been accepted by the party and sanctioned by the Court as a part of the evidence, the person is only prospectively and not *de facto* a witness. Certain consequences follow from this:

- (1) A person who has been sworn by mistake, as sometimes happens under the practice of swearing in a group (*ante*, § 1819), and has not yet been put on the stand, is not yet the witness of the party for whom he was sworn.¹
- (2) A person sworn but not yet asked any question is not the witness of the party swearing him;² moreover, he cannot be cross-examined even to discredit him, for there is as yet no testimonial assertion to be discredited.³
- (3) A person sworn and asked questions, where he gives no answer or where the facts in his answer are irrelevant to the case, has not yet become the party's witness.⁴
- (4) A person who is questioned and answers merely to

¹ 1827, *Clifford v. Hunter*, cited in note 4, *infra*; 1840, *Wood v. Mackinson*, 3 Moo. & Rob. 273 (Coleridge, J.: "If there really be a mistake, whether on the part of counsel or officer, and that mistake be discovered before the examination in chief has begun, the adverse party ought not to have the right to take advantage of this mistake by examining the witness"; here, the fact that the counsel had been misinstructed as to the witness' knowledge was held to form such a mistake; otherwise, if he had discovered that the witness "knew other matters inconvenient to be disclosed").

² 1898, *Milton v. State*, 40 Fla. 251, 24 So. 69 (summoned only); 1899, *State v. Lucas*, 194 N. C. 825, 28 S. E. 932. *Contra*: 1890, *Mason v. R. Co.*, 58 S. C. 70, 36 S. E. 440.

³ 1899, *Bracegirdle v. Bailey*, 1 F. & F. 536 (at the close of the plaintiff's case, the plaintiff himself was tendered for cross-examination, but was not examined in chief; defendant proceeded to ask several questions "as to the past conduct and life of the witness"; Byles, J.: "Inasmuch as he has proved nothing, you cannot cross-examine him to discredit him"); 1899, *Toole v. Nichol*, 46 Ala. 406, 419 (witness sworn but not asked; the opponent had also had the witnesses

separated; "the purpose of a cross-examination is to sift the testimony of a witness and to try his integrity; when he has not been examined in chief, there can be no necessity for this"); 1827, *Ellmaker v. Buckley*, 16 S. & R. 72, 77 (witness sworn, but asked no questions; cross-examination's purpose being to try credibility, "it would be palpably absurd when applied to a person who had given no evidence at all").

Yet a person sworn and asked no questions but tendered voluntarily to the opponent for cross-examination (as in *Bracegirdle v. Bailey*, *supra*) may of course be cross-examined upon the latter's own case.

⁴ 1827, *Clifford v. Hunter*, 3 C. & P. 16. *Tenterden, L. C. J.* (here the person turned out to be another of the same name); 1825, *Crovy v. Carr*, 7 Id. 64 (same an immaterial question and answer); 1793, *Debee v. Tinker*, 2 Root 166 (sworn and asked, but questions excluded as irrelevant); 1859, *Brown v. State*, 28 Ga. 199, 212; 1876, *Arts v. R. Co.*, 44 Ia. 284, 286; 1899, *State v. Carter*, 51 Ia. An. 385, 25 So. 443 (a witness called, declared she knew nothing of the case, and was withdrawn); 1899, *Fall Brook C. Co. v. Hewson*, 155 N. Y. 150, 52 N. E. 1095 (asked on immaterial points only); 1897, *Wat-*

... a document does become a witness of the party thus using him.⁶ (5) If a deposition is offered, but the answers to the direct interrogatories are for some reason held inadmissible for the offering party, the answers to the cross-interrogatories are equally inadmissible, because otherwise a cross-examination would be allowed with no direct examination preceding.⁶ So, too, if the taking party has wholly failed to offer the deposition;⁷ and the same principle is assumed in those cases which hold that the non-taking party who uses the entirety of a deposition not used by the taker cannot impeach the deponent,⁸ and that the taker may impeach him.⁹

§ 1894. Same: (b) on Subpoena duces tecum. (1) A person summoned by subpoena duces tecum does not by merely attending and producing the document become the summoner's witness.¹ He has himself furnished no testimony; the document is not receivable in evidence unless proved by some one; it is the person proving it, and not the person bringing it, who fur-

ishes v. U. S., 5 Oll. 723, 30 Pac. 88 (after preliminary questions, no knowledge of the subject appeared). *Contra*: 1793, Phillips v. Kemer, 1 Rep. 355.

Any relevant answer of course permits cross-examination. So, too, as a deposition, after the taking party has once begun his questions, he cannot withdraw the proceeding; the opponent is entitled to cross-examine: 1833, *Re Rindenberg*, 34 Fed. 542.

¹ 1818, *Morgan v. Brydges*, 2 Stark. 314 (compare note 3, § 1894); 1836, *People v. Barker*, 30 Mich. 377, 301, 27 N. W. 535 (witness called to testify merely to showing the defendant a section of the statutes, allowed to be cross-examined to another conversation); 1840, *Pago v. Kankey*, 6 Mo. 433; 1874, *St. Louis & I. M. R. Co. v. Silver*, 54 Id. 264. Compare the remarks of Christianity, J., in *Campbell v. Dewey* (1861), 9 Mich. 391, 412.

² 1878, *Callison v. Smith*, 20 Kan. 26, 27 (but pointing out that the rule might be different for a party-witness, whose answers in any event would be admissions, independent of the direct examination; on this point, compare § 1875 and 1416, ante).

³ 1833, *Smith v. Biggs*, 3 Sim. 391. *Contra*, *suble* (allowing cross-examination of a deponent present in court): 1803, *Sherrod v. Hughes*, — Tenn. —, 75 S. W. 717. That the direct examiner, after using the direct answers, may put in the cross-answers, if the cross-examiner does not, is noticed post, § 2102, and depends on another principle.

⁴ *Ante*, § 912, note 2; and the following statutes should have been inserted there: Alaska C. C. P. 1900, § 636 (like Or. Annot. C. 1892, § 230); Or. Annot. C. 1892, § 230 (like Cal. C. C. P. § 2084). For the validity of the Commission amendments of 1901 to Cal. C. C. P. § 2084 (quoted ante, § 912, n. 2), see ante, § 496.

⁵ *Ante*, § 912, note 3; and the following cases belong there: 1834, *Moomington v. Ostrom*, 120 Ill. 120, 123, 28 N. E. 1043.

But distinguish the right of the opponent to put in the entire deposition taken but not read by the first party (ante, § 1859); it is then not a question of cross-examination only.

For the right to put in the remainder of a deposition when the opponent has put in one part only, see post, § 2102.

Where a deponent has been summoned by the opponent and is present, but his deposition is nevertheless allowed to be read by the taking party (ante, §§ 1411, 1415), he becomes the latter's witness, and the opponent may cross-examine orally in addition: 1860, *Ford v. Ford*, 11 Humph. 59, 92, *semble*; 1871, *Sweet v. Rogers*, 11 Holk. 117, 122.

⁶ 1839, *R. v. Muriel*, cited M. & M. 513, *Gamble and Littledale, JJ.*; 1830, *Davis v. Dale*, 4 C. & P. 235, M. & M. 514, *Tindal, C. J.*; 1831 (1), *Newland v. Reeves*, cited 2 Cr. & M. 481, *Parks, J.*; 1834, *Summers v. Moseley*, 3 Cr. & M. 477, 3 Dowl. Pr. 364, *Exch.* (on consultation with the other judges); 1834, *Rush v. Smith*, 1 C. M. & R. 54, *Exch.*; 1834, *Perry v. Gibson*, 1 A. & E. 43, 3 Nov. & M. 462, *K. B.* (*Park, J.*: "I always thought that a subpoena duces tecum had two distinct objects, and that one might be enforced without the other"; *Lord Denman, C. J.*, declared it "fully considered and decided"). The following argument served to clarify the question: *Mr. Serjt. Ludlow*, arguing, in *Summers v. Moseley*, *supra*: "Any other regulation would be productive of the greatest mischief, as it would continually impose on the party the necessity of calling an adverse witness; and a document may even be given by one party (as happened in this case) to a most hostile individual for the very purpose of compelling the opposite party to call him as their witness. . . . A person who has possession of a document may know nothing about the case; and it is absurd to compel the party wanting only the document to examine the party producing it about a matter as to which he may be perfectly ignorant. The writ comprises two things, — it orders the attendance of the witness to testify the truth as to the matters he knows, and to bring with him a document; it does not follow that, because he is called on to do the latter, he is supposed to be called on to give evidence under the compulsion of the former branch of the writ."

nishes testimony. (2) A person producing a document and being sworn but not being asked any question, does not become the witness of the party swearing him.² (3) A person producing a document and answering questions tending to prove it does become the questioner's witness.³

§ 1095. Same: Other Principles of Evidence discriminated (Right of Cross-examination, Character on Cross-examination, Accused on Cross-examination, Form of Questions, Impugning One's Own Witness). The rule under consideration is concerned solely with the order of presenting evidential material; the assumption is that the fact may be proved on direct examination at a later stage, and the only question is whether it may be elicited during the earlier stage. The rule is therefore to be discriminated from certain other independent rules which have a bearing on cross-examination:

(1) A fundamental rule — the Hearsay rule — is that all testimonial evidence, to be admissible, must be subjected to cross-examination. Hence arise problems as to the satisfaction of the test by adequate opportunity for cross-examination in depositions and former testimony (*ante*, §§ 1373-1389) and in the trial in hand (*ante*, §§ 1391-1393), and the existence of exceptions to the requirement (*ante*, § 1420).¹

(2) The kinds of facts that may be employed to discredit a witness depend upon a special group of rules. Some of these rules forbid the facts to be proved by other testimony than that of the witness himself, and thus these rules come to be phrased with specific reference to cross-examination (*ante*, §§ 878, 944, 977), as the exclusive means of discrediting. They deal, however, with the question whether the facts may be proved at all, and not with the question of order of proof, i. e. whether they may be proved on cross-examination rather than at a later stage.²

(3) When an accused takes the stand in his own behalf, the question arises whether he may be discredited like any other witness (*ante*, § 889), and whether he has waived his privilege against self-implication so that he may be compelled to answer questions involving criminal misconduct (*post*, § 2276). Here, again, the question is not as to the order of evidence, but

¹ 1815, *Reed v. James*, 1 Stark. R. 122, *Ellenborough*, L. C. J.; 1822, *Simpson v. Smith*, 1 Stark. Evid., 3d ed., 187, per Holroyd, J.; 1834, *Rush v. Smith*, 1 C. M. & R. 95 (here a question was put, but no answer made). *Contra*, 1819, *R. v. Brooks*, 2 Stark. 472, *Abbott*, C. J.; but this case, which long served to bedevil the whole subject, cannot be regarded as law.

Whether such a witness can be compelled to take the stand, under the form of his answer, is a different question (*post*, § 2300).

² 1812, *Morgan v. Brydges*, 2 Stark. 314; and other cases cited *supra*, § 1093, note 2. From this the following cases are to be distinguished: 1814, *R. v. Netherthong*, 2 M. & S. 337, *Kenyon*, L. C. J. (an interested witness summoned merely as custodian of documents; an opponent objecting to the witness as interested may "inquire as to the custody," i. e. merely to satisfy any doubts as to his being out of the facts); 1815, *Reed v. James*, 1 Stark. 122, *Ellenborough*, L. C. J.

(an interested creditor producing a bill of exchange as the debt-instrument, allowed to speak to it only because the opponent had objected to his interest, i. e. only as for the opponent; therefore he did not become the summoner's witness, and could not be cross-examined). For the practice in Chancery, see *Greenlay*, Evidence in Equity, 126.

³ The difference is that there the question is merely whether there need be any adverse examination at all by the opponent; here that question is assumed to be settled in the affirmative, and the inquiry is at what stage of the case certain topics of that adverse examination shall be placed.

⁴ The rule against impeaching one's own witness is invoked frequently as if the question were whether one may cross-examine the witness; the distinctions noticed *ante*, §§ 916, 1092, will exhibit the real nature of the inquiry.

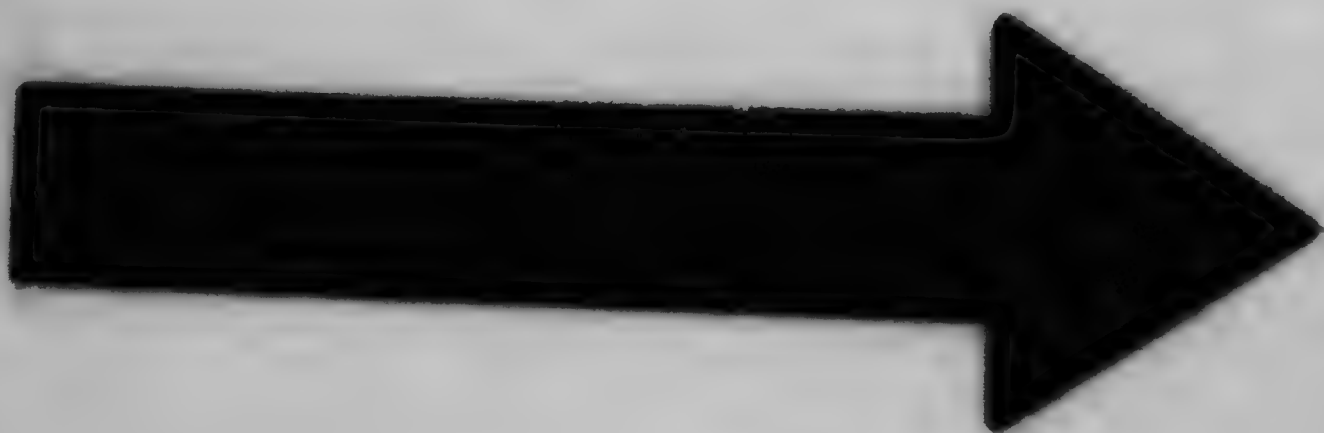
the compellability of certain answers; yet the rulings do not always indicate which principle is involved. The same question arises where a husband or wife takes the stand and is claimed by the opponent to have waived thereby the privilege of not testifying against wife or husband (*post*, § 2242). In cases of that sort the liability to confusion with the present rule is the greater because one view of the proper limitation applicable to the privilege-question is that the waiver extends only to the topics testified to on the direct examination and not to all the issues material to the case.

(4) The form and manner of questions (whether leading, misleading, abusive, cumulative, lengthy, or the like) is governed by certain rules for Testimonial Interrogation, designed to secure the most trustworthy utterances (*ante*, §§ 766-788). Some of these are specially designed or modified with reference to a cross-examiner's questions; but they concern the mode of interrogation, not the order of topics inquired about.

§ 1896. *Re-direct Examination.* The party calling the witness has upon the direct examination had an opportunity to obtain from the witness all his knowledge on all the facts relevant to the party's own case. There is therefore no need of a re-direct examination except to meet what has been brought out in the meantime upon the cross-examination, namely, facts made relevant to overthrow the opponent's facts adduced in support of his own case, under the orthodox rule for cross-examination (*ante*, § 1895), and facts explaining away discrediting facts or other weakening facts affecting the proponent's own case and brought out on cross-examination. Nevertheless, the discrimination between these classes must here often be a matter of nicety. Honest misjudgments and inadvertent omissions often occur during the direct examination, and the repetition of particular parts sometimes becomes desirable; while, on the other hand, the only danger to be guarded against is the unfair misleading of the opponent by the reservation of important testimony until the re-direct examination at a time when he may have dismissed the needed witnesses in opposition. Accordingly, the general principle of the trial Court's discretion (*ante*, § 1867) is here fully recognized as sanctioning the exceptional allowance, in case of need, of new testimony which could have been put in before, or of a repetition of matters already testified to:¹

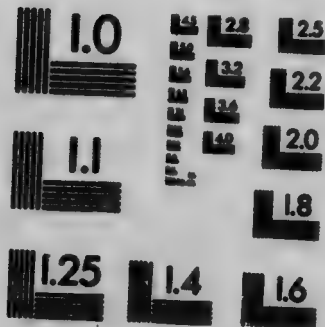
¹ *Accord*: (compare also the cases under § 1896, *post*); *Eng.*: 1835, *Blewett v. Tregonning*, 3 A. & E. 584, 585, 581, 583, 584; *U. S.*: *Alaska*: C. C. P. 1900, § 649 (like Or. Annot. C. 1892, § 620); *Ark.*: *State*, 1894, § 2943 (for re-examination "to the same matter," leave of Court is necessary; but re-examination "as to any new matter upon which he has been examined by the adverse party" is allowable); *Cal.*: C. C. P. 1872, § 2060 ("A witness once examined cannot be re-examined as to the same matter without leave of Court, but he may be re-examined as to any new matter upon which he has been examined by the adverse party. And after the examinations on both sides are once concluded, the witness cannot be recalled without leave of

the Court. Leave is granted or withheld in the exercise of a sound discretion"); 1892, *People v. McNamara*, 24 Cal. 509, 512, 29 Pac. 963; *Colo.*: 1876, *Sloan R. M. & L. Co. v. Gutthall*, 3 Colo. 8, 13 (here held properly rejected, without mentioning discretion); 1876, *Schaefer v. Gildea*, *ib.* 15, 30 (allowable in discretion); *Conn.*: 1893, *Morehouse v. Morehouse*, 70 Conn. 430, 30 Atl. 16; 1890, *Headley v. Seward & S. Co.*, 71 *id.* 640, 43 Atl. 997; *Ga.*: 1856, *Jesse v. State*, 29 Ga. 156, 164 (to have the report of testimony taken down); 1897, *Thomason v. State*, 25 *id.* 499, 504; 1890, *Augusta & S. R. Co. v. Randall*, 85 *id.* 314, 11 S. E. 706; 1897, *Kidd v. State*, 101 *id.* 528, 28 S. E. 990; *Ida.*: *Rev. St.* 1897, § 6821; *Ill.*: 1878, *Wickenkamp*



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1844, *King, J.*, in *State v. Duncan*, 8 Rob. La. 562, 563: "It is understood to be now the universal practice of the Courts of this State, in both civil and criminal proceedings, to permit a witness, after having been examined in chief, consigned and cross-examined, to be again examined by the party introducing him, upon points touching which he had not before testified, and subsequently to be recalled and interrogated in regard to facts material to the issue, which had not been previously elicited or referred to, either from inadvertence or ignorance that they were within the knowledge of the witness. In civil cases it has been held that it is discretionary with the Court to permit witnesses to be introduced, even after both parties had announced that the evidence had been closed; the exercise of such a discretion may frequently be as important to the safety of the accused as to the interest of the State."

However, for matters designed to meet the effect of the cross-examination, the first opportunity occurs during re-examination; hence, as for the case at large in rebuttal, after the case in reply (*ante*, § 1873), to put them in at that stage is not to vary the usual order and needs no express consent of the trial Court. It is therefore sometimes said that the proponent is entitled as of right to a re-examination for this purpose;² but this ought not to mean any more narrow a policy in granting new trials for errors in this respect (*ante*, § 21).

v. Wickenkamp, 77 Ill. 92, 95; 1891, *Springfield v. Dalby*, 139 id. 38, 39 N. E. 860; *Ind.*: 1896, *Pigg v. State*, 145 Ind. 560, 43 N. E. 309; *Ia.*: 1852, *State v. Ruhl*, 8 Ia. 450; *Ky.*: C. C. P. 1895, § 600 (substantially like Ark. Stat. 1894, § 2962); *La.*: 1844, *State v. Duncan*, 8 Rob. 562 (trial Court's discretion controls; no distinction between civil and criminal cases; quoted *supra*); 1867, *State v. Denis*, 19 La. An. 119 (but repudiating the discretionary liberty for criminal cases; the Court nevertheless conceding that this was an instance "wherein a relaxation of the rule might serve to advance the course of justice"; such a ruling is in notable contrast to the spirit of the rulings in the palmy days of Chief Justice Martin); 1878, *State v. Swayze*, 30 id. 1323, 1327 (preceding case approved, in an opinion of singular obscurity of language and confusion of thought); *Mass.*: 1875, *Wallace v. R. Co.*, 119 Mass. 93; 1886, *Dole v. Wooldredge*, 142 id. 184, 7 N. E. 632 (the test should be, whether the questions cover "matters not new in themselves or unconnected with the statements elicited on cross-examination, or remote and distinct from that which was the subject of inquiry and investigation on the part of the defendant in cross-examination, but have a natural and close connection with it"); *Mich.*: 1875, *Hammens v. Bentley*, 33 Mich. 89, 91; 1897, *Minkley v. Springwells*, 113 id. 347, 71 N. W. 649; *Minn.*: 1899, *Backus v. Barber*, 75 Minn. 262, 77 N. W. 939; *Miss.*: 1880, *Dillard v. State*, 58 Miss. 389; *Mo.*: 1843, *Brown v. Burrus*, 8 Mo. 26, 29; 1889, *State v. Pratt*, 96 id. 482, 492; 1896, *State v. Fitzgerald*, 130 id. 407, 33 S. W. 1113; *Mont.*: C. C. P. 1895, § 3378 (like Cal. C. C. P. § 2050); *Nebr.*: 1879, *Schlenker v. State*, 9 Nebr. 241, 249; 1894, *Murphy v. State*, 43 id. 34, 61 N. W. 491; 1895, *Collins v. State*, 46 id. 37, 64 N. W. 432; 1901, *George v. State*, 61 id. 669, 85

N. W. 940; *N. Y.*: 1827, *Winchell v. Latham*, 6 Cow. 682 (here the cross-examiner's question did not necessarily involve evidence of an admission, and hence a re-examination to negative the admission was unnecessary); 1886, *Simmons v. Havens*, 101 N. Y. 433, 5 N. E. 73; 1895, *People v. Buchanan*, 145 id. 1, 39 N. E. 846; *Or.*: Annot. C. 1892, C. C. P. § 839 (like Cal. C. C. P. § 2050); *Pa.*: 1813, *Curran v. Connery*, 5 Bin. 488; *S. C.*: 1899, *Sloan v. Courtenay*, 54 S. C. 314, 32 S. E. 431; *S. D.*: 1895, *Baird v. Gleckler*, 7 S. D. 384, 64 N. W. 118; *Tex.*: 1895, *Cunningham v. R. Co.*, 88 Tex. 534, 31 S. W. 629; *Va.*: 1849, *Howell v. Com.*, 5 Gratt. 664, 669; *Wis.*: 1874, *Schaser v. State*, 36 Wis. 429, 431; 1891, *Humphrey v. State*, 78 id. 571, 47 N. W. 386.

² Compare also with the following citations the cases under § 952, § 1044, *ante* (re-examination to explain bias or self-contradiction); 1881, *Osborne v. O'Reilly*, 34 N. J. Eq. 60, 66; 1901, *Gray v. R. Co.*, 165 N. Y. 457, 59 N. E. 262; 1903, *Martin v. Richmond F. & P. R. Co.*, — Va. —, 44 S. E. 695 ("The process of explaining away discrediting evidence belongs naturally in the re-examination"); and the statutes cited *supra*, note 1. *Contra*: 1899, *McCooe v. R. Co.*, 173 Mass. 117, 53 N. E. 133 (explanations on re-direct examination are allowable in discretion).

Distinguish in general the rules for admissibility of various facts to support a witness' credit (*ante*, §§ 1100-1144).

For the repetition of questions on the same topic, see *ante*, § 782; certain aspects of that problem merge into the present one.

For the allowance of irrelevant facts in explanation of irrelevancies brought out on cross-examination, see *ante*, § 15. For the admission of the remainder of a conversation on re-examination, see *post*, § 2115.

§ 1897. *Re-Cross-Examination, and Later Stages.* (1) No doubt cases may arise in which a re-direct examination may make relevant certain new evidence for which there was no prior need or opportunity, and for this purpose a re-cross-examination becomes proper; in such cases it is sometimes said to be a matter of right.¹ But for other matters there is ordinarily no such need, and the allowance of a re-cross-examination depends in such cases on the consent of the trial Court.²

(2) Situations are conceivable in which still another direct or cross-examination may be needed for new matters; but it seems generally conceded that the protraction of the examination to this length is always in the hands of the trial Court.³

2. Recall.

§ 1898. *Recall for Re-Direct Examination.* It can rarely occur that during the putting in of a party's case at large the recall of a witness once dismissed by him becomes necessary in order to obtain facts which could not have been put in during the witness' examination on the original call. Nevertheless, the cross-examination of an intervening witness may develop such a situation. Moreover, inadvertent omissions constantly and unavoidably occur; and repetitions become desirable sometimes for clearness' sake. The chief danger to be guarded against is the unfair misleading of the opponent, who may have dismissed his own witnesses. Accordingly, while it does not seem to be maintained that there are cases in which a recall may be demanded as of right, it is conceded that the allowance of a recall, upon the general principle (*ante*, § 1867), rests entirely with the trial Court's discretion:

1813, *Tighe*, C. J., in *Curren v. Connery*, 5 Binn. 489: "The examination of witnesses is to be conducted in such manner as to discover the truth without taking any unfair advantage. The party who calls the witness examines him first; he is then cross-examined by the adverse party; after which, if necessary, the party who produced him may examine him again. The mouth of the witness is not to be closed, because the counsel omitted to ask a material question at first. It may be necessary, in order to come at the truth of the case, to examine him as to new matter, and after that there may be a second cross-examination. The Court at their discretion may permit a witness to be examined by either party over and over again at any time during the trial. But they will take care to exercise this discretion, so as not to suffer any advantage to be gained by trick or artifice. If the plaintiff should declare that he had finished his testimony, in consequence of which the defendant should dismiss some of his witnesses, and then the plaintiff should offer to produce new testimony, which might perhaps have been contradicted by the witnesses who have been dismissed, the Court would not suffer him to avail himself of such disingenuous conduct."

¹ 1853, *Wood v. McGuire*, 17 Ga. 303, 318, *semble*; 1872, *State v. Scott*, 24 La. An. 161, *semble* (for the accused). Compare what is said *supra*, § 1896.

² 1845, *State v. Hoppins*, 5 Ired. 405 ("were it otherwise, and counsel had the arbitrary power of resuming cross-examinations as often as they chose, it is obvious it would lead to great abuses in harassing witnesses and protracting trials"); 1866, *Thornton v. Thornton*, 39 Vt. 122, 160; 1897, *Atlantic & D. R. Co. v. Rieger*, 95 Va. 418, 28 S. E. 590.

Compare § 1874, *ante* (surrebuttal), where the rulings are sometimes difficult to distinguish from those on the present point; the governing principle is the same. For re-cross-examination in surrebuttal, see also *post*, § 1899.

³ 1901, *Berger v. Booth*, 13 Haw. 291, 296 (re-re-direct); 1890, *Brown v. State*, 72 Md. 466, 475, 30 Atl. 186 (re-re-direct).

There was a re-re-cross-examination of the plaintiff in *Tilton v. Beecher*, N. Y., 1875, *Abbott's Rep.* II, 684.

1830, *Marcy, J.*, in *People v. Mather*, 4 Wend. 229, 240: "When the examination is closed and the witness dismissed from the stand, it is a matter resting in the discretion of the Court which receives the testimony to allow of a further examination. I do not doubt that this discretion is often too indulgently exercised; but it is scarcely possible for this Court to regulate it. Courts which try issues of fact must experience the inconveniences arising from too great indulgences in this respect, and on them devolves the duty of applying the corrective. At all events it is a matter too purely discretionary to warrant the interference of this Court, unless it should be in a very flagrant and oppressive instance."

It will be noticed that when the recall is asked, not (as here assumed) during the original case, but after the close of the proponent's case in chief or the proponent's case in reply, it merges in the larger question of the propriety of putting in evidence at the tardy stage of rebuttal (*ante*, § 1873) or surrebuttal (*ante*, § 1874); and when the recall is asked after the close of the case at large, the same question is practically presented as for all evidence offered in that stage (*ante*, §§ 1876-1881). The decision in such cases depends on the principles already considered under those heads; but the general principle of the trial Court's discretion, as set forth in the passages above quoted, applies in the present as well as in the other classes of cases.¹ In Chancery the same principle was applied in allowing the submission of new interrogatories to a deponent.²

¹ In the following rulings it is not always possible to learn whether the witness was recalled before the close of the case in chief or in reply, but practically the rule would be the same as for a recall after that stage; compare also the cases under § 1896, *ante* (re-direct examination on the original call), where some of the rulings may be intended to deal with the present situation; compare also the cases under § 1044, *ante* (recall to explain a self-contradiction); *Eng.*: 1839, *R. v. Frost*, 4 State Tr. W. s. 83, 384 (allowed on a point where they could not have foreseen that the opponent's witness would assert certain facts); 1841, *White v. Smith*, A. M. & O. 171; 1834, *Adams v. Bankart*, cited in *Chitty's Gen. Pract.* III, 901; *Can.*: 1857, *St. Denis v. Grenier*, 2 Low. Can. Jar. 33; 1860, *Joseph v. Morrow*, 4 id. 236; 1864, *Jackson v. Filteau*, 15 Low. Can. 60; *U. S.*: *Ala.*: 1884, *Phoenix Ins. Co. v. Moog*, 78 Ala. 284, 309; 1889, *Riley v. State*, 88 id. 193, 196, 7 So. 149; 1896, *Crawford v. State*, 112 id. 1, 21 So. 214; *Alaska*: C. C. P. 1900, § 668 (cited *ante*, § 1896); *Cal.*: C. C. P. 1873, § 3050 (quoted *ante*, § 1896); *Colo.*: 1894, *Layton v. Kirkendall*, 20 Colo. 236, 283, 38 Pac. 55; *Fla.*: 1878, *Coker v. Hayes*, 16 Fla. 368, 376; *Ga.*: 1853, *Walker v. Walker*, 14 Ga. 243, 251 (to make a correction); 1860, *Bigelow v. Young*, 30 id. 121, 125 (to re-state his testimony; but "this is a dangerous practice" not allowable with a witness "whose fairness lies under any ground of suspicion"); 1902, *Central of G. R. Co. v. Duffey*, 116 id. 346, 42 S. E. 510 (allowed for a correction, even after the witness has conferred with counsel); *Ill.*: 1897, *Bonnet v. Glatfield*, 190 Ill. 166, 174, 11 N. E. 250; 1898, *Anderson T. Co. v. Fuller*, 174 id. 221, 51 N. E. 281; *Ky.*: 1896, *Louisville Ins. Co. v.*

Monarch, 99 Ky. 578, 36 S. W. 563; *La.*: 1868, *Dunn v. Pipes*, 20 La. An. 276 (to re-state his testimony for correcting the report of it); 1879, *State v. Woods*, 31 id. 267; 1898, *State v. Walker*, 50 id. 420, 23 So. 967 (allowable for a correction, where counsel dispute as to the terms of his answer); *Md.*: 1869, *Schwartz v. Yearly*, 31 Md. 270, 276; 1871, *Green v. Ford*, 35 id. 82, 88 (to re-state testimony); 1898, *Legore v. State*, 87 id. 735, 41 Atl. 60; *Mass.*: 1895, *Robbins v. R. Co.*, 165 Mass. 30, 42 N. E. 334; 1902, *McLean v. Pains*, 181 id. 287, 63 N. E. 883; *Mich.*: 1892, *Erickson v. R. Co.*, 93 Mich. 414, 418, 33 N. W. 393 (allowed for a correction in the report of testimony); *Mo.*: 1898, *State v. Soper*, 148 Mo. 217, 235, 49 S. W. 1007; *N. H.*: 1831, *Severance v. Hilton*, 24 N. H. 147; *N. Y.*: 1829, *People v. Mather*, 3 Wend. 229, 249; *N. C.*: 1879, *State v. Lee*, 80 N. C. 483, 485; *Or.*: C. C. P. 1891, § 639 (cited *ante*, § 1896); *Tex.*: 1874, *Goins v. State*, 41 Tex. 334, 335 (to make explanations); *U. S.*: 1896, *Faust v. U. S.*, 163 U. S. 453, 16 Sup. 1112; *Va.*: 1848, *Howell's Case*, 5 Gratt. 644, 658; 1895, *Burke v. Shaver*, 92 Va. 345, 23 S. E. 749.

Nor is there any exception to this principle in the doctrine that, after an order for the sequestration of witnesses, a witness who after dismissal has disobeyed the order may be refused to be admitted on recall; for here also it is conceded by all that the trial Court in its discretion may decline to enforce the penalty (*ante*, § 1842).

² 1837, *Gresley*, *Evidence in Equity*, 54, 134; 1859, *Bevan v. McMahon*, 2 Sw. & Tr. 55 (in a court of common law, "whenever I have suspected that he was being again brought forward to meet the stress of the case, I have invariably refused to accede to it"); 1884, *Meyer v. Mitchell*,

§ 1899. **Recall for Re-Cross-Examination.** A recall for re-cross-examination will ordinarily be unnecessary, except in the rare cases where the direct examination of an intervening witness has brought out new facts upon which the prior witness may throw light, and for this purpose the matter can always be left in the hands of the trial Court. The general principle, therefore, of the trial Court's discretion as controlling the grant of a recall for this purpose (*ante*, § 1898) is conceded to apply here also.¹ The only exception, possibly, is that of a recall to put the warning question essential to lay a foundation for impeaching by proof of a prior self-contradictory assertion; here it is sometimes held that the recall is a matter of right.²

But the ordinary case of a recall by the opponent for re-cross-examination is to be distinguished from that of a re-cross-examination of a witness recalled for re-direct examination by the party originally using the witness (*ante*, § 1898); for there the re-direct examination usually is intended to bring out new matter, and a cross-examination to probe into this or to discredit the witness in respect of it will of course not need the express consent of the Court (on the principle of § 1897), since there has been no prior opportunity for that purpose.³

§ 1900. **Re-recall.** The general principle of the trial Court's discretion (*ante*, § 1898) would apparently be held to control all requests for a second recall for any purpose whatever.

77 Ala. 312, 314; McDonald v. Jacobs, ib. 524, 527; 1898, Hall v. Pegram, 85 id. 522, 534, 5 So. 309, 6 So. 612; 1893, Swarts v. Chickering, 58 Md. 290, 297; 1815, Kingston v. Tappen, 1 John. Ch. 368 (there being here "no suggestion of any tampering with the witness"); Denton v. Jackson, ib. 536; 1830, Hallock v. Smith, 4 id. 649; 1823, Beach v. Fulton Bank, 3 id. 573, 580, 587; 1826, Phetipiece v. Sayles, 4 Mas. 312, 320; 1867, Fant v. Miller, 17 Gratt. 187, 219.

For the recall of an accused to make a second "statement," in the jurisdiction which still refuses him the right to testify, see *ante*, § 579.

For a recall to explain an irrelevant fact by other irrelevant evidence, see *ante*, § 15.

¹ Add to the following cases the rulings collected *ante*, § 1874 (surbuttal) and § 1899 (re-cross-examination), in which it is sometimes impossible to learn the precise situation to which the ruling was applied, and the statutes cited *ante*, § 1896; 1891, Louisville & N. R. Co. v. Barker, 96 Ala. 435, 438, 11 So. 453; 1893, Thompson v. State, 100 id. 70, 72, 14 So. 621; 1893, Thomas v. State, ib. 53; 1875, People v. Parton, 49 Cal. 632, 636, *semble*; People v. Keith, 50 id. 137, 139; 1899, McCogge v. State, 41

Fla. 525, 26 So. 734; 1899, Anthony v. State, — Ida. —, 55 Pac. 884; 1897, Nixon v. Beard, 111 Ind. 142, 12 N. E. 131; 1851, Ross v. Hayne, 3 Ia. 211, 213; 1859, State v. Ruhl, 8 id. 447, 450 (to re-state the testimony); 1888, Fowler v. Strawberry Hill, 74 id. 648, 38 N. W. 521; 1899, State v. Soper, 148 Mo. 217, 49 S. W. 1007; 1897, State v. Robinson, 32 Or. 43, 48 Pac. 357; 1859, Com. v. Hart, 21 Pa. 495, 502; 1895, People v. Thiede, 11 Utah 241, 39 Pac. 537.

² The cases are considered *ante*, § 1086.

³ 1834, R. v. Palmer, 6 C. & P. 653; 1849, Hendron v. Robinson, 9 B. Mon. 505 (where the witness after argument begun had been allowed to repeat his testimony, and could be shown to have contradicted in so doing); 1896, Titus v. Gage, 70 Vt. 13, 39 Atl. 246 (testing as expert, by cross-examination after rebuttal, of one called first for his knowledge but on rebuttal as an expert, held improperly forbidden).

But this does not entitle the opponent, without permission, to go beyond the scope of the re-direct examination; 1889, Moellering v. Evans, 12 Ind. 196, 22 N. E. 989.

**SUB-TITLE II: RULES TO AVOID CONFUSION OF ISSUES, UNFAIR
PREJUDICE, OR UNDUE WEIGHT.**

CHAPTER LXIV.

A. CIRCUMSTANTIAL EVIDENCE.

§ 1904. General Principle.

B. TESTIMONIAL EVIDENCE.

§ 1906. General Principle.

§ 1907. Witnesses merely Cumulative, or Excessive in Number; General Principle.

§ 1908. Same: (1) Expert Witnesses; (2) Character-Witnesses; (3) Witnesses in General.

§ 1909. Judge as Witness.

§ 1910. Juror as Witness.

§ 1911. Counsel or Attorney as Witness.

§ 1912. Referee, Arbitrator, Sheriff, as Wit-

NESS:

§ 1913. Documents taken to the Jury-Room.

A. CIRCUMSTANTIAL EVIDENCE.

§ 1904. General Principle. Circumstantial evidence, concededly relevant, may nevertheless be excluded by reason of the general principle (*ante*, § 1863) that the probative usefulness of the evidence is more than counterbalanced by its disadvantageous effects in complicating and confusing the issues before the jury, or in creating an unfair prejudice in excess of its legitimate probative weight. In either case, its net effect is to divert the jury from a clear study of the exact purport and effect of the evidence, and thus to obscure and suppress the truth rather than to reveal it. But the operation of this principle cannot practically be expounded apart from the examination of the rules of relevancy which affect the same kinds of evidence; because sometimes the operation of the present principle may be obviated by a change in the situation and its ban may thus be removed, and the evidence will then be receivable if relevant. For example, the bad moral character of an accused person, though relevant, is nevertheless excluded by the principle of unfair prejudice, when offered against the accused; yet the accused's good moral character, though no more relevant than before, is admitted in his favor, because the present principle ceases then to operate. . . . Moreover, the exclusion usually results only when other principles combine with the present one. For these reasons, it becomes necessary to treat the operation of the present principle in connection with the operation of the principles of relevancy, though those principles themselves form in theory distinct domains in the law of evidence. In this place, therefore, it is enough to note the bearing of the principle upon various sorts of circumstantial evidence already considered in dealing with the rules of relevancy.

1. *Confusion of Issues.* This consideration operates potentially throughout the whole realm of circumstantial evidence. It is given positive effect chiefly where the evidence consists of particular facts of human conduct or external events which are of themselves only minor and additional and are not the sole mode of proof for the matter in issue. Moreover, even in these cases,

effect is given to it usually only when the other principles of Unfair Prejudice (*supra*) and of Unfair Surprise (*ante*, §§ 1845, 1849) combine at the same time to accumulate an overweight of disadvantage in using the evidence. The influence of the present principle may be seen in the rules affecting the use of particular acts of misconduct to prove the character of a party (*ante*, § 194), of other crimes as evidence of plan or intent (*ante*, § 300), of other instances proving the defective or dangerous nature of highways, machines, and the like (*ante*, § 443), and of particular acts of misconduct to discredit the character of a witness (*ante*, § 978).

2. *Unfair Prejudice.* This consideration, like the preceding one, is found operating potentially throughout the realm of circumstantial evidence; and, like the preceding one, it is found mainly in its positive effects where the other principles of Confusion of Issues (*supra*) and of Unfair Surprise (*ante*, §§ 1845, 1849) combine also to oppose the use of the evidence. Nevertheless, it has effect also in some marked instances where neither of the others has any bearing. Its operation may be seen in the rules affecting the use of a party's general character (*ante*, § 55), of a party's capacity or habit (*ante*, §§ 83, 92), of particular acts of misconduct to evidence the character of a party (*ante*, § 194), of other crimes to prove a plan or intent (*ante*, § 300), and of a witness' character (*ante*, §§ 921, 978). It is found also affecting the use of real evidence (or *autoptic profference*) in one or two aspects (*ante*, §§ 1157, 1158).

The influence, then, of the present considerations upon the law of circumstantial Evidence as a whole is large and widespread, although it is not practicable to state it in the form of rules standing distinctly apart from the other rules.

B. TESTIMONIAL EVIDENCE.

§ 1906. *General Principle.* When a witness has once been declared to be qualified, i. e. to have the fundamental qualities essential to render his assertions trustworthy (*ante*, §§ 483-867), the considerations that can outweigh this and exclude his testimony because on the whole it unduly confuses the issue or prejudices the fair determination of the facts must supposably be rare; and so the rules of exclusion resting on such considerations are but few. There are indeed no absolute and positive prohibitions having a general recognition.¹ What we find is, first, a rule permitting the exclusion of additional witnesses upon a single topic where their testimony is merely superfluous and only cumbers the issues, — this rule resting on the principle (*ante*, § 1863) of Undue Confusion of Issues; and, secondly, three suggested (but not established) rules requiring the exclusion of certain kinds of witnesses whose personality might be supposed to carry undue weight with the jury

¹ Distinguish the rules of Privilege and the like in Part III, post (§ 2175); there the exclusion rests on extrinsic policy having nothing to do with the probative defects or efficiency of the testimony; here, as noted already (*ante*, § 1171),

in surveying the nature of the rules in Part II, we are concerned with those rules which are based on the desire to secure the highest probative efficiency for the evidence and to eliminate disturbing evidential facts.

and thus to divert them from an impartial consideration of the evidence; these rules rest upon the principle (*ante*, § 1863) of Unfair Prejudice, although other reasons are sometimes suggested as also serving for a foundation.

§ 1907. *Witnesses merely Cumulative, or Excessive in Number; General Principle.* Where the array of witnesses called to testify on a given side mounts up in numbers, it is obvious that each additional witness increases, in almost geometrical ratio, the possibilities of confusing the issues and of thus diverting the jury from a clear and concentrated consideration of the precise issue in dispute. Each witness adds new items of detail in his examination and cross-examination; each witness may be impeached by the calling of additional witnesses on the other side; each of these new ones adds his quota of details; and each may in turn lead to the calling of new impeaching witnesses on the first side; and with each of these last the same round of possibilities begins again; until amid the interminable entanglements of scores of witnesses and their statements it would become practically impossible for the jurymen to follow the thread of the substantial issue in controversy and to detect the true effect of the evidence. The result would be the stifling of the truth, not its revelation, and the decision would probably turn upon the chance effect of fragments of evidence making casual impressions, rather than upon an orderly consideration of all the salient facts.

Nevertheless, the possibility of confusion through the exposition of a mass of details is not in itself a sufficient reason for refusing to hear those details, where the complication is inherent in the issue. If the truth is complicated, the complication must none the less be struggled with, at whatever risk of baffled endeavor. It is where the complication and confusion are substantially unnecessary, or the small value of the evidence is overwhelmed by its disadvantages, that a rule of evidence may properly intervene in prohibition. This much in general has been conceded on all hands; the effort has been to draw the line fairly between necessary and unnecessary complication. It has never been supposed that a party has an absolute right to force upon an unwilling tribunal an unending and superfluous mass of testimony limited only by his own judgment or whim. But the difficulty is to define the situations in which the testimony may be properly regarded as practically superfluous or relatively unprofitable:

1827, Mr. Jeremy Bentham, in his *Rationale of Judicial Evidence*, b. IX, pt. VI, c. II, § 1 (Bowring's ed., vol. VII, p. 531): "What number of witnesses shall a party be allowed to produce? Put a limitation anywhere upon the number, you lay the party under the necessity of leaving the mass of evidence on his side incomplete; you pave the way to deception and consequent misdecision. Put no limitation anywhere upon the number, you put it in the power of a *malæ fide* suitor (if superior to a certain degree in respect of opulence) to overwhelm his adversary with an indefinite load of testimony and the expense, vexation, and delay attached to it. . . . The greater the mass of evidence in the cause, the heavier the burthen imposed by it on the mental faculties of the judge [*i. e.* the jury]; the heavier the burthen on the judge's mind, the greater the probability that his force of mind will not be adequate to the sustaining of it, to the acting under it in such a manner as to extract the truth from the mass of matter through which it is dif-

fixed, to frame to himself a right judgment respecting the principal facts in dispute and to decide in consequence. . . . [The chances ordinarily in favor of a right decision being assumed as 100 to 1,] suppose the faculties of the judge in a state of complete confusion, and the force of his mind altogether unequal to the task of framing a right decision under the pressure of the burthen thrown upon it by the aggregate mass of evidence; this chance of 100 to 1 will be reduced to an even chance, or chance of 1 to 1; at which point, the party who is in the right will have no greater chance of prevailing than the adversary who is in the wrong. At this point, the advantage possessed by him who is in the right is equal to 0; and to this point every additional quantity, added to the load of evidentiary matter, tends in proportion to its pressure to reduce the cause. . . . The evils, therefore, which arise from excess of evidence are very great; and that they form a proper subject for the legislator's consideration is out of the reach of dispute. But the propriety of allowing them to be productive of actual exclusion, of giving them in practice the effect of a conclusive reason, depends upon *proportion*, viz., upon the preponderance of the collateral inconvenience in the shape of vexation, expense, and delay, as compared with the probability of direct mischief resulting from deception and consequent misdecision resulting for want of the evidence proposed to be excluded." 1

In attempting to determine when this overbalance of disadvantages exists, rendering the admission of the testimony relatively unprofitable, it may be assumed in advance that the facts testified to are relevant; more than this the party of course cannot claim, and less than this can certainly not be forbidden him. The question thus reduces itself in effect to that of the number of witnesses allowable upon facts concededly relevant. May any limitation be imposed at all? It is clear that no rule of limitation, if any be made, should in its terms be mandatory and invariable, and that the rule should merely declare the trial Court empowered to enforce a limit when in its discretion the situation justifies this; and such is in fact the form which the rule (so far as accepted) does take.

What are these situations in which the trial Court is empowered in its discretion to limit the number of witnesses? To this question the answer is, in some respects, clear and accepted on all hands; in others, it is as yet the subject of rulings somewhat conflicting and diversified in their details.

§ 1908. *Same*: (1) **Expert Witnesses**; (2) **Character Witnesses**; (3) **Witnesses in General**. (1) The frequent uncertainties and hopeless contrariety which are well known to beset the use of *expert testimony* and have led to much speculation over methods of improvement (*ante*, § 562), tend to reduce its serviceableness as a decisive testimonial element, and hence make it easier to dispense with it when an over-accumulation threatens to complicate and confuse the controversy. A limitation may therefore properly be set upon the number of expert witnesses:

1858, *Grier, J.*, in *Winans v. R. Co.*, 21 How. 100: "A judge may obtain information from experts, if he desire it, on matters which he does not clearly comprehend, but can-

1 Mr. Bentham's proposal of reform (too lengthy to be set out here) consisted chiefly in subdividing the "burthen" by eliminating before the actual trial all testimony that is practically not needed on the main controversy; this is to be accomplished by the parties' submission

beforehand of a brief or sketch of all the proposed evidence, so that the few precise points over which alone there is any real controversy will remain for testimony on the trial, and will then cause little or no complication. His exposition of this proposal deserves perusal.

not be compelled to receive their opinions as matter of evidence. Experience has shown that opposite opinions of persons professing to be experts may be obtained to any amount, and it often occurs that not only many days, but even weeks, are consumed in cross-examinations to test the skill or knowledge of such witnesses and the correctness of their opinions, wasting the time and wearying the patience of both Court and jury, and perplexing instead of elucidating the questions involved in the issue."

1870, *Cowley, J.*, in *Fraser v. Jennison*, 42 Mich. 206, 224, 3 N. W. 882 (approving a limitation to five expert witnesses to insanity): "If testamentary cases are ever to be brought to a conclusion, there must be some limit to the reception of expert evidence; and that which was fixed in this case was quite liberal enough. To obtain such evidence is expensive, since desirable witnesses are not to be found in every community; but an army may be had if the Court will consent to their examination; and if legal controversies are to be determined by the preponderance of voices, wealth in all litigation in which expert evidence is important may prevail almost of course. But one familiar with such litigation cannot but know that, for the purposes of justice, the examination of two conscientious and intelligent experts on a side is better than to call more; and certainly, when five on each side have been examined, the limit of reasonable liberality has in most cases been reached. The jury cannot be aided by going farther. Little discrepancies that must be found in the testimony, of those even who in the main agree, begin to attract attention and occupy the mind, until at last jurors, with their minds on unimportant variances, come to think that expert evidence, from its very uncertainty, is worthless. This is not a desirable state of things; and it can only be avoided by confining the use of expert evidence within reasonable bounds."

This result may be said to be universally accepted; the trial Court in its discretion may limit the number of expert witnesses.¹

(2) The value of *character-evidence*, impeaching or sustaining a party or a witness, is commonly much exaggerated (*ante*, §§ 920, 1611); its comparative futility in the ordinary case, and its tendency to degenerate into a mere exhibition of petty local jealousies and animosities, of no real probative service, have induced the Courts to concede unanimously that the number of character-witnesses may without disadvantage be limited, as the trial Court may prescribe:

1840, *Nelson, C. J.*, in *Bissell v. Cornell*, 94 Wend. 354, 357: "We have heretofore held that the judge at the circuit may exercise a sound discretion as to the number to be sworn of impeaching and supporting witnesses [to character]. There must be some limit. Any one familiar with trials must be aware that, after some dozen of witnesses on a side have been examined, equally supporting and impeaching a party or witness, very little additional benefit is derived by enlarging the number. The relative strength of the testimony will be the same, however extended the examination. A balanced public opinion will appear."

1854, *Waite, J.*, in *Bunnell v. Butler*, 23 Conn. 65, 69: "It would be absurd to hold that upon an enquiry of this sort, depending in a great measure upon the opinion of witnesses,

¹ Add to the following citations some of the rulings in note 2, *infra*, which deal with expert witnesses but do not limit the rule to that class: Can. St. 1902, c. 9, adding § 6a to Evid. Act 1893 (of "professional or other experts entitled according to the law of practice to give opinion evidence," not more than five on one side are to be called without leave of Court before examination of any experts); Ont. St. 1902, c. 18 (similar to Can. St. 1902, c. 9, making three the limit, instead of five); 1879, *Fraser v. Jennison*, 42

Mich. 206, 224, 3 N. W. 882 (testator's sanity; refusal to admit a sixth expert witness for the contestants, held proper; quoted *supra*); 1847, *Sizer v. Burt*, 4 Denio 428; 1879, *Hilliard v. Beattie*, 59 N. H. 442, 444 (personal injury; number of experts may be limited, but a modification of the order must not be unfair); 1895, *Wabash R. Co. v. Deffance*, 52 Oh. 262, 40 N. E. 89; 1890, *Powers v. McKenzie*, 90 Tenn. 182, 16 S. W. 559; 1858, *Winans v. R. Co.*, 31 How. 100 (quoted *supra*).

a party has the right to examine as many as he pleases, and that the Court and jury are bound to sit and hear them without any power to interfere. There must necessarily be a limit to such inquiries, and it is for the Court to prescribe it. . . . Much, however, will depend upon the circumstances of the case and the importance of the testimony of the principal witness."

(3) For witnesses up any point whatever a similar rule of limitation may be enforced. It may not be possible to define any other specific classes of witnesses or of facts for which a rule can be laid down; but it is possible to sanction a general rule as applicable, in the circumstances of the case, to any kind of fact or witness whatsoever. The reason of the rule — namely, that the disadvantage of confusion preponderates over the testimonial value, little or none — of the additional witnesses — may come to be applicable at any time:

1878, *Sherwood, C. J.*, in *State v. Walton*, 68 Mo. 91, 93 (dealing with a limitation on the issue of change of venue): "We regard such ruling clearly within the domain of judicial discretion, with which, unless arbitrarily and abusively exercised, we should refrain from interfering. It would be productive of very serious and hitherto unheard of consequences, should the law be so declared by this Court as to cut off and preclude inferior tribunals from the exercise of one of the most ordinary functions pertaining to the daily administration of justice. . . . Any other theory of the law would permit, nay prompt, a crafty criminal to block the wheels of both punitive and remedial justice, by using the latest census returns of the county as a fecund source of limitless supply for countless subpoenas, thus securing a continuance under the pretence of securing a change of venue."

1894, *Jenner, J.*, in *Hupp v. Boring*, 8 Oh. C. C. 259, 260: "Has the trial Court the power to limit the number of witnesses that may be called in proof of a material fact or of the issue? The question is one of importance in practice. Mere numbers do not necessarily determine the weight of the testimony; and numbers within a reasonable limit are often of great importance. It has long been held that, in eliciting the truth from a witness, the manner and extent of the examination is largely in the discretion of the trial judge. But when it comes to the number to be called to establish a fact or a given issue, must all discretion be denied? A trial sometimes becomes a contest as to which side can overwhelm the other with the larger number of witnesses. And we have repeated what recently occurred in a common pleas court in this circuit, the issue between two neighboring farmers being the identity of three sheep, not worth to exceed three dollars. A hundred witnesses were called, ten days consumed in the trial, the three sheep were soon

¹ Accord: Conn.: 1854, *Bunnell v. Butler*, 23 Conn. 65, 66 (quoted *supra*); Ind.: 1897, *State v. Thomas*, 111 Ind. 575, 578, 13 N. E. 35 ("It may be that in some cases a limit may be put"); Ia.: 1879, *Bays v. Herring*, 51 Ia. 286, 291, 1 N. W. 558 (in trial Court's discretion); 1892, *Bays v. Hunt*, 60 Id. 251, 254, 14 N. W. 783 (same); 1899, *Minthorn v. Lewis*, 78 Id. 620, 622, 43 N. W. 465 (same); 1896, *State v. Benhout*, 100 Id. 155, 69 N. W. 422 (limitation to five on each side, held proper in discretion); Mich.: 1865, *Hollywood v. Reed*, 57 Mich. 234, 237, 23 N. W. 792 (number of sustaining and impeaching witnesses "is in the discretion of the Court, and is generally limited to an equal number on each side"); Mo.: 1899, *State v. Rutherford*, 153 Mo. 124, 53 S. W. 417 (more than six witnesses to defendant's character, excluded properly on the facts); N. H.: 1879, *Plummer v. Oatpoe*,

59 N. H. 53, 58 (limitation to twenty on each side, held proper); N. Y.: 1840, *Bisell v. Cornell*, 24 Wend. 354, 357 (character of plaintiff in alander to mitigate damages; refusal to hear more than sixteen witnesses on a side, held proper in discretion; quoted *supra*); Oh.: Rev. St. 1898, § 7287 (no more than ten witnesses on each side allowable "upon the subject of character or reputation" in any criminal case except murder, manslaughter, rape, rape-assault, or selling liquor to habitual drunkard, unless full fees are deposited or paid beforehand); Tenn.: 1897, *Williams v. McKee*, 98 Tenn. 139, 38 S. W. 730 (trial Court may limit in discretion; here disapproving of the fixing of the number before testimony was introduced); Tex.: 1879, *Johnson v. Brown*, 51 Tex. 65, 76 (a reasonable limitation is proper).

followed by the loss of the entire flocks of the unfortunate farmers, and also a large part of their farms. In another part of this circuit the issue tried was the alleged warranty of a heifer at an auction sale of stock; all the men present at the sale were called by one or the other of the contending parties, with a result not less disastrous than the sheep case. A Court of justice that has no power to regulate such exhibitions of bad temper, is hardly worthy of the name. . . . We conclude that a reasonable limitation of the number of witnesses who may be called in proof of a fact, or of a single issue, is within the discretion of the trial Court, to be exercised, no doubt, with caution, considering the nature of the case, the character of the witnesses, and the state of the proof."

Some such general principle seems to be conceded on all hands.⁶ There is, however, a lack of harmony and certainty in applying it. (a) In the first

⁶ *Alaska*; C. C. P. 1900, § 646 (like *Or. Annot. C. 1892, § 263*); *Ark. Stats.* 1894, § 2665 (like *Cal. C. C. P. § 2044*); 1890, *Jones v. Glidewell*, 53 Ark. 161, 176, 18 S. W. 733 (election contest; limitation held to be for the trial Court's discretion); 1897, *Hall v. State*, 44 Id. 121, 40 S. W. 576 (trial Court's discretion approved, excluding cumulative witnesses to errors in an accomplice's testimony); 1902, *Hughes v. State*, 70 Id. 450, 66 S. W. 676 (Court's discretion, under *Stats. § 2985*, in limiting the further examination of a witness, held improperly exercised); *Cal. C. C. P.* 1872, § 2044 (Court "may stop the production of further evidence upon any particular point when the evidence upon it is already so full as to preclude reasonable doubt"); *Del.*; 1901, *Fritchard v. Henderson*, 3 Fed. 128, 50 Atl. 218 (rule of Court, limiting to six witnesses to one fact, applied); 1901, *Giordano v. Brandywine Granite Co.*, Id. 423, 52 Atl. 332 (where the number has been limited beforehand, a witness who, being the person supposed by the counsel, nevertheless knows nothing on the subject, counts as one of the limited number; *Spruance, J.*, diss., and properly); *D. C. Comp. St.* 1894, c. 55, § 155 (in criminal trials, the Court "may allow such number of witnesses on behalf of the defendant as may appear necessary"); *Id.*; 1864, *Gray v. St. John*, 26 Ill. 222, 236 (fraud in conveyance; deposition excluded on the principle that "when a fact is sufficiently established, and is not controverted, the Court may properly refuse to suffer its time to be occupied in hearing further evidence on that point"); 1869, *White v. Hermann*, 51 Id. 243, 246 (refusal to permit more than four witnesses to value of land, held improper); 1879, *Mueller v. Rebhan*, 24 Id. 142, 151 (proponent of a will introduced seventeen witnesses to prove that the testator's condition had not changed prior to the will's execution; opponent offered to admit that all other witnesses of proponent would testify to this and certain other facts; ruling that no more witnesses to these facts should be examined for proponent, held proper); 1891, *Greene v. Ins. Co.*, 134 Id. 310, 25 N. E. 563 (insanity of a grantor; limitation to nine witnesses on each side, held improper on the facts; partly because the order was not made at the opening of the trial, partly because the issue was the main one in dispute); 1900, *Chicago Terminal T. R. Co. v. Bagbee*, 184 Id. 353, 56 N. E. 386 (limitation by parties' stipulation; additional witnesses ex-

cluded); *Ind.*; 1838, *Gardner v. State*, 4 Ind. 632, 634 (beating by a schoolmaster; limitation to two witnesses for the defence, as to the absence of blows with foot and fist, apparently held an abuse of discretion); 1869, *Hubbell v. Osborn*, 31 Id. 249 (limitation to one witness on a material point, held improper); 1861, *Union R. T. & S. T. Co. v. Moore*, 30 Id. 458 (land-value; limitation to eleven on each side, held proper in discretion); 1864, *Butler v. State*, 27 Id. 378, 380, 388 (murder; limitation for depositions out of the State to forty-five for the defence, held proper in discretion); 1866, *Mergentheim v. State*, 107 Id. 547, 572, 8 N. E. 546 (condition of a canal said to be a nuisance; limitation to seven on each side, held proper in discretion); *Id.*; 1870, *Keece v. R. Co.*, 30 Id. 78, 80 (whether a locomotive spark-net could be seen from the belt-frame; limitation held for trial Court's discretion); 1882, *Everett v. R. Co.*, 59 Id. 243, 244, 13 N. W. 109 (land-value; limitation to five on each side, held proper in discretion); 1890, *McConnell v. Osgood*, 60 Id. 298, 295, 45 N. W. 850 (condition of sidewalk; limitation to six on each side; objection not sufficiently taken); 1895, *Preston v. Cedar Rapids*, 95 Id. 71, 63 N. W. 577 (land-value; limitation to seven on each side, held proper in discretion); *Kan.*; 1878, *Fisher v. Conway*, 21 Kan. 18, 24 (limitation to four witnesses, upon a matter of self-defence, held improper; though on "any collateral matter" the trial Court may in discretion limit the number); *La.*; *St.* 1894, No. 67, *Wolff's Rev. L.* p. 277 (in criminal cases "each side shall not be allowed to summon more than six witnesses," except after the attorney's written application setting forth under oath "what he expects to prove by the additional witness, that an additional number is required to meet the ends of justice and to make a proper prosecution or defence"); *Mass.*; 1816, *Howe v. Thayer*, 17 Pick. 91, 97 (additional witnesses on an undisputed point, excluded); 1848, *Cushing v. Billings*, 2 Cush. 136 (trial Court has discretion; using the illustrations mentioned in the next case); 1883, *Com. v. Ryan*, 134 Mass. 223, 224 ("it must be in the power of the Court to limit the amount of testimony where it may be extended indefinitely, as in the case of usage or character or genuineness of handwriting"); *Mich.*; 1868, *Barhyte v. Sammers*, 68 Mich. 341, 36 N. W. 93 (unsoundness of a mare before sale; limitation to seven witnesses on a side, held improper; no authority cited); 1891, *Detroit C. R. Co. v.*

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place, it is generally agreed that the existence of a need for the limitation should be left to the trial Court's determination.⁴ (b) In the next place, it is also generally agreed that the rule may be applied only to exclude additional witnesses to the same issue or controverted fact; though a precise definition of the scope of such an issue is not furnished, nor, perhaps, can it be. Both of these conditions to the rule are fair and sound. (c) A Court occasionally declares the rule applicable only where the fact is not actually controverted.⁵ But this limitation is unsound, because the value of merely cumulative witnesses may become trifling even where the point is controverted, and the policy of the rule rests on the proportion between the probative value of the additional witnesses and the disadvantages they bring. (d) Some of the statutory provisions declare the rule applicable whenever the evidence "is already so full as to preclude reasonable doubt." Yet it seems undesirable to require the judge to pass upon this question, even provisionally; and it is unnecessary to do so, because the true reason for the right value of the additional witnesses is that, if the jury did not believe the foregoing ten, they will hardly believe two more, and if they did believe the ten, then two more are not needed; in other words, the exclusion of the two more as valueless does not by any means rest on the assumption that the preceding ones have proved the fact indubitably (as the codifiers seem to have believed), but on the consideration that two more of the same sort cannot make a bad case better. The statutory phrasing should rather run: "if it is already so full that more witnesses to the same point could not be reasonably expected to be additionally persuasive." (e) Sometimes a Court declares the qualification that the limiting of numbers is proper only upon collateral issues; though there is little authority for this.⁶ The term "collateral" is a much-abused one; it is difficult of definition, and should be avoided.⁷ Moreover, there is no reason here for such a restriction of the

Mitt, 83 Md. 654, 48 N. W. 1007 (electric railroad on decreasing travel in streets, lowering rents, etc.; limitation to "eight or ten" witnesses, held proper in discretion); *Mass.*, 1878, *State v. Whiton*, 68 Mo. 91, 92 (prejudice as ground for change of venue; limitation to six on each side, held proper in discretion; see quotation *supra*); 1897, *State v. Lamb*, 141 Id. 296, 42 S. W. 627 (alibi; number limitable in discretion); 1901, *State v. Smith*, 164 Id. 567, 65 S. W. 270 (exclusion of additional witnesses to deceased's threats, after eight had testified, held not improper); *Mont.*, C. C. P. 1895, § 3372 (like Cal. C. C. P. § 2044); *N. Y.*, 1893, *Sixth Ave. R. Co. v. Metrop. El. R. Co.*, 138 N. Y. 540, 553, 34 N. E. 400 (number limited, in trial Court's discretion, for proving damages by taking of land); 1896, *People v. Barberi*, 149 Id. 254, 43 N. E. 635 (the trial Court held improperly to have refused to admit for the accused the corroborating testimony of others than the accused and yet allowed the jury to question her credibility); *Ok.*, 1894, *Hupp v. Boring*, 8 Ok. C. C. 259 (condition of boundary, in claim by adverse possession; limitation to four on each

side, held proper in discretion; quoted *supra*); *Or.*, C. C. P. 1892, § 633 (like Cal. C. C. P. § 2044); *Tex.*, 1891, *Galveston H. & S. A. R. Co. v. Matula*, 79 Tex. 577, 15 S. W. 573 (exclusion of new depositions proving different facts tending to prove the same ultimate issue, held improper); *Wis.*, 1892, *Meier v. Morgan*, 62 Wis. 289, 294, 52 N. W. 174 (whether ice was properly packed; limitation to eight witnesses, held proper in discretion); 1896, *Larson v. Eau Claire*, 92 Id. 86, 65 N. W. 731 (trial Court's discretion approved in excluding a tenth witness as to the condition of a highway). In France, under the numerical system (*post*, § 2032) a limitation to ten witnesses to a single fact was introduced in the 1300s (Glason, *Histoire du droit et des institutions de la France*, VI, 544; 1895).

⁴ See the cases *passim* in the preceding note.
⁵ E. g. in Illinois and Massachusetts.
⁶ *Greene v. Ins. Co.*, Ill., *supra*. *Contra*: *Preston v. Cedar Rapids, Ia.*; *Hupp v. Boring, Oh.*, and others by implication, *supra*.
⁷ *Ante*, §§ 38, 1001.

rule; the exigency may equally arise upon any part of the issue, as the reasons above given indicate clearly. (f) It is sometimes required that the trial Court announce (with or without the parties' motion), before any witnesses on the point are offered, that a limitation of the witnesses upon the particular fact will be enforced, and a failure to do this is said to prevent the enforcement of any limitation; on the theory that, unless the party is thus advised of the intended limit, he may be obliged to omit his most valuable witnesses through not having known of the necessity of choosing the best of the lot at his disposal. This requirement has a plausible fairness in it, and is usually proper when feasible. But it is not always feasible, because the judge may not know of the party's intention as to number of witnesses; and it is not always proper for the judge to commit himself to such a fixed limit before hearing any of the witnesses.⁸ The trial Court's discretion should be left to determine whether such a prior notice was feasible and desirable under the circumstances. (g) Finally, the rule should be applied with equal effect against both parties, so that neither be unfairly advantaged thereby.⁹

The rules as to limiting the impeachment of an impeaching witness (*ante*, § 894), as to the length of an examination of a single witness (*ante*, § 783), the number of counsel that may examine on each side (*ante*, § 783), and the repetition of the same questions (*ante*, § 782), which depend perhaps to some extent upon considerations of the present sort, have been already discussed in more appropriate places.

§ 1909. *Judge as Witness.* That a judge may give testimony as a witness in a trial before a Court of which he is a member seems in the classical English practice not to have been doubted, though the precedents are scanty.¹ It is not clear whether a judge so testifying was regarded as bound to retire from the Bench thereafter during the trial; but the propriety and legality of his taking the stand when needed seem to have been assumed.² This is

¹ Moreover, the intimation in *Greene v. Ins. Co., Ill.*, that the notice must be given at the opening of the trial, is unjust and impracticable as a general rule.

If one of the prescribed number proves incompetent, he ought not to be reckoned as one of the allotment of that party, because his withdrawal diminishes by so much the time and the complications: *Contra*: 1895, *Preston v. Cedar Rapids*, 95 Ia. 71, 63 N. W. 577 ("It was defendant's business to know, before it called the witnesses, that they possessed the requisite knowledge to testify concerning that matter"); 1901, *Giordano v. Brandywine Granite Co., Del.* (cited *supra*).

² Compare *Hilliard v. Beattie, N. H.*, *ante*, note 1.

³ 1660, *Regicides' Trials*, Kel. 12 ("Secretary Morris and Mr. Annealey, President of the Council, were both in commission for the trial of the prisoners, and sat upon the bench; but there being occasion to make use of their testimony against Hacker, one of the prisoners, they both came off from the bench and were sworn

and gave evidence, and did not go up to the bench again, during that man's trial; and agreed by the Court that they were good witnesses, tho' in commission, and might be made use of"); 1680, *Earl of Stafford's Trial*, 7 How. St. Tr. 1293, 1413, 1442, 1487 (some of the lords judges testified); 1683, *Oate's Trial*, 10 id. 1079, 1142 (L. C. J. Jeffreys, asked to testify what he said at a former trial, replied: "No, there will be no need for that; I will acknowledge anything I said then"); 1716, *Hawkins, Pleas of the Crown*, b. 2, c. 46, § 30 ("It seems agreed that it is no exception against a person's giving evidence, either for or against a prisoner, that he is one of the judges or jurors who are to try him").

⁴ In more modern times, doubts are found: 1872, *Duke of Buccleuch v. Metropolitan Board*, L. R. 5 E. & L. App. 429, 433 (Cleasby, B.: "With respect to those who fill the office of judge, it has been felt that there are grave objections to their conduct being made the subject of cross-examination and comment (to which hardly any limit could be put) in relation to proceed-

observable in the discussion which reappears, at various epochs,² over a celebrated problem once put by King Henry IV, concerning the proper conduct for a judge who has been the sole spectator of a murder and comes afterwards to preside on the trial of an innocent person charged with it. The controversy that arose over this problem concerned a different principle, namely, the judge's duty and power to use his private knowledge in his judicial capacity (as by ordering an acquittal); but it seems not to have been doubted by any of those who expressed their views that the judge might lawfully have given testimony; the only doubt was whether it was his moral duty to do so:

1696, Sir John Hawles, Solicitor-General, in *Fennick's Trial*, 13 How. St. Tr. 537, 667: "If a judge knows anything whereby the prisoner might be convicted or acquitted (not generally known), then I do say he ought to be called from the place where he sate and go to the bar and give evidence of his knowledge; and so the judge in H. IV's time ought to have done, and not to have suffered the prisoner to have been convicted and then get a pardon for him; for a pardon will not always do the business"; and commenting on Cornish's Trial, 11 id. 459 (1685), as to the failure of the judge to testify to a witness' testimony at a former trial: "Every man knows that a judge in a civil matter tried before him, and a counsel even against his client, has been enforced to give evidence (provided it be not of a secret communicated to him by his client), for in that particular a judge ceases to be a judge, and is a witness; of whose evidence the jury are the judges, though he after re-assume his authority and is afterwards a judge of the jury's verdict. . . . If it be so in civil matters, let any man show me a reason why the law is not so in criminal matters."

In modern times, however, and in this country, the policy of uniting in one person the double capacity of judge and witness in the same trial has been much questioned. It must be premised that the objections are not based upon the general quality of judgeship, so as to oppose the admission of a judge as witness in any trial during his period of office as judge; there could be no conceivable reason for that.³ Nor is it here a question of the judge's privilege against compulsory process (*post*, § 2372). Nor do the objections question the propriety of a judge's leaving the bench and in the same trial becoming a witness, where he has relevant knowledge; for, by reason of a principle already examined (*ante*, § 1805), this is the only way in which his personal knowledge can be contributed. The objections are based rather upon the impolicy of combining at the same time the capacities of judge and witness, i. e. of becoming a witness *without ceasing to be a judge of the cause* and of continuing to act as judge in the cause even after finishing his testimony as witness. The various considerations of policy that have been advanced at one time or another are represented in the following passages:

ings before them; and, as everything which they can properly prove can be proved by others, the Courts of law discountenance, and I think I may say prevent, them from being examined"; but this was not said especially of the judge *coram* (*quo*): 1890, *R. v. Petrie*, 30 Ont. 317, 333 (held improper, where the judge sits without a jury).

² See the citations collected *post*, § 2369, under Judicial Notice.

³ Thus, a judge may always testify, in a cause where he is not sitting, as to proceedings before him in another cause; see, for an illustration (1889), *State v. Duffy*, 87 Conn. 523, 18 Atl. 791.

1824, *Martin, J.*, in *Ross v. Butler*, 3 Mart. n. s. 312: "There may be a different mode of practice which, by taking off the reason of the rule [of incompetency], perhaps destroys it in jury cases. If the judge, when he tries the facts, must weigh the evidence, he must do so impartially; this, perhaps, he cannot be easily supposed to do when he is to weigh his testimony against that of another. When, however, not he but a jury is to try an issue of facts, it would seem the reason in some degree fails. Yet cogent ones present themselves: in a Court composed of one judge only, who is to administer the oath? It cannot be done by any but a member of the Court, and he is the only one. . . . It seems to us some legislative provision is necessary in a case like this. Otherwise, the party cannot attain his right."

1851, *Parker, J.*, in *Moras v. Moras*, 11 Barb. 510, 511: "The objection to the competency of a judge rests on an entirely different ground [from that of a juror]. It goes to the power of the Court — the power to administer the oath, to decide on a question of competency, or the admissibility of parts of the evidence, to commit for refusing to answer, and to exercise over the witness all the other powers of the Court, which may be called into requisition for the protection of the rights of the party. . . . In examining this question upon principle, there seems to be the same difficulty, whether the Court consists of one judge or of three, all of them being necessary to constitute the Court. In the latter case, if one of the judges be called as a witness, there are but two judges left to administer the oath, to decide upon his competency if he be objected to, and to decide questions as to the relevancy of his testimony. If he refuses to answer, there are but two judges to commit him for contempt. Two-thirds of a court cannot form a legal tribunal. The party has a right to three judges, the number prescribed by statute. Can it be said that there are three judges when one is under examination as a witness — or in the prisoner's box, on a proceeding for contempt in not answering? When thus proceeded against he becomes a party, and may be heard in his defense either in person or by counsel. Can it be said, that under such circumstances, he still, by his presence, forms part of the Court, and gives validity and jurisdiction to its proceedings? And is it not absurd to say that he still forms part of the Court, when the two judges still on the bench commit him for contempt? The statute has declared the qualifications of judges, and will not allow one to sit in any cause to which he is a party, or in which he is interested (2 R. S. 373, 3d ed.). If one judge, holding a court alone, cannot be both judge and witness, it seems to me to be equally clear upon principle, that a judge cannot, who is one of three judges necessary to constitute a Court. The two characters are inconsistent with each other, and their being united in one person is incompatible with the fair and safe administration of justice. . . . The objection to a juror's being a witness rests mainly on a question of public policy, and the objection to a judge being sworn depends on an additional and different ground, viz., that of want of power to discharge the duties of a court while acting as a witness."

1894, *Riddick, J.*, in *Rogers v. State*, 60 Ark. 76, 86, 20 S. W. 894: "If the judge of such a Court [having but one judge] takes the stand to testify against the defendant, there is no one to control his testimony or keep him within proper bounds. Even if he can control his own testimony, and discharge at the same time what have been called 'the incompatible duties of witness and judge,' yet, however careful and conscientious he may be, the chances are great that by thus testifying he will to some extent detract from the dignity that should surround the functions of his high office. Instead of the impartial judge administering the law with a firm and even hand, he takes on for the time the appearance of a partisan, endeavoring to uphold by his testimony one side against the other. More than likely he provokes unseemly conflicts between himself and counsel, and arouses the distrust of the party against whom he testifies. In addition to this, the higher his character and standing as a judge, the more danger that he thus gives the party in whose favor he testifies an undue advantage over the opposing side."

1896, *Dunbar, J.*, in *Maitland v. Zanga*, 14 Wash. 92, 44 Pac. 117: "It seems to us that there are many reasons why the judge should not be allowed to testify that would not

weigh in the case of a juror. If the defendant is entitled to the testimony of the judge, the plaintiff is equally entitled to his testimony, and it might eventuate, if this practice were to be tolerated, that the judge, upon a motion for a nonsuit, would be compelled to pass upon the weight of his own testimony; and, considering the inclination of the human mind to attach more importance to its own statements than to those of others, it is easy to see that the rights of the litigants might be prejudiced in such a case. Again, while upon the witness stand he would have a right to all the protection that any other witness has under the law. He could refuse to answer questions which, in his judgment, might tend to criminate him. He might decline to answer questions the admissibility of which it would be necessary for the court to determine, and which would bring him as a witness in conflict with himself as a court. Again, it would to a certain extent lead to the embarrassment of the jury, who are subordinate officers of the court, and under its directions, to have to weigh the testimony of the judge in the same scales with the testimony of other witnesses in the case whose testimony was opposed to that of the judge. And in many ways it seems to us that this practice would lead to embarrassment, and would have a tendency to lower the standard of courts, and bring them into contempt. There is no necessity for this practice, for, under the liberal provisions of our laws, if a party desires to avail himself of the testimony of the judge, another judge may be called in to preside at the trial of the cause."

Regarding the nature of the dilemma thus presented and the apparent ease of obviating these objections, it may be noted at the outset that their effect, if they are to be yielded to, is practically to exclude the judge of the cause from giving testimony at all. The simple expedient of discarding the judicial capacity and not returning to the Bench during the same trial is with us no real solution of the dilemma; because the modern and probably universal practice in this country constitutes the trial Court of but a single judge, or, in the rare instances where two are required (as sometimes in capital cases), renders both essential to the Court's constitution; nor, in the conditions everywhere prevailing, is another judge available on short notice for substitution. The practical result would usually be, then, either that the judge in the case could not testify at all, or that the trial would be interrupted by postponement — the latter an inconvenient and highly objectionable alternative, because it might necessitate an entire re-trial.

Coming, then, to the reasons set forth in the above quotations, it will be seen that one of them at least — the inability of the judge to administer the witness' oath to himself — is a petty obstacle (if it is one) which should rather be obviated (as it is in many jurisdictions) by a statute empowering the clerk to administer rather than by the clumsy solution of disqualifying the judge. Furthermore, as to some of the other reasons — such as the impropriety of the judge passing upon his own claim of privilege and the unseemliness of the judge being impeached for untruthfulness by the opponent, — it may be said that these are the merest possibilities, that they may be trusted to be avoided through the combined good sense and discretion of counsel and judge, and that to establish a universal rule for the sake of rare contingencies is impractical and unnecessary. The only real and remaining objections to the judge's assuming the place of a witness seem to be, in the first place, that he would be put thereby into a more or less partisan attitude before the jury

and would thus as a judge lose something of the essential traits of authority and impartiality; secondly, that his continuing power as judge would embarrass and limit the opposing counsel in his cross-examination of the judge-witness, and would thus unfairly restrict the opponent's opportunity to expose the truth; and, thirdly (though this is itself inconsistent with the first reason), that the judge's official authority would impress his testimony upon the jury with special and therefore unfair weight. In all these objections there is a modicum of truth. Yet is it necessary on that account to lay down a universal prohibition? The force of the objections would be most seen and would rise to an appreciable degree only when the judge became a principal witness,—as in the case put by King Henry IV, where the judge had been an eye-witness of a murder. In all such instances (which are rare enough), the usefulness of his testimony would be known beforehand, and his own discretion and the parties could be trusted to send the cause before another judge for trial. But in the ordinary instance the judge's testimony is desired for merely formal or undisputed matters, such as the proof of execution of a certificate or of the administration of an oath or of a deceased witness' former testimony. To suppose here a danger, that the inconveniences above noted would occur in any appreciable degree is to be unduly apprehensive. Military commanders do not train cannon on a garden-gate; and the law of evidence need not employ the cumbrous weapon of an invariable rule of exclusion to destroy an entire class of useful and unobjectionable evidence in order to avoid embarrassments which can easily be dealt with when they arise. Since the trial judge has no interest to subject himself or counsel or jury to these supposed embarrassments, it may properly be left to his discretion to avoid them, when the danger in his opinion arises, by retiring from the Bench before trial begun or by interrupting and postponing the trial and securing another judge.

The precedents in this country are by no means harmonious; but some of them at least, as well as a statutory provision reproduced in several codes, seem to lay down the rule above indicated.⁵

⁵ With the following, compare also the citations ante, § 1805 (judge's testimony as hearsay), and post, § 2372 (judge's privilege): *Ala.*: 1890, *Dabney v. Mitchell*, 66 *Ala.* 495, 503 (probate judge's own affidavit, held properly excluded by himself); 1897, *Estes v. Bridgforth*, 114 *id.* 231, 21 *So.* 512 (excluded, on the ground of giving improper weight to the testimony with the jury); 1902, *Randall v. Wadsworth*, 130 *id.* 635, 31 *So.* 555 (probate judge held incompetent to testify to the loss of official files); *Ark. Stats.* 1894, § 2965 (civil cases; quoted post, § 1910); 1894, *Rogers v. State*, 60 *Ark.* 76, 84, 29 *S. W.* 694 (in criminal cases, a sole judge cannot testify for the prosecution); *Cal. C. C. P.* 1872, § 1883 ("The judge himself, or any juror, may be called as a witness by either party; but in such case it is in the discretion of the Court or judge to order the trial to be postponed or suspended, and to take place before another judge or jury"); *Conn.*: 1889,

State v. Duffy, 87 *Conn.* 525, 18 *Atl.* 791 (justice of the peace, allowed to testify to the defendant's admissions in testifying below); *Ga.*: 1892, *Baker v. Thompson*, 81 *Ga.* 436, 15 *S. E.* 644 (trial justice, on appeal to the Court in which he presides; excluded, because he cannot swear himself); 1898, *Shockley v. Morgan*, 103 *id.* 158, 29 *S. E.* 694 (a sole judge held incompetent); *Ida.* *Rev. St.* 1887, § 5959 (like *Cal. C. C. P.* § 1883); *Ill. Rev. St.* 1874, c. 148, § 5 (where a county or probate judge is an attesting-witness to a will offered before him for probate, he is to make oath to the will before the circuit court, and then the other witnesses make oath to him as in other cases); *Ia.* *Code* 1897, § 4610 (a judge may testify, but may in discretion order the trial to be had before another judge); *Ky. C. C. P.* 1895, § 603 (a judge is competent, but the Court may transfer the trial to another judge); *La.*: 1894, *Ross v. Buhler*, 2 *Mart. n. s.* 312 (dis-

§ 1910. *Juror as Witness.* Some of the objections to the giving of testimony by a judge, as well as other independent ones, have been advanced against the use of a juror's testimony. They are sufficiently set forth in the following passages:

1851, *Parke, J.*, in *Morse v. Morse*, 11 Barb. 510, 511: "The competency of a judge rests upon different grounds from that of a juror. A juror is to decide only questions of fact, and is examined before the cause is submitted to him. The objection to his competency rests on public policy. In all cases he has to pass upon his own credibility; and this difficulty would be greatly increased in case of his impeachment. He may refuse to answer, in which case his commitment would delay the trial. The party against whom he is called is subjected to a great disadvantage, for the juror may be expected to maintain unyieldingly in the jury box the opinions he has expressed on the witness-stand. It may plausibly be objected, therefore, that respect for the feeling of the juror and regard for justice to the parties should exclude the juror as a witness and require the objection to be made on the calling of the jury, that the party need not suffer for the want of his testimony."

1865, *Woodward, C. J.*, in *Houser v. Com.*, 51 Pa. 332, 337: "Let it be distinctly said that jurors are not incompetent witnesses in either criminal or civil issues. They have no interest that disqualifies, and there is no rule of public policy that excludes them. . . . The learned counsel argue that the practice violates the constitutional rights of the accused, who are entitled to a speedy and public trial by an impartial jury, and to be con-

tributed judge, held inadmissible in his own court; proceeding upon Spanish law; 1882, *Bermudez, C. J.*, *obiter*, in *State v. Barnes*, 34 La. An. 395, 399 ("The law could not disqualify a judge, even if the judge were a material witness"); *Rev. L.* 1897, § 3192 (a judge is not to be incompetent as such by "being a material witness in the case in favor of either party"); § 3944 (where a judge is a material witness, provision is made for swearing him, etc.); *Mont. C. C. P.* 1895, § 3164 (like Cal. C. C. P. § 1883); *Neb. Comp. St.* 1899, § 5922 (a judge is competent as a witness, but, if testifying, he may in discretion order postponement and trial before another judge); *Nev. Gen. St.* 1895, § 3408 (like Cal. C. C. P. § 1883); 1903, *Reno M. & L. Co. v. Westerfield*, 26 Nev. 332, 67 Pac. 961, 69 Pac. 899 (whether a judge may refuse to testify; opinion *obscure*); *N. J.* 1903, *State v. De Maio*, — N. J. L. —, 55 Atl. 644 (a judge sole cannot be called as a witness); *N. Y.* 1906, *Perry v. Weyman*, 1 John. 530 (justice of the peace held incompetent, when sworn by another justice, because the statute required the oath to be administered by the justice trying the cause); 1848, *Re Heyward*, 1 Sandf. Sup. 701 (extradition; the police justice issuing the warrant was admitted to testify upon what papers it issued; "it is in no respect *infra dignitatem* for the judge to appear as a witness in this mode"; citing two other instances); 1851, *Morse v. Morse*, 11 Barb. 510, 515 (quoted *supra*); 1854, *People v. Miller*, 3 Park. Cr. 197, 200 (a judge essential to the Court cannot testify before himself); 1874, *People v. Dohring*, 59 N. Y. 374, 379 ("The inclination of the Courts has been to hold that when it is necessary for the conduct of the trial that one should act as judge, he may not be called from the bench to be examined as a

witness; but when his action as a judge is not required because there is a sufficient court without him, he may become a witness; though it is then decent that he do not return to the bench"; but here the point was not necessary to a decision); *N. D. Rev. C.* 1895, § 5705 (like Cal. C. C. P. § 1883) *Oh.*: 1859, *McMillen v. Andrews*, 10 Oh. St. 112 (justice of the peace held incompetent in his own court, by implication of statutory procedure); *S. D. Stats.* 1899, § 6546 (like Cal. C. C. P. § 1883); *Tenn. Code* 1896, § 5594 (a judge is a competent witness for either party "in any cause tried before him either of a civil or criminal nature"); *Tex. C. Cr. P.* 1895, § 778 (a trial judge "is a competent witness for either the State or the defendant"); § 780 (clerk may administer the oath to him); *U. S.*: 1798, *U. S. v. Lyon*, Wharton's State Trials, 233, 335 (the presiding judge was asked and answered questions by the defendant, who called no other witnesses); 1799, *U. S. v. Fries*, ib. 482, 532 (one of the bench was sworn and testified to matters connected with the sedition charged; he was also cross-examined); *Utah Rev. St.* 1898, § 3415 (like Cal. C. C. P. § 1883).

From this question whether the judge in the cause is disqualified as a witness, distinguish the following matters involving other principles affecting the use of judge's testimony: (1) whether a judge's notes of former testimony are receivable without calling the judge, — a question of the Hearsay rule (*ante*, § 1606); (2) whether a judge, under the same rule, may use his private knowledge without taking the stand as a witness (*ante*, § 1805); (3) whether a judge is privileged from personal attendance to testify (*post*, § 2372); and (4) whether a judge is privileged not to reveal official secrets (*post*, § 2375).

fronted with the witnesses. Our law takes the utmost care to secure to the accused, in capital cases, an impartial jury—it almost allows prisoners to select their own triers. They may examine jurors as to their knowledge of circumstances, their expressions, opinions or prejudices, and challenge as many as they can show cause for, and may challenge twenty without showing cause, and then if any juror happens to have knowledge of any pertinent fact, he is bound to disclose it in time for the accused to cross-examine him, and to explain or contradict his testimony. If this be not a fulfilling of the constitutional injunction in behalf of impartial juries, it would be difficult to invent a plan that would fulfil it and at the same time be consistent with the demands of public justice. But counsel imagine that the constitutional right to *confront* witnesses would be abridged in the instances of witnesses taken from the jury-box, because their truth and veracity could not be attacked without damage to the attacking party. As to material witnesses, those, we mean, upon whose testimony the event is essentially dependent, we think they ought not to be admitted into the jury-box, and we believe the general practice is to exclude them where the fact is discovered in time; but we do not think the constitutional provision alluded to, nor any rule of law, is violated by the examination of a juror as a witness. The *a priori* presumption is that he is a man of truth and veracity or he would not have been summoned as a juror; and confronting witnesses does not mean impeaching their character, but means cross-examination in the presence of the accused. . . . He, like all other witnesses, must 'confront' the accused, that is, be examined in the presence of the accused, and be subject to cross-examination; but he is not disqualified to be a witness."

These objections seem reducible in substance to two: first, that the opposing counsel will be embarrassed by a fear of offending the juror, so that an adequate cross-examination or impeachment would be prevented; and, secondly, that the juror, sitting afterwards as judge of the facts, would be disposed to give excessive weight to his own testimony and in general to treat too favorably the testimony of the side whose partisan he had been made. The first objection is in the hands of the opponent himself to obviate, for if the juror is to be a principal witness and his testimony will be of such consequence as to deserve impeachment on thorough cross-examination, the opponent may ascertain this upon the juror's *voir dire*, and may then exclude him by challenge. The second objection is of slight consequence, because it may usually be obviated in the same way by challenge, and because the impartiality of the remaining jurymen can be trusted to counteract whatever slight bias may be by possibility created in the testifying juror, and because this bias can ordinarily affect only a minor fact in the whole mass of evidential matter.

Accordingly, it has always been regarded as proper that a juror having any relevant knowledge should be called as a witness, returning to the box after completing his testimony.¹

¹ To the following authorities add those cited *ante*, § 1900, which also imply the competency of a juror to testify; by statute certain restrictions are sometimes imposed: *England*: 1663, Fitzjames v. Moya, 1 Sid. 133 (a jurymen testified for the defendant, and then "continued of the jury"); 1679, Reading's Trial, 7 How. St. Tr. 259, 267 (Defendant: "My lord, I am very glad to see Sir John Cutler here; for I did intend to have his evidence"; L. C. J. North: "That you may have, though he be sworn [on the jury]"); 1744, Heath's Trial, 18 id. 1, 123

(a juror was sworn and testified to impeach a witness); 1716, Hawkins, Pl. Cr., b. 2, c. 46, § 80 (quoted *ante*, § 1900, note 1); *United States*: Ark. Stats. 1894, § 2965 ("The judge or juror may be called as a witness by either party; but in such cases it is in the discretion of the judge to suspend the trial and order it to take place before another judge or jury"; and if party knows beforehand that juror is to be called by him, he must disclose it and the witness be excluded from jury); Cal. C. C. P. 1872, § 1883 (quoted *ante*, § 1900); 1897, Sa-

Distinguish the principle of the Hearsay rule, which forbids a juror to make use of his *private knowledge* in any other way (*note*, § 1800); the principle of Judicial Notice, which allows a juror to use *general information* common to all men, without taking the stand (*post*, § 2570); and the principle of Privilege, which forbids the juror to *disclose the secrets* of the jury-room (*post*, § 2846).

§ 1911. **Counsel or Attorney as Witness.** The competency of a counsel or attorney to testify on behalf of his client, as a problem in evidence, has occupied a singular place in our law. Occurring in practice with much more frequency than that of a judge's or a juror's competency, it has presented constant opportunity for objection and discussion; the reasons of the most diverse sort, urged against it, are much more cogent than those urged against the testimony of judge or juror; the force of these reasons has been generally conceded; and yet in almost every court the final step has failed to be taken, and the judges have halted half-way between a prohibition and a license; while the legislators, who have eagerly busied themselves with a reenactment of the common-law truism that a juror may be a witness, have ignored the troublesome problem of a counsel's testimony. In the days of King Henry VIII and his abuse of the law's methods to tyrannical private ends, an instance is recorded of a counsel's testifying against his client;¹ but this misunderstood instance, which has been spread into general knowledge by the anathema of an eminent legal biographer,² is in truth beside the point;

vigny F. & W. R. Co. v. Quo, 108 Ga. 123, 29 S. E. 607; *Ida. Rev. St.* 1897, § 5959 (like Cal. C. C. P. § 1883); 1896, *State v. Cavanaugh*, 98 Ia. 686, 691, 68 N. W. 452; Ky. C. C. P. 1895, § 603 (a juror is competent, but the Court may suspend the trial and select another jury; and the witness must be excluded from the jury if known beforehand to the party); *Mont. C. C. P.* 1895, § 3164 (like Cal. C. C. P. § 1883); 1903, *Chicago R. I. & P. R. Co. v. Collier*, — Nebr. —, 95 N. W. 472; *Nev. Gen. St.* 1888, § 3408 (like Cal. C. C. P. § 1883); 1874, *People v. Dohring*, 59 N. Y. 374, 376 ("It is settled that a juror may be a witness on a trial before himself and his fellows"; thus discrediting the *obiter dictum* in *Morse v. Morse*, 11 Barb. 510, 515, quoted *supra*); N. D. Rev. C. 1896, § 5705 (like Cal. C. C. P. § 1883); 1892, *Plank-Road Co. v. Thomas*, 20 Pa. 91, 95 (one who had been a viewer); 1865, *Hower v. Com.*, 51 id. 332, 337; S. D. *Stata.* 1899, § 5346 (like Cal. C. C. P. § 1883); *Utah Rev. St.* 1896, § 3415 (like Cal. C. C. P. § 1883); 1895, *People v. Thiede*, 11 Utah 241, 39 Pac. 837; 1902, *Dunbar v. Parks*, 5 Vt. 217; *Wash. C. & Stats.* 1897, § 5001 (juror may be examined as witness). *Contra*: 1890, *R. v. Petrie*, 20 Ont. 317, 319 (apparently doubted).

A juror may therefore also be an *interpreter*: 1893, *People v. Thiede*, 11 Utah 241, 39 Pac. 837; 1895, *Thiede v. Utah*, 159 U. S. 510, 16 Sep. 62 (here with the accused's consent). It was once suggested, but without any ground either in precedent or in policy, that the jury-

man might *refuse to testify as a witness*: 1840, *Manley v. Shaw*, Car. & M. 361, per Tindal, C. J.

Distinguish the rule of *qualification as juror* that a prospective witness may be *challenged as a juror*; e. g.: 1877, *Commander v. State*, 60 Ala. 1, 6 (persons already summoned as witnesses for prosecution, held incompetent as jurors); *Atkins v. State*, ib. 48, 49 (same; failure to examine them as witnesses is immaterial); *Mo. Rev. St.* 1899, § 2615 (no witness in criminal case is to be sworn as juror, if challenged before swearing).

¹ 1535, *Sir Thomas More's Trial*, 1 How. St. Tr. 386, 387, 390 (treason; some twelve-month before the trial, Mr. Rich, Solicitor-General, went to the accused in the Tower, to take away his books, and "pretending friendship with him," put a hypothetical case, and got an answer from the accused; on the trial, the proof languished, whereon "Mr. Rich was called to give evidence in open court upon oath, which he immediately did," of this conversation).

² 1856, *Campbell, Lives of the Chancellors*, 4th ed., II, 61 ("Mr. Solicitor, to his eternal disgrace, and to the eternal disgrace of the Court who permitted such an outrage on decency, left the bar and presented himself as a witness for the Crown"; but these epithets may have been inspired by the fact that he testified to a confidential communication with the accused).

for it not only concerned the case of a counsel testifying against his client (a matter upon which there has never been doubt), but involved apparently a breach of professional confidence, and was in that respect sufficiently illegal and indefensible. Certain it seems that until the 1800s³ no doubt was raised as to the propriety of a counsel or attorney testifying for his client. Even then the doubt in England came by indirection only;⁴ while in this country it was raised merely by invoking for individual cases the general principle of disqualification by interest in the event of the suit,⁵ — a principle which of course did not apply to counsel merely as such. But in 1846, in England, a single judge sitting at Nisi Prius and citing no precedents, declared such testimony inadmissible, on broad though indefinite grounds,⁶ and this ruling, though repudiated in the same jurisdiction within half a dozen years by a Court in banc,⁷ served to bring the question into the arena of general discussion, and to give a larger scope to the problem of policy involved; and the echoes of the debate have not yet died away.

The arguments advanced against admitting counsel or attorney as witness for the client are of three distinct sorts.

(1) First, the general principle of *disqualification by interest*, to be enforced not according to the narrow technical tests now obsolete (*ante*, § 576), but because of the general emotional relation of partisanship which exists in favor of the client, independently of any specific interest in the event of the cause:

³ 1654, *Waldron v. Ward*, Style 449 (a "counsel in the case" allowed to be examined).

⁴ *Circa* 1810, *R. v. Milne*, 3 B. & Ald. 606, note (the prosecutor was obliged to waive giving evidence before Lord Ellenborough, C. J., would allow him to address the jury); 1819, *R. v. Brice*, ib. 606 (the prosecutor was not allowed to address the jury; *per Curiam*: "Besides, the prosecutor may be and generally is a witness, and it is very unfit that he should be permitted to state, not upon oath, the facts to the jury which he is afterwards to state to them on his oath").

⁵ See the American cases before 1846, cited in note 9, *infra*, which all deal with it in this way.

⁶ 1846, *Stones v. Byron*, 4 Dowl. & L. 393, 11 Jur. 242, 1 Bail Court Rep. 249 (the plaintiff's attorney acted as advocate, and also testified to contradict the defence; Pattenon, J., held his testimony inadmissible, as not "consistent with the due administration of justice"); 1847, *Deane v. Packwood*, ib. 395, note, 1 Bail Court Rep. 312 (preceding case followed by Erie, J.).

⁷ The English and Canadian cases are as follows: *Eng.*: 1852, *Cobbett v. Hudson*, 1 E. & B. 11, 22 L. J. Q. B. 11 (the plaintiff, conducting his own cause *in forma pauperis*, was held entitled as of right to address the jury as well as to testify; the foregoing cases were discredited; and the rule was put on the ground that a party's right to testify and his right to be his own advocate were separate and not incon-

sistent, though the practice was reproved as "contrary to good taste and good feeling" and "revolting to the minds of the jury"; the same rule was apparently held applicable to a counsel and witness not being also a party, but this was not expressly declared; "if the practice does gain ground to a degree seriously injurious to justice, the judges were said to have power to make a rule against it). In Canadian jurisdictions the same result was generally reached: *N. Br.*: 1847, *Shields v. McGrath*, 3 Kerr 396 (counsel not allowed to be a witness for his party); 1875, *Bank of B. N. A. v. McElroy*, 2 Fuga 463 (counsel allowed to be witness, as a matter of right for the party; but "it is an indecent proceeding and should be discouraged"; repudiating the preceding case, on the authority of *Cobbett v. Hudson*); 1890, *Halifax Banking Co. v. Smith*, 29 N. Br. 462, 469, 480 (counsel who had assisted in a business transaction with notes, allowed to give his opinion of handwriting; two judges diss.); *Ont.*: 1847, *Benedict v. Baulton*, 4 U. C. Q. B. 96 (counsel not allowed to be witness for his party, following *Stones v. Byron* and *Deane v. Packwood*); 1847, *Cameron v. Forsyth*, ib. 189 (preceding case treated as representing the rule); 1876, *Davis v. Ins. Co.*, 39 id. 452, 477, 481 ("It is a misdirection for a judge to reject the testimony of counsel when offered as a witness on behalf of his client"; following *Cobbett v. Hudson*; though it is "desirable" not to keep the characters separate if possible; preceding two cases in effect repudiated).

1833, *Porter, J.*, in *Coe v. Williams*, 5 Mart. w. s. 130 (referring to an early prohibitory statute): "The motives which induced the Legislature to pass such a law were supposed to be that attorneys could not safely be intrusted to testify for their clients; that under the influence of professional zeal they became in feeling, if not in interest, completely identified with those who employed them."

This reason, it may be said once for all, has totally disappeared from the controversy. It was easy to appreciate its force in the epoch when pecuniary interest was a disqualification in general; but with the disappearance of that disqualification has passed away any inclination to see special danger in the even less tangible interest of a counsel. The rulings concerned with this argument³ have therefore no present significance.

(2) The second reason, though indirectly connected with the preceding thought, is in effect wholly distinct, and is of the nature of those principles of Extrinsic Policy later dealt with (*post*, § 2175). It is concerned with the dangerous effects of the practice upon the public mind. In short, it does not fear that lawyers may as witnesses distort the truth in favor of the client, but it fears that the public will *think* that they may, and that the public's respect for the profession and confidence in it will be effectively diminished. This is at once the most potent and most common reason judicially advanced:

1847, *Lewis, P.*, in *Miehler v. Baumgardner*, Pa. Com. Pl., 1 American Law Journal, w. s. 304, 306: "In the course of twenty-five years' experience, I have seldom known an attorney received as a witness in chief for his client, touching a disputed fact, without some loss of reputation, and without to some extent bringing reproach upon the profession to which he belonged and upon the court of which he was an officer. . . . Existing prejudices and modes of thinking, whether just or not, point to the exclusion of such testimony as indispensable to the usefulness of all who are officially connected with the administration of justice. . . . Liability to suspicion of partiality and falsehood exists, . . . and its consequences to the public, when applied to those who are constantly charged with official trusts, are too alarming to escape observation."

1848, *Sandford, J.*, in *Lille v. Keon*, 1 Code Reporter (N. Y. Super.) 4: "When we test the objection to the attorney by any established principle in the law of evidence, we find no good ground for rejecting him. Thus, he is not interested in the event of the suit [unless he is employed on a contingent fee]. . . . There is no reason for excluding the attorney on the ground of privilege or of confidence as between him and the adverse party. . . . As to the effect of this practice upon the character of the bar itself, we think the evil will work its own cure. Attorneys as well as counsellors of standing and character will never, except in extreme cases, present themselves before a jury as witnesses in their own causes on litigated questions, and in such cases only because of some unforeseen necessity. Those gentlemen of the bar who habitually suffer themselves to be used as witnesses for their clients soon become marked, both by their associates and the Courts, and forfeit in their character more than will ever be compensated to them by success in such clients' controversies."

1848, *Anon.*, in 5 Western Law Journal 437: "The attorney's exclusion should rest on peculiar grounds. He should be rejected, not for the protection of the opposite party, but for his own; not because his integrity may be exposed to temptation, but because it will be exposed to suspicion. Let us consider for a moment the relation which he appears to sustain toward the party he represents. . . . He is paid for the knowledge,

³ *Infra*, note 3, *passim*.
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industry, talent, and zeal he may exert in the cause. Though his compensation depends on no contingency of success or failure, yet he feels entitled to charge, and his client feels disposed to pay a higher fee when the cause terminates successfully. His sympathy for a losing client induces him to abate the amount of his charge, and he feels that a fortunate litigant can compensate him more liberally. There are cases, too, in which, from the inability of his client, he must receive nothing, if the case is determined against him. . . . He is perhaps ardent to prevail for the sake of victory. Reputation is greatly enhanced by success. The vulgar generally applaud the winning lawyer, as the winning horse, and have no better criterion of ability than the event of a suit. The successful termination of a case, especially a doubtful one, often attracts other business. In whatever degree some minds may be influenced by such motives, there is no advocate wholly indifferent to the prestige which attends victory. The lawyer who approaches a jury to sustain a case by his testimony, and to advocate it by his eloquence, places himself in an indecent position. Paid for the ability he may exert in obtaining success, deceived by a partial knowledge of the facts, and ardent to win, his testimony must be viewed with distrust. His statement, though perfectly reliable under other circumstances, is received with suspicion by the jury, generally consisting of men whose limited education and position in life give them no enlarged views of things, and no elevated opinion of human nature. The incompetency of the attorney, therefore, need not be placed on the probability of the falsehood of his testimony. He should not be suffered by the Court to place himself in a position that may lessen his character, or diminish the confidence of men in the purity of the administration of justice."

1867, *Lawrence, J.*, in *Reas v. Demoss*, 45 Ill. 447, 449: "An attorney occupying the attitude of both witness and attorney for his client subjects his testimony to criticism if not suspicion; but where the half of a valuable farm depends upon his evidence, he places himself in an unprofessional position, and must not be surprised if his evidence is impaired. While the profession is an honorable one, its members should not forget that even they may so act as to lose public confidence and general respect."

(3) The third reason is of the sort otherwise noticed in this Chapter, namely, the fear that the testimony of the counsel and his statements in argument might be so identified in the minds of the jury that they might be too ready to give to the argument a testimonial credit and effect, as if the oath of the counsel as witness were pledged to it, and thus be unduly impressed with its weight. This reason (which is somewhat inconsistent with the preceding one) has rarely been advanced, and derives its only importance from the fact that it was propounded by the successful counsel in the case which threatened for a time to establish the rule of absolute exclusion:

1846, *Mr. Udall*, arguing, in *Stones v. Byron*, 4 Dowl. & L. 308: "It would be a practice attended with the most mischievous consequences, if an attorney or any other person, acting as the advocate of a party, could afterwards present himself before the jury as a witness to support those statements he had been making in the course of his speech. The characters of an advocate and a witness should be sedulously kept apart. The one is a person zealously and warmly espousing the interests of his client; the other a person sworn fairly and impartially, without bias or favor to either party, to tell the truth of what he had witnessed or heard. The jury might have considerable difficulty in separating those statements which they had heard from a person as advocate from those which they had heard from the same person as witness."

The result of the controversy has been that, in the Courts dealing with this question since 1846, the force of these objections (mainly of the second)

has been fully realized; but that they have nevertheless declined, almost unanimously, to lay down a rule of prohibition.* The reasons are, probably,

* Compare also with the following authorities the quotations ante, §§ 1806, 1807, which sometimes hint at the same result: *Als.*: 1844, *McGhee v. Hancell*, 18 Ala. 17, 21 (an attorney in the case is not as such disqualified by interest); 1846, *Morrow v. Parkman*, 14 id. 769, 775 (same); 1852, *Quarles v. Waldron*, 20 id. 217 (same, provided his fee is not contingent on the event of the suit); *Conn.*: 1844, *Carrington v. Holabird*, 17 Conn. 280, 290 (counsel in a former proceeding, not disqualified in proceedings to procure a new trial and an injunction against the judgment); 1866, *Thresher v. Bank*, 68 id. 261, 26 Atl. 26 (a party held entitled both to try his case and to be a witness; but otherwise for a party who is an attorney-at-law, to whom applies "the wholesome rule of professional etiquette which holds the position of trial lawyer and material witness to be incompatible"; here a ruling allowing the attorney to try the cause and to testify, and refusing the opponent's request that the testimony be only in answer to questions put, was held not erroneous); *D. C.*: 1864, *Mary Harris' Trial*, *Cipphane's Rep.* 61, 117 (murder of Adoniram J. Barroughs; defense of insanity; Mr. Joseph H. Bradley, chief counsel for the accused, testified at length of his observation of her mental condition after becoming her counsel; here apparently a decided impropriety, which led later to a meeting comment by the prosecuting attorney); *Del.*: 1901, *Fritchard v. Henderson*, 8 Pen. Del. 123, 20 Atl. 318 (one in the office of the counsel, and taking some part in the case, excluded); *Ga.*: here statutes have hopelessly confused the present rule with that of privileged communications (*post*, § 2292): *St.* 1850, p. 46, Feb. 21 (no attorney shall give testimony "either for or against his client, the knowledge of which he may have acquired from his client or during the existence and by reason of the relationship of client and attorney"); 1853, *Swift v. Perry*, 13 Ga. 123 (*St.* 1850, disqualifying attorneys, held to apply "only in the case pending to which the client is a party"); 1855, *Riley v. Johnston*, ib. 260, 266 (statute applied); 1855, *Chappell v. Smith*, 17 id. 68 (statute applied); 1855, *McDonald v. Lane*, 18 id. 444, 452 (statute applied); 1856, *Churchill v. Corker*, 25 id. 479, 489 (like *Swift v. Perry*); 1856, *Causes v. Wiley*, 37 id. 444, 450 (statute applied); 1859, *Osborn v. Herron*, 28 id. 312, 316 (statute applied); 1860, *Sherman v. Morton*, 31 id. 34, 43 (statute applied); *St.* 1859, p. 18 (repealed the statute of 1850, but provided that no attorney should be "allowed" to testify to the client's admissions after employment in the case); *St.* 1864, p. 139 (declared all persons competent with certain exceptions, and repealed all conflicting laws; one exception was: "Nor shall any attorney be compellable to give evidence for or against his client"); 1876, *Willie v. West*, 60 id. 613 (*St.* 1864 is held to signify that attorneys are "competent, though not compellable, to testify" for their clients); *St.* 1887, p. 30, Code 1895, § 5271 ("no attorney shall be competent or compellable

to testify in any Court in this State for or against his client, to any matter or thing, knowledge of which he may have acquired from his client by virtue of his relations as attorney, or by reason of the anticipated employment of him as attorney"); 1887, *Fire Ass'n v. Flemming*, 70 id. 3, 3 S. E. 480 (attorney admitted for his client); 1888, *Shelley v. James*, 81 id. 419, 8 S. E. 607, *semble* (statute affects competency for his client); 1888, *Lewis v. State*, 91 id. 168, 16 S. E. 906 (statute makes an attorney incompetent for his client); *Ida.*: 1888, *Sebree v. Smith*, 2 Ida. 237 (*Hash*, 359), 16 Pac. 915 (attorneys should not be witnesses for their clients, except in case of extreme necessity; here, testimony to the opponent's negotiations was excluded); 1901, *State v. Seymour*, 7 id. 243, 63 Pac. 1036 (county attorney, held compellable to testify for the accused); *Ill.*: 1861, *Stratton v. Henderson*, 26 Ill. 68, 73, 76 (counsel allowed to testify for his client as to interest-reckoning; "we are not altogether in favor" of it, but "we have no law or rule of practice" against it); 1865, *Morgan v. Roberts*, 38 id. 68, 85 (issue involving an attorney's claim for fees; attorney allowed to be witness; "all the Court can do is to discountenance the practice, and, when the evidence is indispensable, recommend to the counsel to withdraw from the cause"); 1867, *Ross v. Demoss*, 45 id. 447, 449 ("It is of doubtful professional propriety . . . without first entirely withdrawing" from the cause); 1900, *Drach v. Kamberg*, 187 id. 385, 53 N. E. 370 (attorney allowed to testify as subscribing witness to a will; but "Courts have always discountenanced the practice"); *Ida.*: 1859, *Abbott v. Striblen*, 6 la. 191, 196 (attorney allowed to prove the copy of a document and the original's loss); *Kan.*: 1869, *Central Branch U. P. R. Co. v. Andrews*, 41 Kan. 370, 377, 31 Pac. 276 (attorney competent for his client, even though acting upon a contingent fee); 1901, *State v. Herbert*, 63 id. 516, 64 Pac. 235 (county attorney, allowed to testify to testimony at a former trial; the opinion misconceives the principle); *Ky.*: 1860, *Hall v. Renfro*, 3 Metc. 51, 53 (attorney held competent for his client; with "the question of professional propriety . . . the Court has no concern"); *La.*: 1836, *Cox v. Williams*, 5 Mart. n. s. 139 (early statute forbidding attorney to testify in a case where he has been employed, held not to prevent the opponent calling him); 1852, *Madden v. Farmer*, 7 La. An. 580 (attorney's testimony not receivable as "full proof" for his client, "particularly in cases where the attorney would be personally responsible if the action was not sustained"); 1853, *Sprigg v. Beaman*, 6 La. 60, 64 (counsel held not excluded by interest because his practice, without a contract, was to vary his fee according to success); *Rev. Civ. C.* 1883, § 2283 (a person's "being employed as counsellor or attorney does not disqualify him from being a witness in the cause in which he is employed"); *Me.*: 1891, *Rules of the Supreme Judicial Court*, No. 42, in 73 Me. 546, 561 ("No attorney or counsellor shall be permitted to take

because the expected evil is one that would be caused only by an inveterate practice and not by casual instances, and because the strong recommendations of the Courts have proved sufficient to prevent the use of such testimony other than in casual, unavoidable, and therefore harmless instances. There is, then, in general, no rule, but only an urgent judicial reprobation, forbidding counsel or attorney to testify in favor of his client.

From this are to be distinguished: the prohibition, under the Hearsay rule, of a counsel's stating unproven facts in his argument (*ante*, § 1806), and the privilege of a client against his attorney's or counsel's disclosure of confidential communications (*post*, § 2290).

§ 1912. *Referee, Arbitrator, Sheriff, as Witness.* (1) A referee, sitting in the place of judge and jury, would be affected by a rule of prohibition against a judge's testifying in a trial before himself.¹

any part in the conduct of a cause before a jury in which he is a witness for his client, except by special leave of the Court"); *Mass.*: 1843, *Potter v. Ware*, 1 Cash. 519, 523 (attorney not disqualified by interest to testify; there may be cases in which they can do it, not only without dishonor, but in which it is their duty to do it; such cases, however, are rare"); *N. H.*: 1833, *Rules of Court*, 6 N. H. 580 ("No attorney or counselor shall be permitted to take any part in the conduct of any cause before the jury, after he shall have testified for his client in the same cause"); *N. J.*: 1831, *Folly v. Smith*, 12 N. J. L. 139 (attorney held competent for his client to prove his power of attorney); *N. Y.*: 1813, *Caniff v. Myers*, 15 John. 246 (attorney held competent to prove his power of attorney); 1831, *Tallock v. Cunningham*, 1 Cow. 236 (same); 1843, *Little v. Keon*, 1 Code Reporter 4 (attorney held competent; quoted *supra*); 1873, *Tison v. Beecher*, Abbot's Rep. II, 303, (Official Report III, 1011, 1016 (Mr. Tracy was allowed to testify for the defendant; quoted *ante*, § 1807; Mr. Beach afterwards made scathing comments on the propriety of this action); *N. C.*: 1813, *Storum v. Newby*, 1 Murph. 423 (counsel allowed to be witness, not being otherwise interested); 1843, *State v. Woodside*, 9 Ired. 496, 503 (attorney or counsel allowed to be witness; "it is a practice not to be encouraged"); *Pa.*: 1783, *Newman v. Bradley*, 1 Dall. 340 (counsel not disqualified by interest in judgment-fee); 1814, *Miles v. O'Hara*, 1 S. & R. 32, 34 (not disqualified by expecting a larger fee if successful); 1823, *Boulton v. Hebel*, 17 Id. 312 (not disqualified where not legally entitled to a contingent fee); 1847, *Mishler v. Baumgardner*, Pa. Com. Pl. 1 Amer. L. Journ. n. s. 304 (counsel inadmissible; quoted *supra*); 1843, *Frear v. Drinker*, 3 Pa. 36 520 ("It is a highly indecent practice for an attorney to cross-examine witnesses, address the jury, and give evidence himself to contradict the witness," though his testimony is "sometimes indispensable," and no law forbids it); 1849, *Bell v. Bell*, 12 Id. 235 (an attorney is competent, though it is "commendable delicacy" to withdraw from argument); 1843, *Linton v. Com.*, 45 Id. 234 (attorney not disqualified by interest); 1872, *Follansbee v. Walker*, 72 Id. 236 (*Frear v.*

Drinker quoted and approved); 1864, *Perry v. Dicken*, 105 Pa. 83, 86 (an attorney should decline to testify for his client, except so far as absolute necessity makes it his duty); *S. C.*: 1819, *Reid v. Colcock*, 1 N. & McD. 392, 397 (attorney not so much disqualified by interest to testify; "but it is a matter of much delicacy," and should be avoided unless indispensable); *Tax.*: 1854, *Spencer v. Kinnaird*, 12 Tex. 106, 109 ("The ends of justice sometimes make it necessary that an attorney should give evidence for his client," but Courts should "only tolerate it in cases of pressing necessity"); *U. S.*: 1866, *French v. Hall*, 119 U. S. 152, 7 Sup. 170 ("There is nothing in the policy of the law, as there is no positive enactment, which hinders the attorney of the party . . . in a civil action from testifying at the call of his client; in some cases it may be unseemly"; here the exclusion was held improper); *Utah*: 1899, *McLaren v. Gillespie*, 19 Utah 137, 56 Pac. 680 (an attorney is competent for his client; but he should not be called unless indispensable, and he should then retire from the case, if possible with safety to client's interests); *Wash.*: 1903, *Voss v. Bender*, 32 Wash. 546, 73 Pac. 697 (a rule of court prohibiting an attorney who testifies for his client from making an argument to the jury, held proper); *W. Va.*: 1891, *Monte v. Rymer*, 18 W. Va. 642, 645 ("While there are some cases of extreme character in which such practice is necessary, ordinarily it is much to be regretted"); *Wis.*: 1896, *Hardike v. State*, 67 Wis. 552, 557, 20 N. W. 723 (counsel for the prosecution testified to a partial admission by the defendant, made to him during the preliminary examination; the "propriety" of this was said to be "very questionable").

¹ 1851, *Morse v. Morse*, 11 Barb. 310, 313 (referee declared incompetent, as being both judge and juror, and being ineligible as the former and probably also as the latter; *ante*, §§ 1909, 1910).

(Otherwise of a commissioner of depositions: 1886, *Bright v. Woodard*, 1 Vern. 365 ("a commissioner [to take depositions] may be a witness, but then he ought to be examined before any other witness be examined").

§ 1904-1913] COUNSEL, ARBITRATOR, ETC., AS WITNESS. § 1913

(2) An arbitrator, in respect to testifying before the body of which he is a member, would equally be prohibited by a rule affecting a judge.³ But the usual question here is as to the subsequent disclosure by the arbitrator of the proceedings before him, which involves a different principle (*post*, § 2358).

(3) A sheriff, or other court officer charged with the safekeeping of jurors, is not prohibited from testifying to facts relevant to the cause.⁴ Whether he, or any one else, may reveal the conduct or utterances of the jurors during their retirement, involves a different principle (*post*, § 2354).

§ 1913. Documents taken to the Jury-Room. It was formerly said that writings under seal, received in evidence or as part of the issue, could be taken by the jury for further perusal upon retirement into their room for deliberating upon their verdict, but that other writings could not be:

Ans 1726, Chief Baron Gilbert, Evidence, 17: "These exemplifications [of records], and all other under seal, shall be delivered to the jury to be carried off with them; but sworn copies shall not; . . . [1] the jury are allowed to carry them [the former] away with them as the acts of the most remarkable solemnity, that the most solemn acts may make the last impression. [2] Another reason why matters under seal shall be delivered to the jury is because these things, that are generally of higher or at least of equal credit with matters sworn *visu voce*, would not be yet understood so well upon the hearing as the evidence *visu voce* may upon the examination, where the jury have liberty to put what question they please. . . . [3] [Writings not under seal] have no intrinsic credit in themselves, . . . they have no credit but what they derive from something else, viz., from the oath of the person who attests them or from some presumption in their favor, so that they receive their credit from some act in Court, but do not carry it along with them, and therefore cannot be removed out of Court with the jury. But things under seal are supposed to have an intrinsic credit from the impression of the signature, and are supposed to be known by the jury in some measure."

These reasons seem fantastic enough now, and were more or less artificial and *ex post facto* at the time that they were advanced; although the rule itself had an intimate connection with the history of jury-trial.¹ But with the disappearance of the seal's importance, the rule in its original form has ceased to be maintainable on any pretext.

Nevertheless, an effort has been made by some Courts, finding the rule ready made at hand, to preserve and adapt it to changed conditions, by making a distinction between written and oral materials of evidence, or between written depositions and oral testimony; and they have discovered reasons of policy which forbid the jury to have this opportunity of emphasis for the one form of evidential matter, as well as invented expedients for keeping from the jury's perusal whatever irrelevant material is bound up in the same

¹ The case does not seem to have been ruled upon. It is generally said merely that an arbitrator is admissible if the facts desired from him are provable: 1668, *Re Dare Valley R. Co.*, L. R. 6 Eq. 429, 435; 1872, *Duke of Buccleuch v. Metropolitan Board*, L. R. 5 E. & I. App. 412, 423, 425.

² 1867, *People v. Coughlin*, 65 Mich. 704, 33

N. W. 905 (sheriff); 1896, *People v. Beverly*, 106 Id. 509, 513, 66 N. W. 379 (officer in charge); 1900, *Reed v. Com.*, 96 Va. 517, 36 S. E. 399 (deputy sheriff); 1888, *State v. Shores*, 31 W. Va. 491, 499, 7 S. E. 415 (sheriff).

³ Thayer, *Preliminary Treatise on Evidence*, 104-112.

document with material justly admitted. Statutes also have in many States affected the common-law rule. But these are all questions of the proper control of the jury in its deliberations, and not of the rules of evidence, and are therefore without the present purview.²

² In the following opinions a clue will be found to the authorities and distinctions: 1897, *Burton v. State*, 115 Ala. 1, 22 So. 585; 1897, *Koch v. State*, lb. 99, 22 So. 471; 1896, *Wakeman v. Marquand*, 5 Mart. n. s. La. 265, 267; 1874, *Sawyer v. Garcelon*, 63 Me. 25; 1882, *Tabor v. Judd*, 62 N. H. 288, 292; 1897, *People v. Hughson*, 154 N. Y. 153, 47 N. E. 1092; 1901, *State v. Shaw*, 73 Vt. 149, 50 Atl. 863; 1882, *Doctor Jack v. Terr.*, 2 Wash. Terr. 101, 106,

3 Pac. 632; 1897, *State v. Moody*, 18 Wash. St. 165, 51 Pac. 356; 1883, *Welch v. Ins. Co.*, 23 W. Va. 288, 308; 1895, *Starke v. Wolf*, 90 Wis. 434, 63 N. W. 755.

Distinguish the refusal to send the jury documents never admitted or formally introduced in evidence: 1897, *State Bank v. Brewer*, 100 Ia. 376, 69 N. W. 1011; 1897, *Gable v. Ranch*, 50 S. C. 95, 27 S. E. 555.

SUB-TITLE III: OPINION RULE.

TOPIC I: GENERAL PRINCIPLES.

CHAPTER LKV.

- § 1917. History of the Rule.
 § 1918. Theory of the Rule.
 § 1919. Erroneous Theories: (1) Logical Opposition between "Opinion" and "Fact."
 § 1920. Same: (2) "Usurping the Function of the Jury."
 § 1921. Same: (3) Opinion on the Very Issue before the Jury.
 § 1922. Same: (4) Opinion admissible when preceded or accompanied by Facts or Grounds.

- § 1923. Practical Test for receiving Opinions: (a) Skilled Witnesses.
 § 1924. Same: (b) Lay Witnesses.
 § 1925. Distinction between Rule of Expert-Qualifications and Opinion Rule.
 § 1926. Flexibility of the Test.
 § 1927. Discriminations as to (1) Hypothetical Questions, and (2) "Impressions."
 § 1928. Form of the Opinion Rule as Negative or Affirmative.
 § 1929. Future of the Opinion Rule.

§ 1917. **History.** The so-called Opinion Rule is in its scope much narrower than the term "opinion"; it deals with opinion in a special sense only. It is not the only rule which may serve to raise an objection to opinion-testimony. What is first to be ascertained, then, is the way in which this rule took shape and was differentiated from other rules affecting opinions as testimony. The steps of development are not as simple to trace as in some other instances, but the general conditions at the beginning and at the end seem clear.

1. The judicial utterances of the 1700s must be approached with the recollection that up to that time there was no traditional or received notion that opinion (or the like) was proper or was improper to listen to, and that (as with so many other commonplace notions of to-day's law of evidence) there had been little or no thought on the subject. Chief Baron Gilbert (*ante* 1726) has nothing to say about such a rule; Mr. Justice Buller (*ante* 1767) has nothing to say; there is nothing to say at that time.

2. Nevertheless, then and shortly later, there is appearing an appreciation of one important and afterwards fully established principle,—the principle of Testimonial Knowledge (*ante*, § 657), i. e. that the witness must speak as a knower, not merely a guesser; that when the witness, speaking (for example) to a sale of goods, declares that he thinks or believes or is persuaded that the sale was not made, such a witness cannot be heard, so far as he means that he did not see the transaction in question but believes so on rumor alone or has otherwise reached by supposition his conclusion. This principle of personal observation came early into play in emphasizing the impropriety of testimony by one who speaks only from hearsay. This was probably what Coke had in mind in the passage attributed to him in *Adams v. Canon*,¹ in 1622:

"It is no satisfaction for a witness to say that he 'thinketh' or 'persuadeth himself,' and this for two reasons; first, because the judge is to give an absolute sentence, and for

¹ Dyer, 33 b.

this ought to have a more sure ground than 'thinking'; secondly, the witness cannot be sued for perjury."

It is the phrases resorted to for expressing this principle that are here of interest. Such a witness is told by the Court: "That is mere opinion; we want what you *know*, not what you *think* or *believe*." This is one phrase of contrast which the Court might use, — the contrast between knowing (i. e. personally observing) and opining (i. e. believing without sufficient observation). But there is another phrase; the judge might say, "We want not your *opinion*; have you any *facts*? For we can guess and opine as well as you can; tell us facts if you have them." This demand for "facts" means, as before, some real or positive grounds of knowledge in the witness. The principle of objection which the judge has in mind is the same in both cases; he will have knowledge, not opinion, — facts, not opinion. In the following passages this attitude towards opinion-evidence is illustrated:

1644, *Archbishop Laud's Trial*, 4 How. St. Tr. 315, 399; a witness, testifying to rumors of the bishop's tampering with a jury, said "and thereupon, as he conceives, the petty-jury was changed"; the defendant argues: "[This evidence] is not the knowledge, but the conceit only of the witness; he 'conceives,' which I am confident cannot sway with your lordships for a proof."

1824, *Mr. Thomas Starkie*, Evidence, 173: "A witness examined as to facts ought to state those only of which he has had personal knowledge. . . . It has been said that a witness must not be examined in chief as to his *belief* or *persuasion*, but only as to his *knowledge* of the fact. . . . As far as regards mere belief or persuasion which does not rest upon a sufficient and legal foundation, this position is correct, — as where a man believes a fact to be true merely because he has heard it said to be so."²

At this stage, then, and as the distinct first meaning of the disparaging references to "opinion," the profession has in mind a witness who turns out upon examination to have no facts to contribute, no knowledge, no personal acquaintance with the man or the land or the loan or the affray about which he is speaking. In this requirement, however, there is no new principle, no independent "opinion rule," but merely a recognition of an otherwise established general principle of testimony: qualifications that the witness, to be competent at all, must have personal observation (*ante*, §§ 657, 658). Had the matter gone no farther, there would have been no separate "opinion rule," but merely a special application of an ordinary principle of testimonial competency.

3. But, at the same time that this principle is becoming recognized, or shortly after, there occurs a general recognition of what seemed at the time as an exception to it, — the use of skilled witnesses. A witness is called to the stand, but appears to have no personal acquaintance with the circumstances in dispute; then how can we listen to his mere opinion? Because he is a skilled witness on these matters, says the counsel. But what difference can that make, we ask, since he knows no facts? The answer to this was not at first easy to phrase; though all saw that there was a good answer and

² See another good example in *R. v. Heath*, 1744, 18 How. St. Tr. 1, 76.

that the witness must be heard. The precedent and custom of using such testimony reached far into the past; but in its original and long-persisting form it was hardly regarded as evidence to the jury, but as an aid sought by the Court, and thus as collateral to and parallel with the jury itself, which in theory at least was no more than a body of triers aiding the Court:

1900, Professor James Bradley Thayer, *Cases on Evidence*, 2d ed., 672, note: "The furnishing of such assistance [of skilled persons] to the Court was a very ancient thing. It is probable that for a good while after witnesses were regularly allowed before the jury, experts were thought of in the old way as being helpers of the Court, and the Court instructed the jury upon the points on which such aid was furnished. But at last the modern conception came in, which regards the experts as testifying, like other witnesses, directly to the jury. In 1353, in an appeal of mayhem, the viscount was ordered to summon skilful surgeons from London, to inform the Court whether the wound was mayhem or not. The Court had previously inspected it, and could not tell.³ In 1493,⁴ Brian, C. J., alleged a precedent, and the case was such: A man was bound in an obligation upon a condition to pay five pounds of fine gold. . . . The obligation ran *puri auri*. . . . And the masters of grammar were sent for to advise what the Latin was for 'fine,' and they could not tell. In 1619,⁵ in ejectment, upon evidence to the jury the question was whether a child who was born January 5, 1611, was the daughter of a man who died March 23, 1610. Several physicians testified that she might be, and gave their scientific reasons. 'The Court held here that it might well be as the physicians had affirmed; . . . and so the Court delivered to the jury that the said Elizabeth, who was born forty weeks and more after the death of the said Edmund Andrews, might well be the daughter of the said Edmund.'"

1554, *Buckley v. Thomas*, 1 Plowd. 122; *Stannord, J.*: "In order to understand it truly, being a Latin word [*licet*], we ought to follow the steps of our predecessors, judges of the law, who, when they were in doubt about the meaning of any Latin words, enquired how those that were skilled in the study thereof took them, and pursued their construction"; *Saunders, J.*: "I grant that if matters arise in our law which concern other sciences or faculties, we commonly apply for the aid of that science or faculty which it concerns, which is an honorable and commendable thing in our law."

Thus the early status of the expert helper of the Court had naturally prevented any question from being raised as to his information in the aspect of testimony to the jury.⁶ But by the latter part of the 1700s he took his place with others as a mere witness to the jury, and so the problem had to be faced, i. e. of squaring the use of such testimony with the general principle above noted that a witness must have personal knowledge, must state facts, not opinions. The traditional use of such testimony was not to be abandoned; this was clear. But the process of accounting for it in theory was at first troublesome. The general notion was expressed (in one shape or another) that the jury needed such help, always had had it, and must have it now, opinion or no opinion. In the great case of *Folkes v. Chadd*, the notable feature of Lord Mansfield's opinion is his frequent use of the word

³ Lib. Ass. 145, 5.

⁴ Y. B. 9 H. VI, 16, 8.

⁵ *Alsop v. Bowtrell*, Cro. Jac. 541.

⁶ For a collection of cases showing early instances of the use of expert testimony and also of special juries from the trades and professions, see an interesting article by Mr. Learned Hand,

in 15 *Harvard Law Review*, 40, "Historical and Practical Considerations regarding Expert Testimony," as well as the note in Thayer's *Cases*, *ubi supra*. The canon law at this time knew such a practice: 1552, *Reformatio Legum* . . . *elasticorum*, tit. *De fide*, c. 7.

"facts"; he is trying to show that this kind of witness' "opinion" really has a sufficient flavor of fact about it to suffice; and this notion is perhaps the key to the common use of the phrase "matter of science" (in this judgment and in later treatises) to sanction and describe the kind of admissible testimony; for "science" was at that time not used in the sense of "knowledge coördinated, arranged, and systematized," but meant simply "knowledge in general." Lord Mansfield in effect answered the objection that the expert had no personal knowledge, no facts, by pointing out that the subject was in truth one of fact, but of a class of facts about which expert persons alone could have knowledge:

1782, *Lord Mansfield, C. J., in Folkes v. Chadd*, 3 Dougl. 153 (it was objected that the evidence of Mr. Smeaton, an eminent engineer, as to the cause of a harbor's filling up, "was matter of opinion, which could be no foundation for the verdict of a jury, which was to be built entirely on facts, not opinions"): "The question is, to what has this decay been owing? The defendant says, to this bank. Why? Because it prevents the back-water. That is matter of opinion; the whole case is a question of opinion, from facts agreed upon. Nobody can swear that it was the cause. . . . It is a matter of judgment, what has hurt the harbor. . . . A confusion now arises from a misapplication of terms. It is objected that Mr. Smeaton is going to speak, not as to facts, but as to opinion. That opinion, however, is deduced from facts which are not disputed, — the situation of banks, the course of tides and of the winds, and the shifting of sands. . . . I cannot believe that where the question is whether a defect arises from a natural or an artificial cause, the opinions of men of science are not to be received. . . . The cause of the decay of the harbor is also a matter of science. . . . Of this, such men as Mr. Smeaton alone can judge. Therefore we are of opinion that his judgment, formed on facts, was very proper evidence."

This, then, is the second notable feature, namely, the general recognition, by the end of the 1700s, that there was a class of persons, i. e. those skilled in matters of science, who, though they personally knew nothing about the circumstances of the particular case, might yet, perhaps by way of exception, give their opinion on the matter. This stage of development may be seen in the following passages (and it must be understood that these earlier treatise-writers simply recorded the state of practice and thought at the bar, and their record is as significant in that aspect as a judge's ruling); the language of Peake and Espinasse especially shows the place of the doctrine as a part of the rule as to personal knowledge:

1801, *Mr. T. Peake, Evidence*, 142: "Though witnesses can in general speak only as to facts, yet in questions of science persons versed in the subject may deliver their opinion upon oath on the case proved by other witnesses. . . . Thus a physician who has not seen the particular patient, may, after hearing the evidence of others, be called to prove on his oath the general effects of a particular disease and its probable consequences in the particular case; for, though not a particular fact, it is still general information, which the rest of mankind stand in need of to enable them to form an accurate judgment on the subject in dispute."

1811, *Mr. J. Espinasse, Nisi Prius*, 411 (1st Am. ed.): "It is a general rule that a witness must deliver his testimony according to his knowledge; but there are occasions on which the opinion of the witness is legal and proper evidence, as in all matters of science."*

* So also: 1' *Phillips, Evidence*, 290; 1810, *Swift, Evidence*, 111.

The limits of this apparent exception now became the field of controversy; and the point of view was still that of an exception to a rule about the testimonial qualification of personal knowledge.

4. This being so, it is next to be noted that as yet no one thought of questioning the opinions, conclusions, or inferences of the ordinary or lay witness when he came properly equipped with a basis of "facts," of personal observation. In other words, the disparagement of "opinion" had always in mind the testimony of a person who had no "facts" of his own observation to speak from, and the skilled witness was the person who had to be received by way of exception to that notion. Thus, when an ordinary or lay witness took the stand, equipped with a personal acquaintance with the affair and therefore competent in his sources of knowledge, the circumstance that incidentally he drew inferences from his observed data and expressed conclusions upon them did not present itself as in any way improper. It would not occur to any judge that this witness was doing a wrong thing. In short, it was only "opinion" as a mere guess or a belief without observation which they rejected; but "opinion" as an inference or conclusion from personally-observed data they did not think of disparaging. That this was the attitude toward the lay observer will appear from the following passages:

1806, *Mr. W. D. Evans, Notes to Pothier*, II, 216: "There are also many cases in which witnesses speak from judgment and opinion, without reference to any technical knowledge; such, for instance, is evidence of character, and all other testimony amounting to a general conclusion from particular facts."

1811, *Mr. Espinasse, Nisi Prius*, 411 (after the passage quoted above): "So also as to the value of goods sold, it must always rest in opinion only; and the like as to the sanity of a party, and all other matters of proof which from their nature can only be given from the opinion which the witness may form."

In the United States, the same tradition and attitude of thought is also clearly apparent:

1808, *Forbes v. Caruthers*, 3 Yeates 527; *per Curiam*: "Mere abstract opinion is not evidence; but a surveyor, or any other person conversant on the subject, may state facts and his opinion on those facts."

1820, *Washington, J.*, in *Harrison v. Rowan*, 3 Wash. C. C. 567 (admitting witnesses to insanity): "The mere opinions of the witnesses are entitled to little or no regard, unless they are supported by good reasons, founded on facts which warrant them in the opinion of the jury. If the reasons are frivolous or inconclusive, the opinions of the witnesses are worth nothing."

1821, *Duncan, J.*, in *Rambler v. Tryon*, 7 S. & R. 94: "Opinion is no evidence, without assigning the reason of such opinion."

1840, *O'Neill, J.*, in *Seibles v. Blackhead*, 1 McMull. 57: "It is true that the mere opinion of witnesses who have not the aid of science to guide them would not have any weight in such a case, and would be generally inadmissible unless sustained by facts showing the opinion to be true. . . . I find that the witnesses generally said they thought the slave to be unsound, and if they had stopped there such testimony ought to have been rejected; but they go on to fortify their opinions with facts showing some foundation for them, and hence they were admissible and were to be compared with the facts by the jury."

We here see in the language of the American judges that their only objection to "opinion" is that by itself it does not indicate that the witness has the personal acquaintance with the matter which he ought to have; but the moment he exhibits his "facts," i. e. his own observed data, they are ready enough to listen to his inferences or conclusions.

The language of these rulings also illustrates the genesis of the later phrase with which we have since been made familiar. "*Mere opinion*," said Lord Mansfield, in *Carter v. Boehm*,⁸ is not evidence; "mere abstract opinion," says the Pennsylvania Court in 1803, is not evidence; "opinions not coupled with the facts," "opinion without assigning a reason," say other judges, is no evidence; because, of course, it does not appear that the witness has any personal knowledge. But, in another generation's time, there occurs this mutilation, that "*opinion is not evidence*,"—a very different and vastly broader proposition. Now this new and heterodox phrase would never have obtained currency and established a separate doctrine (peculiarly developed in America) if a motive had not been furnished for it; and to find how that motive or principle was furnished and what it was, we must return to the case of the skilled witness in "matters of science," whose admissibility was by this time universally conceded as an exception to the doctrine that "*mere opinion*" (i. e. not founded on fact-knowledge) was inadmissible.

5. When this skilled witness takes the stand and is asked what he thinks, for example (as in *Folkes v. Chadd*) about the cause of a harbor's becoming filled up, it is obvious that one of the first thoughts to occur to the objector would be that the witness was no different from the member of the jury. Here was a man who had never seen the place, had no "facts" to add, and was going to give just what each jurymen would ask of his brethren after they retired, i. e. his opinion upon the general question in doubt, the cause of the harbor's decay. Why should he do this? Why waste time in listening to numbers of such persons when the twelve men in the box have been specially selected for the very purpose of having *their* opinions serve as decisive? There would be only one reason for listening to such outside opinions, namely, that the witness was such a person that the jury would be really aided by his opinion. And this in truth was the notion which finally came to serve as a test; i. e. whether additional light could be thrown upon the question by a person of skill in the particular subject. The test may be seen in the process of development in the following rulings:

1702, *Hathaway's Trial*, 14 How. St. Tr. 682; cheating by pretending to be bewitched; a witness to the defendant's conduct said: "There appeared to be neither profit nor revenge in the case; and I thought he could not be such a fool to pretend all this for no end, and run the hazard of being whipped"; L. C. J. *Holt*: "The question is not whether he shall be punished for a fool, but whether he be a knave. Whatever punishment he may suffer, if convicted, does not belong to you to determine."

1766, *Carter v. Boehm*, 3 Burr. 1905, 1918; the opinion of an insurance-broker that a certain letter ought to have been disclosed; *Mansfield*, L. C. J.: "Great stress was laid upon the opinion of the broker. But we all think the jury ought not to pay the least

⁸ Quoted *infra*.

regard to it. It is mere opinion, which is not evidence. It is opinion after an event. It is opinion without the least foundation from any previous precedent or usage. It is an opinion which, if rightly formed, could only be drawn from the same premises from which the Court and the jury were to determine the cause."

1807, *Beckwith v. Sydebotham*, 1 Camp. 116; ship-surveyors were called to give an opinion of seaworthiness based on the statements of a certain deposition; Mr. Garrow objected "that this was an inference which it was for the jury to draw, if the facts would warrant it"; *Ellenborough*, L. C. J., held that "where there was a matter of skill or science to be decided, the jury might be assisted by the opinion of those peculiarly acquainted with it from their professions or pursuits."

1816, *Durrell v. Boderley*, Holt N. P. 285; underwriters were asked as to whether a fact would have prevented them from writing a policy; *Gibbs*, C. J.: "Lord Mansfield and Lord Kenyon discountenanced this evidence of opinion, and I think it ought not to be received. It is the province of the jury, and not of the underwriters, to decide what facts ought to be communicated. It is not a question of science, in which scientific men will mostly think alike, but a question of opinion, liable to be governed by fancy, and in which the diversity might be endless. Such evidence leads to nothing satisfactory, and on that ground ought to be rejected."

It will be noticed that in the two earlier cases, during the 1700s, the testimony was neither objected to nor excluded; even Lord Mansfield merely declared that the jury ought not to regard it. There was up to that time no rule against it, but merely a growing perception of a reason for some kind of a rule. Not until the early 1800s do we find the English judges laying down a distinct rule of a new sort, applicable to opinion-testimony, on the ground, not of lack of personal knowledge, but of its superfluity as an aid to the jury. By 1824 Mr. Starkie is found⁹ generalizing that "the general distinction is this, that the jury must judge of the facts for themselves," yet, that testimony of witnesses having no personal knowledge will be admitted "wherever the question depends on the exercise of peculiar skill and knowledge that may be made available."

6. This, then, being now looked on as the test for listening to a skilled witness who knew nothing personally of the matter in controversy, it soon served as a reason for the novel and broader doctrine that was being specially worked out in the United States. The English writers and judges and the early American judges, when they disparaged "mere opinion," never had in mind (as above seen) the case of the lay-witness who, having a "fact"-knowledge, included in his testimony an opinion or inference based on those data,—as in the leading instances (used by those writers and judges) of handwriting, character, and sanity. But when, by careless usage, the phrase came to be passed along that "*opinion* is not evidence," the distinction just before established for skilled witnesses not having a "fact"-knowledge was readily enlarged, and was made to apply to the lay witness who *had* a "fact"-knowledge, and to support the new and broad idea that "opinion" in general was not evidence. That distinction or test was, as put by Mr. Garrow, in *Beckwith v. Sydebotham*, "this was an inference which it was for the jury to draw, if the facts would warrant it." Now, if a lay witness having a

⁹ Evidence, 174.

"fact"-knowledge had put those facts before the jury and then proposed to add his own inference or conclusion or opinion upon those facts, as made at the time, it is apparent that the same test might be applied to exclude this opinion or inference of his, since the facts had already been laid by him before the jury and they were as competent as he to draw that inference. This language sounds familiar enough to us to-day, but the key to the history of the rule is that it was a novel idea at that time, — say, in the second, third, and fourth decades of the 1800s. The important thing is that at one blow a large portion of the testimony of the lay witness was hewed off, like the rotten limb of a tree, — a limb whose soundness had until this time scarcely been doubted.

It must be noted, too, that this extension — logical enough, it is true, and correct in theory, but pernicious (as it has proved) in practice — is a peculiarly American doctrine. It has apparently not taken place in England in any important degree.¹⁰ There appear to be no English rulings which indicate that the "opinion" rule has there been thought to exclude the inferences which a "fact"-witness has made from the data he lays before the jury. Certainly no such broad logical extension of the test to lay witnesses is the familiar possession of the English bar as it is of our own. The great controversies, for example, that have disturbed our Courts over lay opinions upon insanity and upon value have never been dreamed of at the English bar. This conservative attitude is plentifully illustrated in the English cases cited under particular topics in the ensuing sections. The strongest expression looking towards the expansion of the rule for lay witnesses is found in the following individual utterance, which is not only isolated, but itself also indicates that the actual practice at the time was opposed to the judicial suggestion:

1838, *Coleridge, J.*, in *Wright v. Tatham*, 5 Cl. & F. 690: "I do not, indeed, concede, though it is not, perhaps, necessary now to decide the point, that the mere opinion of a witness even on oath is, as such, admissible evidence upon a question of competency. Where you can bring the decision of that question, as you sometimes may, to depend upon deductions from scientific premises, you may hear those deductions expressed as opinions by scientific men. The necessity of the case justifies this departure from the general rule; but competency, in the main, is a question of fact, and the jury are to draw their conclusions from the evidence of the facts before them, not from the opinions which others may have formed from facts not before the jury. I admit that, in practice, where the witness to facts is present, it is by no means uncommon to ask directly for his opinion; such a question it would be idle to object to, for the objection would only lead to a detailed inquiry into particular facts, which the witness is there ready to go into. Nothing therefore would be gained by it. I am not, however, aware that the question has ever, upon argument, been decided to be correct in form."

It would apparently have been more accurate to say that such a question had never been decided to be incorrect. If there had been any working rule

¹⁰ The following passage is hardly prohibitive: 1878, *Taylor, Evidence*, 7th ed., § 1416: "On some particular subjects, however, positive and direct testimony may often be unattainable; and in such cases a witness is allowed to testify

as to his belief or opinion, or even to draw inferences respecting the fact in question from other facts, provided these last facts be within his personal knowledge."

of exclusion of the sort suggested, rulings like the following, in a trial remarkable for the strictness and pertinacity with which objections were pressed and decided, would be unaccountable:

1800, *Queen Caroline's Trial*, Linn's ed., II, 200; impeachment of the Queen, charging immoral and undignified conduct; the question was put to a witness for the defence: "Did you in other respects ever perceive that her Majesty conducted herself, either in public or in private, in any way to which a just exception could be taken?" the Attorney-General objected, but did not mention the opinion rule; the Lord Chancellor "saw no legal objection to the question."

It may therefore be said, on the whole, that the extension of the exclusionary doctrine to inferences of lay-witnesses speaking from their own observation, is to be regarded as an innovation that did not occur earlier than the 1800s, and never obtained orthodox standing in the original home of our jurisprudence.¹¹

The sum of the history is, then, that the original and orthodox objection to "mere opinion" was that it was the guess of a person who had no personal knowledge, and the "mere opinion" of an expert was admitted as a necessary exception; the later and changed theory is that wherever inferences and conclusions can be drawn by the jury as well as by the witness, the witness is superfluous, and thus an expert's opinion is received because and whenever his skill is greater than the jury's, while a lay opinion is received because and whenever his facts cannot be so told as to make the jury as able as he to draw the inference. The old objection is a matter of testimonial qualifications, requiring personal observation; the modern one rests on considerations of policy as to the superfluity of the testimony. In the old sense, "opinion" — more correctly, "mere opinion" — is a guess, a belief without good grounds; in the modern sense, "opinion" is an inference from observed and communicable data.

§ 1918. *Theory of the Opinion Rule.* The true theory, then, of the Opinion rule, in the sense we are here to use, is simply that of the exclusion of supererogatory evidence. It is not that there is any fault to find with the witness himself or the sufficiency of his sources of knowledge or the positiveness of his impression; but simply that his testimony, otherwise unobjectionable, is not needed, is superfluous. Thus the principle of exclusion is in no sense one of Testimonial Qualifications, but one of Auxiliary Policy (*ante*, § 1863). The delay and waste avoided might be in a single instance trifling; but its seriousness and its unbearableness can be appreciated if we suppose that there were no evidential limits whatever of the above nature. The time taken in the rehearsal of an interminable multitude of opinions, the confusion of the main issues by an additional mass of testimonial differences and impeachments, and the tendency for the jury now and then to

¹¹ It is true that in the broad form of excluding opinion upon the very issue in controversy (*post*, § 1921) modern English rulings are found. But the extreme liberality of attitude in orthodox English practice may be seen in the rulings

upon conduct (*post*, § 1849); for a good instance, see the Farnell Commission's Proceedings, 1888, 76th day, Times' Rep. pt. 21, pp. 157, 158.

decide simply according to the preponderance of numbers and of influential names,—all these are possibilities, in the absence of some limit of the present nature. Whether these possibilities are so imminent that the rule needs, as a matter of policy, to be enforced as strictly as it is now in this country, is another question (*post*, § 1930); but of the general propriety of the principle in some form there can be no doubt.

What we have to notice, in inquiring as to the scope and the effect of the principle, is that it does not employ any mere shibboleth; it does not rest on a simple caprice, prejudice, or tradition; and, most of all, it does not exclude any specific class of witnesses or all testimony on a specific subject. It simply endeavors to save time and avoid confusing testimony by telling the witness: "The tribunal is on this subject in possession of the same materials of information as yourself; thus, as you can add nothing to our materials for judgment, your further testimony is unnecessary, and merely cumbers the proceedings." It is this living principle which is (or ought to be) applied in each instance; nothing more definite than this is the test involved by the principle. In some instances, one witness may be able to give real help to the tribunal, while another may not,—as where we should listen to the estimate of a certain bullet's calibre by a gunmaker, but not to that of the ordinary witness who found it and produces it. In other instances, no witness at all may be capable of giving real help,—as where clothes of the deceased are brought into court, and the question is whether they were what is commonly described as black.¹ In still other instances, any witness whatever could give the tribunal real help, as in all cases of past events which have to be described by the observers. There is, thus, no special department of knowledge and no fixed formula involved. We are dealing merely with a broad principle that, whenever the point is reached at which the tribunal is being told that which it is itself entirely equipped to determine without the witness' aid on this point, his testimony is superfluous and is to be dispensed with.

The following passages amply illustrate in a variety of phrasings the judicial recognition of this principle; the clearest expressions being those of Mr. Justice Campbell, in Michigan, Mr. Justice Foster, in New Hampshire, and Mr. Justice Bell, in Texas:

1766, *Mansfield*, L. C. J., in *Carter v. Boehm*, 3 Burr. 1905, 1918: "It is an opinion which, if rightly formed, could only be drawn from the same premises from which the Court and the jury were to determine the cause; and therefore it is improper and irrelevant in the mouth of a witness."

1828, *Gibson*, J., in *Cornell v. Green*, 10 S. & R. 16: "It is a good general rule that a witness is not to give his impressions, but to state the facts from which he received them, and thus leave the jury to draw their own conclusion; and wherever the facts can be stated, it is not to be departed from. But every man must judge of external objects according to the impressions they make on his senses; and after all, when we come to

¹ Yet even here the past conditions may allow of opinion answers: 1902, *State v. Henry*, — W. Va. —, 41 S. E. 459 (one who had seen a spotted coat eight months before, allowed to state that he thought the spots to be of blood, although the coat was before the jury).

speak of the most simple fact which we have witnessed, we are necessarily guided by our impressions. There are cases where a single impression is made by induction from a number of others, as, where we judge whether a man is actuated by passion, we are determined by the expression of his countenance, the tone of his voice, his gestures, and a variety of other matters; yet a witness speaking of such a subject of inquiry would be permitted directly to say whether the man was angry or not. . . . I take it that wherever the facts from which a witness received an impression are too evanescent in their nature to be recollected, or are too complicated to be separately and distinctly narrated, his impressions from these facts become evidence."

1840, *Vo. planck, Sen., Mayer v. Penta*, 24 Wend. 678: "Opinion is admitted when a jury is incompetent to infer, without the aid of greater skill than their own, as to the probable existence of the facts to be ascertained or the likelihood of their occurring from the facts actually proved before them. . . . All these [scientific opinions] are testimonies to general facts which the jury can ascertain in no other way. . . . The same reason of absolute necessity has compelled the admission of opinion in certain cases where the poverty of human language makes it absolutely impossible to separate in words the minute and transient facts observed by the witnesses from the inference as to some other fact irrefutably connected with the former in his own mind. Testimony as to handwriting, I think, resolves itself into this, as no words can fully convey to others the minute particularities on which such judgment is founded. So, too, in questions of identity as to men, to goods, horses, etc., though facts on which such judgment is founded may be partially stated, still the judgment or opinion is admitted."

1858, *Campbell, J., in Evans v. People*, 12 Mich. 35: "It is an elementary rule that, where the Court or jury can make their own deductions, they shall not be made by those testifying. In all cases, therefore, where it is possible to inform the jury fully enough to enable them to dispense with the opinions or deductions of witnesses from things noticed by themselves or described by others, such opinions or deductions should not usually be received."

1858, *Bell, J., in Conner v. State*, 23 Tex. 331, 337, 340: "There are many things which the mind may clearly apprehend, and yet the mental process cannot be so explained as to be understood by others. A witness may state with much certainty that one with whom he has associated daily for years has become insane, and yet he cannot clearly explain to others how it is that he knows the individual in question to be insane. . . . In all these cases the opinion of the witness is received because the facts, which constitute the cause from which the opinion proceeds as an effect, cannot themselves be presented or communicated to the jury, so as to impart to them the knowledge which the witness actually possesses. . . . The true reason why the opinions of witnesses may be given to the jury, upon questions not involving skill or science, . . . is, because witnesses have a knowledge of the thing about which they speak and have acquired that knowledge in a manner which cannot be communicated, or from facts incapable in their very nature of being explained to others, [so] that they may state what they know in the best way they can. This best way is by giving in the form of an opinion that which cannot be put in the form of explanation or narration."

1875, *Loomis, J., in Sydeman v. Beckwith*, 43 Conn. 12: "These exceptions to the general rule are allowed on the ground of necessity, where the subject of the inquiry is so indefinite and general as not to be susceptible of direct proof, or where the facts on which the witness bases his opinion are so numerous and so evanescent that they cannot be held in the memory and detailed to the jury precisely as they appeared to the witness at the time. . . . The very basis upon which, as we have seen, this exception to the general rule rests is that the nature of the subject-matter is such that it cannot be reproduced or detailed to the jury precisely as it appeared to the witness at the time."

1875, *Foster, C. J., in Hardy v. Merrill*, 56 N. H. 241: "Opinions concerning matters of daily occurrence, and open to common observation, are received from necessity; and any rule which excludes testimony of such a character, and fails to recognize and submit

to that necessity, tends to the suppression of truth and the denial of justice. The ground upon which opinions are admitted in such cases is, that, from the very nature of the subject in issue, it cannot be stated or described in such language as will enable persons not eye-witnesses, to form an accurate judgment in regard to it. How can a witness describe the weight of a horse? or his strength? or his value? Will any description of the wrinkles of the face, the color of the hair, the tones of the voice, or the elasticity of step, convey to a jury any very accurate impression as to the age of the person described? And so, also, in the investigation of mental and psychological conditions, — because it is impossible to convey to the mind of another an adequate conception of the truth by a recital of visible and tangible appearances, — because you cannot, from the nature of the case, describe emotions, sentiments, and affections, which are really too plain to admit of concealment, but, at the same time, incapable of description, — the opinion of the observer is admissible from the necessity of the case; and witnesses are permitted to say of a person, 'He seemed to be frightened'; 'he was greatly excited'; 'he was much confused'; 'he was agitated'; 'he was pleased'; 'he was angry.'"²

It will be seen, from these passages, that the instances in which the witness' opinion is excluded by this principle are roughly classed into two groups. First, all witnesses, whether testifying on observed data of their own or on data furnished by others, may state their inferences so far only as they have some *special skill* which can be applied to interpret or draw inferences from these data. Secondly, witnesses having *no special skill*, who have had *personal observation* of the matter in hand, may, as a result of their personal observation, have drawn inferences or made interpretations which the tribunal could equally well make from the same data of personal observation, if laid before them; and thus if it is possible to detail these data fully for the tribunal, the witness' own inferences are superfluous. But there is also a third group in which exclusion must take place, though Courts seldom find it necessary to point it out, namely, where the witness would detail the data of personal observation (and not only mere inferences), but the tribunal has an equal opportunity of personal observation, — as where the question is whether the accused has dark or light hair, or whether a house which has been viewed by the tribunal has three or six stories.³ Now it is apparent that in the first two groups — by far the commonest — the kind of testimony excluded happens to consist in inferences from other data; the witness is giving his judgment, estimate, inference, opinion. This circumstance it is that has led to the common use of "opinion" as the epithet for that which is to be excluded, and the rule of exclusion has thus been briefly termed the Opinion Rule.

§ 1919. *Erroneous Theories*: (1) *Logical opposition between "Opinion" and "Fact"* If the above principle is the true one, it is obvious (leaving history out of the question and considering only principle) that there is no virtue in any test based on the mere verbal or logical distinction between

² Compare also the following opinions: 1826, Green, J., *Rochester v. Chester*, 3 N. H. 365; 1844, Shaw, C. J., in *Com. v. Rogers*, 7 Metc. 504; 1873, Ewing, J., in *Eyerman v. Sheehan*, 53 Mo. 223; 1890, Brown, J., in *Van Wycklen v. Brooklyn*, 110 N. Y. 420, 34 N. E.

179; 1890, Mitchell, J., in *Graham v. Pennsylvania Co.*, 139 Pa. 159, 21 Atl. 151.

³ For example: 1898, Irving v. Shethar, 71 Conn. 434, 43 Atl. 235 (two accounts before the jury; whether they were kept in the same way, excluded).

"opinion" and "fact." There is perhaps, in all the law of evidence, no instance in which the use of a mere catch-word has caused so much of error of principle and vice of policy; — error of principle, because the distinction between "opinion" and "fact" has constantly and wrongly been treated as an aim in itself and a self-justifying dogma; vice of policy, because if this specious catch-word had not been so handily provided for ignorant objectors, the principle involved would not have received at the hands of the Bar and the Bench the extensive and vicious development which it has had in this country. It is necessary now to notice why, so far as the principle or the reason of the thing is concerned, the law takes no more special account of a logical difference between "opinion"-testimony and "fact"-testimony than between testimony by a man-witness and testimony by a woman-witness.

(a) In the first place, no such distinction is scientifically possible. We may in ordinary conversation roughly group off distinct domains for "opinion" on the one hand and "fact" or "knowledge" on the other; but as soon as we come to analyze and define these terms for the purpose of that accuracy which is necessary in legal rulings, we find that the distinction vanishes, that a flux ensues, and that nearly everything which we choose to call "fact" either is or may be only "opinion" or inference. This false verbal antithesis is frequently met with in judicial opinions;¹ but perhaps the most careful attempt to justify the distinction is the following:

1840, Sir George Cornewall Lewis, *Influence of Authority in Matters of Opinion*, 1: "It is true that even the simplest sensations involve some judgment; when a witness reports that he saw an object of a certain shape and size, or at a certain distance, he describes something more than a mere impression on his sense of sight, and his statement implies a theory and explanation of the bare phenomenon. When, however, the judgment is of so simple a kind as to become wholly unconscious, and the interpretation of the appearances is a matter of general agreement, the object of sensation may, for our present purpose, be considered a fact. . . . The essential idea of opinion seems to be that it is a matter about which doubt can reasonably exist, as to which two persons or two persons would not be a matter of opinion, nor would it be a matter of opinion that twice two are four. But when testimony is divided, or uncertain, the existence of a fact may become doubtful, and, therefore, a matter of opinion."

This doctrine is not sustained by sound psychological or metaphysical analysis. A sufficient illustration of the fallacy of this supposed inherent distinction between Fact and Opinion may be found in the following passages:

1838, Dr. Richard Whately, *Elements of Rhetoric*, pt. I, c. II, § 4: "[As to matter of fact and matter of opinion,] decidedly it is not meant, at least by those who use language with any precision, that there is any greater certainty, or more general and ready agreement, in the one case than in the other; e. g., that one of Alexander's friends did or did not administer poison to him, every one would allow to be a question of fact."

¹ 1841, Gaston, J., in *Clary v. Clary*, 3 Ired. 88: ("But judgment founded on actual observation . . . is more than mere opinion. It approaches to knowledge, and is knowledge, so far as the imperfection of human nature will permit knowledge of these things to be acquired");

1840, Wilcox, J., in *Batchelder v. Taylor*, 10 N. H. 131; 1839, Parker, C. J., in *Hale v. Glendon*, 11 id. 401; 1840, Verplanck, Sen., in *Mayor v. Potts*, 24 Wend. 676; 1834, Harlan, J., in *Connecticut Life Ins. Co. v. Lathrop*, 111 U. S. 612, 4 Sup. 383.

though it may be involved in inextricable doubt; while the question, what sort of an act that was, supposing it to have taken place, all would allow to be a question of opinion, though probably all would agree in their opinion thereupon."

1887, Mr. James Sully, *Illusions*, 328: "It must have been plain to an attentive reader throughout our exposition that, in spite of our provisional distinction, no sharp line can be drawn between much of what on the surface looks like immediate knowledge, and consciously derived or inferred knowledge. On its objective side, reasoning may be roughly defined as a conscious transition of mind from certain facts or relations of facts to other facts or relations of facts recognized as similar. According to this definition, a fallacy would be a hasty, unwarranted transition to new cases not identical with the old. And a good part of immediate knowledge is fundamentally the same, only that here through the exceptional force of association and habit the transition is too rapid to be consciously recognized. Consequently, illusion becomes identified at bottom with fallacious inference; it may be briefly described as collapsed inference. . . . I simply wish to show that, by a kind of fiction, illusion [of the senses] may be described as the result of a series of steps which, if separately unfolded to consciousness (as they no longer are), would correspond to those of a process of inference."

If then our notion of the supposed firm distinction between "opinion" and "fact," is that the one is certain and sure, the other not, surely a just view of their psychological relations serves to demonstrate that in strict truth nothing is certain. Or if we prefer the suggestion of Sir G. C. Lewis that the test is whether "doubt can reasonably exist," then certainly it must be perceived that the multiple doubts which ought to exist would exclude vast masses of indubitably admissible testimony. Or if we prefer the idea that "opinion" is inference and fact is "original perception," then it may be understood that no such distinction can scientifically be made, since the processes of knowledge and the sources of illusion are the same for both. It is impossible, then (supposing it were desirable), to confine witnesses to some fancied realm of "knowledge" or "fact" and to forbid them to enter the domain of "opinions" or inferences. There are no such contrasted groups of certain and uncertain testimony, and there never can be.

(b) Furthermore, an examination of the so-called Opinion rule, as applied in its various instances, shows that the opinion-element is in the very law itself, a merely superficial and casual mark, and not the essential feature. On the one hand, *that which is excluded is not always "opinion"* (in the sense of "inference from observed data" or in any other sense), but may be "fact." For example, where the question is whether the hair of the accused is black or yellow, or whether a house which the jury has viewed is three or six stories high, no witness will be listened to, and yet the testimony excluded deals with "facts," not "opinions," whatever may be the sense taken for those terms. On the other hand, *that which is admitted is not always "fact,"* but often "opinion." For example, all hypothetical estimates of skilled witnesses are to be so described. Furthermore, for lay witnesses, all matters of measure, identity, quality, and the like must be considered as no better than "opinions"; and after all, the question whether Doe struck Roe first, or *vice versa*, may become a mere matter of "opinion." In short,

the element of inference from observed data is one which plays a great or less part in every witness' testimony, and yet the rule does not exclude it as such.

It may as well be recognized, then, that there is no virtue in any distinction resting on a contrast between "opinion" and "fact"; and that, while the traditional term "Opinion rule" may be retained for convenience' sake, the essential principle is to-day independent of any such catch-word. This truth has already been plainly emphasized in various judicial utterances:

1888, *Campbell, J.*, in *Kelley v. Richardson*, 69 Mich. 486, 87 N. W. 514: "These cases are so common that few persons ever think that what are rightly called facts are at the same time no more nor less than conclusions. Thus, impressions of cold or heat, light and darkness, size, shape, distance, speed, and many personal qualities, physical and mental, are constantly acted on as facts, although not uniformly judged by all observers, for the simple reason that the facts cannot be otherwise communicated."

1875, *Foster, C. J.*, in *Hardy v. Merrill*, 56 N. H. 241: "All evidence is opinion merely, unless you choose to call it fact and knowledge, as discovered by and manifested to the observation of the witness. . . . And it seems to me quite unnecessary and irrelevant to crave an apology or excuse for the admission of such evidence, by referring it to any exceptions (whether classified, or isolated and arbitrary) to any supposed general rule, according to the language of some books and the custom of some judges. There is, in truth, no general rule requiring the rejection of opinions as evidence. A general rule can hardly be said to exist, which is lost to sight in an enveloping mass of arbitrary exceptions. . . . Suppose, the day before or a week before the death, a lawyer, farmer, and blacksmith saw the deceased, and had an opportunity to see whether he appeared to be well or sick: suppose the lawyer is asked, 'Did you observe any indications of his being well or sick?' and the answer to be, 'I observed no indication of his being sick; he appeared as well as usual, as well as I ever saw him'; suppose the farmer is asked, 'Did you notice anything unusual in his appearance or conduct?' and the answer is, 'No, I did not'; suppose the blacksmith is asked, 'In your opinion was he well or sick?' and the answer is, 'In my opinion he was perfectly well; his spirits, looks, and behavior, all showed, in my opinion, freedom from weakness and pain'; what legal distinction can be drawn between these questions and answers, to make one competent, and either of the others incompetent? It is all opinion, and nothing but opinion, of the man's physical condition in relation to health or disease. The use or the omission of the word 'opinion,' in either of those questions or answers, does not affect the character of the testimony in the slightest degree. Calling such testimony 'opinion' does not make it 'opinion'; and calling it something else does not make it something else."

§ 1920. Same: (2) "Usurping the Function of the Jury." A phrase, often put forward as explaining why the testimony we are concerned with is excluded, declares that the witness, if he were allowed to express his "opinion," would be "usurping the functions of the jury." A milder form of statement is found in a few earlier passages:

1816, *Gibbs, C. J.*, in *Durrell v. Boderley*, Holt N. P. 285: "It is the province of the jury, and not of the underwriters, to decide what facts ought to be communicated."

In the United States, the stronger and vituperative charge of "usurpation" came later to be made:

1840, *Nelson, C. J.*, in *Lincoln v. R. Co.*, 23 Wend. 452: "Opinions, belief, deductions from facts, and such like, are matters which belong to the jury and by which they arrive

at their verdict. When the examination extends to these, and the judgment, belief, and inferences of a witness are inquired into as matters proper for the consideration of a jury, their province is in a measure usurped; the judgment of witnesses is substituted for that of the jury."¹

This phrase is made to imply a moral impropriety or a tactical unfairness in the witness' expression of opinion. In this aspect the phrase is so misleading, as well as so unsound, that it should be entirely repudiated.² It is a mere bit of empty rhetoric. There is no such reason for the rule, because the witness, in expressing his opinion, is not attempting to "usurp" the jury's function, nor could if he desired. He is not attempting it, because his error (if it were one) consists merely in trying to get before the jury a piece of testimony which ought not to go there; and he could not usurp it if he would, because the jury may still reject his opinion and accept some other view, and no legal power, not even the judge's order, can compel them to accept the witness' opinion against their own.³ That there is no hidden danger of "usurpation" lurking here, and no need of invoking sentiment to repel it, will be clearly seen if we remember that the improper evidence is equally inadmissible before a judge sitting without a jury. Whatever the organization of the tribunal, it is not to waste its time in listening to superfluous and cumbersome testimony.

§ 1921. *Same*: (3) *Opinions on the Very Issue before the Jury*. Another erroneous test, prevalent in some regions, and nearly allied to the preceding one, if not merely another form of it, is that an opinion can never be received when it touches "the very issue before the jury":

1868, *Elliott, J.*, in *Yost v. Conroy*, 92 Ind. 471: "It is a general rule that a witness cannot be allowed to express an opinion upon the exact question which the jury are required to decide."¹

The fallacy of this doctrine is, of course, that it is both too narrow and too broad, measured by the principle. It is too broad, because, even when the very point in issue is to be spoken to, the jury should have help if it is

¹ 1841, *Phillips v. Kingsford*, 19 Mo. 379 ("the witness is not to substitute his opinion for that of the jury").

These seem to be the earliest instances. Other illustrations now abound.

² We are of course not here concerned with those rulings, proper enough, which in dealing with the weight of evidence already admitted, forbid the jury to take expert testimony as decisive; that is an entirely different subject; thus, in *Head v. Hargrave*, 106 U. S. 45 (1881), *Field, J.*, says: "To direct them to find the value of the services from the testimony of the experts alone was to say to them that the issue should be determined by the opinions of the attorneys and not by the exercise of their own judgment of the facts on which those opinions were given."

³ 1864, *Campbell, J.*, in *Beanbien v. Cicotta*, 12 Mich. 567: "Jurors are not bound to accept opinions unless they consider them well founded; and we do not find in practice that they are

often misled by the opinions of eye-witnesses who approve themselves sensible and candid."

¹ Other examples: 1899, *L. C. Halsbury*, in *North Cheshire & M. B. Co. v. Manchester R. Co.*, App. Cas. 83, 85; 1876, *Brickell, C. J.*, in *Smith v. State*, 55 Ala. 11; 1873, *Chicago & A. R. Co. v. R. Co.*, 67 Ill. 145 ("it amounts to nothing more nor less than permitting the witnesses to usurp the province of the jury"); 1874, *Chicago R. I. & P. R. Co. v. Moffitt*, 75 id. 529. Probably the notion took rise from the following imperfectly reported ruling: 1821, *R. v. Wright, R. & R.* 456 (a physician and asylum-keeper gave an opinion as to symptoms of insanity, etc., and ended: "My firm conviction is that it was an act of insanity"; on consulting, "several of the judges doubted whether the witness could be asked his opinion on the very point which the jury were to decide," namely, whether the act charged was an act of insanity). But here the point was whether the witness was dealing with a matter of law (*post*, § 1958).

needed. It is too narrow, because opinion may be inadmissible even when it deals with something other than the point in issue. Furthermore, the rule if carried out strictly and invariably would exclude the most necessary testimony. When all is said, it remains simply one of those impossible and misconceived utterances which lack any justification in principle:

1845, *Messrs. Carrington and Kirwan*, note in 1 C. & K. 313: "It seems to be a mistake to say that, in putting such a question to the witness as was put in the above case of *Fenwick v. Bell* [whether a collision could have been avoided by proper care] you submit to his decision a point which the jury alone can try. On the contrary, it is submitted that the object of putting the question is not at all to decide upon the fact itself, but to prove an entirely new fact, namely, the opinion of a person of competent skill as to what might or might not have been done by the parties under a given state of circumstances. The jury are of course to decide upon the value of this opinion, as well as upon the value of the evidence on which it is founded; and thus it is plain that in the end the whole matter is submitted to their consideration, and that the only effect of the opinion will be to assist them in judging of a question of which the witness may reasonably be supposed, on account of his professional knowledge, to have been more competent to judge than themselves."

1875, *Danforth, J.*, in *Snow v. R. Co.*, 65 Me. 231: "The reason for its exclusion given by counsel, that it would instruct the jury as to the amount of the verdict to be rendered, would seem to be a very good reason for its admission. Instruction is what the jury want. They would not be bound by it any more than by other testimony, but it would be more or less valuable in enabling them to come to a correct conclusion."

§ 1922. Same: (4) Opinion admissible when preceded or accompanied by Facts or Grounds. It has already been seen, in reviewing the history of the doctrine (*ante*, § 1917), that in the beginning the disparagement of opinion rested on grounds totally different from those now received. It was objected to because as a mere guess, the belief of one having no good grounds, it lacked the testimonial qualification of Observation; hence, a mere opinion, as soon as it appeared to be such, must be rejected. In a few jurisdictions the modern doctrine has been confused with the earlier one, and it is laid down as a general rule that opinions must be accompanied with the facts on which they are based, — usually with the exception that expert witnesses are exempted from this rule.¹

Now in no aspect is this rule sound. In the first place, then, there is no principle and no orthodox practice which requires a witness having personal observation to state in advance his observed data before he states his infer-

¹ Accord, that the coincidence of the question with the very issue in the case is *per se* no ground of exclusion: 1844, *Fenwick v. Bell*, 1 C. & K. 313; *Coltman, J.*; 1874, *Mansell v. Clements*, L. R. 9 C. P. 139, *constr.*; 1897, *Ryder v. State*, 100 Ga. 523, 28 S. E. 246; 1891, *Poolo v. Dean*, 132 Mass. 589, 591, 26 N. E. 408; 1897, *Donnelly v. R. Co.*, 70 Minn. 278, 73 N. W. 157; 1895, *Nebonne v. R. Co.*, 68 N. H. 236, 44 Atl. 521; 1890, *Van Wycklen v. Brooklyn*, 118 N. Y. 439, 34 N. E. 179; 1899, *Littlejohn v. Shaw*, 159 Id. 188, 53 N. E. 810; 1891, *Scalf v. Collin Co.*, 86 Tex. 517, 16 S. W. 314; 1897, *New York El. Co. v. Blair*, 26 C. C. A. 216, 79 Fed.

896; 1896, *Fireman's Ins. Co. v. Mohlmann Co.*, 33 Id. 347, 91 Fed. 35; 1899, *Western Coal & M. Co. v. Berberich*, 36 Id. 364, 94 Fed. 529.

² 1854, *Bryan v. Walton*, 20 Ga. 490; *Goodwyn v. Goodwyn*, ib. 600; 1860, *Choice v. State*, 31 Id. 466; 1895, *Crockett v. Davis*, 81 Md. 134, 31 Atl. 710; 1865, *Owen, J.*, in *Railroad Co. v. Schulz*, 43 Oh. St. 270, 283, 1 N. E. 324; 1840, *Seibles v. Blackhead*, 1 McMull. 56; and many of the cases cited *post*, § 1938. In *Jones v. Fuller*, 19 S. C. 70 (1882), the form is slightly different; the witness must state the facts supporting his opinion, if they are capable of being stated.

ences from them; all that needs to appear in advance is that he had an opportunity to observe and did observe, whereupon it is proper for him to state his conclusions, leaving the detailed grounds to be drawn out on cross-examination (*ante*, § 655). Any other rule cumbers seriously the examination, and amounts in effect to changing substantially the whole examination into a *voir dire*, — an innovation on established methods which is unwarranted by policy. Secondly, if the rule were good, it would be as necessary for the expert witness as for the lay witness. Thirdly, no justification for it seems ever to have been attempted; it is simply an instance of traditions misunderstood. Its lack of principle has been more than once judicially exposed:

1878, *Hines, J.*, in *Brown v. Com.*, 14 Bush 407: "Exactly what is meant by the expression in some cases, when such evidence has been admitted, that 'the witnesses must detail the facts upon which the opinion is based,' we do not find explained. If the admissibility of the opinion as evidence must depend upon the facts from which it is formed, it is manifest that there is a question for the Court antecedent to its introduction, and that to promulgate a general rule as to the amount and quality of the evidence that should satisfy the Court in every case would be impossible. . . . It is not intended that the admissibility of the evidence shall be made to depend upon the ability of the witness to state specific facts from which the jury may, independent of the opinion of the witness, draw a conclusion of sanity or insanity; for it is the competency of the opinion of the witness that is the subject of inquiry. The ability of the witness to detail certain facts of the mind may add very greatly to the weight of the opinion given in evidence; but they will not of necessity affect the question of competency."

1881, *Chalmers, C. J.*, in *Wood v. State*, 58 Miss. 743: "The qualification that the opinion of the non-expert must be accompanied by a statement of the facts on which it is based is not very important; since, whether the witness be an expert or a non-expert, the grounds of his belief and his opportunities of observation may always be elicited; and, whether the witness be of the one class or the other, his testimony should be rejected by the Court where it consists of a mere naked declaration of opinion with neither learning, observation, nor acquaintance to support it."²

§ 1923. **Practical Test for receiving Opinions:** (1) **Skilled Witnesses.** It has already been seen (*ante*, § 1918) that the instances in which inferences are excluded are divisible into three groups, the first two being the commonest and affording the only source of difficulty. What specific tests, by way of reducing the general principle to specific rules, have been afforded by the Courts?

The first group includes witnesses who are sought for their *special skill* in drawing inferences or making interpretations upon data either observed by themselves or furnished by others. For this class, the unsound rule has sometimes been laid down that the witness must be one who employs his skill professionally or commercially:

1884, *Earl, J.*, in *Ferguson v. Hubbell*, 97 N. Y. 513: "It is not sufficient to warrant the introduction of expert evidence that the witness may know more of the subject of inquiry and may better comprehend and appreciate it than the jury; but to warrant it

² Compare also: 1888, *Pallard v. Wybourn*, 1 Hag. 727, *Dr. Lashington*; 1881, *Colce v. State*, 75 Ind. 511, 513.

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introduction the subject of the inquiry must be one relating to some trade, profession, science, or art in which persons instructed therein by study or experience may be supposed to have more skill and knowledge than jurors of average intelligence may be presumed generally to have."¹

But the only true criterion is: On *this subject* can a jury from *this person* receive appreciable help? In other words, the test is a relative one, depending on the particular subject and the particular witness with reference to that subject, and is not fixed or limited to any class of persons acting professionally:

1867, *Pigot, C. B.*, in *M'Fadden v. Murdock*, 1 Ir. Rep. C. L. 211, 218: "The subjects to which this kind of evidence is applicable are not confined to classed and specified professions. It is applicable wherever peculiar skill and judgment, applied to a particular subject, are required to explain results or to trace them to their causes."

1875, *Loomis, J.*, in *Taylor v. Monroe*, 43 Conn. 44: "The true test of the admissibility of such testimony is not whether the subject matter is common or uncommon, or whether many persons or few have some knowledge of the matter, but it is whether the witnesses offered as experts have any peculiar knowledge or experience, not common to the world, which renders their opinions founded on such knowledge or experience any aid to the Court or jury in determining the questions at issue."²

No more specific test can be supplied, defining the kind of subject which certainly or usually will need no aid at all from any witness. A few of the most careful attempts are the following:

1851, *Shaw, C. J.*, in *New England Glass Co. v. Lovell*, 7 Cush. 321: "[The] experience [must not be] of such a nature that it may be presumed to be within the common experience of all men of common education moving in the ordinary walks of life."

1872, *Beck, C. J.*, in *Hamilton v. R. Co.*, 36 Ia. 37: "When the consequences of actions or of combinations of circumstances may only be known by those familiar with the subject, and cannot be understood by those not possessing skill or peculiar knowledge thereof, opinions of experts are competent evidence."

1872, *Foster, J.*, in *Ellingwood v. Bragg*, 53 N. H. 489: "The subject must be one peculiar and exceptional, concerning which some explanation, such as peculiar knowledge alone can afford, is required in order to render it intelligible to the comprehension and understanding of ordinary men."

§ 1924. *Same: (2) Lay Witnesses.* The second group of persons to whom the Opinion Rule has to be applied (*ante*, § 1918) includes those who concededly have *no greater skill* than the jury in drawing inferences from the kind of data in question. Such a witness' inferences are inadmissible when the jury can be put into a position of equal vantage for drawing them,—in other words, when *by the mere words and gestures of the witness the data he has observed can be so reproduced that the jurors have those data as fully and exactly as the witness had them at the time he formed his opinion.* This test has been variously phrased in judicial language:

¹ Accord: 1872, *Beck, C. J.*, in *Hamilton v. R. Co.*, 36 Ia. 36.

² Accord: 1873, *Rowley v. R. Co.*, L. R. 8 Ex. 221 (an insurance accountant; the counsel's argument in objection that "knowledge of a subject, however ample, unless it is professional, does not

entitle a witness to speak to matters of opinion," was apparently repudiated); 1855, *Woodward, J.*, in *Hyde v. Woolfolk*, 1 La. 166; 1859, *Ames, C. J.*, in *Buffum v. Harris*, 5 R. I. 251; 1846, *Royce, J.*, in *Clifford v. Richardson*, 18 Vt. 627; 1872, *Wheeler, J.*, in *Masons v. Fuller*, 45 id. 32.

1838, *Gilson, J.*, in *Cornell v. Green*, 10 S. & R. 16: "I take it that whenever the facts from which a witness received an impression are too evanescent in their nature to be recollected, or are too complicated to be separated and distinctly narrated, his impressions from these facts become evidence."

1863, *Johnson, J.*, in *Clark v. Baird*, 9 N. Y. 186: "Evidence of opinion is also recognized as proper, on the same ground of necessity, in cases where language is not adapted to convey those circumstances on which the judgment must be formed."

1868, *Campbell, J.*, in *Evans v. People*, 12 Mich. 85: "Many cases exist in which it is impossible by any description, however graphic, to explain things so as to enable any one but the witness himself to see or comprehend them as they would have been seen or comprehended could the jury have occupied his position of observation."

1875, *Endicott, J.*, in *Com. v. Sturtevant*, 17 Mass. 122: "[The condition is that] the subject matter to which the testimony relates cannot be reproduced or described to the jury precisely as it appeared to the witness at the time."

1878, *Peck, J.*, in *Bates v. Sharon*, 45 Vt. 481: "[Opinion is admitted] where the facts are of such a character as to be incapable of being presented with their proper force to any one but the observer himself, so as to enable the triers to draw a correct or intelligent conclusion from them without the aid of the judgment or opinion of the witness who has had the benefit of personal observation."

It is in the application of this test that the Opinion rule really breaks down, as an aid in the investigation of truth. In the vast majority of rulings of exclusion, the data observed by the witness could not, in any liberal and accurate view, be really reproduced to the jury by the witness' words and gestures. The error of the judges consists in giving too much credit to the possibility of such reproduction. What is chiefly wrong is by no means the test itself, but the illiberal and quibbling application of it.

§ 1925. *Distinction between the Opinion Rule and the Rule of Experiential Qualifications.* In practice, therefore, when an inference is offered, two principles have to be applied. We first ask (from the point of view of Testimonial Qualifications), Is it a matter as to which the witness as such needs a special experience above the ordinary, and if so, has he this? When this question has been settled in favor of the witness, we ask (from the point of view of the Opinion rule), Does the jury need any inference from the witness, either because of his skill or because his observed data cannot be adequately reproduced by him? The practical distinctions in the working of the two rules have already been examined in detail (*ante*, § 557) and need not be here repeated.

§ 1926. *Flexibility of the Test.* That the test of the Opinion rule is a flexible, a living one; that there is no fixed form of words, no mere shibboleth—such as the word "opinion" conveys—this is the important aspect of the principle never to be lost sight of. The question must be asked on each occasion, Can the jury be fully equipped, by the mere recital of the data, to draw inferences?—in other words, Can *all* the data be *exactly* reproduced by mere testimonial words and gestures?

1885, *Owen, J.*, in *Railroad Co. v. Schulz*, 43 Oh. St. 270, 283, 1 N. E. 324: "It must not be supposed that there is any rule of evidence concerning the opinions of witnesses which is peculiar to fences, highways, bridges, or steamboats, or to any other special sub-

fact of investigation. Where the facts concerning their condition cannot be made palpable to the jurors so that their means of forming opinions are practically equal to those of the witnesses, opinions of such witnesses may be received, accompanied by such facts supporting them as they may be able to place intelligently before the jury."

1890, *Mitchell, J.*, in *Graham v. Pennsylvania Co.*, 139 Pa. 161, 21 A2. 191: "There is extraneous difficulty in laying down any rule precise enough for practical application, and the only proper course is to keep the principle steadily in view, and apply it according to the circumstances of each case."

§ 1927. *Discriminations as to (1) Hypothetical Questions, and (2) Impressions.* (1) When an expert witness, testifying from personal observation, gives his opinion as testimony, it is usually necessary to predicate in express terms, *hypothetically*, the data upon which the opinion is based. The reason is that otherwise the jury would be unable to tell whether his opinion was meant by him to be applied to the facts ultimately found by the jury. This reason, however, is not connected with the Opinion rule, but rests on the principle of Testimonial Qualifications that a witness' grounds of knowledge must be made to appear. It has therefore been dealt with under that head (*ante*, §§ 672-684).

(2) A lay witness speaking of facts from personal observation, and not offering any opinion, may nevertheless qualify the force of his belief or knowledge by describing it as merely an "*impression*." This may mean that his original observation was not accurate enough to give certainty in his mind, or that his recollection of his original observation has since become dimmed. The propriety of such testimony may thus involve the principles applicable to the Testimonial Qualifications of Observation and of Recollection; from that point of view it has already been considered elsewhere (*ante*, §§ 658, 726, 727).

§ 1928. *Form of the Opinion Rule — Negative or Affirmative.* Shall we say that a witness *may* state his inferences *unless* it appears that the jury *can* be equally equipped? Or shall we say that a witness *may not* state his inferences *unless* it appears that the jury *cannot* be equally equipped?

If we are dealing with the first sort of witness — the witness alleged to be specially skilled —, it seems clear that his possession of special skill — i. e. skill beyond that of the jury —, should first be made to appear; that is, the second form of the test, as above, is the proper one. But if we are dealing with the other sort of witness — the one not claiming greater skill but simply drawing inferences from his own observation which any one in his place could draw —, the answer may be different. The answer here virtually depends on our attitude — whether of favor or disfavor — toward the principle involved. If we believe that the drawing of inferences by an observer of the data is a hateful, dangerous, and reprehensible thing, — if we prefer to put obstacles of technical and not real force in the way of the most common sort of testimony, — if we believe that this modern and minor rule about Opinion is a fundamental canon in the investigation of truth, if we are opposed to Baron Parke's wish to employ "a compendious mode of ascertaining the result

of the actual observation of the witness,"¹ — then, of course, we shall look upon every witness as a possible "usurper" of the jury's function, we shall watch each phase of his testimony anxiously, and stop his mouth as soon as he approaches the insidious heresy of an "opinion" or inference. On the other hand, if we believe that the rule in question, as applied to the unskilled witness who has personally observed the data, is a mere minor rule of convenience not in any way concerned with the value of the testimony, if we hold that it is inconsistent to aim in theory at convenience and simplicity by a rule which in thorough application causes ten times the inconvenience and complication which in theory it was to avoid, if we prefer to make the rules of evidence our tools rather than to become ourselves their helpless slaves, — then we shall conclude to adopt the first form of the test as above; that is, we shall allow the witness to state freely all the results which he is qualified to reach, and only now and then, when he comes to matters as to which it is instantly clear that the jurors are or can be as fully equipped with the data, we shall exclude his inferences.

The attitude of the Courts, however, has been usually the former, and not the latter. Against this usual attitude the following notable protest is judicially recorded:

1870, *Doe, J.*, in *State v. Pike*, 49 N. H. 428: "Opinions, like other testimony, are competent in the class of cases in which they are the best evidence, as when a mere description without opinion would generally convey a very imperfect idea of the force, meaning, and inherent evidence of the things described. Like other testimony, opinions are incompetent in the class of cases in which they are not the best evidence, as when they are founded on hearsay or on evidence from which the jury can form an opinion as well as the witness. A rule that opinions are or are not evidence must necessarily be in conflict with the rule which admits the best evidence. A constant observer of the trial of cases, examining the testimony for the purpose of ascertaining how many opinions are received and how many rejected, will find ten of the former as often as he finds one of the latter; and if he is very critical, he will find the ratio much greater than that. Opinions are constantly given. A case can hardly be tried without them. Their number is so vast and their use so habitual that they are not noticed as opinions distinguished from other evidence. . . . The cases of identity of persons and things and of handwriting having been named in the English books as illustrations of the competency of opinions, those cases were supposed to be peculiar exceptions to the general rule, whereas they are mere instances of the application of the general rule which admits the best evidence. This general, natural, fundamental, comprehensive, and chief rule of evidence was gradually ignored, and special and artificial rules were substituted; or, if there was not an absolute substitution, there was such a removal of emphasis from the general rule to the special rule that the former lost the overshadowing influence and control which belong to it. Entire systems of law, theology, medicine, and philosophy are easily changed by a transfer of emphasis from one point to another. To say the least, the emphasis which belongs to the general rule admitting the best evidence was gradually taken from it and placed upon the fact that there are some opinions which, not being the best evidence, are not evidence; and this fact was gradually transformed into a so-called general rule that opinions are not evidence, and this artificial rule was treated as a rule of law. The objection to this supposed rule against opinions is that it has usurped the place of the supreme rule admitting the best evidence; that it is a mere statement of the sup-

¹ 5 CL & F. 670.

proved fact that opinions are not admitted under the rule of the best evidence; and that, as a statement of that kind, it is not true. . . . When the fact that some opinions are not the best evidence had been magnified and turned into the so-called general rule of law that opinions are not evidence, and the rule admitting the best evidence was supplanted by it, it was thought necessary to find a special precedent for every opinion before it could be admitted. The judgments of Westminster Hall were searched to find a decision that an opinion as to the value of property was competent, and to find another decision that an opinion as to sanity was competent. No such decisions could be found. None had ever been made; because such opinions had always been received as unquestionably competent. The reason of the failure to find the decisions was not understood here. The failure was taken as conclusive proof that in England the opinions were not admitted. When an American mistake of this magnitude is discovered, it is fit to be corrected at once. To return to the true principle is not to change the law, but to cease violating the law; or, putting it in a milder form, to allow that which is the law *de facto* to yield to that which is the law *de jure*."

§ 1929. *Future of the Opinion Rule.* If one were asked to name the rules most peculiar to the Anglo-American evidence-law, he ought perhaps to name the Character rule, the Hearsay rule, and the Opinion rule. Neither is found on the Continent. All three are indigenous judicial developments. All are the product of the jury-system. All are founded on a peculiar cautiousness in our law, and all have been developed with an equally peculiar rigidity and stolid disregard of practical consequences. All three are complex and far-reaching in application, as well as voluminous in detailed development. But a radically different future may be predicted for them. The Hearsay rule and the Character rule will always remain in our law, in a more or less relaxed form; while the Opinion rule will in substance disappear. An important difference between them is that the first two are the solid growth of experience; while the last rule, in its American development, is merely the logically technical development of a misunderstood term. The Opinion rule day by day exhibits its unpractical subtlety and its useless refinement of logic. Under this rule we accomplish little by enforcing it and we should do no harm if we dispensed with it. We accomplish little, because, from the side on which the witness appears and from the form of the question, his answer, *i. e.* his opinion, may often be inferred. We should do no harm, because, even when the final opinion or inference is admitted, the inference amounts in force usually to nothing unless it appears to be solidly based on satisfactory data, the existence and quality of which we can always bring out, if desirable, on cross-examination. Add to this that, under the present illiberal application of the rule, and the practice as to new trials, a single erroneous ruling upon the single trifling answer of one witness out of a dozen or more in a trial occupying a day may overturn the whole result and cause a double expense of time, money, and effort; and we perceive the absurdly unjust effects of the rule. Add, finally, the utter impossibility of a consistent application of the rule, and the consequent uncertainty of the law, and we understand how much more it makes for injustice rather than justice. It has done more than any one rule of procedure to reduce our litigation towards a state of legalized gambling.

The remedy (whenever one shall be undertaken) ought to be radical. The only purpose for which we need any weapon of the sort is the potential need of saving the time that in some cases might be otherwise taken by marshalling an interminable multitude of opinions, and of preventing the consequent confusion of issues and the possibility of forcing a verdict by mere preponderance of numbers and influential names.¹ But all this is mere possibility; it would not even be feasible in the ordinary case; and, whenever it was feasible, and if it should then be attempted, the ordinary judicial discretion to limit the number of witnesses (*ante*, § 1907), and the rule requiring personal knowledge (*ante*, §§ 664, 1364, 1917), would quite answer all practical purposes. For this reason there seems to be no objection against taking a radical step, — the entire abolition of the rule as such, leaving only in its place some specific discretion in the judge to meet the possibilities above mentioned.

For this purpose, some such statute as the following would seem to be adequate: "An inference or opinion may always be stated to the tribunal by a witness experientially qualified to form it, provided either that he has had adequate personal observation of the matter in question or that he has the data hypothetically stated to him in court; and it is immaterial whether or not the data are capable of being so stated by him or by others that the tribunal is equally capable of drawing the inference, and whether or not the data are stated by him before stating his inference, and whether or not the inference involves the very subject of the issue, or one of the issues, before the tribunal; provided that the trial judge may in any case in his discretion exclude testimony involving an inference from data observed, or any other superfluous testimony, whenever in his judgment such testimony is merely cumulative or of undue personal weight, and is therefore undesirable."

¹ An example of this possibility for evil appears in the French trials of Captain Dreyfus and M. Zola, where the opinions of eminent generals were invoked to overwhelm the tribunal.

TOPIC II: OPINION RULE, APPLIED TO SUNDRY TOPICS.

CHAPTER XLVI.

1. Sanity.

- § 1933. History of the Rule as to Laymen's Opinions.
- § 1934. Principle and Policy of the Rule.
- § 1935. Facts observed need not precede Statement of Opinion.
- § 1936. Attesting Witnesses to Wills; their Opinions always Receivable.
- § 1937. Opinion as to Sanity, distinguished from Opinion as to Testamentary or Criminal Capacity.
- § 1938. State of the Law in the Various Jurisdictions.

2. Value.

- § 1940. History.
- § 1941. Theory and Policy; in general.
- § 1942. Same: Land taken by Eminent Domain.
- § 1943. State of the Law in the Various Jurisdictions; (1) Property-Value.
- § 1944. Same: (2) Other Values (Services, Personal Injuries, Breaches of Contract, etc.).

3. Insurance-Risk (Increase or Materiality).

- § 1946. Principle.
- § 1947. State of the Law in the Various Jurisdictions.

4. Conduct (including Care, Reasonableness, Safety, and the like).

- § 1949. History and General Principle.
- § 1950. Discriminations as to Other Principles: (1) Other Persons' Conduct as evidencing Danger, Reasonableness, and the like; (2) Moral Character, Professional Skill, and other General Traits.
- § 1951. Application of the Principle: Testimony as to the Safety, Care, Prudence, Duty, Skill, Propriety, of Specific Conduct.

5. Law.

- § 1952. In general.
- § 1953. Foreign Law.
- § 1954. Trade Usage; as involving (1) an Opinion of Law or (2) an Inference from Specific Instances.
- § 1955. Interpretation of Documents; (1) Expert Interpretation of the Meaning of Technical Words.

- § 1956. Same: (2) Location of Descriptions in Deeds, Maps, and Surveys.
- § 1957. Same: (3) Contents of a Lost Document.
- § 1958. Testator's or Grantor's Capacity; Accused's Capacity.
- § 1959. Solvency.
- § 1960. Miscellaneous Instances (Possession, Ownership, Necessity, Authority, etc.).

6. State of Mind (Intention, Feelings, Knowledge, Meaning, Understanding, and the like).

- § 1962. General Principle.
- § 1963. (1) Testimony to a State of Mind, in general (Intention, Motive, Purpose, Feelings, etc.).
- § 1964. Same: Rule of Testimonial Knowledge (of Another's Intention), distinguished.
- § 1965. Same: Rule of Testimonial Interest (One's Own Intention), distinguished.
- § 1966. Same: Alabama Doctrine.
- § 1967. Same: Rules of Substantive Law, distinguished (Dedication, Fraudulent Transfer, Will, Ballot, Crime, and the like).
- § 1968. Same: Declarations of Intent, distinguished.
- § 1969. (2) Testimony to the Meaning of a Conversation or Other Utterance ("Impression" or "Understanding" conveyed by Language).
- § 1970. Same: Rule of Testimonial Knowledge, distinguished.
- § 1971. Same: Rules of Substantive Law, distinguished: (a) Understanding of a Party to a Contract; (b) Intention in Libel or Slander; (c) Parol Evidence Rule.
- § 1972. Same: Rule for Explaining away the Meaning of an Admission or Contradiction, distinguished.

7. Sundry Topics.

- § 1974. Corporal Appearances of Persons and Things ("looking" Bad, Ill, and the like; Intoxication, Age, etc.).
- § 1975. Medical and Surgical Matters.
- § 1976. Probability and Possibility; Capacity and Tendency; Cause and Effect.
- § 1977. Distance, Time, Speed, Size, Weight, Direction, Form, Identity, Resemblance, and the like.
- § 1978. Miscellaneous Topics of Testimony.

1. Sanity.

- § 1933. History of the Rule as to Laymen's Opinions. At common law in England there never had been any question that the opinions of lay wit-

necess as to sanity or insanity could be received. Wherever a person presented himself as having had acquaintance with and therefore observation of a testator or an accused person whose sanity was in question, i.e. wherever the witness had the fundamental testimonial qualification of personal observation (*ante*, §§ 657, 689) no one thought of objecting on the score of the Opinion rule. This plainly appears in the long list of trials in which such testimony was received.¹ Moreover, when the Opinion rule began to be discussed and formulated, in the last part of the 1700s and the early part of the 1800s, the judges and the treatise-writers constantly named this subject as one upon which lay opinions were always and unquestionably received.²

In the United States, however, when the phrase "mere opinion" (i.e. opinion not resting on observed data) "is not evidence," came to be distorted into the phrase "opinion is not evidence" (*ante*, § 1917), one of the first subjects to come up for consideration was that of sanity. The ruling which lent most aid to the doubters (and probably the earliest excluding ruling) was that of *Poole v. Richardson*, in 1807.³ This, however, was entirely misunderstood by those who relied on its authority.⁴ As in so many of the early rulings, the notion at the base of it was not the modern notion of opinion as "inference," but the old one of opinion as "belief having no observed data to support it" (*ante*, § 1917). However, it served, whether rightly or wrongly understood, to raise the doubt. Speedily the controversy spread; and sooner or later every Court had to face the objection based on the Opinion rule. Generally, the view favoring admission prevailed; the great law-making and argument-furnishing precedent for the earlier rulings being the opinion of Mr. J. Gaston, in *Clary v. Clary*, in North Carolina, in 1841,⁵ and for the more recent rulings, the opinions of Mr. J. Doe, dissenting, in *Boardman v. Woodman*, in New Hampshire, in 1866,⁶ and of Mr. J. Foster, in *Hardy v. Merrill*, in the same court, in 1875.⁷ The opinion of Mr. J. Doe succeeded in bringing about a change of heart in his own Court, and is the arsenal of arguments to whose supplies it is chiefly due that the Courts of the country are to-day

¹ The following list could doubtless be added to: 1734, *Arnold's Trial*, 16 How. St. Tr. 706-766, *passim*; 1741, *Goodere's Trial*, 17 id. 1067, *passim*; 1746, *Evans v. Blood*, 3 Bro. P. C. 632, 636; 1746, *Bradshaw's Trial*, 18 How. St. Tr. 416; 1760, *Karl Ferrens' Trial*, 19 id. 923-953, *passim*; 1763, *Lowe v. Jolliffe*, 1 W. Bl. 344 (Lord Mansfield); 1790, *Frith's Trial*, 22 How. St. Tr. 313-317, *passim*; 1792, *Attorney-General v. Parnter*, 3 Bro. Ch. C. 44; (Lord Thurlow); 1800, *Hadfield's Trial*, 27 How. St. Tr. 1330; 1802, *Wall's Trial*, 28 id. 113; 1803, *Wood v. Hammerton*, 9 Ves. Jr. 145; 1812, *Bellingham's Case*, Annual Register 305; 1812, *Bowler's Case*, ib. 309; 1822, *Marquis of Londonderry's Case*, ib. 435; 1828, *Ley's Case*, 1 Lew. Cr. C. 239; 1831, *Offord's Case*, Annual Register 109; 1837, *R. v. Goode*, 7 A. & E. 535, 538; 1837, *Wright v. Tatham*, ib. 314, 323, 345, 373, 384, 396, 401; on appeal in 5 Cl. & F. 698, 712, 719, 730, 734, 735, 738, 744, 784, 759 (in this case, the hesitation of Mr. J. Coleridge, at p.

690, upon the present point is apparently the first and only instance in England where any questioning of such evidence occurred; see the quotation *ante*, § 1917); 1840, *R. v. Oxford*, 1 Towns. St. Tr. 123-124, 4 St. Tr. n. s. 497, 528, 9 C. & P. 538, 547 (Denman, L. C. J.): "There may be cases where medical testimony may be essential; but I cannot agree with the notion that moral insanity can better be judged of by medical men than by others"; 1843, *R. v. M'Naughton*, 4 St. Tr. n. s. 847, 909 ff.; 1 Towns. St. Tr. 384; 1843, *Bowman v. Bowman*, 2 M. & Rob. 501; 1843, *R. v. Higginson*, 1 C. & K. 130; 1866, *Aitken v. McMeckan*, App. Cas. 310.

² Some examples will be found *ante*, § 1917.
³ 3 Mass. 330. There was an earlier one in the same year, *Chase v. Lincoln*, 3 Mass. 337; but it is little cited.

⁴ As noted *post*, § 1933, under Massachusetts.

⁵ 2 Iredell 50.

⁶ 47 N. H. 144.

⁷ 59 N. H. 239.

so nearly unanimous in accepting the common-sense view of the subject.⁸ A judicial revolution also occurred in the decisions of the New York Court; and the last few years have seen an effort in the Court of Massachusetts, the original home of the error, to retreat so far as may be from their early position. The scars of the controversy, however, in spite of the general victory for correct reasoning and good sense, are seen in some technical and fantastic distinctions which still disfigure the rule as now applied in some jurisdictions, notably in New York, — distinctions which serve only to confuse, and would never have been imagined but for the supposed necessity of conceding something to the demands of the Opinion rule.

It should be added that the controversy has throughout centered almost entirely on the Opinion rule; and the exclusion has never entirely, and only once or twice partially, proceeded on the doctrine of Experiential Qualifications (*ante*, § 568), i. e. that lay observers were not fitted to judge of sanity or insanity. That question has almost unanimously by the excluding judges been either ignored or answered affirmatively.⁹

§ 1934. *Principle and Policy of the Rule.* The argument for exclusion was usually based upon precedent and the shibboleth of "opinion evidence," rather than upon principle or deliberate reasoning; the following passage represents perhaps the clearest argument:

1853, *Mason, J.*, in *De Witt v. Barley*, 9 N. Y. 367: "There is no such insuperable difficulty in describing the mental manifestations which are relied upon in any case to prove insanity as there is in the cases of personal identity and handwriting. Those manifestations which usually attend a sound mind are made familiar to all by the intercourse of all classes of men, and the evidences or mental manifestations which characterize insanity, so far as they fall under the observation of men generally, are of that character which witnesses can describe or relate. They generally consist in acts or words and frequently in both combined; and there is no more difficulty in describing and relating them to a jury than there is in many other cases where the witness is required to state the facts and circumstances and is not permitted to give his opinion upon the conclusion to which they lead."

The argument for admission is of two sorts; the first is directed to show that the principle of the Opinion rule does not exclude the kind of testimony in question; the second points out the practical inconvenience involved in excluding it, and also urges that in any case the rule accomplishes nothing. (1) The argument from principle is thus stated:

1841, *Gaston, J.*, in *Clary v. Clary*, 2 Ired. 80: "In the first place, it seems to us that the restriction of the evidence to a simple narration of facts, having or supposed to have a bearing on the question of capacity, would if practicable shut out the ordinary means of truth; and, if freed from this objection, cannot in practice be effectually enforced. The sanity or insanity of an individual may be a matter notorious and without doubt in a neighborhood, and yet few, if any, of the neighbors may be able to lay before the jury

⁸ One may be pardoned for noting here the singular coincidence that on the morning of the very day when the above words of justice and respect to this great jurist were being penned, a thousand miles away, he had died suddenly, under a stroke of paralysis.

⁹ The authorities on that point have been collected *ante*, § 568; but wherever that reason has affected a Court excluding lay witnesses' opinions, it will here be noted.

distinct facts that would enable them to pronounce a decision thereon with reasonable assurance of its truth. If the witness may be permitted to state that he has known the individual for many years, has repeatedly conversed with him and heard others converse with him; that the witness has noticed that in these conversations he was incoherent and silly; that in his habits he was occasionally highly pleased and greatly vexed without a cause; and that in his conduct he was wild, irrational, extravagant, and crazy,—what would this be but to declare the judgment or opinion of the witness of what is incoherent or foolish in conversation, what reasonable cause of pleasure or resentment, and what the indicia of sound or disordered intellect? If he may not testify, but must give the supposed silly or incoherent language, state the degrees, and all the accompanying circumstances of highly excited emotion, and specifically set forth the freaks or acts regarded as irrational, and this without the least intimation of any opinion which he has formed of their character, where are such witnesses to be found? Can it be supposed that those not having a special interest in the subject shall have so charged their memories with those matters, as distinct independent facts, as to be able to present them in their entirety and simplicity to the jury? Or if such a witness be found, can he conceal from the jury the impression which has been made upon his own mind; and when this is collected, can it be doubted but that his judgment has been influenced by many, very many circumstances which he has not communicated, which he cannot communicate, and of which he himself is not aware?"

1849, *Chilton, J.*, in *Norris v. State*, 16 Ala. 779: "Does not even a casual observer of mental phenomena fully recognize the impossibility of communicating to another the facts and almost numberless minute circumstances indicating a morbid action of the brain and consequent mental aberration, the main force of which may consist in some peculiar characteristic which none but the observer can fully appreciate? The jury, unlike the witnesses, have no knowledge of the condition of the accused from personal observation. How then shall they be placed in possession of those mysterious and indescribable phases which insanity wears, which, though they make a correct and vivid impression upon the mind of the observer, yet lose much of their force by attempted description? Must the prisoner lose the benefit of such testimony altogether; or shall the witness be required to furnish as well as he may a pantomimic delineation of the wild look, the vacant stare, the unnatural gait, the distorted countenance, the idiotic laugh, as well as the numberless caprices and sudden and apparently causeless exhibitions of joy and sorrow? Were such the law, the force of the testimony would be made to depend upon the powers of the witness for imitation."

1866, *Doe, J.*, in *Boardman v. Woodman*, 47 N. H. 144: "From the nature of the subject, it cannot generally be so described by witnesses as to enable others to form an accurate judgment in regard to it. . . . The opinion of an unprofessional witness is competent, not because he can give no description of the appearances which indicate sanity or insanity, but because ordinarily he cannot give an adequate description of them."¹

(2) The argument from practical policy is thus stated:

1866, *Doe, J.*, in *Boardman v. Woodman*, 47 N. H. 144: "To ask a witness on such a trial whether Miss B. appeared peculiarly or strangely, was substantially to ask whether in the witness' opinion she was insane. The appellant's witnesses were allowed to testify that she appeared excited. It is some consolation to reflect that, where the refinements of the law attempt to enforce a rule not based upon reason or principle or the common experience of mankind, it is usually found impracticable in its application to the detail of a trial.² But this consolation is diminished by the fact that swift witnesses, however

¹ The following are also leading opinions: 1855, *Hempstead, J.*, in *Kelly's Heirs v. McGuire*, 13 Ark. 601; 1864, *Campbell, J.*, in *Beaubien v. Clotte*, 12 Mich. 489; 1870, *Doe, J.*, in *State*

v. Pike, 49 N. H. 414; 1852, *Parker, P. J.*, in *DeWitt v. Barley*, 13 Barb. 554; 1853, *Deuis, J.*, in *DeWitt v. Barley*, 9 N. Y. 389.

² As was conceded by *Colt, J.*, in 127 Mass.

instructed, checked, and reprimanded, generally succeed in giving their opinions, while the cautious and impartial, whose opinions are much more valuable, are often limited to very meagre and unsatisfactory testimony."

1875. *Feoster, C. J., in Hardy v. Merrill*, 56 N. H. 250: "Now let us imagine a scene that might very probably be exhibited in any court where the Massachusetts rule prevails. One witness says: 'He did not appear as usual; he did not appear natural.' 'Very well,' says a learned barrister, 'very well, Mr. Witness. You may say that, — that is quite regular, — that is your opinion. Now tell us in what respect he did not appear "as usual" or "natural." 'Well, I can't describe it, but I should call it wandering, delirious; he was incoherent in his talk.' 'Very well, Mr. Witness, you acquit yourself like a sensible man. Now tell the jury whether in your opinion he was then of sound mind.' 'I object,' thunders the learned barrister on the other side. 'I object,' thunders the opposing junior. 'Counsel know better; it is an insult and an outrage to put such a question.' . . . The witness is confounded. The jury are confounded. Everybody is confounded, — except those who understand that 'incoherence of thought' and 'delirium,' vulgarly called 'wandering,' is not a state of mental unsoundness, is not mental disease; and that 'as usual' or 'natural' is not a condition of mental health. Whether it is such condition or not is a question then solemnly debated. . . . At the close of the scene which I have described, not a man of the laity goes out of the room without being disgusted with this exhibition of the law as a system of arbitrary rules, that ignoring all legal ideas decides upon a distinction purely verbal. And why should not the laymen be disgusted with the senseless subtlety which permits one party to show by his witness that a testator 'appeared perfectly natural,' and forbids the adverse party to offer the testimony of another witness that 'he didn't appear to be in his right mind'? . . . The selection of the phraseology in which such an opinion may be expressed, and that in which it cannot be uttered, depends on no legal principle, but on the mere whim of the Court. Such an arbitrary and senseless choice or rejection of terms in which to express an admissible opinion is mere, sheer logomachy, a waste of precious time given us for better purposes, a verbal quibble unworthy of the law and calculated to bring it into contempt."

Before noting the state of the law in the different jurisdictions, three distinctions, occasionally made in the rulings, must be mentioned:

§ 1935. **Facts Observed need not precede Statement of Opinion.** It has been already noticed (*ante*, §§ 1917, 1922) that the general rule, in a few Courts, requires that a statement of the facts (or observed data) must precede the witness' statement of his opinion or conclusion; and that this on principle is an unsound limitation. Now the chief field for the application of this misconceived requirement has been the present topic; and in a number of jurisdictions the Courts are found requiring that "the facts," i.e. observed data, "must accompany (or precede) the opinion." This requirement in some of the remaining jurisdictions has been expressly negatived;¹

430: "It is impossible to prevent witnesses from having opinions or to frame questions and restrain answers so as to leave no inference as to what such opinions are. Whatever facts a witness states, under any form of interrogatory, are stated because he has formed an opinion in advance that they support one side or the other and prove sanity or insanity. The difficulty is inherent."

¹ For an example of the kind of examination satirized by the learned judge, see *Matter*

of *Ross*, 87 N. Y. 519 (1882); but a more glaring instance of the degradation of the general principle to a mere rule for legal guessing is found in *Holcomb v. Holcomb*, *Paine v. Aldrich*, N. Y., cited *post*, § 1938.

² 1881, *Wood v. State*, 58 Minn. 743; 1889, *State v. Lewis*, 20 Nev. 345, 23 Pac. 241; 1877, *Garrison v. Blanton*, 48 Tex. 303.

For the general doctrine that an expert need not state beforehand the facts observed by him, see *ante*, § 676.

in the others it does not exist in practice, but has not been expressly passed upon.

§ 1936. *Attesting Witnesses to Wills; their Opinions always Received.* Whatever the result of the controversy as to lay witnesses in general, all Courts have preserved the traditional practice of receiving the opinions of attesting witnesses to wills. The theory that the law had provided this preappointed testimony for the express purpose of securing witnesses to the testator's capacity as well as to his signature, as well as the unquestioned practice, prevailed over any theory that the judges might have as to the bearing of the Opinion rule.¹

§ 1937. *Opinion as to Sanity, distinguished from Opinion as to Testamentary or Criminal Capacity.* Opinion as to sanity and opinion as to general testamentary or criminal capacity are entirely distinct. The latter sort of opinion is inadmissible (when it is) because a question of law may be involved, and witnesses' conclusions are not needed on such points. Rulings excluding such opinions (*post*, § 1958) may well coexist with rulings receiving Opinions as to sanity.

§ 1938. *State of the Law in the various Jurisdictions.* Of the state of the law in the various jurisdictions, it is enough to note in general that laymen's opinions are to-day everywhere conceded to be admissible, subject to local qualifications and quibbles.¹

¹ The fact is that the attesting-witness exception obtained even under the old sense of "opinion"; i. e., those whose names were subscribed were called and asked as to (1) the execution of the will, and (2) the testator's soundness of mind; and it was not necessary to show beforehand that they had intimately observed him or even known him at all; thus, their judgment might be "mere opinion," i. e. belief not founded on any observed data; yet it would be received, by way of exception; the authorities are collected *ante*, § 659.

² Under each jurisdiction compare the cases cited *ante*, § 659, and *post*, § 1958: *Alabama*: A few early rulings excluded lay opinions, except those of attesting witnesses: 1843, *State v. Brinyea*, 5 Ala. 243, *semble*; 1848, *McCurry v. Hooper*, 12 id. 337; 1849, *Watson v. Anderson*, 15 id. 202 (lay witnesses were by agreement allowed to testify); 1850, *McAllister v. State*, 17 id. 437, *semble*; but the later and now established doctrine admits them, with the proviso that the facts (or observed data) must be stated in connection with the opinion: 1845, *Bowling v. Bowling*, 8 id. 541; 1849, *Roberts v. Trawick*, 13 id. 84; 1849, *Rembert v. Brown*, 14 id. 367 (which seems to be *contra*, but really only requires that the witness shall not express his conclusions without the grounds for them; the opinion does not refer to *Bowling v. Bowling*); 1849, *Norris v. State*, 16 id. 777; 1854, *Florey's Ex'rs v. Florey*, 24 id. 247; 1854, *Powell v. State*, 25 id. 27; 1859, *Stubbs v. Houston*, 33 id. 304; 1860, *Re Carmichael*, 36 id. 617; 1861, *Fountain v. Brown*, 36 id. 75; 1862, *Ford v. State*, 71 id. 397; 1895, *Yarborough v. State*, 105 id. 42, 16 So. 758; 1900,

Dominick v. Randolph, 124 id. 557, 27 So. 481; 1901, *Caddell v. State*, 129 id. 57, 30 So. 76 ("opinions affirming sanity may be based on a mere negation of unnatural or peculiar conduct, without a specification of facts"); *Arkansas*: Lay opinions are received: 1855, *Kelly's Heirs v. McGuire*, 15 Ark. 600; 1860, *Beller v. Jones*, 22 id. 96; 1896, *Shaeffer v. State*, 61 id. 245, 32 S. W. 679 ("not admissible until it first be shown by his own testimony that he has information on which it can reasonably be based"); 1898, *Green v. State*, 64 id. 533, 43 S. W. 973 (after stating the grounds); *California*: Lay opinions were for a long time treated as admissible without qualification: C. C. P. § 1870, par. 10 ("the opinion of a subscribing witness to a writing, the validity of which is in dispute, respecting the mental sanity of the signer; and the opinion of an intimate acquaintance respecting the mental sanity of a person, the reason for the opinion being given," are admissible); 1880, *Estate of Brooks*, 54 Cal. 474 (yet, in *Estate of Toomes*, 1b. 513, the point was treated as unsettled); 1881, *People v. Wreden*, 59 id. 393; and the rulings collected *ante*, § 659; but later rulings ignore this, and appear to have veered over to the Massachusetts distinction (*infra*), admitting only an opinion as to the rationality of specific acts: 1895, *Wax's Estate*, 106 id. 343, 39 Pac. 624; 1898, *People v. Arrighini*, 122 id. 123, 54 Pac. 591 (whether they saw "anything strange or peculiar" in the accused's manner, allowed); 1901, *Keithley's Estate*, 134 id. 9, 66 Pac. 5 (whether a person appeared rational, allowed); *Columbia (District)*: 1895, *Taylor v. U. S.*, 7 D. C. App. 27, 34 (admissible, following *Ins. Co. v. Lathrop*

U. S.; 1899, *Horton v. U. S.*, 18 id. 310, 394 (the grounds of the opinion must first be stated); 1901, *Raub v. Carpenter*, 17 id. 506, 512 (similar); *Connecticut*: Lay opinions are received, when accompanied by the facts observed; 1822, *Grant v. Thompson*, 4 Conn. 206; 1850, *Danham's Appeal*, 37 id. 196; 1896, *Kimberly's Appeal*, 68 id. 428, 36 Atl. 847 (following *Shanley's Appeal*); 1900, *State v. Cross*, 73 id. 722, 46 Atl. 148; *Delaware*: Lay opinions have always been admitted; 1838, *Duffield v. Morris*, 3 Harringt. 375, 385 (but not without stating the facts; except for attesting witnesses); 1899, *Steele v. Helm*, 3 Marv. 237, 43 Atl. 153 (admissible after first stating the facts); 1901, *Pritchard v. Henderson*, 3 Pen. Del. 156, 50 Atl. 216, *semble* (the facts need not be stated beforehand); *Florida*: Lay opinions are admissible; 1892, *Armstrong v. State*, 30 Fla. 170, 201 (admissible, after stating the data); *Georgia*: Lay opinions are received when accompanied by the facts observed; 1849, *Potts v. House*, 6 Ga. 336; *1850*, *Choice v. State*, 31 id. 466; 1896, *Frissell v. Reed*, 77 id. 722, 731; 1895, *Bowden v. Achor*, 95 id. 243, 22 S. E. 271; 1898, *Scott v. McKee*, 105 id. 224, 31 S. E. 183 (subscribing witness need not state the data for his opinion); 1900, *Herndon v. State*, 111 id. 178, 36 S. E. 634; but an intervening decision has served to introduce an element of confusion and uncertainty; 1895, *Welch v. Stipe*, 95 Ga. 762, 22 S. E. 670 (this latest form of the test is: "Before the opinion of a non-expert witness can be considered it must appear not only that the witness has the opportunity of learning the facts upon which the opinion is predicated, but it must appear that the opinion was in fact based upon the facts and circumstances so ascertained, and not upon bare conjecture; and, in addition to this, it must appear that the witness, in the expression of the opinion, speaks with reference to the facts upon which it is predicated. ... But where [as here] she neither states the facts coming under her observation nor states that the opinion expressed is the result of such observation, there is no possible theory upon which it can be received in evidence"); *Illinois*: Lay opinions have always been admissible; 1867, *Reed v. Taylor*, 45 Ill. 489; 1875, *Rutherford v. Morris*, 77 id. 397; 1876, *Carpenter v. Calvert*, 83 id. 70; 1883, *Upstone v. People*, 109 id. 175; 1896, *American Bible Soc. v. Price*, 115 id. 642, 5 N. E. 126; 1899, *Jamison v. People*, 145 id. 357, 377, 34 N. E. 496 (admissible when stating the data); 1897, *Grand Lodge v. Wisting*, 168 id. 408, 48 N. E. 59; 1903, *Wallace v. Whitman*, 301 id. 59, 66 N. E. 811 (that a testator "acted foolish," excluded); *Indiana*: Lay opinions are received; whether with the requirement that the facts observed must accompany them, cannot be told; 1839, *Dee v. Reagan*, 5 Blackf. 217 (accompanied by the reasons); 1884, *Kenworthy v. Williams*, 5 id. 379; 1871, *Rush v. Magee*, 36 id. 78; 1872, *Leach v. Probstner*, 39 id. 494; 1879, *State v. Newlin*, 69 id. 112; 1891, *Coloe v. State*, 75 id. 844 (if the facts are stated); 1882, *Ryman v. Crawford*, 86 id. 269; 1893, *Sage v. State*, 91 id. 143; 1894, *Goodwin v. State*, 95 id. 538; 1887, *Cline v. Lindsay*, 110 id. 337, 11 N. E. 441; 1888, *Johnson v. Culver*, 116 id. 289, 19 N. E. 129; 1892, *Hamrick v. Hamrick*, 134 id. 324, 34 N. E. 3; 1895, *Jenney Electric Co. v. Branham*, 145 id. 314, 41 N. E. 448; 1895, *Bower v. Bower*, 145 id. 194, 41 N. E. 523; 1900, *Blume v. State*, 154 id. 343, 56 N. E. 771 (if the facts are stated); *Iowa*: Lay opinions are to be received; with the requirement that the facts must accompany them; 1859, *Pelamougees v. Clark*, 9 Ia. 11 (here the Court professed to follow *DeWitt v. Barley*, N. Y., and permitted opinions to be given, provided the reasons are described as fully as possible); 1871, *State v. Porter*, 34 id. 137; 1876, *Butler v. Ins. Co.*, 45 id. 97; 1890, *Severin v. Zack*, 55 id. 30, 7 N. W. 404 (accompanied by the facts); 1892, *Smith v. Hickenbottom*, 57 id. 736, 11 N. W. 684; 1897, *Norman's Will*, 73 id. 86, 33 N. W. 374 (same); *State v. Winter*, ib. 635, 34 N. W. 475 (same); 1898, *Meeker v. Meeker*, 74 id. 354, 37 N. W. 773; 1894, *Der 'ing v. Butcher*, 91 id. 425, 430, 59 N. W. 69 (admissible, if the facts detailed satisfy the Court as a sufficient basis for the opinion; but this apparently means merely facts affecting the extent of his observation, under § 689, *ante*); 1896, *Kosteletzky v. Scherhart*, 99 id. 120, 68 N. W. 591; 1897, *Furlong v. Carraher*, 102 id. 358, 71 N. W. 210 (applying the requirement strictly); 1897, *State v. McDonough*, 104 id. 6, 73 N. W. 357 (feeble-minded person); 1898, *Manatt v. Scott*, 106 id. 303, 76 N. W. 717; 1898, *Goldthorp v. Goldthorp*, ib. 722, 77 N. W. 471; 1899, *Furlong v. Carraher*, 108 id. 492, 79 N. W. 277 (the data must first be stated, except for a subscribing witness); 1899, *Alvord v. Alvord*, 109 id. 113, 80 N. W. 306 (the data stated must tend to support the witness' opinion); 1899, *State v. Robbins*, ib. 650, 80 N. W. 1061 (the question must be based not upon "your acquaintance" with him, but "the actions that you have seen"); 1900, *State v. Wright*, 112 id. 436, 84 N. W. 541; 1901, *Hertrich v. Hertrich*, 114 id. 643, 87 N. W. 689; *Kansas*: Lay opinions may be received, when accompanied by the facts; 1884, *Baughman v. Baughman*, 32 Kan. 538, 4 Pac. 1003; 1898, *State v. Bennerman*, 59 id. 586, 53 Pac. 874; 1900, *Zirkle v. Leonard*, 61 id. 636, 60 Pac. 318; 1903, *Grimshaw v. Kent*, — id. —, 73 Pac. 92; *Kentucky*: Lay opinions have always been receivable, and at first without any qualification; 1829, *M'Daniel's Will*, 2 J. J. Marsh. 337; then the qualification was laid down (under the erroneous impression that the Court was thus following the practice of Massachusetts and Pennsylvania) that the facts must accompany the opinion; 1843, *Hunt's Heirs v. Hunt*, 3 H. Monr. 577; 1844, in *Jones' Adm'r v. Perkins*, 5 id. 223, *semble*; but this qualification seems since to have been dropped; 1878, *Brown v. Com.*, 14 Bush 404; 1893, *Wine v. Foote*, 81 Ky. 12; 1894, *Newcomb's Ex'r v. Newcomb*, 96 id. 120, 27 S. W. 997; 1895, *Phelps v. Com.*, — id. —, 32 S. W. 470; 1896, *American Accident Co. v. Fiddler*, — id. —, 36 S. W. 528; 1900, *Abbott v. Com.*, — id. —, 55 S. W. 196; *Louisiana*: 1876, *State v. Coleman*, 27 La. An. 691, 692 (opinion inadmissible "without detail

ing the facts"); 1901, *State v. Smith*, 106 La. 33, 30 So. 248 (opinion admissible when the data for it are stated); *Maine*: Here, following the Massachusetts doctrine, lay opinions (except those of attesting witnesses) were excluded; 1831, *Ware v. Ware*, 9 Me. 55 (excluding even medical testimony); 1869, *Wyman v. Gould*, 47 id. 139; 1870, *Robinson v. Adams*, 68 id. 410 (negative opinion, that "he observed nothing peculiar," held not to be excluded by the rule); 1885, *Fayette v. Chesterville*, 77 id. 33; *Maryland*: Lay opinion was originally admitted without qualification: 1844, *Brooke v. Berry*, 2 Gill 98; and this apparently still obtains for attesting witnesses: 1877, *Williams v. Williams*, 47 Md. 325; but, as to other lay witnesses, the requirement applies that the facts observed must accompany the opinion: 1848, *Brooke v. Townsend*, 7 id. 27; 1852, *Stewart v. Redditt*, 3 Md. 78; 1854, *Dorsey v. Warfield*, 7 id. 73; 1862, *Weems v. Weems*, 19 id. 344; 1867, *Higgins v. Carlton*, 28 id. 137; 1872, *Waters v. Waters*, 35 id. 542; 1877, *Williams v. Williams*, 47 id. 325; 1882, *Chase v. Winans*, 59 id. 452, *semble*; 1901, *Safe Deposit & T. Co. v. Berry*, 93 id. 560, 49 Atl. 401 (opinion inadmissible unless the witness first so states facts that it may be seen whether his conclusion "has any relation to or can fairly be said to be dependent on them"); 1901, *Brashears v. Orme*, ib. 443, 49 Atl. 620 (similar); 1902, *Jones v. Collins*, 94 id. 403, 51 Atl. 396 (whether the witness "had observed anything that indicated a lack of mind or of understanding on his part," allowed; a subscribing witness and a physician may express an opinion without first reciting the facts observed; *Pearce, J.*, diss. on the latter point); *Massachusetts*: In this jurisdiction, the *fas et arigo mali*, and for long the main support of the error, there appear three distinct stages in the progress of doctrine: first, a group of early rulings, extending down to the second quarter of the 1800s, and dominated by the older sense of "opinion" (*ante*, § 1917) as "belief not resting on personal observation," excluded "mere opinion" (unless from attesting witnesses); but did not exclude the opinions of those lay witnesses who spoke from personal observation and were ready to show that they had sufficiently observed: 1807, *Chase v. Lincoln*, 3 Mass. 237; 1807, *Poole v. Richardson*, ib. 330 ("other [than subscribing] witnesses were allowed to testify to the appearance of the testator, and to any particular facts from which the state of his mind might be inferred, but not to testify merely their opinion or judgment"); 1808, *Buckminster v. Perry*, 4 id. 524 ("Two or three witnesses [not subscribing ones] were of opinion that the testator was much broken and very forgetful about the time the will was made; and they testified particularly to several alight instances of a want of recollection"); 1811, *Hathorn v. King*, 3 id. 371 (physicians present at a deathbed were allowed to give their opinions, after stating the facts supporting them); 1812, *Dickinson v. Barber*, 9 id. 225 (physicians who gave mere opinions, stating no facts observed by themselves and predicated no hypothesis of others' testimony, were excluded); 1827, *Needham v. Ida*, 5 Pick. 511 ("mere opinions of other [than subscribing] witnesses

were not competent evidence, and were not entitled to any weight, further than they were supported by the facts and circumstances proven at the trial"); next, the true meaning of *Poole v. Richardson* was misunderstood, and in a series of rulings the doctrine was established that lay opinion (in the sense of an inference from personally observed data) as to a person's sanity was inadmissible: 1834, *Com. v. Wilson*, 1 Gray 339; 1836, *Baxter v. Abbott*, 7 id. 79; 1861, *Hubbell v. Bissell*, 3 All. 300; 1861, *Com. v. Fairbanks*, ib. 511; 1862, *Townsend v. Pepperell*, 59 Mass. 42, 48; 1868, *Hastings v. Rider*, ib. 623; by this time the New Hampshire decisions had become familiar to the profession, and the unsoundness of the Massachusetts doctrine had been frequently pointed out; and in the last quarter of the 1800s comes a third stage, in which an effort is made to confine the orthodox rule within narrowest limits, and, while acknowledging its sway, to avoid some of its unfortunate effects; in the following rulings all the questions named were held proper, except as otherwise noted: 1872, *Barker v. Comins*, 110 id. 480, 487 ("Did you notice any change in his intelligence or understanding, any want of coherence in his remarks?"); 1874, *Nash v. Hunt*, 116 id. 251 ("observed no incoherence of thought, nor anything unusual or singular in respect to his mental condition"); 1875, *May v. Bradley*, 137 id. 418, 422 ("any fact which led you to infer that there was any derangement of intellect"); 1884, *Com. v. Brayman*, 136 id. 439, 440 (whether a person had failed, mentally or physically, at a certain time); 1885, *Cowles v. Merchants*, 140 id. 381, 5 N. E. 398 (going back to the old strictness); 1891, *Poole v. Dean*, 152 id. 590, 26 N. E. 406 ("ordinary business capacity"; but this was an expert opinion, and perhaps was considered from the will-capacity standpoint); 1891, *McConnell v. Wildes*, 153 id. 490, 26 N. E. 1114 (following *May v. Bradley*); 1892, *Smith v. Smith*, 157 id. 389, 33 N. E. 348 ("whether from the general appearance of the testator he considered him capable of making a contract or of transacting important business," excluded; following "the rule early adopted and uniformly adhered to by this Court"); 1896, *Laplane v. Warren Cotton Mills*, 165 id. 487, 43 N. E. 294 (that "he was not a bright boy," allowed; note that other cases involving, as here, injuries to an employee seem to be concerned with the relevancy of the fact, and not with the opinion rule); 1897, *Clark v. Clark*, 169 id. 523, 47 N. E. 510 ("whether your sister has failed or has not failed in her mental capacity during the past five years"); 1901, *Hogan v. Roche's Heirs*, 179 id. 510, 61 N. E. 87 (whether a testatrix "knew what she was talking about" in a certain utterance); 1902, *Ratigan v. Judge*, 181 id. 572, 64 N. E. 204 ("Was he subject to delusions or hallucinations?" held improper); this modified result is accompanied by a decided qualification of theory, closely approaching that of the New York Court, but less liberal in form; this modification (as put forward in *Nash v. Hunt*, *supra*) admits such evidence as does not involve "an opinion as to the condition of the mind itself, but only of its manifestations in conversation with the witness";

Religion: Lay opinions have always been admissible, but the modern rulings show the necessity of the qualification that "facts" must accompany the inference: 1864, *Beaubien v. Cloutte*, 12 Mich. 489 (opinion by Campbell, J.); 1870, *Kempsey v. McGinnis*, 21 id. 128; 1873, *Johnson v. McKee*, 27 id. 473; 1878, *People v. Finley*, 38 id. 484; 1879, *Fraser v. Jennison*, 42 id. 215, 3 N. W. 582 (whether deceased was eccentric, allowed); 1883, *Rice v. Rice*, 50 id. 448, 15 N. W. 545; 1892, *Prentiss v. Bates*, 98 id. 224, 242, 53 N. W. 153 ("Before the witness is permitted to express an opinion, he must testify to something in the appearance of the party which is sufficient at least to justify the inference of incompetency"); 1893, *Lynch v. Duran*, 95 id. 393, 407, 54 N. W. 582 (similar); 1893, *O'Connor v. Madison*, 96 id. 183, 187, 57 N. W. 105 (the witness must first state some fact "that legitimately tends to show incompetency"); 1894, *People v. Borgetto*, 99 id. 336, 56 N. W. 338 (similar); 1896, *Sagar v. Hogmire*, 108 id. 410, 66 N. W. 327 (after stating the facts); 1897, *Sullivan v. Foley*, 112 id. 1, 70 N. W. 322 (following *Prentiss v. Bates*); 1898, *Lamb v. Lippincott*, 115 id. 73, 73 N. W. 867 (witness to insanity must first state some conduct tending to show it; but witness to sanity need not state conduct tending to show it); 1900, *People v. Casey*, 124 id. 279, 82 N. W. 683 (on this point, long settled locally, the opinion cites four of the above decisions in its own Court, and eleven of other Courts); *Minnesota*: Lay opinions are admissible, when preceded by the facts: 1880, *Pinney's Will*, 27 Minn. 281; 1880, *Woodcock v. J*, 28 id. 144; 1881, *Wood v. State*, 28 id. 218, 30 N. W. 894; *Mississippi*: Lay opinions are admissible: 1881, *Wood v. State*, 28 Miss. 742; 1884, *Reed v. State*, 62 id. 408; 1886, *Sheehan v. Kearney*, 21 id. 21; *Missouri*: Lay opinions are admissible, but the original rule has been altered by the modern qualification that the "facts" must first be stated: 1848, *Baldwin v. State*, 12 Mo. 234; 1863, *Farrell's Adm'r. v. Brennan's Adm'r*, 32 id. 334; 1870, *State v. Klinger*, 46 id. 228; 1876, *Crowe v. Peters*, 63 id. 435; 1877, *Moore v. Moore*, 67 id. 195; 1881, *State v. Erb*, 74 id. 304; 1882, *Appleby v. Brock*, 76 id. 317; 1887, *State v. Bryant*, 93 id. 299, 6 S. W. 102; 1891, *State v. Williamson*, 106 id. 170, 17 S. W. 172; 1899, *State v. Bronstine*, 147 id. 520, 49 S. W. 512; 1899, *State v. Soper*, 148 Mo. 235, 49 S. W. 1007 (but witnesses to sanity need not state the data beforehand); 1900, *State v. Holloway*, 156 id. 222, 56 S. W. 734; *Montana*: Lay opinions are admissible: C. C. P. 1895, § 3146 (10) (like Cal. C. C. P. § 1870); 1899, *Terr. v. Roberts*, 9 Mont. 15, 22 Pac. 132; *Nebraska*: Lay opinion is admissible, after the "facts" are first stated: 1879, *Schlenker v. State*, 9 Nebr. 241, 1 N. W. 857; 1893, *Shultz v. State*, 37 id. 481, 498, 55 N. W. 1090; 1895, *Pinneger v. State*, 46 id. 493, 64 N. W. 1594; 1896, *Hay v. Miller*, 48 id. 154, 66 N. W. 1115; 1896, *Hoover v. State*, 48 id. 184, 66 N. W. 1117; 1898, *Lamb v. Lynch*, 56 id. 125, 76 N. W.

486 (admissible, if the main facts are first detailed to the jury); 1895, *Snider v. State*, 48 id. 306, 76 N. W. 574; *Nevada*: Lay opinion is admissible: 1899, *State v. Lewis*, 20 Nev. 345, 22 Pac. 241; *New Hampshire*: The early practice here was probably like the English practice (as Mr. J. Doe points out in 49 N. H. 417); but in 1866, after the supposed doctrine of *Poole v. Richardson*, Mass., had raised the widespread controversy, the New Hampshire Court laid down the following rule, in effect the same as the modern Massachusetts rule: 1866, *Boardman v. Woodman*, 47 id. 134 (Sargent, J.: "[The witness] may state the acts and sayings of the person whose sanity is questioned, and may describe his appearance, but may not give his present opinion as to his sanity or insanity, nor state the impression made upon witness' mind at the time of the acts, sayings, or appearances testified to, in regard to the sanity or insanity of such person at such times"); but from his result (the Court is composed of three members) Mr. J. Doe dissented in a vigorous opinion (quoted ante, § 1934); then, in 1870, the majority view was re-declared in *State v. Pike*, 49 id. 407, Mr. J. Doe again dissenting, in an opinion based on a renewed and careful study of the subject; in 1871, in *State v. Jones*, 50 id. 381, and in 1874, in *State v. Archer*, 54 id. 466, the same result was repeated; in 1874, the Democratic majority in the Legislature, for political reasons, abolished the existing Supreme Court (whose members were Republicans) and created a new one; and in the new appointments two of the Republican ex-judges, not including Judge Doe, were given positions; in 1876, by another political convulsion, there was another "remodelling" of the Court, and Mr. Doe was now appointed Chief Justice; but in the meantime, and during his absence from the Bench, the Court as re-constituted by his political opponents repudiated former precedents, and adopted in *Hardy v. Merrill*, 54 id. 227 (1875), the policy for which Mr. J. Doe had so long contended,—that of the unrestricted admission of lay opinion; the result being in an unusual way a tribute to his sagacity and learning; that policy has since remained the law of the State: 1888, *Carpenter v. Hatch*, 64 id. 576, 15 Atl. 219; *New Jersey*: Lay opinion is admissible: 1854, *Matter of Vanauken*, 10 N. J. Eq. 186 (but the witness must give the "facts"); 1854, *Stackhouse v. Horton*, 15 id. 208; 1896, *Genz v. State*, 56 N. J. L. 462, 34 Atl. 816; *New Mexico*: 1896, *Territory v. Padilla*, 8 N. M. 510, 46 Pac. 246 (only the details are admissible, not the opinion; purporting to follow the Massachusetts rule); *New York*: Here the profession has been vouchsafed what seem to be five distinct stages of doctrine: (1) first is found, as in other early rulings in this country, the traditional English practice of receiving lay opinions without question: 1828, *Fisher v. Clark*, 1 Paige Ch. 173, *Walworth, C.* (question not raised); 1847, *Arnot v. People*, 4 Denio 9; (2) next is found the opposite doctrine—of entire exclusion—adopted by a divided Court; the dissenting opinion of

¹ Some of the above details have been furnished by the courtesy of Professor Jeremiah Smith, a former colleague of Judge Doe's.

Mr. J. Denio, and the majority opinion of Mr. J. Mason, and that of the eminent Mr. F. J. Parker, are leading opinions: 1853, *DeWitt v. Barley*, 9 N. Y. 327 (by Ruggles, C. J., Johnson, Taggart, Gardiner, and Mason, JJ.); against Denio, Willard, and Morse, JJ.); (3) next, after five years, in the course of the same litigation, the original doctrine obtained the upper hand; the membership of the Court having been almost entirely changed, the dissenting opinion of Denio, J., in the former decision, now being adopted: 1858, *DeWitt v. Barley*, 17 id. 340 (opinion by Selden, J., adopting the dissenting opinion of Denio, J., in 9 N. Y.; concurred in by Johnson, C. J., Comstock, Denio, Roosevelt, Harris, Pratt, and Strong, JJ.); 1862, *DeLafield v. Parish*, 25 id. 9, 37, 82, 165; (4) it chanced, however, that Mr. J. Selden, in his opinion, employed the following passage: "It is required that the jury should be furnished with every practicable means of testing the accuracy of the opinion. The witness must state, as far as he is able, the facts and reasons upon which he bases his conclusions; and if the jury are able to see from this statement that such conclusion is unfounded, they are of course to disregard it"; this requirement, perfectly proper for all testimony whatsoever, and not constituting in any way a modification of the rule adopted, served to create a misunderstanding, and led within a decade to the fourth form of doctrine, practically the same as the third stage of the Massachusetts rule, as soon afterward promulgated: 1866, *Clapp v. Fullerton*, 34 N. Y. 124; Porter, J.: "[The layman] may characterize as rational or irrational the acts or declarations to which he testifies. . . . But to render his opinion admissible even to this extent, it must be limited to his conclusions from the specific facts he discloses. . . . He may testify to the impression produced by what he witnessed; but he is not legally competent to express an opinion on the general question whether the mind of the testator was sound or unsound"; this form of doctrine prevailed for a quarter of a century: 1867, *O'Brien v. People*, 36 id. 282; 1881, *Rider v. Miller*, 96 id. 511; 1882, *Matter of Ross*, 87 id. 319; 1884, *Holcomb v. Holcomb*, 95 id. 320; *People v. Conroy*, 97 id. 67; (5) as between this form, and a rule admitting a general opinion absolutely, it would hardly be supposed that a crevice could be found in which a new species of legal flora could find nourishment; but there was, and it was soon filled as follows: The layman may speak, it was said, as to the person's general rationality with reference to a particular appearance or act of conduct, but not as to that general rationality independent of such appearances or acts; thus, in 1889, *People v. Packenham*, 115 id. 202, 21 N. E. 1035, the question "from what you saw and heard him say at that time, was he rational or irrational?" was held admissible; and a further example of the verbalistic acuteness necessarily cultivated by this logomachy was the ruling in *Paine v. Aldrich* (1892), 133 N. Y. 546, 30 N. E. 725, declaring this question reprehensible: "Taking into consideration these facts that you have stated here in your testimony to-day, which you learned from your contact

with Mr. Paine and from his conversations with you, what impression did he give you as to whether or not he was rational or irrational?" while this one was pronounced unexceptionable: "From the conversations you had with him and from his actions, his acts in your presence, were those conversations or those acts those of a rational or an irrational man?"; the rulings since *Paine v. Aldrich* consist of attempts to effectuate the above distinctions of twinedism and twinedlees: 1893, *People v. Taylor*, 138 N. Y. 396, 409, 34 N. E. 275 (acts stated may be spoken of as rational or the reverse); 1895, *People v. Strait*, 148 id. 566, 42 N. E. 1045 (lay witnesses may say "whether the acts and declarations testified to impressed them as rational or irrational," but cannot give an opinion as to "general soundness or unsoundness"); 1896, *People v. Youngs*, 151 id. 210, 45 N. E. 460 (a question whether the person's acts and conversations were rational or irrational, held improper in form, because it did not call merely for the impression made upon the observer, but for a statement as to the absolute rationality, etc.; yet in this instance the testimony was held practically to answer the rule); 1897, *People v. Burgess*, 153 id. 561, 47 N. E. 889 ("acts impressing the witness as rational," allowed); 1897, *People v. Koerner*, 154 id. 353, 48 N. E. 730 ("whether such acts or conduct impressed them as rational or irrational," allowed); 1898, *Wyse v. Wyse*, 155 id. 367, 49 N. E. 942; "What impression did Mr. W.'s language and conduct make upon your mind as to the condition of his mind? Was it rational or irrational?" held improper); 1902, *People v. Truck*, 170 id. 203, 63 N. E. 281 ("A witness may state whether the actions of a person impressed him as rational or irrational, but can go no farther"); of these rulings all that can be said is that they belong rather to some system which decides controversies by mumbling magic formulas before a fetish; *North Carolina*: Lay opinion has always been admissible: 1832, *Griffin v. Ing*, 3 Dev. 356; 1839, *Norwood v. Marrow*, 4 Dev. & B. 442; 1841, *Clary v. Clary*, 2 Ired. 70 (quoted ante, § 1934); 1863, *McDougald v. McLean*, Winst. 120; 1874, *State v. Ketcher*, 70 N. C. 624; 1881, *McLeary v. Norment*, 84 id. 236; 1882, *Horah v. Knox*, 87 id. 483; 1884, *Barker v. Pope*, 91 id. 166; 1885, *McRae v. Malloy*, 93 id. 159; 1888, *State v. Potts*, 100 id. 442, 6 S. E. 637; 1900, *Whitaker v. Hamilton*, 126 id. 465, 35 S. E. 815; *North Dakota*: 1902, *State v. Barry*, — N. D. —, 92 N. W. 809 (admissible, after stating the observed data); *Ohio*: Lay opinion is admissible: 1833, *State v. Gardiner*, Wright 398 (no question raised); 1843, *Clark v. State*, 12 Oh. 487; *Oklahoma*: 1901, *Queenan v. Terr*, — Okl. —, 71 Pac. 218 (New York rulings followed, without citing any others; in apparent ignorance of their heterodox status and their inconsistencies); *Oregon*: C. C. P. 1892, § 706, par. 10 (like Cal. C. C. P. § 1870); *Pennsylvania*: the condition of the rulings in this State is a singular one; the following congeries of cases speaks for itself; certainly no one outside the Court can venture to define the exact state of the doctrine: 1821, *Rambler v. Tryon*, 7 S. & R. 92 (attesting will

witness' opinion receivable absolutely, as in all subsequent rulings; ordinary lay-witness' opinion receivable when accompanied by the grounds for it); 1822, *Irish v. Smith*, 9 Id. 376 (lay-witness' opinion receivable, with an implication only that the facts observed must accompany it); 1849, *Logan v. McGinnis*, 12 Pa. St. 31 (the novel distinction was taken that attesting witnesses to the will could give their opinion without facts, while other persons could give facts but not opinions; none of the preceding rulings in this State being examined); 1884, *Wilkinson v. Pearson*, 23 Id. 119 (returning to the ruling of *Irish v. Smith*); 1861, *Bricker v. Lightner's Ex'r*, 40 Id. 206 (admitting opinions of laymen with the facts of their observation); 1861, *Denn v. Fuller*, ib. 478 (requiring of subscribing witnesses to a will the opinion only, but of deed-witnesses, and all others, the facts as well as the opinion, — though as to the opinion of the latter group the Court hesitates); 1867, *Titlow v. Titlow*, 54 Id. 323 (the still different statement is made that subscribing witnesses may give opinions without the facts, but others may not; yet in the next sentence the former alternative is contradicted, and the effect of the opinion becomes unintelligible; *Bricker v. Lightner's Ex'r* is the only local authority cited); 1868, *Rouch v. Zehring*, 59 Id. 78 (requiring the facts to accompany the opinion); 1869, *Dickinson v. Dickinson*, 61 Id. 405 (here a new form appears; the ordinary witness may give facts and then his opinion, but the facts must "tend to show want of testamentary capacity," and the witness was here declared incompetent because the facts detailed by her did not seem to the judge to indicate insanity); 1871, *Pidcock v. Potter*, 68 Id. 351 (here we learn that "it has always been the rule, after a non-professional witness has stated the facts upon which his opinion is founded," to admit his opinion; and that "from *Rambler v. Tryon* . . . to *Dickinson v. Dickinson*, our decisions have been uniform on this point"); 1884, *First Nat'l Bank v. Wireback's Ex'r*, 106 Id. 45, *Clark, J.* (here *Pidcock v. Potter* is ignored, and *Dickinson v. Dickinson's* peculiar form is reverted to; in this case "the particular facts, stated by each of these several witnesses must be taken alone, as the basis of the proposed opinion of that witness; thus considered, they are found to be in themselves inconclusive in their nature; . . . such facts could not reasonably be assumed as the basis of an opinion," and it was excluded); 1885, *March 9, Taylor v. Com.*, 106 Id. 370, *Mercer, C. J.* (here the form in *Pidcock v. Potter* is now reinstated, no authorities being mentioned; "the jury could decide whether those acts and conversations justified the conclusion the witnesses drew therefrom"); 1885, *May 29, Shaver v. McCarthy*, 110 Id. 348, 5 Atl. 614, *Clark, J.* (here the *Dickinson v. Dickinson* peculiarity — "facts and circumstances must furnish the ground of the opinion expressed; whether they are relevant and pertinent for the purpose is a question for the determination of the Court." — is once more resorted to, *Pidcock v. Potter* not being mentioned); 1891, *Elcessor v. Elcessor*, 146 Id. 363, 23 Atl. 350, *Mitchell, J.* (to the same effect, — "facts that afford a fair

foundation for an opinion"); 1892, *Doran v. McConlogue*, 150 Id. 98, 34 Atl. 357 ("Without such facts, as we have often held, opinions are of no value"); the foregoing serve as a passing illustration of the mathematical process known as the "variation of constants," the "constant of aberration" (i.e. by the determination of which the aberration is obtained from its known laws at any given time) being here apparently the next preceding decision but one; however, since 1892, the following rulings seem to exclude opinion more rigidly, under the distinctions peculiar to New York, local precedents being temporarily laid aside: 1899, *Com. v. Wireback*, 190 Id. 186, 48 Atl. 542 ("From what you saw of him, do you think he was of sound or unsound mind?"; excluded; "from the conversation you had . . . and from your observation . . . did you or did you not discover anything that would lead you to believe he was of unsound mind?"; admitted); 1899, *Com. v. Crossinger*, 193 Id. 326, 44 Atl. 433 (*Com. v. Wireback* approved); 1901, *Hepler v. Hosack*, 197 Id. 631, 47 Atl. 847 (approved); 1903, *Com. v. Gearhart*, 205 Id. 387, 54 Atl. 1029 (*Com. v. Wireback* approved); *South Carolina*: Lay opinion is receivable: 1794, *Heyward v. Hazard*, Bay 335; 1903, *Scarborough v. Baskin*, 65 S. C. 558, 44 S. E. 63 (after stating the facts); *Tennessee*: Lay opinion is receivable; attesting witnesses stating merely the opinion without any grounds, and others preceding their opinion by the facts observed: 1833, *Gibson v. Gibson*, 9 Yerg. 332; 1859, *Norton v. Moore*, 3 Head 480; 1865, *Van Huse v. Rainbolt*, 2 Coldw. 141 (that a subscribing witness need not state his grounds); 1868, *Puryear v. Reese*, 6 Id. 23; 1872, *Dove v. State*, 3 Helak. 365; 1900, *Jones v. Galbraith*, — Tenn. —, 59 S. W. 350 (in chancery, it is not improper if the data are given by answers subsequent to the opinion expressed); *Texas*: In 1855, *Gehrke v. State*, 13 Tex. 572, lay testimony was rejected, on grounds somewhat confused; in 1859, *Cooper v. State*, 23 Id. 337, the propriety of such testimony was assumed as beyond dispute; while in 1873, *Hickman v. State*, 38 Id. 191, the matter was left undecided; in subsequent rulings the testimony is admitted, when accompanied with the facts on which it is based: 1874, *Thomas v. State*, 40 Id. 65 (no local precedents cited); *Holcomb v. State*, 41 Id. 125 (no local precedents cited); 1877, *Garrison v. Blanton*, 48 Id. 303; 1883, *Haney v. Clark*, 75 Id. 93, 96; 1891, *Scalf v. Collin Co.*, 80 Id. 517, 16 S. W. 314; 1895, *Brown v. Mitchell*, 87 Id. 140, 26 S. W. 1059; *United States*: Lay opinion is receivable: (1) *Supreme Court*: 1877, *Insurance Co. v. Rodel*, 95 U. S. 238; 1884, *Connecticut Life Ins. Co. v. Lathrop*, 111 Id. 612, 4 Sup. 533; 1902, *Raub v. Carpenter*, 187 Id. 159, 23 Sup. 72 (an opinion based on the person's general condition of health and "all you know about him yourself" excluded; "the opinion of the witness from facts he did not disclose was inadmissible"); 1903, *Queenan v. Oklahoma*, — Id. —, 23 Sup. 762 (cited ante, § 689); (2) *Lower Courts*: 1820, *Harrison v. Rowan*, 3 Wash. C. C. 582, 587; 1880, *Kilgore v. Cross*, 1 Fed. 583 (if accompanied by the facts); 1884, *Parkhurst v. Hosford*, 21 Id. 833; 1896, *Mutual Life Ins. Co. v.*

2. Value.

§ 1940. *History.* Our orthodox common law was not troubled with any doubts concerning value-testimony as tainted by the vice of opinion.¹ It recognized fully that value-testimony necessarily involved "opinion," by which was meant a mere estimate, as distinguished from a knowing through the senses. But it also recognized that value-testimony had to be employed, and it was precisely one of the typical accepted instances (*ante*, § 1917) in which "opinion" was received. When the new sense of "opinion" (as "inference") came in (*ante*, § 1917), and received its peculiar American development, it was then seen that the fundamentals of faith were brought thereby into the dark shadow of doubt, and that the question of the propriety of value-testimony had to be faced.

But here are to be noted several stages of thought. (1) In a New York ruling of 1840 the question is first found raised, under the old sense of "opinion"; i. e. such testimony was objected to and excluded because it involved mere speculation or guessing over what no witness could pretend to have sensible knowledge of.² The argument, as accepted in New York, did not exclude value-testimony absolutely; for the same judge admitted testimony as to the value of a dog while excluding it as to the value of business profits. Moreover, though there are still traces of it in New York rulings,³ it never obtained acceptance elsewhere. Still, it served to throw doubt on value-testimony. (2) Meanwhile, the principle of the Opinion rule had already been invoked in New Hampshire to exclude value-testimony, and had effected the exclusion in that State; and the question, thus presented in two jurisdictions, was thenceforth raised all along the line. Why should a witness testify that the value of a piece of land was so much, when he could state its features sufficiently in detail and leave the jury to make their own inference? Fortunately, the futility of this argument was everywhere else

Lenbric, 18 C. C. A. 332, 71 Fed. 843. *Utah*: 1896, *Christensen's Estate*, 17 Utah 412, 53 Pac. 1003 (lay opinion admissible); *Vermont*: In 1835, *Lester v. Pittsford*, 14 Vt. 189, lay opinion was admitted; in 1845, *Morse v. Crawford*, 17 Id. 502, the qualification was appended that the facts supporting the opinion must accompany it; and this the subsequent cases follow; 1861, *Crane v. Crane*, 33 Id. 15; 1875, *Hathaway's Adm'r v. Ins. Co.*, 48 Id. 350; 1878, *State v. Hayden*, 51 Id. 303; 1883, *Westmore v. Sheffield*, 56 Id. 247; 1892, *Fairchild v. Beacom*, 64 Id. 243, 24 Atl. 335; 1896, *Frery v. Gusha*, 66 Id. 264; 1898, *Re McCabe*, 70 Id. 153, 40 Atl. 52 (by a layman, that the person charged as insane was suffering from parais, the witness having observed the same symptoms as in his own father similarly afflicted, excluded); 1901, *Sargent v. Burton*, 74 Id. 24, 52 Atl. 73; *Virginia*: Lay opinion is receivable: 1825, *Burton v. Scott*, 3 Rand. 404; 1847, *Mercer v. Kelso's Adm'r*, 4 Gratt. 118 (no question raised); 1870, *Beverley v. Walden*, 20 Id. 158 (same); 1878, *Chenham v. Hatcher*, 30 Id. 68 (same); 1887, *Fishburne v.*

Ferguson's Heirs, 34 Va. 106, 4 S. E. 575; 1894, *Whitelaw v. Sims*, 30 Id. 593, 19 S. E. 113; *Washington*: 1902, *Higgins v. Nethery*, 30 Wash. 239, 70 Pac. 499 (lay opinion receivable); *West Virginia*: Lay opinion is receivable: 1877, *Jarrett v. Jarrett*, 11 W. Va. 584, 626; 1882, *Nicholas v. Kershner*, 20 Id. 285; 1888, *Kerr v. Lunaford*, 31 Id. 439, 630, 6 S. E. 493; 1892, *State v. Maier*, 36 Id. 737, 762, 15 S. E. 991, *seable*; *Wisconsin*: In 1874, *Barnham v. Mitchell*, 34 Wis. 132, the opinion of a non-expert was admitted, with an implication that the witness' facts and reasons should accompany it; this subsequently became the rule; 1891, *Yanke v. State*, 51 Id. 468, 8 N. W. 276; 1899, *Crawford v. Christian*, 102 Id. 51, 78 N. W. 406 (excluded because not shown to have knowledge of facts).

¹ The question seems to have been once raised in England: 1849, *Gauntlett v. Whitworth*, 2 C. & K. 780 (whether certain nuisances depreciated house-values in a locality; admitted).

² In this aspect the objection has been dealt with elsewhere (*ante*, § 643).

³ Noted *post*, § 1943, under New York.

seen; and, though the question was brought up and had to be settled in almost every other jurisdiction, it was settled in favor of receiving such testimony. This view was also afterward taken in New Hampshire (by legislation) and in New York. (8) But the unrest and doubt created in arguing the question has left its traces. All that can be said to have been conceded by universal assent is that the simple question of market value or of value in its ordinary form is not affected by the Opinion rule. For many forms of value-testimony (such as the amount of damage by tort or breach of contract) most Courts still have some doubt and disfavor, — the result of the general inclination to consider strictly and admit grudgingly every sort of inference of which the data can possibly be substituted for the jury. It is enough here to note that historically we should probably not be troubled with these doubts to-day if it had not been for the widespread doubt (now at rest) prevailing during an earlier generation over value-testimony pure and simple.

§ 1941. *Theory and Policy; in general.* The theory on which the Opinion rule is made to exclude value-testimony is, of course, that the witness can sufficiently detail to the jury the various data affecting the value, and the jury can then draw from his data their inference as to the value. As this theory has nowhere been defended except in New Hampshire, and even there with little attempt to expound the principle, no judicial exposition of it is available. The answer to it, namely, that the witness can not be expected to reproduce the data sufficiently and exactly to the jury, has been many times clearly expounded:

1857, *Skinner, J.*, in *Illinois C. R. Co. v. Van Horn*, 18 Ill. 280: "To describe to a jury a piece of ground, however minutely, with its supposed adaptations to use, its advantages and disadvantages, and demand of them, upon this information alone, a verdict as to its value would be merely farcical."

1870, *Dee, J.*, in *State v. Pike*, 49 N. H. 422: "The exception introduced by Judge Green and Judge Harris in *Rochester v. Chester* was peculiar to this State; it seems never to have prevailed anywhere else in the whole world. Not only was it a local peculiarity; it was a troublesome and mischievous one. . . . It was unjust; it often resulted in excessive, often in insufficient damages. It was expensive and annoying; the parties were compelled to summon a greater number of witnesses than would have been necessary if their opinions could have been taken; and the process of obtaining from them such testimony as they were allowed to give, and excluding their opinions, was difficult and tedious. It was inconsistent with itself; for . . . the witness who was not permitted to say that he thought a certain horse was worth more or less than a thousand dollars was permitted to give his opinion of the age, size, weight, form, speed, strength, endurance, health, appetite, docility, timidity, and general disposition of the horse."

1897, *Caldwell, J.*, in *St. Louis I. M. & S. R. Co. v. Edwards*, 24 C. C. A. 300, 78 Fed. 745 (admitting testimony as to the damage to cattle): "Nor is it any answer to say that the witness can tell the jury how long the cattle were in the cars, or how they looked and acted, and that from that imperfect information the jury may arrive at a correct conclusion as to the damage. The poverty of the English language makes it absolutely impossible for a witness to present to the minds of the jurors the appearance of cattle, and what that appearance denotes, as it is presented to his practised and experienced eyes. The experiences of the witness and the appearance of the cattle cannot be photographed on the minds of the jurors. The knowledge of the condition of these cattle, and how that condition affected their value, must of necessity have existed in the mind of the

witness who had had such a large and extended experience in shipping cattle with far greater clearness and certainty than it could have been communicated to the minds of the jurors by any statement he might have made of what he saw merely, however clear and lucid such statement might have been. It is obvious that, if witnesses were to be permitted to state to a jury those facts only of which they have absolute knowledge, not only the range of inquiry, but the province of remedial justice, would be very materially contracted."

§ 1942. *Same: Land taken by Eminent Domain.* So far as principle is concerned, the only other question that needs examination is that raised by the rulings of various Courts admitting testimony to the value of a given piece of land — *e.g.* where it has been sold or taken by eminent domain —, but rejecting it when it deals with the total amount of the *loss or benefit to the estate of which a part has been taken* by eminent domain. Here three observations may be made. (1) Where, as in some jurisdictions, it has been a disputed point whether the right to compensation excludes or includes a set-off or diminution to the extent of benefit received, then of course we are not dealing with a question of evidence, but a question of substantive law. It is assumed here that the law of the State allows the benefit to be deducted. (2) The Courts have probably been moved by the circumstance that the question asked of the witness is in substance the final issue for the jury, *i.e.* What was the total amount of damage received? or, Was there on the whole a benefit or a loss? This is not in form a value-inquiry; yet in effect it is simply an inquiry as to the value by which the complainant's estate has been diminished. Moreover, though it is usually the exact ultimate issue on which the jury must return a finding, that is no objection on principle to the testimony (*ante*, § 1921). (3) A few Courts have noticed the inconsistency of allowing the witness to speak of land-values generally while rejecting his statement as to the total damage done by a forcible taking. That inconsistency comes prominently to view where (as in some jurisdictions) the witness is allowed to state the value of the piece of land taken and then the value of the whole estate before the taking and after the taking, but is not allowed to state the net value of loss or benefit. That there is any inconsistency is denied in the following way:

1863, *Elliott, J.*, in *Yost v. Conroy*, 92 Ind. 465: "There is, however, not the slightest conflict between the two propositions stated. . . . Many things enter into the estimate of benefits and damages besides the value of the land taken and the value of the residue with and without the improvement; so that, in expressing an opinion as to the value, a witness does not give an opinion as to the amount of the benefit or damages; he does no more than furnish evidence upon one of the elements of the estimate."

It seems impossible, however, to escape the argument that there is in truth an inconsistency:

1860, *Gray, J.*, in *Swan v. Middlesex*, 107 Mass. 178: "The witnesses, being competent to testify to the value of the land affected before and after the alteration of the highway, might testify to the simple question of arithmetic which of those two values was the greater, — in other words, whether the petitioners' estate was benefited or injured."

1878, *Dunford, J., in Snow v. R. Co.*, 65 Mo. 281: "The value of the amount of damage to property must necessarily be a matter of opinion, and the judgment of one well acquainted with its situation and character, its surroundings and facility of market, must be more satisfactory than any description without such judgment. It is true, this, like all oral testimony, may at times prove unreliable; but its value can be readily and satisfactorily tested by cross-examination. . . . The difference in value before and after the tacking would be a valid test of that damage, and it would seem to be immaterial whether the testimony was admitted in this form or in answer to a direct question as to the amount of the damage. In either case it must come as an opinion, and in either case it is a question of value."¹

§ 1943. *State of the Law in the Various Jurisdictions: (1) Property-Value.* In all jurisdictions testimony to the value of a specific piece of property is now received, as not obnoxious to the Opinion rule. In a few jurisdictions the testimony has been received without raising the question.² Nevertheless, it may be said that no Court would reject value-testimony absolutely and in the ordinary form. It is for the variations from simple value-testimony that doubt and exclusion is found.³

¹ The rulings are placed with the others in the next section.

² Compare the rulings cited *ante*, §§ 711-720 (testimonial qualifications for value-witnesses).

³ *Alabama*: 1881, *Montgomery & W. P. R. Co. v. Varner*, 19 Ala. 106 (damage under eminent-domain taking; excluded); 1884, *Alabama & F. R. Co. v. Bartlett*, 49 id. 87 (same); 1878, *Haralson v. Campbell*, 68 id. 377 (same); *Arkansas*: 1884, *Texas & St. L. R. Co. v. Kirby*, 44 Ark. 106 (damage under eminent domain; admitted); 1890, *St. Louis I. M. & S. R. Co. v. Ayres*, 67 id. 371, 55 S. W. 189, *semble* (witness may state value before and after, and then total damage); 1902, *St. Louis I. M. & S. R. Co. v. Jacobs*, 70 id. 401, 68 S. W. 248 (damage to estate, excluded); 1909, *St. Louis I. M. & S. R. Co. v. Hall*, — id. —, 74 S. W. 293 (total damage to land by fire, admitted); *Florida*: 1897, *Sullivan v. Lear*, 25 Fla. 473, 2 So. 846 (property-value; admitted); *Georgia*: 1878, *Brunswick & A. R. Co. v. McLaren*, 47 Ga. 548 (damage under eminent domain; excluded); 1883, *Cincinnati & G. R. Co. v. Mims*, 71 id. 344 (same); *Illinois*: the value of land may be stated: 1864, *Metawa Gaslight Co. v. Graham*, 35 Ill. 349; 1870, *Hayes v. R. Co.*, 54 id. 376; 1871, *Cooper v. Randall*, 59 id. 330; 1875, *Keithsburg & E. R. Co. v. Henry*, 79 id. 294; so also of damage under eminent-domain taking: 1864, *Metawa Gaslight Co. v. Graham*, 35 id. 349; 1870, *Hayes v. R. Co.*, 54 id. 376; 1871, *Cooper v. Randall*, 59 id. 330; 1873, *Lafayette B. & M. R. Co. v. Winslow*, 66 id. 219; 1874, *Galena & S. W. R. Co. v. Haslam*, 73 id. 497; 1877, *Hyde Park v. Dunham*, 85 id. 578; 1881, *Green v. Chicago*, 97 id. 372; 1885, *Spear v. Drainage Com'n.*, 113 id. 684; 1896, *Chicago P. & M. R. Co. v. Mitchell*, 159 id. 406, 49 N. E. 973 (*contra*: 1873, *Chicago & A. R. Co. v. R. Co.*, 67 id. 145); and the value of land before taking and after taking: 1895, *Pike v. Chicago*, 155 Ill. 656, 40 N. E. 567; whether a certain fact would affect the value is admissible: 1870, *Hayes v. R. Co.*,

54 Ill. 376; *Indiana*: value-testimony in general is admissible: 1883, *Yost v. Conroy*, 92 Ind. 464; in particular, the value of property: 1856, *Evansville R. Co. v. Fitzpatrick*, 10 id. 122; 1860, *Sinclair v. Rush*, 14 id. 451; 1862, *Croase v. Holman*, 19 id. 38; the value of personal property: 1870, *Kirkpatrick v. Snyder*, 33 id. 171; including that of land: 1875, *Logansport v. McMillen*, 49 id. 494; 1876, *Holten v. Board*, 55 id. 199; 1888, *Johnson v. Culver*, 116 id. 269, 19 N. E. 129; but not of damage under eminent-domain taking: 1856, *Evansville R. Co. v. Fitzpatrick*, 10 id. 122; 1860, *Sinclair v. Rush*, 14 id. 451; 1862, *New Albany & S. R. Co. v. Huff*, 19 id. 310; 1876, *Logansport v. McMillen*, 49 id. 494; 1877, *Baltimore H. Co. v. Johnson*, 59 id. 247; same *v. same*, ib. 480; 1877, *Baltimore P. & C. R. Co. v. Stoner*, ib. 579; 1878, *Noah v. Angle*, 63 id. 428; 1882, *Hagaman v. Moore*, 84 id. 501 (benefit only); 1883, *Yost v. Conroy*, 92 id. 465 (examining the preceding —); quoted *supra*, § 1942; yet the value before the taking and after the taking may be stated: 1870, *Ferguson v. Stafford*, 33 id. 164; 1878, *Frankfort & K. R. Co. v. Windsor*, 61 id. 299 (value of two halves as cut by railroad); 1882, *Indianapolis D. & S. R. Co. v. Fugh*, 85 id. 281; furthermore, while damage to personality may be estimated, if the data also are given: 1870, *Kirkpatrick v. Snyder*, *supra*; yet land damage caused by unskillful sowing may not be: 1871, *Bissell v. West*, 35 id. 54; *Iowa*: the value of personal property may be stated: 1863, *Anson v. Dwight*, 18 Ia. 244; 1885, *Tubbs v. Garrison*, 68 id. 48, 25 N. W. 921; as well as the value of land; but the damage done to personality may not be stated: 1863, *Whitmore v. Bowman*, 4 G. Greene 149; 1866, *Anson v. Dwight*, 18 Ia. 244, *semble*; nor the damage to land under eminent-domain taking: 1861, *Dalsell v. Drivenport*, 12 id. 441; 1865, *Promer v. Wapello Co.*, 18 id. 330; 1872, *Causton v. Iowa City*, 34 id. 204; 1870, *Russell v. Burlington*, 30 id. 265; 1873, *Harrison v. R. Co.*, 36 id. 325; 1887, *Lewis v. Ins. Co.*, 71 id. 97, 33 N. W. 190; though the

value before the taking and after the taking may be stated: 1884, *Stor v. R. Co.*, 1 la. (Cole's ed.) 394; 1885, *Heury v. R. Co.*, 2 id. 390; 1881, *Dalzell v. Davenport*, 12 id. 440; *Kenore*: the value of land in general may be stated: 1898, *St. Louis R. & A. R. Co. v. Chapman*, 38 Kan. 310, 18 Pac. 606; but not the damage by eminent-domain taking: 1878, *Roberts v. Brown Co.*, 21 id. 355; 1883, *Parsons Water Co. v. Knapp*, 28 id. 734, 7 Pac. 548; 1883, *Wichita & W. R. Co. v. Kuhn*, 28 id. 676, 17 Pac. 323; 1883, *Leroy & W. R. Co. v. Ross*, 40 id. 608, 20 Pac. 197; 1889, *Ottawa O. C. & C. (I. R. Co. v. Adolph)*, 41 id. 603, 21 Pac. 642; nor even the diminution of value after the taking: 1883, *Wichita & W. R. Co. v. Kuhn*, 28 id. 676, 17 Pac. 323; 1889, *Leroy & W. R. Co. v. Ross*, 40 id. 608, 20 Pac. 197; yet the value before the taking and after the taking may be stated: 1880, *Kanans Cont. R. Co. v. Allen*, 24 id. 24; 1888, *Leavenworth T. & S. W. R. Co. v. Paul*, 28 id. 620; *Kentucky*: 1891, *Illinois C. R. Co. v. Smith*, 110 Ky. 298, 61 S. W. 2 (value of damage by eminent domain; excluded); *Maine*: the value of personality may be stated: 1866, *Haswell v. Mitchell*, 53 Mo. 470; 1870, *Whiteley v. China*, 61 id. 303; 1878, *Washington Ice Co. v. Webster*, 48 id. 444; as well as the value of realty: 1875, *Snow v. R. Co.*, 65 id. 230 (land); 1899, *Tebbetts v. Haskins*, 16 id. 298 (cost of a house); in the following case the value of mills was not allowed to be stated, as being on the facts a matter of common knowledge: 1860, *Clark v. Walter Power Co.*, 22 id. 77; *Massachusetts*: value may be stated, of realty as well as of personality; that certain circumstances would or would not affect value may of course also be stated: 1873, *Miller v. Smith*, 112 Mass. 476 (whether cribbing, etc., affects the value of horses); 1878, *Chandler v. J. P. Aqueduct*, 125 id. 551 (for what purpose land was suited); moreover, the damage done by eminent-domain taking or otherwise may be stated: 1847, *Vandine v. Burpee*, 13 Metc. 236 (damage to garden and nursery); 1847, *Wyman v. R. Co.*, ib. 326; 1861, *Walker v. Boston*, 6 Cush. 279; 1833, *Dwight v. Co. Com'rs*, 11 id. 308; 1854, *Shaw v. Charlestown*, 3 Gray 106; 1863, *Shattuck v. Stoughton R. Co.*, 6 All. 117; 1849, *Sven v. Middlesex*, 101 Mass. 177; 1874, *Tucker v. R. Co.*, 118 id. 547; 1883, *Taft v. Com.*, 158 id. 526, 529, 544, 23 N. E. 1046; 1896, *Beale v. Boston*, 166 id. 53, 43 N. E. 1029; on this point compare the cases cited ante, § 714, under *Massachusetts*, many of which involved eminent-domain taking; it has been ruled that the value of a reversion subject to the public easement could not be stated: 1861, *Boston & W. R. Co. v. O. C. & F. R. N. Co.*, 3 All. 14; *Michigan*: the amount of damage in eminent-domain taking may be stated: 1886, *Grand Rapids v. R. Co.*, 56 Mich. 647, 26 N. W. 159; *Minnesota*: not only may the value before the taking and after the taking be stated: 1873, *Simmons v. R. Co.*, 18 Minn. 189 (explaining *Winona & S. P. R. Co. v. Denman*, 10 id. 247); 1872, *Colvill v. R. Co.*, 19 id. 285; 1873, *St. Paul & S. C. R. Co. v. Murphy*, ib. 510; 1889, *Emmons v. R. Co.*, 41 id. 133, 42 N. W. 789; but the total damage by the taking

may be stated: cases supra, and those: 1873, *Lohmische v. R. Co.*, 19 id. 481; 1883, *Lehrer v. R. Co.*, 20 id. 291, 18 N. W. 51; 1883, *Sherman v. R. Co.*, 21 id. 222, 15 N. W. 239, no, for personality, the diminution of value after being required may be stated: 1883, *Johnston Harvester Co. v. Clark*, 21 id. 167, 17 N. W. 111; in an earlier case, which would hardly be followed to-day, the damage to crops was not allowed to be stated: 1862, *Sowers v. Dikens*, 6 id. 29; the following case probably supercedes this: 1888, *Hobbs v. Willmar*, 71 id. 421, 73 N. W. 1867 (amount of damage to property by water, admitted); *Mississippi*: 1866, *Whitfield v. Whitfield*, 40 Miss. 267 (value of personality, admitted); 1900, *Board v. Hendricks*, 77 id. 483, 27 So. 613 (land value, excluded, for reasons obscurely stated); *Minnesota*: the value may be stated of personality: 1873, *Cantling v. R. Co.*, 54 Mo. 391; as well as of realty: 1866, *Thomas v. Mallinckrodt*, 43 id. 60; and the damage by eminent-domain taking may be stated: 1876, *Tate v. R. Co.*, 64 id. 153; 1886, *Springfield & S. R. Co. v. Calkins*, 90 id. 543, 3 S. W. 82; 1886, *St. Louis v. Ranken*, 95 id. 193, 3 S. W. 349; 1898, *Union Elev. Co. v. R. Co.*, 135 id. 248, 24 S. W. 1071; but apparently not of damage done to personality: 1899, *Salice v. St. Louis*, 159 id. 615, 34 S. W. 463 ("amount of damage done to the wagon and harness," excluded); *Nebraska*: the value of personality may be stated: 1882, *Keith v. Tilford*, 12 Neb. 275, 11 N. W. 215; 1894, *Western H. I. Co. v. Richardson*, 40 id. 1, 9, 88 N. W. 597 (the lump value of a stock of goods); as well as that of realty: cases cited *infra*; it was originally held that, in eminent-domain taking, not even the value after taking could be stated: 1891, *Fremont E. & M. V. R. Co. v. Whalen*, 11 id. 591, 10 N. W. 491; but this was overruled, and now the value before the taking and after the taking may be stated: 1882, *Republican V. R. Co. v. Arnold*, 13 id. 497, 14 N. W. 479; 1883, *Burlington & M. R. Co. v. Schlantz*, 14 id. 423, 16 N. W. 429; 1883, *Northeastern N. R. Co. v. Frasier*, 25 id. 53, 40 N. W. 609; though the total damage may not be stated, and this is applied also to damage caused by a trespass: 1883, *Burlington & M. R. Co. v. Schlantz*, 14 id. 423, 16 N. W. 429; *Burlington & M. R. Co. v. Reim*, ib. 472, 16 N. W. 747; 1888, *Fremont E. & M. V. R. Co. v. Marley*, 25 id. 143, 40 N. W. 948; 1902, *Read v. Valley L. & C. Co.*, — id. —, 62 N. W. 622 (the amount of damage that would have been suffered if the defendant had not acted as charged, excluded); *New Hampshire*: in this State the radical position was early taken of refusing to allow the value of anything to be directly stated: 1826, *Rochester v. Chester*, 3 N. H. 345 (Green, J., "there is perhaps no species of property in the community, of the value of which the jury are better acquainted, than houses and lands"); 1833, *Peterboro v. Jeffrey*, 6 id. 463, Upham, J.; 1844, *Robertson v. Stark*, 15 id. 113, Parker, C. J.; then came two decisions limiting this doctrine: 1839, *Whipple v. Whipple*, 10 id. 131 (horses); 1840, *Beard v. Kirk*, 11 id. 401 (sleds); but the former position was again resumed: 1850, *Holt v. Moulton*, 21 id. 291; 1851, *Car-*

and Railroad v. Grady, 20 Md. 242; 1868, *Mansfield v. Fire Ins. Co.*, 27 Id. 123; 1864, *Low v. Railroad*, 40 Id. 301; finally, this unfortunate heterodoxy was abolished by statute: Pub. L. 1861, c. 234, § 22 (opinions as to "value of any real estate, goods, or chattels," are admissible from qualified witnesses); *New Jersey*: 1873, *Hausenbeck v. Crumright*, 20 N. J. 14; 413 (value of realty; admissible); *New York*: in this State there came first a line of rulings hostile to the whole to the reception of value-testimony: 1840, *Brill v. Flagg*, 20 Wend. 356 (dogs; admitted); 1840, *Mayor v. Post*, 24 Id. 675, *semble* (in general; admitted); 1842, *Dunham v. Simmons*, 3 Hill 600 (damage to a horse; excluded); 1843, *Palgo v. Kelley*, 5 Hill 604 (cost of raising a sunken boat; excluded); 1847, *Lamoure v. Caryl*, 4 Denio 373 (services; admitted); 1847, *Howard v. Ins. Co.*, 5 Id. 507 (value of stock of goods; admitted, distinguishing, but not satisfactorily, *Phoenix Fire Ins. Co. v. Philip*, 13 Wend. 81); 1847, *Joy v. Hopkins*, 5 Id. 84 (personalty; admitted); 1849, *Morehouse v. Mathews*, 2 N. Y. 514 (damage to animals; excluded); during the same period, however, there were rulings (Norman v. Wells being the leading one) excluding value-statements, as already mentioned (*ante*, § 1940), on the theory that they involved mere speculation or guessing; these rulings are noted *supra*, § 643; the law being in this state of uncertainty, the decision in *Clark v. Baird*, 1853, 9 N. Y. 185, set the question at rest, from the point of view of both theories, by holding value-statements in general proper; and this has been subsequently adhered to: 1846, *Robertson v. Knapp*, 35 Id. 92; 1891, *Roberts v. R. Co.*, 122 Id. 465, 29 N. E. 496; disposing of the apparent contrary ruling in *Avery v. R. Co.*, 1890, 121 Id. 31, 24 N. E. 30; but it may be supposed that the rulings of *Dunham v. Simmons* and *Morehouse v. Mathews*, *supra*, as to damage to personalty, would still be followed; moreover, the doctrine of Indiana and a few other jurisdictions, noticed above, that in taking of land by eminent domain statements as to the whole amount of damage are not receivable, though statements of the value before the taking and after the taking are receivable, has been adopted in New York: 1891, *Roberts v. R. Co.*, 122 Id. 455, 23 N. E. 484; 1893, *Sixth Av. R. Co. v. El. R. Co.*, 130 Id. 548, 33 N. E. 400; however, in *Solomon v. R. Co.*, 1894, 103 Id. 436, 9 N. E. 430, there had been an effort to hark back to the doctrine of *Norman v. Wells*, *supra*, by saying that a speculative estimate of value would not always be admissible; and a little later this is found taking definite shape in rulings that an estimate of what the value of an estate would now have been had the right of taking not been exercised would be improper; here, however, the Opinion rule seems to be the subordinate one, and the main consideration is that the statement is a mere speculation or guess, i. e. an employment of the old doctrine above alluded to; the dissenting opinion of Gray, J., in the *Roberts* case sufficiently shows the fallacy of this view; it seems, however, to be still the law: 1889, *McGowan v. R. Co.*, 117 Id. 219, 22 N. E. 937; 1891, *Roberts v. R. Co.*, 122 Id. 465, 29 N. E. 496;

1892, *Barker v. F. & A.*, 512, 30 N. E. 499; *North Dakota*: 1891, *Anderson v. Bank*, 6 N. D. 497, 73 N. W. 916 (value of a promissory note; expert testimony excluded); *Ohio*: a statement as to the damage by eminent-domain taking is not receivable: 1850, *Atlantic & G. W. R. Co. v. Campbell*, 4 Oh. St. 303; 1856, *Cleveland & P. R. Co. v. Ball*, 5 Id. 373; yet the value before the taking and after the taking may be stated: *Atlantic & G. W. R. Co. v. Campbell*, *supra*, *semble*; *C. & P. R. Co. v. Ball*, *supra*; *Oklahoma*: 1890, *Coyle v. Baum*, 3 Okl. 695, 41 Pac. 300 (personalty; value before and after injury may be stated); 1908, *Toutle v. Kent*, — Id. —, 73 Pac. 310 (total damage to a stock of goods converted, excluded); *Oregon*: 1898, *Portland v. Kamm*, 10 Or. 384 (damage by eminent-domain taking; admitted); *Pennsylvania*: the value of personalty may be stated: 1840, *Clark v. Spence*, 10 Watts 326; 1843, *Bingham v. Rogers*, 6 W. & S. 501; 1845, *Whitwell v. Crane*, 6 Id. 371; 1846, *McGill v. Rowland*, 8 Pa. St. 432; 1859, *Mish v. Wood*, 24 Id. 432; 1875, *Adams Expr. Co. v. Schlesinger*, 75 Id. 346, 356; as well as the value of realty: 1826, *Kellogg v. Kranner*, 14 S. & R. 141; 1834, *Ley v. Huber*, 3 Watts 348; 1839, *Searle v. R. Co.*, 33 Pa. 63; 1861, *East Pa. R. Co. v. Hiestar*, 40 Id. 50; 1862, *Brown v. Corey*, 43 Id. 495, 506; 1864, *East Pa. R. Co. v. Hottenstine*, 47 Id. 30; 1865, *Pennsylvania R. Co. v. Henderson*, 51 Id. 321; 1869, *Delaware L. & W. R. Co. v. Burson*, 61 Id. 369; 1873, *Pittsburgh V. & C. R. Co. v. Rose*, 74 Id. 369; 1876, *Pennsylvania & N. Y. R. Co. v. Bunnell*, 81 Id. 426; 1886, *Pittsburgh V. & C. R. Co. v. Vance*, 115 Id. 532, 6 Atl. 764; furthermore, in eminent-domain taking, the value before and after the taking may be stated: 1862, *Brown v. Corey*, 43 Id. 495, 506; 1864, *East Pa. R. Co. v. Hottenstine*, 47 Id. 30; 1876, *Pennsylvania & N. Y. R. Co. v. Bunnell*, 81 Id. 426; as well as the total damage: 1867, *Pennsylvania R. Co. v. Bruner*, 55 Id. 319, 331, *semble*; 1871, *White Deer Creek Impr. Co. v. Samsman*, 67 Id. 420; 1896, *Lee v. Water Co.*, 176 Id. 223, 35 Atl. 194; *Rhode Island*: at first the damage by eminent-domain taking was allowed to be stated, though by experts only: 1856, *Buffum v. R. Co.*, 4 R. I. 223; 1860, *Howard v. Providence*, 6 Id. 514; but in *Tingley v. Providence*, 1867, 6 Id. 492, this practice was abandoned; and while the witness was allowed to state market values before and after, he was prohibited from stating the fact or the amount of total damage exceeding benefit; followed in *Brown v. R. Co.*, 1878, 12 Id. 234; *South Carolina*: 1901, *Dant v. R. Co.*, 61 S. C. 323, 39 S. E. 827 (damage under eminent domain; admitted); *South Dakota*: 1900, *Schuler v. Board*, 12 S. D. 460, 81 N. W. 390 (total damage by eminent domain; allowed); *Texas*: statements as to land-value are receivable: 1856, *Haas v. Choussard*, 17 Tex. 592 (mill-site); *United States*: 1913, *Den v. Wright*, 1 Fed. 73 (val. of land; admitted); 1843, *Alfonso v. U. S.*, 2 F. 426 (value in general; admitted); 1886, *Lehigh V. C. Co. v. Chicago*, 26 Fed. 419 (damage by taking; admitted); 1887, *Lafin v. R. Co.*, 33 Id. 432 (same); 1890,

§ 1944. *State of the Law in the Various Jurisdictions: (2) Other Values (Services, Personal Injuries, Breaches of Contract, etc.).* In dealing with other values, the Courts are apt too often to see some violation of the Opinion rule in the most straightforward and practical questions.¹ Of the remaining classes of values, nothing special need be said; except that in personal-injury cases the exclusion of opinions of value is perhaps reasonable, not because of the Opinion rule (which would insist on the grounds being substituted for the

Montana R. Co. v. Warren, 137 U. S. 352, 11 Sup. 96 (damage by taking; admitted); 1898, *The Conqueror*, 166 id. 110, 131, 17 Sup. 510 (use of a yacht; admitted); 1897, *St. Louis I. M. & S. R. Co. v. Edwards*, 24 C. C. A. 300, 78 Fed. 745 (damage to cattle in shipment, admitted; quoted *supra*, § 1941); *Vermont*; 1858, *Laurent v. Vaughn*, 30 Vt. 24 (personalty; admitted); 1860, *Crane v. Northfield*, 32 id. 126 (same); *Washington*; 1892, *Seattle & M. R. Co. v. Gilchrist*, 4 Wash. 509, 513, 30 Pac. 733 (damage to land by taking; allowable); *West Virginia*; 1884, *Railroad Co. v. Foreman*, 24 Va. 673 (damage by eminent-domain taking; admitted); 1896, *Blair v. Charleston*, 43 id. 62, 26 S. E. 341 (value after taking; admitted); 1900, *Kay v. R. Co.*, 47 id. 467, 35 S. E. 973 (value before and after is alone allowable); *Wisconsin*: the value of property may be stated: 1867, *Noonan v. Halsey*, 22 Wis. 35; but as to damage or benefit done to land, there has been some fluctuation; there first occur the following favorable rulings: 1851, *Milwaukee & M. R. Co. v. Eble*, 3 Finney 334 (whether and how a railroad would increase or diminish land value); 1854, *Cole v. Clarke*, 3 Wis. 337 (on a *quantum meruit*, whether plaintiff's work had on the whole benefited defendant's premises); but, as regards damage by land-taking or highway-improvements, a statement of the whole amount is now excluded: 1867, *Farrand v. R. Co.*, 31 id. 435; 1872, *Church v. Milwaukee*, 31 id. 520; but the value before the taking and after the taking may be stated: 1869, *Snyder v. R. Co.*, 35 id. 65; 1875, *Hutchinson v. R. Co.*, 37 id. 610; 1883, *Neilson v. R. Co.*, 59 id. 530, 17 N. W. 310; there is also the following ruling: 1883, *Watson v. R. Co.*, 57 id. 351, 15 N. W. 468 (probable cost of land-improvements; excluded).

¹ On all these topics, compare also the rulings cited *ante*, §§ 715, 716, which sometimes imply a rule on the present subject; *Services*: the testimony is admitted in the following cases, except as otherwise noted: 1858, *Butler v. King*, 10 Cal. 341 (excluded); 1875, *Covey v. Campbell*, 52 Ind. 158; 1880, *Johnson v. Thompson*, 72 id. 170; 1898, *Clark v. Elsworth*, 104 Ia. 443, 73 N. W. 1023 (attorney's services); 1897, *Fowler v. Fowler*, 111 Mich. 678, 70 N. W. 336 (services on a farm); 1870, *Allis v. Day*, 14 Minn. 518 (attorney's services); 1901, *Calhoun v. Akeley*, 23 Minn. 254, 35 N. W. 170 (legal services); 1887, *Hurt v. R. Co.*, 94 Mo. 260, 7 S. W. 1 (damage by loss of service, excluded); 1899, *Sprague v. Sea*, 123 id. 327, 53 S. W. 1074 (value of housekeeping services); 1883, *Alt v. Fig Syrup Co.*, 19 Ner. 119, 7 Pac.

174; 1902, *Harris v. Smith*, 71 N. H. 320, 52 Atl. 334 (hauling wood); 1876, *Williams v. Brown*, 26 Oh. St. 551 (attorney's services); 1898, *Ward v. R. Co.*, 53 S. C. 10, 30 S. E. 594 (services of a physician); 1896, *Camp v. Ristine*, 101 Tenn. 524, 47 S. W. 1098 (same); 1886, *Dushane v. Benedict*, 120 U. S. 647, 7 Sup. 696 (damage by loss of services; excluded because not accompanied by facts); 1901, *Watras v. Trendall*, 74 Vt. 54, 52 Atl. 118 (value of boarding-services); 1896, *Turner v. R. Co.*, 15 Wash. 213, 46 Pac. 243, *semble* (attorney's time, excluded); *Personal injuries*: in the following cases, an estimate of the damage done by a personal injury is excluded, though sometimes the ruling is applied only to the plaintiff's own estimate: 1886, *Little Rock M. R. & T. R. Co. v. Haynes*, 47 Ark. 500, 1 S. W. 774 (plaintiff himself); 1877, *Central R. & B. Co. v. Kelly*, 58 Ga. 110; 1880, *Thomas v. Hamilton*, 71 Ind. 277; 1870, *Tefft v. Wilcox*, 6 Kan. 55; 1856, *Wilcox v. Leake*, 11 La. An. 179; 1903, *Tenney v. Rapid City*, — S. D. —, 96 N. W. 96; 1886, *Bain v. Cushman*, 60 Vt. 343, 15 Atl. 171 (plaintiff himself); 1898, *DeWald v. Ingle*, 31 Wash. 616, 73 Pac. 469; *Contract's non-performance*: 1847, *Peterson v. Wallace*, 7 Ark. 291 (damage by non-payment, excluded); 1902, *Foots & D. Co. v. Malonv*, 115 Ga. 985, 42 S. E. 413 (damage to business by breach of contract, excluded); 1873, *Linn v. Sigbee*, 67 Ill. 75 (trade lost by breach of contract restraining trade, excluded); 1867, *Mitchell v. Allison*, 29 Ind. 44 (damage by failure to perform, excluded); 1870, *Ferguson v. Stafford*, 33 id. 164 (amount gained if contract had been performed, allowed); 1882, *Ætna L. Ins. Co. v. Nexsen*, 84 id. 347 (value of life insurance policy, allowed); 1898, *Ironton Land Co. v. Batchart*, 73 Minn. 39, 75 N. W. 749 (value of land with a contract performed and unperformed, allowed); 1872, *Fitzgerald v. Hayward*, 50 Mo. 521 (damage by non-performance, allowed); 1901, *U. S. v. McCann*, 40 Or. 13, 66 Pac. 274 (amount of damage from breach of contract, excluded); 1882, *Jones v. Fuller*, 19 S. C. 64, 70 (marriage-promise; estimate by persons knowing the circumstances of the parties, allowed); 1876, *Waco Tap R. Co. v. Shirley*, 45 Tex. 375 (probable cost of completing a contract, allowed); *Sundries*: 1897, *Arkansas M. R. Co. v. Griffith*, 63 Ark. 491, 39 S. W. 580 (by a farmer, as to the cost of his living, admitted); 1899, *Burton v. B. S. C. Co.*, 171 Mass. 487, 80 N. E. 1028 (value of the use of inventions, allowed); 1899, *Graven v. Kennedy*, 119 Mich. 621, 78 N. W. 667 (value of insurance business bought, allowed).

inference), but because there are no precise grounds, i. e. the injury is one not capable of being stated in terms of money, except so far as it involves the loss of income or support. Nevertheless, so long as the law gives compensation in the shape of money, there is an inconsistency in excluding estimates in money.

3. Insurance Risk (Increase or Materiality).

§ 1946. *Principle.* Whether expert testimony by professional insurance men is receivable to throw light upon the effect of a given circumstance in forming a "material risk" or in causing an "increase of risk," has been the subject of a controversy more than a hundred years old,—a controversy mainly due to the failure to distinguish the different issues which may in this or that case be involved, and impossible to settle until a clear appreciation of this difference of issues is gained. The general question, whether a given circumstance has increased a risk, either represents or is closely connected with at least four distinct issues, for each of which the problem of the Opinion rule's application must receive an independent solution. (1) The question may be whether an insurance broker *has fulfilled his duty* to his principal (the insured) which requires him to provide by new policies or new clauses against any change of "risk" (i. e. of circumstances possibly affecting the property's status with reference to existing policies) brought to his notice. (2) The question may be, in an action for the value of property confiscated, whether the owner of property near to a new public servitude, e. g. a railroad, *has been injured* by it with reference to (a) an actual increased danger from fire, or (b) an increased expense necessarily imposed upon him for insurance, whether or not the danger has in fact increased. (3) The question may be, in an action by an insured against the insurers, whether there existed at the making of the contract an undisclosed or misrepresented circumstance "*material to the risk*," or whether there has since been an "*increase of risk*," which circumstance or increase, by not having been communicated according to the terms of the policy, has forfeited the policy. These different issues may be examined in order:

(1) *Insurance broker's duty.* The solution here can best be illustrated by the following case:

1883, *Chapman v. Walton*, 10 Bing. 57; an insurance broker received a letter from the insured, announcing the alteration of the voyage in certain respects, and was told to "do the needful" with it; he procured certain alterations in the policies, but the ship was lost at a place not covered by the altered policies, and the broker was sued for breach of duty; *Tindal, C. J.*: "The point to be determined is, not whether the defendant arrived at a correct conclusion upon reading the letter, but whether, upon the occasion in question, he did or did not exercise a reasonable and proper care, skill, and judgment. This is a question of fact, the decision of which appears to us to rest upon this further inquiry, viz., whether other persons exercising the same profession or calling, and being men of experience therein, would or would not have come to the same conclusion as the defendant. . . . It is not a simple abstract question, as is supposed by the plaintiff, what the words of the letter mean. It is what others conversant with the business of a policy broker would have understood it to mean, and how they would have acted upon it under the same cir-

circumstances. . . . This conclusion, it appears to me, neither judge nor jury could arrive at from the simple perusal of the letter, unassisted by evidence; because they would not have the experience upon which a judgment could be formed."

This result is not to be questioned. The case is the ordinary one of the propriety of professional conduct, and it is obvious that skilled aid must be employed to explain to the tribunal the situation as it would be understood and dealt with by a person of ordinary skill in the profession. Thus, incidentally, the question may arise whether a particular circumstance, *e. g.* the stopping at a specific port not mentioned in the original policy, would by possibility so affect the attitude of the insurer that the broker as a prudent agent ought to cover it by a new clause.

(2) *Injury to property by eminent-domain process.* Here we assume that by the substantive law the owner may include in his bill of damages (a) an actual increased danger from fire, or (b) an increased expense necessarily imposed for insurance, irrespective of actual increase of danger. As to the employment of expert testimony on the first point, the question is the same as one to be taken up under the next head (3) (a), and it is enough to refer to what is said there. As to its employment on the second point, there can be no doubt of its propriety. The issue is, Can the owner get insurance at the same rates as before? and insurance experts are certainly capable of helping the jury to determine whether he can or cannot.

(3) *Uncommunicated "increase of risk" or "misrepresentation of material facts," as forfeiting a policy.* (a) Here let us first assume that the issue is whether there has been an actual (or objectively real) increase of danger by the subsequent circumstance, or whether the preëxisting and concealed circumstance was actually (or, in objective reality) "material," *i. e.* made the fire-danger greater than it would have been. On this assumption, it is a fairly disputable question whether any expert testimony is needed to aid the jury. Certainly, on some points they clearly do not need it:

1853, *Hills v. Ins. Co.*, 2 Mich. 479; the fact of pending litigation was not disclosed, and the opinion of underwriters was offered to show it to be material, inasmuch as "the insured might be tempted to fire his property, or in case of accidental fire, be less disposed to make exertions to put it out, or less vigilant to insure against fire"; Wing, P. J.: "This is not a question of science or skill; . . . it is a mere deduction of reason from a fact, founded upon the common experience of mankind that a man may be tempted to do wrong when placed in circumstances where his cupidity may be excited. A jury does not need evidence to convince them that this may be the effect."

It seems clear, from this point of view, that the use of expert testimony may or may not be necessary according to the nature of the circumstance at issue in each case. There should be a liberal leaning towards the use of such aid whenever it is by possibility useful; but at any rate, there can be no hard-and-fast rule against it. This doctrine is well set forth in the following opinion:

1853, *Ranney, J.*, in *Protection Ins. Co. v. Harmer*, 2 Oh. St. 457: "The application of the doctrine to cases of insurance is as obvious and easy as to any other. A fact concealed

or not communicated is claimed to have been material to the risk assumed; because from its probable or necessary results, it increased the chances of loss. The question is, did it so increase them? If the answer can be given from ordinary experience and knowledge, the jury must respond to it unaided. . . . In cases of life and marine insurance, such [expert] testimony may often become indispensable. . . . In cases of fire insurance, it is more difficult to see when a necessity for such evidence could ever arise. But I am not prepared to say that it might not, and if it did, no doubt it should be governed by the same principles. It is therefore impossible to say that the opinions of witnesses are never to be received in determining the materiality of facts not disclosed; much less can it be said that they are to be received in all cases. In each case it must depend on the nature of the inquiry. . . . There was nothing in the question raised here [whether the fact of a suspected incendiary fire, shortly before, was material] requiring either science or skill to determine. The effect that a previous fire might have upon the safety of the building thereafter could be as well understood by one man as another. Every man of sense would know that it would depend entirely upon the cause of the fire."

1896, *Taft, J., in Penn M. L. Ins. Co. v. M. S. B. & T. Co.*, 19 C. C. A. 286, 72 Fed. 438, 490: "If it requires scientific knowledge or peculiar skill to trace the possible causal or evidential connection between the fact claimed to be material and the loss or death insured against, then, of course, the testimony of those learned in the necessary science, or trained in the particular craft, should be furnished to the jury, to enable them properly to estimate the weight which a reasonably prudent insurer would naturally give to the fact, in his calculation of chances. But where the calculation of the chances involves a consideration only of facts of everyday life, of the motives of men living in the same community with members of the jury, and of those ordinary physical and natural causes of which every man is presumed to have an understanding, it is difficult to see why an insurance examiner should be permitted to influence the jury by giving his sworn opinion on the very issue which they are assembled to try, and of which they are presumed to have the same opportunities upon which to found a reliable judgment as he. It is true, he may have had occasion, in his business, to consider and weigh facts of this character, for this purpose, much more frequently than the jury, but that does not render his opinions on the facts competent evidence. . . . Certainly, there is the same ground for excluding the individual opinions of insurance men [in life insurance] upon the materiality of particular facts as in marine and fire insurance. Of course, the evidence of physicians as to the tendency of diseases and bodily conditions or habits to shorten life is competent, but insurance men are not experts upon these subjects. Facts other than those relating to the health and habits of the applicant usually either relate to the motive of the applicant to destroy himself, or increase the probability of death by exposure to bodily injury. Of the materiality of this class of facts the jury can judge quite as well as one experienced in passing on insurance risks. They are within the common knowledge of mankind."

(b) But is the above assumption of (a) correct? Is it true, in the words of the judge first quoted, that "the question is, Did the fact concealed or not communicated, from its probable or necessary results, increase the chances of loss?" Are we investigating the objective reality of an increase of danger, or is our true purpose of inquiry something quite different? The latter, it seems clear. The inquiry before the Court in such a case is, in truth, Is the circumstance in question one which *would have influenced the insurer* (or promisor) to fix a higher rate of premium? In other words, not the objective reality of an increase of danger is involved, but the relation which the circumstance in question subjectively bears to the insurer's settled classified terms of charge. When the policy is agreed to be void "if any material fact or circumstance has not been fairly represented . . . , or if, without the assent of the Company,

the situation or circumstances affecting the risk shall be so altered as to cause an increase of such risks," the proviso is inserted with reference to the course which the insurer would have taken, had he in view of those facts been entering anew upon the contract, *i. e.* with reference to his either increasing the premium or refusing the insurance altogether, as induced by the circumstance in question. Thus the word "risk" does not mean "actual danger," but "danger as determined by the insurer's classification of the various circumstances affecting the rate of premium." Our main inquiry, then, is as to the insurer's schedule of classified "risks" (*i. e.* combinations of circumstances); and as we may desire further evidence than his own word for it, we may examine, secondarily, the usage of insurers in the same community, because their custom will tend to show what the individual insurer's practice is, as conforming presumably to the local methods (*ante*, §§ 376, 379). We do not look at the usage as simply incorporated into the contract,¹ but merely as throwing light on the probable practice of an individual of the class.

Thus we are in no way concerned with the question of an actual increase of danger. Perhaps it might be clear that the circumstance in the case in hand did not really increase the danger; but if nevertheless it fell within a class of circumstances scheduled by the insurer (for whatever reason seems best to him) as increasing the danger, it would "increase the risk" under the terms of the contract. A proper mode of obtaining aid, then, as to the insurer's practice in the matter, is to call in persons skilled in the insurance business, who may appropriately add to the jury's information on this subject.² The form of question proper to be put would be: "Would you as a professional insurer, and according to local practice, regard this concealed or misrepresented circumstance as material?" or, "With reference to local practice, would this circumstance be regarded as increasing the risk?" or, "as calling for a higher rate?" or, "as bound to be communicated?" or, to the promisor himself or his agents, "Would you according to your practice or rules have charged a higher rate of premium in view of this circumstance?"

This is the view accepted by a few Courts only. The following passages illustrate it:

1839, *Joy, C. B.*, in *Quin v. Assurance Co.*, Jones & Car. (Ir.) 331: "Now what is the test of materiality? It is this: whether the misrepresentation was such as to induce the insurers, either to insure when they would not have done so if they had known that the premises were so circumstanced as they actually were, or to have required a higher premium. If either were the consequence of misdescription, it was necessarily material."

¹ And whether the insured knew of the usage is thus immaterial.

² The truth is that the above principle is necessarily implied in the theory of "material representation" now accepted for the substantive law in construing insurance contracts. "Materiality" means that which would subjectively affect the insurer's attitude towards the proposed contract; thus the point of view is always subjectively the insurer's state of mind. Compare the following exposition of "materiality" by Tindal, C. J., in *Elton v. Larkins*

(1832), *post*: "A material concealment is a concealment of facts which if communicated to the party who underwrites would induce him either to refuse the insurance altogether or not to effect it, except at a larger premium than the ordinary premium"; which only needs to be qualified by the statement of Blackburn, J., in *Ionides v. Pender*, *post*, that the insurer's attitude must be "the judgment of a rational underwriter governing himself by the principles and calculations on which underwriters do in practice act."

1853, *Black, C. J.*, in *Hartman v. Ins. Co.*, 31 Pa. 477: "I think none of the cases go so far as to say that one who knows the practice, not only of the particular office, but of insurance offices generally, may not give his opinion of the influence which a given fact would have had as an element in the contract."

1854, *Curtis, J.*, in *Hawes v. Ins. Co.*, 3 Curt. 330: "True, it is but an opinion; and so is nearly all evidence of value. If you inquire of a sugar broker, whether the existence of a certain quality in sugar — as, for instance, dryness — affects the value of the article in the market, you do but get his opinion or judgment that the existence of that fact has an influence with purchasers generally in determining the price. . . . Yet such and similar evidence is constantly admitted. Here the inquiry is in substance whether the market price of insurance is affected by particular facts."

1894, *Taft, J.*, in *Penn M. L. Ins. Co. v. M. S. B. & T. Co.*, 19 C. C. A. 286, 72 Fed. 438: "Materiality of a fact, in insurance law, is subjective. It concerns rather the impression which the fact claimed to be material would reasonably and naturally convey to the insurer's mind before the event, and at the time the insurance is effected, than the subsequent actual causal connection between the fact, or the probable cause it evidences, and the event. Thus, it is by no means conclusive upon the question of the materiality of a fact that it was actually one link in a chain of causes leading to the event. And, on the other hand, it does not disprove that a fact may have been material to the risk because it had no actual subsequent relation to the manner in which the event insured against did occur. A fair test of the materiality of a fact is found, therefore, in the answer to the question whether reasonably careful and intelligent men would have regarded the fact, communicated at the time of effecting the insurance, as substantially increasing the chances of the loss insured against. The best evidence of this is to be found in the usage and practice of insurance companies in regard to raising the rates or in rejecting the risk on becoming aware of the fact."

(e) A qualification of this result may sometimes be necessary. It may be asked, since the sense of words used in a contract must be the ordinary and natural one (as being presumably the one common to both), and not a peculiar sense put forward by one party alone, why can the insurer claim that his own standard of classification shall be adopted, as above? Because the whole transaction presupposes that he has his various charges appropriate to various "risks," and the liberty to raise his premium or decline the insurance entirely must be naturally understood by the insured as dependent on the insurer's established classes of circumstances and "risks"; so that *the insurer's sense of the phrase* is adopted into the contract. But (and here the qualification comes) it may clearly appear in a given case that the phrase was not used with reference to the insurer's sense or classification, and that it is to be interpreted according to the sense used by the insured, i. e. the ordinary sense of "increase of risk," which therefore is to be applied by the jury acting on the standards and knowledge of the average layman. If the case is of this sort, it would seem that expert testimony might, on occasion only, be resorted to (as in (a) *supra*), where the nature of the matter called for it.³ But how shall we

³ The argument might be made, to be sure, that the test would be purely subjective as to the insured; i. e. "Was the risk, as the insured supposed, increased?" and hence expert testimony would never be appropriate. This, however, would only be sound where the policy speaks (as it sometimes does) of an "increase of risk with the knowledge of the insured."

When it does not, "increase of risk" would be an objective fact, as to which expert testimony might be needed. Where the "knowledge of the insured" is expressly taken as the standard, it would seem that a foolish owner might ignorantly endanger his property with impunity; or that one who, for example, allowed his workmen to thaw out dynamite over a stove might show

determine whether the case is of this sort? Is it necessary that the policy should expressly speak of an increase of risk "to the knowledge of the insured"? Or is it enough that the insured did not not know of the insurer's classification? or that it was not set out in the policy? And when the proviso "to the knowledge of the insured" is expressed, does this mean a knowledge of what he considers a risk, or a knowledge of the risks as classified by the insurer? For, if the latter is meant, then if the schedule is shown to the insured or accepted by him, expert testimony could be resorted to, and if not shown nor accepted, expert testimony could not be resorted to. These are queries which have seldom been answered by the Courts, but they may well arise; and the following case illustrates one method of solution:

1882, *Franklin Fire Ins. Co. v. Gruber*, 100 Pa. 273; the Court properly distinguished (as in (b) *supra*), between expert testimony as to the increase of actual danger, and expert testimony of the customary higher rates, accepting the latter only; but the clause read "or if the risk shall be increased . . . within the knowledge of the assured," and the Court pointed out that "the knowledge of the plaintiff was thus made a material factor in this condition; therefore, proof by experts that, from a technical point of view, the risk [or rate of insurance⁴] was increased, came to nothing unless accompanied by proof that the assured knew that the erections complained of created hazards for which by the rules of insurance an additional rate would be charged. But of this he knew nothing. He did not even know the class in which he was insured. . . . It does, therefore, seem to me that without some proof by the company that the plaintiff had some notice or knowledge of the rules of insurance, its expert evidence would come to nothing."

§ 1947. *State of the Law in the Various Jurisdictions.* As the Courts have not always borne in mind the various possible distinctions above discussed, it is not easy to determine the exact state of the law. The rulings may now be examined in the order of the above topics.

(1) *Insurance broker's duty.* There seems to be little authority on the specific point; the view above set forth would probably prevail,¹ and harmonizes with the general doctrine as to expert testimony of professional skill.

(2) *Injury to property by eminent-domain process.* Here, also, there is little authority; the rulings should be considered in the light of the distinctions noted above.²

(3) *Forfeiture of policy for "material" misrepresentation or uncommunicated "increase of risk."* Here a difficulty in stating the law arises from the failure of many Courts to exhibit the principle on which they have decided. They have either admitted or rejected the expert testimony; but that has in itself no significance; everything depends, or ought to depend, upon the principle applied. With reference, then, to the exposition under (3) in the preceding

that he had never known that this was a dangerous proceeding.

¹ As appears from a previous sentence.

² 1833, *Chapman v. Walton*, 10 Bing. 87, quoted *ante*, § 1946; 1903, *Trenton P. Co. v. Title G. & T. Co.*, N. Y., cited *post*, § 1951. The following case seems distinguishable: 1900, *Hill v. Amer. Surety Co.*, 107 Wis. 19, 81 N. W. 1034 (whether the witness company would have insured property in the hands of an assignee,

excluded, on the issue whether the assignee was derelict in not procuring insurance).

³ 1889, *Fingery v. R. Co.*, 78 Ia. 442, 43 N. W. 335 (whether the proximity of a railroad depreciated the value by increasing the risk of fire; expert testimony held receivable as to increase of risk, but not as to increase of insurance rates); 1840, *Webber v. Eastern R. Co.*, 2 Metc. 149 (whether proximity of a railroad would increase a fire risk; admitted).

section, we find the greater number of Courts proceeding without any notice of theory (b) and therefore apparently upon the assumption of theory (a); when the question is asked whether a representation was "material" to the risk or whether there was an "increase of risk," one group of judges has believed in admitting expert testimony as a rule,³ another group has believed in excluding it as a rule,⁴ and a third group has chosen the preferable and proper course of letting the result depend upon the case in hand.⁵ Moreover, when the question is in the form, "whether the usage of underwriters or of the insurer was to charge higher rates for such risks," it would on this theory equally be excluded,⁶ certainly by Courts excluding the former question (as to the individual expert's opinion);⁷ and equally (one would suppose) by Courts allowing the former question, because here the usage is offered merely as hearsay opinion evidence.⁸

³ The question being here whether the misrepresentation was material: 1829, *Lindeman v. Desborough*, 6 B. & C. 567, *semble* (life); 1830, *Richards v. Murdock*, 10 id. 527, *semble* (marine); and the other English cases cited in n. 3, *infra*; 1876, *Leitch v. Ins. Co.*, 66 N. Y. 107 (marine); 1896, *Moses v. Ins. Co.*, 1 Wash. C. C. 358 (marine); 1903, *Marshall v. Ins. Co.*, 3 id. 358 (marine); and the question being here whether the risk was increased: 1866, *Schmidt v. Ins. Co.*, 41 Ill. 299, *semble* (fire); 1884, *German-Amer. Ins. Co. v. Steiger*, 109 id. 234, 236, 259 (fire); 1896, *Traders' Ins. Co. v. Catlin*, 169 id. 256, 45 N. E. 255; 1864, *Mitchell v. Ins. Co.*, 32 La. 434, *semble* (fire); but in *Stannett v. Ins. Co.* (1896), 68 La. 675, 28 N. W. 12, the question is regarded as open; 1866, *Planters' Mut. Ins. Co. v. Rowland*, 66 Md. 244, 7 Atl. 287, *semble* (fire); 1833, *Lapham v. Atlas Ins. Co.*, 24 Pick. 3, 7 (marine); 1863, *Daniels v. Ins. Co.*, 12 Cosh. 490, 490 (fire); 1903, *Taylor v. Security M. F. I. Co.*, 88 Minn. 231, 92 N. W. 952, *semble* (fire); 1867, *Kern v. Ins. Co.*, 40 Mo. 31, 36 (fire); 1854, *Schenck v. Ins. Co.*, 24 N. J. L. 431 (fire).

⁴ The question here being whether the misrepresentation was material: 1766, *Carter v. Boehm*, 3 Burr. 1914, 1916, *Lord Mansfield* (marine); 1816, *Durrell v. Bederley*, *Holt N. P.* 284, *Gibbs, C. J.* (marine); 1863, *Rawls v. Ins. Co.*, 27 N. Y. 293 (life); 1873, *Higbie v. Ins. Co.*, 53 id. 604 (life); 1885, *Schwarzbach v. Protective Union*, 25 W. Va. 622, 651 (fire); and the question here being whether the risk was increased: 1903, *Southern M. I. Co. v. Hudson*, — Ga. —, 43 S. E. 60 (fire); 1858, *Joyce v. Ins. Co.*, 45 Mo. 166 (fire); 1871, *Cannell v. Ins. Co.*, 59 id. 591; 1880, *Thayer v. Ins. Co.*, 70 id. 599; 1903, *New Era Ass'n v. Mactavish*, — Mich. —, 94 N. W. 599 (life); 1882, *Kirby v. Ins. Co.*, 9 Lea 142 (fire).

⁵ Not all of the following cases lay down so broad a rule; most of them exclude expert testimony as to whether leaving a building vacant increases the risk; but they also imply or declare that upon other matters such testimony would be receivable: 1856, *Mulry v. Ins. Co.*, 5 Gray 548 (whether failure to occupy a building increased the fire risk, a matter said in this instance to be one of common knowledge); 1867, *Lyman*

v. Ins. Co., 14 All. 335 (similar); 1853, *Hills v. Ins. Co.*, 2 Mich. 479 (fire); 1831, *Jefferson Ins. Co. v. Cothrel*, 7 Wend. 77 (fire); 1878, *Cornish v. Ins. Co.*, 74 N. Y. 297 (fire); 1853, *Protection Ins. Co. v. Harmer*, 2 Ohio St. 457 (fire); 1876, *Milwaukee R. Co. v. Kellogg*, 94 U. S. 472, *semble* (fire); 1896, *Penn. M. L. Ins. Co. v. M. S. B. & T. Co.*, 19 C. C. A. 296, 73 Fed. 415 (cited *infra*, note 10).

⁶ 1884, *German American Ins. Co. v. Steiger*, 109 Ill. 234, 236, 259 (custom of insurers, excluded); 1876, *Insurance Co. v. Esheleman*, 30 Oh. St. 635 (whether the company would have insured if the disease had been disclosed, excluded); 1903, *Murphy v. Prudential Ins. Co.*, 205 Pa. 444, 35 Atl. 19 (to a medical examiner, whether if certain ailments had existed he would have considered the plaintiff a first-class risk, excluded, because the only issue was as to the truth of the facts stated in the application; unsound, because one of the issues was whether the facts were material to the risk); 1885, *Schwarzbach v. Protective Union*, 25 W. Va. 622, 651; 1894, *Commercial Bank v. Ins. Co.*, 87 Wis. 297, 303, 58 N. W. 391 (action on an adjustment-promise; insurer not allowed to testify that he would not have made the adjustment if he had known of the alteration of account-books).

⁷ *Durrell v. Bederley*, *Schwarzbach v. Protective Union*, *Joyce v. Ins. Co.*, *Connell v. Ins. Co.*, *Rawls v. Ins. Co.*, *supra*.

⁸ And yet we find some of these Courts admitting it; this seems an inconsistency; if the usage, etc., is to be admitted, it can only be on theory (b); yet in the following decisions both sorts of testimony are admitted: 1791, *Chaurand v. Angerstein*, *Peake N. P.* 44, *Lord Kenyon*, *C. J.* (marine); 1804, *Haywood v. Rogers*, 4 East 593 (marine); 1817, *Berthon v. Loughman*, 2 Stark. 258, *Holroyd, J.* (marine) (but in these English cases it does not appear clearly that the Courts were proceeding on this theory; and if they did not, then the rulings belong under note 10, *infra*); and the following American cases cited *supra*, note 3; *Mitchell v. Ins. Co.*, *Planters' Mut. Ins. Co. v. Rowland*, *Kern v. Ins. Co.*, *Moses v. Ins. Co.*, *Marshall v. Ins. Co.*, *Taylor v. Security M. F. I. Co.*, *New Era Ass'n v. Mactavish*. The following early case does

A few Courts, however, adopt the correct theory (*supra* (b)); the result of which is that the question, "Was there in your opinion an increase of risk?" should properly not be asked,⁹ because the actual state of danger is immaterial, and therefore the witness' own estimate of it is immaterial; while insurance experts may of course be called to speak as to the usage of the trade or of the insurer in charging higher rates for such circumstances.¹⁰

Finally, of the Courts accepting this view, we occasionally find one paying attention to the modification (c) above pointed out;¹¹ and the sort of clause thus dealt with is so common in such policies that there is here ample room for a further development and systematisation of the principle.¹²

4. Conduct (including Care, Reasonableness, Safety, and the like).

§ 1949. *History and General Principle.* This topic is one of the few upon which there has ever existed in the English precedents any foundation for doubt. The subject of the testimony in question is manifold; sometimes it is whether proper care was taken, sometimes whether action was reasonable,

not indicate its principle: 1672, *Pickering v. Berkley*, Vin. Abr., "Evidence," P. b. 11, vol. XII, 175 (to prove that pirates were within the excepted risk of "perils of the sea," "the master of the Trinity-house and other sufficient merchants" were called in).

⁹ 1817, *Berthon v. Loughran*, 2 Stark. 238 (marine); 1839, *Quin v. Ins. Co.*, *infra*, *loc. cit.* 336 (fire); 1870, *Lace v. Ins. Co.*, *infra* (apparently settling the prior conflict in Massachusetts rulings); 1893, *First Congreg. Church v. Ins. Co.*, *infra*; 1894, *Hawes v. Ins. Co.*, *infra* (marine); 1896, *Penn M. L. Ins. Co. v. M. S. B. & T. Co.*, *infra* (life).

¹⁰ 1832, *Elton v. Larkins*, 5 C. & P. 305; 1839, *Quin v. Ass. Co.*, *Jones & Car.* 329 (fire; this case, decided by a majority, is an arsenal of arguments, and its opinions, too long for quotation, will repay special study; it should be regarded as the leading case on the subject); 1874, *Ionides v. Pender*, L. R. 9 Q. B. 535, 539 (marine); 1884, *Fiske v. Ins. Co.*, 15 Pick. 312, 319 (marine), *semble*; 1888, *Merriam v. Ins. Co.*, 21 id. 163 (*semble*, in its logical consequence); 1873, *Lace v. Ins. Co.*, 105 Mass. 303 (fire); s. c. 110 id. 363; 1893, *First Congreg. Church v. Ins. Co.*, 158 id. 475, 481, 32 N. E. 5, 3 (fire); 1853, *Hartman v. Ins. Co.*, 21 Pa. 477 (life); 1882, *Franklin Fire Ins. Co. v. Graver*, 100 id. 273 (fire); 1892, *Palmer Mfg. Co. v. Sun Fire Office*, 36 S. C. 263, 15 S. E. 542, *semble* (fire); 1826, *M'Lanahan v. Ins. Co.*, 1 Pet. 183, Story, J. (marine); 1854, *Hawes v. Ins. Co.*, 2 Curt. 230 (marine); 1896, *Penn M. L. Ins. Co. v. M. S. B. & T. Co.*, 19 C. C. A. 295, 73 Fed. 413 (life insurance; whether the existence of other insurance and the commission of embezzlements were material; expert opinion excluded as to the actual increase of risk involved in the fact, unless it is a matter of "scientific knowledge or peculiar skill," but admitted to show the usage of life insurance companies generally in rejecting an application based upon such a fact, since the interpretation depends on what the usage is;

in the case of other kinds of insurance, usage as to charging a higher rate may also be asked for; the opinion contains the fullest citation of authorities).

¹¹ 1882, *Franklin Fire Ins. Co. v. Graver*, 100 Pa. 273 (fire; see quotation *supra*); probably also 1883, *Hobby v. Dana*, 17 Barb. 111 (fire); 1892, *Loomis v. Ins. Co.*, 81 Wis. 366, 51 N. W. 544 (fire).

The distinction made by Mr. Justice Gray, in *Lace v. Ins. Co.*, *supra*, must here be adverted to. He confines the testimony to the usage of underwriters, and rightly enough, so far as this excludes the opinion of individual underwriter-witnesses, because we may infer from the general usage the insurer's usage, though not from an individual's practice. But he also excludes the practice of the insurer himself, because it is a practice not known to the insured. This seems incorrect. In the first place the trade-usage is no better known to the insured, who is an outsider, and thus the learned judge's principle is inconsistently applied. In the next place, the insured's actual knowledge is immaterial, as explained *supra*, unless it is a special proviso of the contract, in which case it may be shown without resorting to trade usage.

¹² The following cases do not affect the points above dealt with: The ruling in *Astor v. Ins. Co.* (1827) 7 Cow. 217, as to the rates of insurance in other offices, has other bearings. In *Brink v. Ins. Co.* (1877), 49 Vt. 445, 459, it was properly ruled that one who has seen the premises may speak as to the nature of the danger. In *Liverpool Ins. Co. v. McGuire* (1876), 52 Minn. 252, the evidence as to increase of risk was rejected because immaterial under the circumstances. In the following case testimony as to the defendant's custom was wrongly rejected as varying the terms of the policy (a reason not applicable); *Summers v. Ins. Co.* (1848), 13 La. An. 505 (life of a slave). For a case turning on a peculiar state of facts, see *Martin v. Ins. Co.* (1890), 42 M. J. L. 47.

sometimes whether sufficient skill was shown, sometimes whether a place or a machine was safe; but all the forms seem reducible to a general one, namely, whether a certain standard of conduct was observed.

Looking first at the orthodox practice in England,¹ it is clear that there is not and never has been any real question as to the propriety of such testimony. In all but a few of the rulings the testimony was even received without objection, — as may be easily understood from the history of the general rule in that country (*ante*, § 1917). The morbid and doctrinaire theory of cautiousness which is the foundation of the American rulings has never been known at the English bar. Into no English judge's mind did the idea enter to exclude the opinion of an observer who proposed to state whether a party had used due care or acted reasonably or managed skilfully.

We may start, then, with the understanding that the rulings on this point in the United States are purely a modern excrescence upon the body of the common law, due to the unhealthy influence of a form of principle with which our Courts have drugged themselves for two generations past.

§ 1950. *Discriminations as to Other Principles; (1) Other Persons' Conduct as evidencing Danger, Reasonableness, or the like; (2) Moral Character, Professional Skill, and other General Traits.* (1) It is necessary to discriminate a sort of evidence sometimes confused with that in question, namely, testimony not of the witness' own judgment as to the quality of conduct as observed by him, but of the fact of *other persons' conduct* offered as evidence of the conduct properly to be expected in the case in hand. For example, testimony that the person in issue, as seen by the witness to jump from a train after a collision, was not prudent in so doing, raises the present question of the Opinion rule; but testimony that other persons at the same time jumped also is of the second sort, and raises a different question. The legal danger is that the conduct of the other persons, instead of being taken by the jury merely as evidence of the condition or quality of the external object, may be used by them as furnishing a fixed legal standard for the case in hand. The evidential question, however, is merely of the relevancy of other persons' conduct under similar circumstances, and does not involve the opinion of the testifying person nor the Opinion rule; it is accordingly elsewhere dealt with (*ante*, §§ 459-461).

¹ 1816, *Jones v. Boyce*, 1 Stark. 493 (that the coachman had been compelled to take a certain course, and that a passenger's conduct in jumping was proper, allowed); 1817, *Jackson v. Tollett*, 2 id. 38 (that a coachman had adopted the most prudent course, allowed); 1824, *Walton v. Nesbit*, 1 C. & P. 72, *Abbott, C. J.* (of an experienced mariner, whether an officer of competent skill would have omitted to make soundings, etc., allowed; the issue being negligence); 1834, *Fenwick v. Ball*, 1b. 312, *Coltman, J.* (an expert was allowed to be asked whether a collision could have been avoided); 1826, *Jameau v. Drinkald*, 12 Moore 148, 157 (admitting testimony as to the blamable conduct causing the accident, and excluding testimony as to the

general fault of either side or the merits of the case; with some doubt and obscurity of language); 1834, *Drew v. New River Co.*, 3 C. & P. 755 (that the condition of a sidewalk was such as to make it unsafe for persons to pass; allowed); 1835, *Wilkes v. Market Co.*, 3 Bing. N. C. 281 (that an obstruction in the street was unreasonable and unnecessary, allowed); 1840, *Sills v. Brown*, 9 C. & P. 604, *Coleridge, J.* (allowing the question, "What was the duty of a captain under certain specified circumstances?"; but excluding the question, "Was the conduct of the captain here right or not?"; here his objection, as the case shows, was merely that the hypothetical form should be employed).

(2) The opinion of a witness, as here desired, upon the prudence, reasonableness, or care, of a *specific act* of conduct by a person in issue must be distinguished from his opinion as to the other person's *general traits of moral character or professional skill*. It is quite possible for the Opinion rule to exclude the former while admitting the latter. For example, the witness' opinion whether an engineer, as observed by him on a given occasion, acted carefully, is distinct from the witness' opinion whether the engineer, with whom he has had a long and intimate acquaintance, possesses the general trait of carefulness and prudence. The application of the Opinion rule to the latter sort of inquiry rests on difficult considerations and has a peculiar history of its own (*post*, §§ 1980-1988).

§ 1951. *Application of the Principle: Testimony as to the Safety, Care, Prudence, Duty, Skill, Propriety, of Specific Conduct.* In the application of the rule to testimony on the present topics will be found no questions of principle having any consequence or difficulty. The decision is apt to depend chiefly on the Court's general attitude — of favor or disfavor — towards the extension of the exclusionary rule. That the exclusionary rulings are a modern heterodoxy may easily be seen by noting that out of the many hundred rulings the dates of two or three only fall before 1850 and of less than a score before 1860. Though many Courts still refuse to be led aside into these quibbles, a great body of unfavorable rulings exists to tempt the Bar to raise the question at every opportunity. Even the experienced casuist would be puzzled to demonstrate a consistency between these rulings in the same jurisdiction. On the whole, the general impression produced, on an unprejudiced reading of these rulings, is that an enormous mass of the most useful testimony is daily excluded under their influence. The apparent purpose of the rule might have been supposed to be (by one unacquainted with our jurisprudence) to exclude testimony in proportion to its significance and directness; and the wonder is how a jury can under the circumstances come to an intelligent conclusion without the aid of the banished testimony.¹

¹ In the following citations, it must be remembered that an excluding decision means usually that the jury are not to be aided by *any one's* inference on the point in question, i. e. no question of the competency of the witness is raised, though the Court, in a given case, may say that on this or that point the opinion of a certain expert, but not of a layman, will be received; the witness thus admitted must of course be qualified by experience on that subject, according to the rules already examined under Testimonial Qualifications, *ante*, §§ 559-571; on this point the distinction between the effect of the Opinion rule and the rules for Experiential Qualifications (as noticed *ante*, §§ 557, 1925) is to be observed. In the following citations, where the testimony is *excluded*, it is to be understood, unless otherwise noted, that the Court under the Opinion rule excludes all testimony, even that of experts; and, where the testimony is *admitted*, that the Court assumes the particular witness offered to be com-

petent on that point; for example, in one ruling, testimony that a steamboat did or did not have a sufficient number of hands was held proper; the note does not record, but it is to be understood, in all such cases, that the Court would of course listen only to a witness skilled in that matter; again, another ruling excludes testimony as to whether a railroad track-walker was a necessary precaution; the note does not record, but it is to be understood, in all such cases, that even an expert in such matters is to be excluded: *Canada: N. Br.*: 1883, *Conner v. Kirkbride*, 23 N. Br. 404 (whether "anything more could have been done than was done to prevent the collision" of wagons, excluded); 1885, *Morrow v. Waterous*, 24 id. 442, 449, 456 (that a mill's foundation was insufficient, excluded, by a majority); 1885, *McNaire Stewart*, ib. 471 (loss of a scow; whether it was "good or bad management" to tow three scows at once, excluded); *Que.*: 1879, *The Atilla*, 5 Que. 343 (expert evidence as to nautical men's

conduct was not rejected as matter of law, but merely declared of no value); *Alabama*: 1849, *Jones v. Hatchett*, 14 Ala. 744 (that a fire could have been stopped, excluded); 1884, *Gibson v. Hatchett*, 34 Id. 307 (same); 1886, *McCrary v. Turk*, 39 Id. 345 (whether a steamer had enough hands, excluded); 1888, *Hall v. Goodson*, 32 Id. 267 (whether a slave's whipping appeared unreasonable, excluded); 1877, *Wood v. Brewer*, 27 Id. 517 (whether work was well done, allowed); 1898, *McCarthy v. R. Co.*, 108 Id. 139, 308, 14 So. 370 (whether cars were well and carefully loaded, allowed); 1895, *Alabama G. S. R. Co. v. Hall*, 103 Id. 599, 17 So. 175 (whether a train's speed was dangerous, excluded); 1895, *Pate v. McConnell*, 104 Id. 449, 18 So. 98 (whether an inexperienced person could have coupled cars, excluded); 1895, *Culver v. R. Co.*, 108 Id. 336, 18 So. 287 (whether a place near a track was safe for standing, admitted); 1897, *Alabama M. R. Co. v. Jones*, 114 Id. 519, 21 So. 567 (whether a place was dangerous for a train to stop, admitted); 1899, *Orr v. State*, 117 Id. 99, 23 So. 596 (that a rock was likely to do injury, excluded); 1900, *Louisville & N. R. Co. v. Tignor*, 126 Id. 593, 28 So. 510 (whether a truck's condition made it dangerous, allowed on cross-examination of one who had testified on the same subject); 1902, *Louisville & N. R. Co. v. Banks*, 133 Id. 471, 31 So. 373 (certain questions as to the proper handling of a locomotive to avoid a collision, ruled upon); 1903, *Birmingham R. & E. Co. v. Jackson*, — Id. —, 34 So. 994 (that a person had to get on one track in order to cross another, excluded); 1905, *Western R. Co. v. Arnett*, 137 Id. 414, 34 So. 997 (that a place on the car was usual and customary, allowed; but that it was possible to fall, if he had been behind the lever, excluded); *Arkansas*: 1892, *Fordyce v. Lowman*, 63 Ark. 79, 34 S. W. 286 (whether a brakeman ought to have understood a risk, excluded); 1899, *Little Rock T. & E. Co. v. Nelson*, 66 Id. 494, 32 S. W. 7 (whether a person could easily have got on a car, excluded); *California*: 1867, *Knight v. R. Co.*, 33 Cal. 336 (whether a fence was sufficient to turn cattle, excluded); 1878, *Shafter v. Evans*, 53 Id. 28 (whether a cattle-cornal was safe, excluded); 1895, *Fogel v. R. Co.*, — Id. —, 43 Pac. 545 (whether the accident could have been avoided, excluded); 1895, *Howland v. R. Co.*, 110 Id. 513, 43 Pac. 993 (whether a car could have been stopped, allowed); 1898, *Redfield v. R. Co.*, 112 Id. 280, 43 Pac. 1117 (whether an electric car could be safely operated by one man, excluded); 1900, *Limburg v. Glenwood L. Co.*, 127 Id. 598, 60 Pac. 176 (safety of a mode of driving, not allowed); 1901, *Snyder v. Holt Mfg. Co.*, 134 Id. 264, 66 Pac. 311 (whether a bolt and nut were sufficient, allowed for an expert); 1903, *Dyas v. Southern P. Co.*, 140 Id. 294, 73 Pac. 973 (sufficiency of a derrick, etc., allowed); *Colorado*: 1888, *Denver S. P. & P. R. Co. v. Wilson*, 12 Colo. 34, 20 Pac. 340 (whether a track-walker was necessary on a railroad, excluded); 1894, *McGonigle v. Kane*, 30 Id. 292, 30 Pac. 367 (safety of an elevator, allowed); 1895, *Grant v. Varney*, 31 Id. 339, 40 Pac. 773 (proper method of timbering a mine, allowed);

1896, *Smuggler U. M. C. Co. v. Broderick*, 30 Id. 16, 50 Pac. 160 (whether a place in a mine was a safe place to work in, excluded); 1900, *Holy Cross G. M. & M. Co. v. O'Bullivan*, 27 Id. 267, 60 Pac. 876 (whether "missed shots" in a mine-blast could with ordinary care be detected, not allowed); *Columbia (District)*: 1867, *Tolson v. Coasting Co.*, 17 D. C. 44 (whether a place was safe for standing, excluded); 1894, *District of Col. v. Haller*, 4 D. C. App. 405, 413 (whether a sidewalk was in a dangerous condition, not allowed); *Connecticut*: 1845, *Porter v. Mfg. Co.*, 17 Conn. 255 (sufficiency of a dam, allowed); 1856, *Dunham's Appeal*, 27 Id. 196, *scilicet* (whether a road was safe, admissible); 1873, *Taylor v. Monroe*, 43 Id. 43 (whether a road needed a railing, allowable for experts); 1893, *Ryan v. Bristol*, 63 Id. 26, 37, 27 Atl. 360 (whether a place was dangerous, allowed); 1900, *Barber v. Manchester*, 73 Id. 673, 45 Atl. 1014 (whether a machine was likely to frighten horses, allowed); 1900, *Dean v. Sharon*, 1b. 647, 43 Atl. 945 (whether a highway was "reasonably safe," allowed); *Florida*: 1897, *Camp v. Hall*, 39 Fla. 585, 23 So. 793 (whether an injury was received by the person's own carelessness, excluded); *Georgia*: 1881, *Augusta & B. R. Co. v. Dorsey*, 46 Ga. 336 (whether a railroad employee's conduct was prudent, allowed); 1886, *East Tennessee V. & G. R. v. Wright*, 76 Id. 536 (whether the defendant was negligent, excluded); 1900, *Lowman v. State*, 109 Id. 501, 34 S. E. 1019 (that the time had come for the accused to either run or fight, excluded); 1901, *Mayor v. Wood*, 114 Id. 370, 40 S. E. 239 (whether a street was wide enough, and whether a place was dangerous, excluded); *Hawaii*: 1896, *Lanpahoehoe Sugar Co. v. Wilder S. S. Co.*, 11 Haw. 261 (whether certain things were "perils of the sea"; whether certain circumstances might have misled experienced mariners; whether a prudent captain ought to have taken a certain precaution; allowed); *Illinois*: 1851, *Ward v. Salisbury*, 12 Ill. 340 (whether a ship was managed skillfully or not, allowed); 1873, *Chicago & N. W. R. Co. v. Ingersoll*, 65 Id. 403 (whether grain could have been delivered, excluded); 1873, *Kendall v. Limberg*, 69 Id. 358 (whether conduct was brutal, excluded); 1875, *Hopkins v. R. Co.*, 78 Id. 33 (whether cars were carefully coupled, excluded); 1875, *Chicago v. McGiven*, 78 Id. 348 (whether a sidewalk cellar-light was safe, excluded); 1877, *Hoemer v. Koch*, 84 Id. 409 (whether a physician's work was unskillful, excluded); 1884, *Chicago & N. W. R. Co. v. Moranda*, 106 Id. 363 (safety of standing a distance from the cars, excluded); 1895, *St. Louis A. & T. H. R. Co. v. Bauer*, 156 Id. 106, 40 N. E. 448 (duty of a brakeman, admitted); 1895, *Springfield R. Co. v. Welsh*, 155 Id. 511, 40 N. E. 1034 (whether all means were used to stop a car, excluded); 1897, *Springfield v. Coe*, 166 Id. 22, 45 N. E. 709 (by the plaintiff, "We walked carefully," inadmissible; should not the Court also have ruled that, instead of alleging "we walked," the witness should have said, "We placed one foot after another upon the ground, touching with the heel, and producing forward motion," leaving it to the jury to say whether it was a "walk" or a "run"?); 1901, *Guudlach v.*

Shoen, 192 id. 500, 61 N. E. 332 (whether a pulley-belt construction was "reasonably safe," admitted); 1902, *Springfield C. R. Co. v. Pantenney*, 200 id. 9, 65 N. E. 443 (by a motorman, whether he knew of anything more he could have done to avoid injury, excluded); 1902, *Black v. Harris*, ib. 96, 65 N. E. 449 (effect of alterations upon the operation of an elevator car, admitted); 1902, *Dunk Bros. C. & C. Co. v. Harrell*, ib. 488, 66 N. E. 39 (number of timbers necessary to prevent a roof from falling, allowed); 1902, *Boardtown v. Clark*, 1904 id. 594, 63 N. E. 372, *accede* (whether with ordinary care a hole could have been seen and avoided, excluded); *Indiana*: 1878, *Louisville M. A. & C. R. Co. v. Spain*, 61 Ind. 465 (whether a fence was sufficient to turn stock, allowed); 1881, *Niagara F. Ins. Co. v. Greene*, 77 id. 395 (reasonable time, in an agent's contract, allowed, for an expert); 1883, *Albion v. Herrick*, 90 id. 349 (whether a street was so dangerous that a prudent man would not cross, excluded); 1886, *Grand Rapids & I. R. Co. v. Killam*, 117 id. 341, 30 N. E. 130 (whether an engineer did his duty, excluded); 1893, *Bonebrake v. Board*, 141 id. 63, 40 N. E. 141 (whether a bridge sufficed to sustain a load, allowed); 1896, *Blover v. P. B. & L. Co.*, 181 id. 642, 50 N. E. 877 (that an elevator gearing was a safe appliance, allowed); 1900, *Chicago & E. I. R. Co. v. Grissam*, 23 Ind. App. 494, 57 N. E. 641 (safety of mode of running train, allowed); *Iowa*: 1868, *Phillips v. Starr*, 36 Ia. 350 (whether an item in a contract's performance was material, excluded); 1872, *Bills v. Ottumwa*, 35 id. 111 (whether a mode of loading a wagon was safe, excluded); 1876, *Gilruth v. Gilruth*, 40 id. 346 (safety of a car for coupling, excluded); 1872, *Hamilton v. R. Co.*, 36 id. 34 (proper way to couple cars, excluded); 1872, *Mulduney v. R. Co.*, ib. 472 (same); 1876, *Belair v. R. Co.*, 43 id. 667 (same); 1876, *Cooper v. Central R. Co.*, 44 id. 140 (safety of speed, excluded); 1877, *Locke v. R. Co.*, 46 id. 110 (reason for not leaving a flagman, excluded); 1877, *Hollowell v. Dickerson*, ib. 540 (safety of street, excluded); 1878, *Taylor v. Lumbering Co.*, 47 id. 644 (whether repairs were necessary, allowed); 1882, *Allen v. R. Co.*, 57 id. 636, 11 N. W. 614 (duty of brakeman, excluded); 1882, *Jasper Co. v. Osborn*, 59 id. 213, 13 N. W. 104 (ability to live peacefully, excluded); 1882, *Brant v. Lyons*, 60 id. 174, 14 N. W. 227 (negligence as the cause of an injury, excluded); 1883, *Funston v. R. Co.*, 61 id. 435, 16 N. W. 518 (whether a team could be turned in a certain space, allowed); 1888, *Kitteringham v. R. Co.*, 69 id. 296, 17 N. W. 565 (time required to make repairs, allowed); 1888, *Baldwin v. R. Co.*, 68 id. 38, 15 N. W. 918 (safe mode of piling lumber, excluded); 1886, *Kuhus v. R. Co.*, 70 id. 544, 31 N. W. 968 (safety of running an engine backwards, allowed); 1887, *Grinnell v. R. Co.*, 73 id. 95, 34 N. W. 758 (time required to stop a train, allowed); 1898, *Gadbois v. R. Co.*, 75 id. 523, 39 N. W. 671 (that a train was started in an unusual way, excluded); 1894, *Betts v. R. Co.*, 92 id. 343, 60 N. W. 623 (sufficiency of cattle cars, allowed); 1894, *Reifanider v. R. Co.*, 90 id. 76, 81, 57 N. W. 692 (the proper position of a brakeman under certain conditions, allowed);

1895, *Duer v. Allen*, 96 id. 26, 64 N. W. 609 (prudent mode of conducting a creamery, excluded); 1897, *Kelly v. West Bond*, 101 id. 609, 70 N. W. 726 (what part of a lawyer's work was unnecessary, excluded); 1897, *Hillier v. Ridler*, 102 id. 476, 72 N. W. 671 (child's suit for services; whether she worked at home as a hired girl, excluded); 1899, *McKay v. Johnson*, 109 id. 618, 79 N. W. 590 (that an engine worked well, admitted; whether it was an engineer's duty to keep the screws tight, etc., admitted); 1899, *Anderson v. R. Co.*, 109 id. 524, 80 N. W. 561 (usual implements for certain work, allowed); 1899, *Taylor v. Bear Coal Co.*, 110 id. 60, 81 N. W. 249 (whether a mine-roof was likely to fall, allowed); 1901, *Quinlan v. R. Co.*, 113 id. 69, 84 N. W. 900 (what were the duties of a brakeman, allowed); 1901, *Cahow v. R. Co.*, ib. 224, 84 N. W. 1066 (how many men would be needed to move safely a railroad tender, excluded); 1901, *Wimber v. R. Co.*, 114 id. 531, 87 N. W. 806 (who had authority to start an engine, allowed); 1901, *Brooks v. Sioux City*, ib. 641, 87 N. W. 602 (that a walk was "in bad condition," held improper; that it was "a good and sound walk," held proper); 1902, *Fitch v. Mason C. & C. L. T. Co.*, 116 id. 716, 89 N. W. 23 (whether with care a car could be run without lurching, excluded); *Kansas*: 1848, *Northern Mo. R. Co. v. Akers*, 4 Kan. 471 (number of men necessary in driving mules, allowed); 1870, *Telft v. Wilcox*, 6 id. 55 (duty of a physician as to treatment of a case, allowed); 1881, *Monroe v. Lattin*, 20 id. 368 (negligence of a driver, excluded); 1881, *Parsons City v. Lindsay*, 26 id. 431 (whether a street was dangerous, excluded); 1883, *Kansas P. R. Co. v. Peavey*, 29 id. 177 (proper mode of coupling, allowed); 1884, *Dow v. Julien*, 32 id. 578, 4 Pac. 1000 (whether care was exercised, excluded); 1885, *Missouri Pac. R. Co. v. Mackey*, 33 id. 303, 6 Pac. 291 (duty of a man; obscure distinction); 1885, *St. Louis & F. R. Co. v. Ritt*, ib. 405, 6 Pac. 883 (proper construction of cattle-guards, excluded); 1896, *Topeka v. Sherwood*, 39 id. 692, 18 Pac. 923 (whether a sidewalk was dangerous, excluded); 1895, *Inaley v. Shire*, 34 id. 793, 29 Pac. 713 (whether there was negligent management, excluded); 1897, *Murray v. Board*, 50 id. 1, 48 Pac. 584 (safety of a bridge, excluded); 1900, *Missouri K. & T. R. Co. v. Merrill*, 61 id. 671, 60 Pac. 619 (what would be the proper mode of mounting a car under certain conditions, allowed); 1900, *Missouri & K. Tel. Co. v. Vandevort*, 67 id. 369, 72 Pac. 771 (whether poles were likely to frighten horses, excluded); *Kentucky*: 1876, *Claxton's Adm'r v. R. Co.*, 13 Bush 643 (safety of machinery, allowed); 1897, *Louisville & N. R. Co. v. Bowen*, — Ky. —, 39 S. W. 81 (that a signal ought to have been given as a crossing, excluded); 1899, *Louisville & N. R. Co. v. Milliken*, — id. —, 51 S. W. 796 (whether a mode of sitting on a freight car was careless or improper, excluded); *Louisiana*: 1900, *State v. Austin*, 104 La. 409, 29 So. 23 (by an accused, whether his belief in the deceased's designs was negligently formed, excluded); *Maine*: 1868, *Hill v. R. Co.*, 55 Me. 444 (whether the blowing of a whistle was safe, excluded); 1875, *State v. Watson*, 65 id. 76 (spreading of fire,

included); 1984, Mayhew v. Mining Co., 76 Id. 111 (whether an apparatus was proper, excluded); 1990, Marston v. Dingley, 85 Id. 846, 84 Atl. 414 (whether a photograph was skillfully reproduced in a newspaper, admitted); Maryland: 1986, Reagan v. N. Co., 10 Md. 276, 281 (whether a collision could have been avoided, excluded); 1872, Waters v. Waters, 25 Id. 283 (propriety of a testator's disposition of his property, admitted); 1908, Baltimore Elev. Co. v. Hall, 65 Id. 405, 5 Atl. 338 (whether a marine collision could have been avoided by care, admitted); 1906, Baltimore & Y. T. R. Co. v. Leachardt, 66 Id. 77, 5 Atl. 346 (whether it was safe to descend from a certain car, inadmissible, but whether a road was dangerous, inadmissible); 1906, Baltimore & L. T. Co. v. Canell, 65 Id. 410, 7 Atl. 308 (safety of a road, allowed); 1907, Sumner v. Shaw, 66 Id. 18, 11 Atl. 200 (propriety of a shipping-broker, allowed); 1908, Baltimore & B. P. Co. v. Hackett, 67 Id. 224, 39 Atl. 610 (whether a water-outlet was a justly constructed, admissible); 1909, Tall v. more S. P. Co., 60 Id. 348, 44 Atl. 1007 (whether a captain interfered to prevent an insufficient promptness, excluded); M.: 1900, Raymond v. Lowell, 6 Cash. 311 (proper condition of a street, excluded); 1931, Land v. Tyngborough, 9 Id. 37, 39 (safety of a place in a road, allowed); 1953, Twombly v. Leach, 11 Id. 402, 403 (whether certain treatment was proper according to the medical profession, admitted); 1961, Nowell v. Wright, 3 All. 170 (proper condition of a street, excluded); 1964, White v. Ballou, 8 Id. 408 (cooper trade; whether certain conduct was prudent, excluded); 1964, Sims v. Warham, 1b. 544 (general condition, as to safety, of a bridge, excluded); 1967, Simmons v. Steamboat Co., 97 Mass. 371 (whether a place was not manifestly improper for passengers, excluded); 1969, Ryerson v. Abington, 103 Id. 340 (safety of a highway, excluded); 1971, Higgins v. Dewey, 107 Id. 495 (whether a fire would probably spread, excluded); 1977, Buxton v. S. P. Works, 121 Id. 448 (whether an injury could have occurred with care by the plaintiff, excluded); 1983, Amstein v. Gardner, 134 Id. 9 (whether a cattle-guard was necessary, excluded); 1984, Donnelly v. Fitch, 136 Id. 538 (whether a horse of certain qualities called for certain care, allowed); 1987, Freeman v. Ins. Co., 144 Id. 579, 13 N. E. 372 (time required to stop a train, allowed); 1987, Gilbert v. Guild, 144 Id. 606, 13 N. E. 368 (whether a machine's danger was obvious, excluded); 1994, McGuerty v. Hale, 141 Id. 51, 36 N. E. 682 (whether a boy was a proper person to put at certain work, excluded); 1995, Lang v. Terry, 163 Id. 138, 39 N. E. 802 (proper way of managing a machine, allowed); 1995, Twomey v. Swift, 1b. 273, 39 N. E. 1018 (whether a person was negligent, excluded); 1996, McCarthy v. Boston Duck Co., 165 Id. 163, 43 N. E. 568 (whether a pulley was a proper one, admitted); 1998, O'Brien v. Look, 171 Id. 84, 50 N. E. 458 (whether a mode of using machinery was proper, allowed); 1998, Edwards v. Worcester, 173 Id. 104, 51 N. E. 447 (whether a road was safe and convenient, excluded); 1999, Lisle v. R. Co., 1b. 469, 53 N. E. 642 (what was the proper way of turning a stone in a derrick,

allowed); 1999, Whitman v. R. Co., 181 Id. 188, 68 N. E. 336 (whether the plaintiff thought he could cross a track safely, excluded); Michigan: 1981, Daniels v. Mosher, 3 Mich. 183 (an opinion by an eye-witness that certain farm work was well done, received; but a similar opinion by others, based on the facts testified to at the trial, rejected); 1978, Clark v. Locomotive Works, 82 Id. 257 (what ought to have been done with a vessel, excluded; whether an engine worked in the ordinary way, admitted); 1982, Marcott v. R. Co., 49 Id. 101, 13 N. W. 374 (whether certain conduct interfered with an employee's work, admitted); 1983, Halsey v. Lumber Co., 54 Id. 278, 16 N. E. 643 (machinery's safety, admitted); 1984, Blin v. R. Co., 63 Id. 226, 2 N. E. 374 (sample) C. J.: "No amount of description is necessary to see the place as the plaintiff saw it, while witnesses must describe the place as well as they can, it is always competent, for those who are familiar with the place, ways and their use, to give their impressions received at the time concerning safety or danger, or of passage and other conditions of a dangerous nature"; 1987, Harris v. Ins. Co., 66 Id. 357, 41 N. W. 425 (contra to the preceding case, which is not cited); 1987, Zola v. Weber, 67 Id. 38, 34 N. W. 364 (whether more force than necessary was used in an act, excluded); 1988, Merkle v. Bennington, 68 Id. 143, 35 N. W. 846 (whether a machine was in good repair, admitted); 1989, Cross v. R. Co., 69 Id. 369, 37 N. W. 361 (like Laughlin v. R. Co., supra); 1993, Lee v. Fletcher, 104 Id. 293, 62 N. W. 387 (whether machinery was safe, allowed); 1994, Van Worden v. Winlow, 117 Id. 564, 76 N. W. 87 (propriety of opening celery trenches, allowed); 1998, Detsur v. Brewing Co., 119 Id. 282, 77 N. W. 946 (whether a broken window was safe, excluded); 1999, People v. Detroit & S. P. R. Co., 125 Id. 366, 84 N. W. 290 (whether a roadbed was safe, excluded); 1998, Storrie v. Grand Trunk El. Co., — Id. —, 96 N. W. 569 (the "necessity or expediency of entering in front of the drums," etc., allowed); Minnesota: 1962, Sowers v. Duke, 8 Minn. 24 (sufficiency of a fence to turn stock, excluded); 1875, Getchell v. Hill, 21 Id. 443 (propriety of certain medical treatment, allowed); 1877, Hayward v. Knapp, 23 Id. 434 (safety of a mooring-place, allowed, for an expert); 1878, Shriver v. R. Co., 24 Id. 509 (whether marbles were properly packed for carriage, allowed); 1881, Krippner v. Biehl, 28 Id. 141, 9 N. W. 671 (propriety of measures taken to stop a fire, allowed); 1884, Kolsti v. R. Co., 32 Id. 134, 19 N. W. 355 (practicability of locking or fencing turntables, allowed); 1885, Mantel v. R. Co., 33 Id. 62, 21 N. W. 853 (whether due care required certain conduct, excluded); 1887, Lindale v. R. Co., 36 Id. 544, 33 N. W. 7 (proper mode of caring for cattle in transit, admitted); 1889, Goodsell v. Taylor, 41 Id. 209, 42 N. W. 873 (same); 1890, Armstrong v. R. Co., 45 Id. 87, 47 N. W. 459 (suitability of a stable for keeping horses, allowed); 1896, Morris v. Ins. Co., 63 Id. 490, 63 N. W. 658 (whether it was dangerous to thresh with steam in a high wind, excluded); 1897, Peterson v. Johnson-Westworth Co., 70 Id. 538, 73 N. W.

510 (whether a guard could have been placed around a gearing, allowed); 1899, *Moore v. Townsend*, 76 id. 64, 79 N. W. 890 (that a ladder was dangerous, excluded); 1899, *Sieber v. R. Co.*, ib. 269, 79 N. W. 99 (whether an engineer's methods in "backing" snow were proper and prudent, allowed); *Mississippi*: 1895, *Kansas City M. & B. R. Co. v. Spencer*, 73 *Miss.* 491, 17 *So.* 168 (how cattle-guards should be built, excluded); 1899, *Grace v. R. Co.*, — id. —, 23 *So.* 575 (whether cattle-guards were properly constructed, excluded); *Missouri*: 1859, *Hill v. Sturgeon*, 26 *Mo.* 329 (prudence of certain nautical conduct, admitted); 1873, *Gariak v. R. Co.*, 49 id. 276 (whether due care was taken, excluded); 1876, *Rickey v. Zeppenfeldt*, 64 id. 276 (whether a train could have been stopped, allowed); 1877, *Koons v. R. Co.*, 65 id. 597 (dangerousness of a turntable, excluded); 1881, *Greenwell v. Crow*, 73 *Mo.* 629 (safety of a place of deposit, admitted); 1896, *Brown v. Road Co.*, 89 id. 188, 1 *S. W.* 129 (safety of a road, admitted); 1887, *Gutridge v. R. Co.*, 94 id. 473, 7 *S. W.* 476 (whether with due care an injury would have occurred, excluded); 1893, *Casnewski v. R. Co.*, 121 id. 201, 212, 25 *S. W.* 911 (the proper position of a street-car driver, allowed); 1896, *Benjamin v. R. Co.*, 133 id. 274, 34 *S. W.* 590 (safety of a coal-hole cover, excluded); 1901, *Hurst v. R. Co.*, 163 id. 309, 63 *S. W.* 695 (whether a switch-yard was in reasonably safe condition, not allowed); *Montana*: 1897, *State v. Gironx*, 19 *Mont.* 149, 47 *Pac.* 798 (whether a parent was a fit person to have the custody of a child, excluded); 1903, *Mets v. Butte*, 27 id. 506, 71 *Pac.* 761 (whether a sidewalk was reasonably safe, excluded); 1903, *Coleman v. Perry*, — id. —, 73 *Pac.* 43 (whether a mangle was out of repair, allowed); *Nebraska*: 1900, *Missouri P. R. Co. v. Fox*, 60 *Nebr.* 531, 83 *N. W.* 744 (duties of a car-inspector, allowed; whether a track was properly constructed, allowed); 1903, *Chicago R. I. & P. R. Co. v. Holmes*, — id. —, 94 *N. W.* 1907 (whether an injured switchman did what was "necessary for him to do," excluded); *New Hampshire*: 1881, *Wells v. Eastman*, 61 *N. H.* 507 (proper time for firing brush, admitted); 1898, *Nouris v. Theobald*, 68 id. 544, 41 *Atl.* 183 (that it was dangerous to take down a building, excluded); 1901, *Challis v. Lake*, 71 id. 90, 51 *Atl.* 260 (what treatment a physician of reasonable skill ought to have given, allowed); *New York*: 1850, *Price v. Powell*, 3 *N. Y.* 323 (whether a cargo was properly stowed, admitted); 1863, *Curtis v. Gano*, 26 id. 427 (whether a construction was workmanlike, allowed); 1863, *Moore v. Westervelt*, 27 id. 238 (whether a ship was safely moored, allowed); 1865, *Walsh v. Ins. Co.*, 32 *N. Y.* 442 (effect of a mode of loading a ship, allowed); 1874, *Haggerty v. R. Co.*, 61 id. 624 (whether anything could have been done to prevent the injury, excluded); 1877, *Baird v. Daly*, 68 id. 551 (whether a ship was unseaworthy, allowed); 1877, *Carpenter v. Transp. Co.*, 71 id. 579 ("whether acts are seamanlike and proper," admitted; whether anything which might have avoided the harm was done or omitted, excluded); 1879, *Scattergood v. Wood*, 79 id. 265

(whether a machine was inferior in working, allowed); 1880, *Ginterman v. Steamship Co.*, 83 id. 343 (how a vessel should have been handled, allowed); 1881, *Hart v. Bridge Co.*, 84 id. 60 (whether certain gates were customary and safe; obscure ruling); 1881, *Ward v. Kilpatrick*, 85 id. 415 (whether work was "well done," allowed); 1884, *Ferguson v. Hubbard*, 97 id. 513 (whether it was dry enough to fire fallow land, excluded); 1891, *O'Neil v. R. Co.*, 129 id. 125, 29 *N. E.* 84 (distance in which a truck could be stopped, admitted); 1899, *Kunberger v. Congress S. Co.*, 159 id. 339, 53 *N. E.* 3 (whether a place was proper for an engine, admitted); 1899, *Littlejohn v. Shaw*, 159 id. 188, 53 *N. E.* 810 (whether a substance "gambier" was merchantable, allowed); 1900, *Dougherty v. Milliken*, 163 id. 537, 57 *N. E.* 757 (whether a mode of anchoring derricks was sufficient, not allowed; the opinion employs an unsound analysis of the Opinion rule; two judges dissenting); 1901, *Finn v. Cassidy*, 165 id. 584, 59 *N. E.* 811 (how an excavation ought to have been made, allowed; *Gray, J.*, and *Parker, C. J.*, diss.); 1903, *New York C. I. Co. v. U. S. Radiator Co.*, 174 id. 331, 66 *N. E.* 967 (whether goods were "needed" under a contract allowed); 1903, *Trenton Potteries Co. v. Title G. & T. Co.*, 176 id. 65, 68 *N. E.* 132 (what ought to have been done in framing a policy of title-insurance, excluded); *North Carolina*: 1849, *Sikes v. Paine*, 10 *Ired.* 290 (whether there was a deficiency in performing a contract to repair, allowed); 1896, *Tillett v. R. Co.*, 118 *N. C.* 1031, 24 *S. E.* 111 (whether a car was coupled negligently excluded); 1898, *Phifer v. R. Co.*, 122 id. 940, 29 *S. E.* 578 ("Were you careful?" excluded); 1901, *Raynor v. R. Co.*, 129 id. 195, 39 *S. E.* 321 (whether more than necessary force was used in expelling a passenger, excluded); 1901, *Jeffries v. R. Co.*, — *N. C.* —, 39 *S. E.* 836 (whether anything was omitted that could have been done to save life, excluded); 1902, *Cogdell v. R. Co.*, 130 id. 313, 41 *S. E.* 541 (whether a man could safely stand on a plank, etc., not allowed); *North Dakota*: 1896, *Ouverson v. Grafton*, 5 *N. D.* 281, 65 *N. W.* 677 (whether a threshing-machine was calculated to frighten ordinary horses, excluded); *Ohio*: 1850, *Stewart v. State*, 19 *Oh.* 307 (whether there was time to avoid an attack, allowed); 1851, *Cincinnati & F. M. Ins. Co. v. May*, 20 id. 223 (whether an act was careful or skillful, excluded; but other principles mainly controlled the ruling); 1860, *Bellefontaine & I. R. Co. v. Bailey*, 11 *Oh. St.* 335 (whether an injury at a railroad crossing could have been avoided, allowed); 1871, *Cincinnati & Z. R. Co. v. Smith*, 22 id. 246 (proper place for a brakeman, allowed); 1875, *Stillwater Turnpike Co. v. Coover*, 26 id. 521 (danger of a place in the road, excluded); 1877, *Insurance Co. v. Tobin*, 32 id. 94 (whether a vessel was seaworthy, allowed; whether it was prudent to run a steamboat under the circumstances, excluded); 1885, *Railroad Co. v. Schultz*, 43 id. 275, 1 *N. E.* 324 (from witnesses not expert, whether a fence was sufficient to turn stock, excluded); 1900, *Ohio & I. T. Co. v. Fishburn*, 61 *Oh.* 608, 56 *N. E.* 487 (proper time for "shooting" an oil-well,

allowed); *Oregon*: 1889, *Heath v. Gilean*, 3 Or. 67 (propriety of certain surgical treatment, allowable); 1899, *Williams v. Poppleton*, ib. 143, 181; 1900, *State v. Mims*, 36 id. 315, 61 Pac. 999 (which party in an affray had the advantage, excluded); 1900, *Chan Sing v. Portland*, 37 id. 64, 60 Pac. 718 (whether the injury would have happened, if defendant had done certain things, not allowed); *Pennsylvania*: 1851, *Beatty v. Gilmore*, 16 Pa. 448 (safety or danger of a place, allowed); 1871, *Delaware & C. Towboat Co. v. Stern*, 69 id. 38, 41 (prudence of a towboat captain, allowed); 1876, *Sinnott v. Mullin*, 82 id. 337, 343 (proper mode of building a retaining wall, allowed); 1882, *Olmsted v. Gere*, 100 id. 131 (skillfulness of a surgical operation, allowed); 1893, *American Steamship Co. v. Landreth*, 108 id. 135, *señle* (opposed to *Beatty v. Gilmore*); 1899, *Long v. E. Co.*, 136 id. 143, 19 Atl. 39 (propriety of a safety-device at a switch, excluded); 1890, *Graham v. Penna. Co.*, 139 id. 149, 160, 31 Atl. 151 (danger of a place, excluded; distinguishing *Beatty v. Gilmore* on the ground that an adequate description was in that case impossible); 1892, *McNerney v. Reading*, 150 id. 611, 618, 25 Atl. 57 (whether a place was dangerous, allowed); 1893, *Elder v. Coal Co.*, 127 id. 490, 499, 27 Atl. 545 (whether certain precautions were sufficient, allowed; but not whether the conduct was negligent); 1895, *Kitchen v. Union Tp.*, 171 id. 145, 33 Atl. 76 (whether a place was dangerous, admitted); 1897, *Platz v. McKean*, 178 id. 601, 36 Atl. 136 (safety of a sluice, excluded); 1897, *Cookson v. E. Co.*, 179 id. 184, 36 Atl. 194 (whether a place was the proper one to stop, look, and listen, admitted); *Auberle v. McKeesport*, ib. 321, 36 Atl. 312 (whether the absence of a guard-rail made a bridge dangerous, excluded); 1898, *Woeckner v. Motor Co.*, 187 id. 306, 41 Atl. 28 (that a motorman exercised good judgment, excluded on the facts); 1899, *Whitaker v. Campbell*, ib. 113, 41 Atl. 38 (whether it was dangerous to clean a machine, admitted); 1899, *Bardslee v. Columbia Tp.*, 188 id. 496, 41 Atl. 618 (contributory negligence; opinions of non-experts, excluded); 1902, *Siegler v. Mellinger*, 203 id. 256, 52 Atl. 175 (that a place was dangerous, excluded); 1903, *Seifred v. Pa. R. Co.*, 208 id. 399, 55 Atl. 1061 (that a railroad crossing was dangerous, excluded; no authority cited); *Rhode Island*: 1858, *Buffum v. Harris*, 5 R. I. 256 (sufficiency and expediency of a drain, etc., allowed); 1894, *Wilson v. R. Co.*, 18 id. 598, 601, 3 Atl. 300 (whether a person seemed to drive carefully, allowed); 1903, *Ennis v. Little*, — id. —, 55 Atl. 684 (whether a certain condition of an eyebolt was defective, excluded); *South Carolina*: 1883, *Ward v. R. Co.*, 19 S. C. 532, 325 (whether there was time to avoid injury, allowed); 1884, *Conch v. R. Co.*, 22 S. C. 561 (whether a place was dangerous, excluded; purporting to follow the preceding case); 1885, *Bridge v. R. Co.*, 25 id. 26 (similar); 1901, *Kaiser v. R. Co.*, 59 id. 311, 37 S. E. 938 (whether passengers had sufficient time to leave a railroad car, allowed); 1903, *Goon v. Southern R. Co.*, — id. —, 45 S. E. 810 (whether it "takes a woman in health to run seven looms," not allowed); *Tennessee*: 1874, *Lawrence v.*

Hudson, 12 Heisk. 672 (negligence of a stage-driver in leaving his seat, excluded); 1896, *Louisville & N. R. Co. v. Reagan*, 96 Tenn. 129, 33 S. W. 1050 (proper way to uncouple cars, admitted); 1897, *Bruce v. Beall*, 99 id. 303, 41 S. W. 445 (probable life of an elevator-cable, admitted; but, whether a prudent person would have discontinued its use, excluded); *Texas*: 1879, *Houston & T. C. R. Co. v. Smith*, 22 Tex. 186 (whether there was time to get out of the way, excluded); 1885, *International & G. N. R. Co. v. Klans*, 64 id. 294 (whether a bridge span was large enough, allowed); 1889, *Telegraph Co. v. Cooper*, 71 id. 512, 9 S. W. 598 (effect of timely assistance at childbirth, allowed); 1890, *Gulf Colo. & S. F. R. Co. v. Compton*, 75 id. 673, 13 S. W. 667 (safety of a train-band equipment, allowed); 1896, *McCray v. R. Co.*, 89 id. 168, 34 S. W. 95 (whether a rail would have fallen if the car was properly loaded, admitted); 1901, *Lipcomb v. R. Co.*, 95 id. 5, 64 S. W. 923 (whether it was a station agent's duty to hire guards, excluded); 1903, *Lents v. Dallas*, 96 id. 258, 72 S. W. 59 (whether an iron grating was too light for the purpose, not allowed); *United States*: 1854, *Weston v. Foster*, 3 Curt. 121 (whether a ship was fully loaded, allowed); 1869, *Chicago v. Greer*, 9 Wall. 733 (whether a test of material was fair, allowed); 1875, *The City of Washington*, 92 U. S. 39 (whether certain conduct was good seamanship, allowed, for an expert); 1877, *Transportation Line v. Hope*, 95 id. 298 (whether it was safe to tag in a certain way, allowed); 1886, *Chandler v. Thompson*, 30 Fed. 40 (skill in management of machinery, allowed); 1887, *Union Ins. Co. v. Smith*, 124 U. S. 421, 8 Sup. 534 (like *City of Washington's* case); 1893, *Pullman P. C. Co. v. Hartins*, 5 C. C. A. 326, 55 Fed. 932 (whether machinery was dangerous, allowed); 1894, *Union P. R. Co. v. Novak*, 9 id. 629, 61 Fed. 573, 15 U. S. App. 400, 413 (whether two brakemen were necessary, allowed); 1894, *Flynt B. & C. Co. v. Brown*, 14 id. 308, 67 Fed. 64 (usual and ordinary way of construction, allowed); 1894, *Northern P. R. Co. v. Urtin*, 158 U. S. 273, 15 Sun. 840 (whether a medical examination was made in a careful manner, allowed); 1896, *Atlantic Ave. R. Co. v. Van Dyke*, 18 C. C. A. 632, 72 Fed. 458 (whether an electrical motor could be safely operated without a sandbox, excluded; but whether it could be stopped quickly without a sandbox, allowed); 1896, *Crane Co. v. Columbus Const. Co.*, 20 id. 233, 73 id. 984 (whether a gas-pipe was laid with proper skill and care, excluded; but whether the workmen were men of experience or skill, and whether specific carelessness or unskillfulness was shown, admitted); 1896, *Blanchard v. Bank*, 21 id. 319, 75 id. 249 (whether books were properly kept, excluded); 1896, *Illinois Cent. R. Co. v. Davidson*, 22 id. 306, 76 id. 517 (the safe method of constructing railroad platforms, etc., admitted); 1897, *New York El. R. Co. v. Blair*, 25 id. 216, 79 id. 696 (whether it was necessary to hoist pipe in a certain way, in properly performing a duty, excluded); 1897, *Blumenthal v. Craig*, 26 id. 427, 81 id. 330 (whether a witness would have known a machine to be more dangerous, allowed); 1897, *Campbell*

5. Law.

§ 1952. In general. The exclusion of testimonial opinion here rests on a ground slightly different from that of all the other instances. The general principle (*ante*, § 1918) is exemplified, to be sure, that the tribunal does not need the witness' judgment and hence will insist on dispensing with it. But here it is not that the jury can of themselves determine equally well; it is that the judge (or the jury as instructed by the judge) can determine equally well.

v. Mayor, 81 Fed. 183 (firemen allowed to state their estimates as to the saving to be made by the use of certain apparatus); 1899, *Western Coal & M. Co. v. Berberich*, 26 C. C. A. 364, 54 Fed. 329 (whether a room was safe to work in, allowed); 1899, *Hunt v. Kila*, 38 id. 641, 96 Fed. 49 (whether an apparatus was "ordinarily safe and proper," excluded); 1901, *Hutchinson Cooperage Co. v. Snider*, 46 id. 517, 107 Fed. 633 (whether a machine was properly constructed or safe, allowed for experts); 1901, *Southern Pacific Co. v. Arnett*, 50 id. 17, 111 Fed. 849 (certain questions as to the proper method of providing for cattle in transit, variously disposed of; Caldwell, J., diss. on one point, on the ground of the witnesses' lack of qualifications); 1908, *Texas & P. R. Co. v. Watson*, — U. S. —, 98 Sup. 681 (whether certain behavior of an engine indicated wrong operation or construction, etc., allowed); *Utah*: 1897, *Wright v. S. P. Co.*, 15 Utah 421, 49 Pac. 369 (whether it was necessary to have certain employees on an engine, admitted); 1897, *State v. McCoy*, ib. 136, 49 Pac. 420 (whether an abortion was necessary to save life, admitted); 1899, *Hayes v. R. Co.*, 17 id. 99, 53 Pac. 1001 (whether sheds were "carefully and properly built," allowed); 1903, *Frits v. Tel. Co.*, 25 id. 263, 71 Pac. 309 (how many linemen should help in stringing wires, etc., allowed); 1903, *Black v. R. M. B. Tel. Co.*, — id. —, 73 Pac. 514 (whether it would be the "proper thing" for a lineman to do a certain thing, excluded); *Vermont*: 1835, *Lester v. Pittsford*, 7 Vt. 156 (safety of a road, excluded); 1857, *Fraser v. Tupper*, 29 id. 410 (whether fires were properly set, excluded); 1860, *Crane v. Northfield*, 33 id. 124 (safety of a road, excluded); 1873, *Oakes v. Weston*, 45 id. 490 (reasonableness of a wagon-load, excluded); 1875, *Dean v. McLean*, 48 id. 413, 421 (proper manner of floating logs, admitted); 1876, *Bixby v. R. Co.*, 49 id. 136 (whether an accident would have happened if certain precautions had been taken, excluded); 1881, *Evarts v. Middlebury*, 53 id. 623 (whether certain horse-shoes were proper for winter use, allowed); 1881, *Weeks v. Lyndon*, 54 id. 640, 645 (safety of a road, excluded); 1886, *Stowe v. Bishop*, 56 id. 499, 3 Atl. 494 (prudence of a mode of leaving a horse, excluded); 1886, *Bemis v. R. Co.*, ib. 637, 3 Atl. 531 (prudence of a mode of using a crane, excluded); 1894, *Houston v. Brush*, 66 id. 331, 339, 29 Atl. 380 (whether a tackle-block was suitable, excluded); 1896, *Brown v. Swanton*, 69 id. 53, 37 Atl. 280 (whether a sluice was sufficient to carry off water, allowed); 1897, *Sawyer v. Shoe Co.*, ib. 486, 38 Atl. 311 (safe

manner of fastening a machine, allowed); *Virginia*: 1896, *Bertha Zinc Co. v. Martin's Adm'r*, 30 Va. 791, 23 S. E. 899 (whether thawing dynamite before an open fire was a safe proceeding, allowed); 1896, *Norfolk & C. R. Co. v. Lumber Co.*, 32 id. 413, 23 S. E. 737 (whether an accident would have happened had certain precautions been taken, excluded); 1897, *Childress v. R. Co.*, 34 id. 184, 26 S. E. 424 (whether the place of a railroad accident was dangerous, excluded); 1899, *Roanoke v. Rhull*, 97 id. 419, 34 S. E. 34 (whether a person with ordinary care could have seen a hole, excluded); 1900, *Southern R. Co. v. Maury*, 98 id. 692, 37 S. E. 285 (testimony to the best and safest mode of loading car wheels, excluded); *West Virginia*: 1899, *State v. Hull*, 45 W. Va. 767, 32 S. E. 240 (rape; by a physician, whether a woman would have voluntarily submitted to certain injuries, excluded); *Wisconsin*: 1867, *Wright v. Hardy*, 23 Wis. 381 (propriety of a mode of amputation, allowed); 1868, *Reynolds v. Shanks*, 23 id. 307 (proper mode of construction of a wall, excluded); 1872, *Leopold v. Van Kirk*, 29 id. 533 (whether due care would have prevented the harm, allowed); 1873, *Kelley v. Fond du Lac*, 31 id. 185 (safety of a road, excluded); 1874, *Montgomery v. Scott*, 34 id. 345 (similar); 1875, *Oleson v. Telford*, 37 id. 331 (whether a stage was overloaded, excluded); 1874, *Montgomery v. Scott*, 34 id. 345 (like Kelley v. Fond du Lac); 1878, *Griffin v. Willow*, 43 id. 511 (same); *Benedict v. Fond du Lac*, 44 id. 496 (same); 1879, *Mellor v. Utica*, 48 id. 429, 4 N. W. 636 (same); 1882, *Veerhusen v. R. Co.*, 53 id. 694, 11 N. W. 433 (sufficiency of a fence, excluded); 1884, *Fitts v. R. Co.*, 59 id. 330, 16 N. W. 166 (proper construction of a turntable, admitted); 1886, *Baker v. Madison*, 62 id. 143, 22 N. W. 141, 563 (like Kelley v. Fond du Lac); 1885, *Quinn v. Higgins*, 63 id. 666, 24 N. W. 462 (propriety of a surgeon's mode of treatment, allowed); 1885, *Lawson v. R. Co.*, 64 id. 459, 24 N. W. 618 (safety of a position occupied in riding in a car, excluded); 1886, *Feliger v. Bastian*, 66 id. 522, 29 N. W. 244 (prudent way of performing work, excluded); 1886, *Mulcairns v. Janesville*, 67 id. 24, 29 N. W. 565 (propriety of a mode of construction, allowed); 1886, *Gates v. Fleischer*, ib. 509, 30 N. W. 674 (like Quinn v. Higgins); 1891, *Trapp v. Druecker*, 79 id. 640, 48 N. W. 664 (propriety of an inventor's lengthy methods in pursuance of a contract, excluded); 1899, *Daly v. Milwaukee*, 108 id. 589, 79 N. W. 752 (whether a cast-iron elbow was obviously safe, allowed); *Laure v. Milwaukee*, ib. 562, 79 N. W. 763 (same).

The principle is the same; but the peculiarity is that a different member of the tribunal is relied upon as equipped with the data. It is not the common knowledge of the jury which renders the witness' opinion unnecessary, but the special legal knowledge of the judge. This peculiarity of the principle's application comes specially into prominence in one of the topics presenting themselves under this head, — evidence of foreign law; for just there even the judge's competence will usually cease, and the aid of testimony will be needed.

§ 1953. *Foreign Law.* No doubt has ever been made that properly skilled testimony may be sought in proving the existence of a foreign rule of law in general.¹ The question that involves the present principle is: When the text of a foreign statute is before the Court, may any aid be received in construing or interpreting it? No one doubts that the aid of a mere translator is proper. But when a translation, if necessary, has been made, is anything farther needed in the way of comment on the text?²

The answer has always and properly been that such aid may at any time be needed and may always be offered. The effect of this conclusion, however, must be distinguished from the effect of the rule of producing the verbatim text (*ante*, § 1271); that is, assuming the production of the complete text, the present question remains, whether an expert's interpretation of that text is admissible:

1844, *Denman*, L. C. J., in *Baron de Bode's Case*, 8 Q. B. 365: "There is another general rule, that opinions of persons of science must be received as to the facts of their science. That rule applies to legal men. . . . Properly speaking, the nature of such evidence is, not to set forth the contents of the written law, but its effect and the state of law resulting from it. The mere contents, indeed, might often mislead persons not familiar with the particular system of law; the witness is called upon to state what law does result from the instrument."

1844, Lord Brougham, in *Sussex Peerage Case*, 11 Cl. & F. 115: "It is perfectly clear that the proper mode of proving a foreign law is not by showing to the House the book of the law; for the House has not organs to know and to deal with the text of that law, and therefore requires the assistance of a lawyer who knows how to interpret it."

§ 1954. *Trade Usage, as involving (1) an Opinion of Law or (2) an Opinion without stating Instances.* (1) When a trade usage is material to the issue, usually by implied incorporation into a contract (*post*, §§ 2440, 2464), the witness to prove it is apt to state it by declaring that usage attributes a

¹ Questions depending on other principles are: Whether the witness is sufficiently qualified in his subject (*ante*, §§ 564, 590); whether the rule of producing the original requires the production of the text of a foreign statute (*ante*, § 1271); whether a Hearsay exception exists for printed copies of foreign decisions or foreign statutes presented (*ante*, §§ 1684, 1697, 1708).

² The principle that the construction and interpretation of documents is for the judge, not the jury (*post*, § 2556), has nothing to do here. It simply differentiates the functions of judge and jury. Having given a specific duty

to the judge, it says nothing about what aid he shall seek in performing it. The present question arises equally where a judge is sitting without a jury.

³ 1844, *Sussex Peerage Case*, 11 Cl. & F. 115; 1851, *Bruce*, V. C., in *Guepratte v. Young*, 4 De G. & S. 221, 237; 1863, *Lord Chelmsford*, in *Di Sora v. Phillipps*, 10 H. L. C. 640; 1894, *Bollinger v. Gallagher*, 103 Pa. 245, 262, 20 Atl. 751. But the Court may of course also consult the text and not merely listen to the opinion: 1857, *Bremer v. Freeman*, 10 Moo. F. C. 306, 363, *semble*; 1889, *Comcha v. Marista*, L. R. 40 Ch. D. 543, 549, 554.

certain *right* or *liability* in certain circumstances. This is of course a violation of the Opinion rule; the witness should state the tenor of the usage or practice, omitting any reference to the legal effect.¹

(2) It has sometimes been said that a witness to trade usage may state only *specific instances*, or must at least mention one or more in support of his statement of the general practice. This notion is traceable to some remarks of Lord Mansfield and later judges, which do not justify it.² There have indeed been judges who have refused, on all the facts of a case, to credit testimony to usage, which could not adduce instances in verification.³ But there is no rule of exclusion.⁴ The usage is itself a fact, and the Opinion rule does not treat such testimony as an inference from data which can be adequately stated without the inference.

§ 1955. *Interpretation of Documents; (1) Expert Interpretation of Technical Words or Phrases.* When a document is to be construed or interpreted, the judge usually has this function; sometimes the jury has it, and either may need testimonial aid in fulfilling it. There are thus to be kept apart

¹ 1892, *Conner v. R. Co.*, 146 Ind. 450, 45 N. E. 682 (the mere assertion of a "custom" does not involve opinion); 1874, *Haskins v. Warren*, 115 Mass. 314, 335 ("Usage is matter of fact, not of opinion; . . . [witnesses'] conclusions or inferences as to its effect, either upon the contract or the legal title or rights of the parties, are not competent to show the character or force of the usage; . . . the effect is to be determined by the Court, or the jury under its direction"); 1836, *Allen v. Merchants' Bank*, 15 Wend. 482, 488 ("The inquiry . . . is not after the opinion of traders and merchants in respect to the law upon a given question, but after the evidence of a fact, to wit, the usage or practice in the course of mercantile business"); 1809, *Doss v. Swoop*, 2 Binn. 72 ("the general understanding and belief of the country as to the liability of carriers by water"; not decided); 1804, *Ryan v. Gardner*, 1 Wash. C. C. 145, 149 (insurance; a witness was offered to prove that goods with a particular mark "must be on board, in order to recover"; *Per Curiam*: "You may examine witnesses to prove a particular course of trade, or other matters in the nature of facts, but not to show what the law is; nothing could be more dangerous than to fix the law upon the opinions of particular men").

Distinguish the *experiential qualifications* of a witness to usage (*ante*, § 565). Distinguish also the numerous questions of substantive law as to the *binding effect* of a usage upon a contract, and as to the materiality of usage under the Federal Evidence rule (*post*, §§ 2440, 2464).

² 1761, *Edie v. East India Co.*, 1 W. Bl. 295, 297, 2 Barr. 1214, 1222 (L. C. J. Mansfield: "Many witnesses were examined by defendants to prove this usage; but it did not appear that in any one fact the indorsees of such special indorsement ever lost the money by such omission [of the words 'or order']"; the evidence was only matter of opinion"; in the report in *Barrow* the point is similar); 1826, *Cunning-*

ham v. Foulbancque, 6 C. & P. 43 (Park, J., to the jury: "Now, there is not a single witness who has proved the reciprocity of the practice; that is, by instances; two witnesses stated it, but did not produce any instances"; this is headnoted by the reporter: "An usage of trade must be proved by instances, and cannot be supported by evidence of opinion merely"; the verdict was set aside "on the counts relating to usage," but that doubt was as to the admissibility of usage at all); 1836, *Hall v. Benson*, 7 Id. 711, 714 (Tindal, C. J.: "Is there any general course of business? Let your mind revolve over instances. I am not asking you whether it is just and proper, but whether there is any prevailing course of business").

³ 1876, *Bishop v. Clay Ins. Co.*, 45 Conn. 450, 455; 1871, *Chenery v. Goodrich*, 166 Mass. 546, 571; 1894, *Miller v. Hallock*, 2 Edw. Ch. 652, 656; 1903, *Ames M. Co. v. Kimball S. S. Co.*, 125 Fed. 333.

⁴ 1761, *Camden v. Cosway*, 1 W. Bl. 417 (L. C. J. Mansfield "ruled that insurance-brokers and others might be examined as to the general opinion and understanding of the persons concerned in the trade; though they knew no particular instance in fact, upon which such opinion was founded"); 1866, *Hamilton v. Nickerson*, 13 Ill. 331 (a well-qualified witness, who "could not state individual cases," admitted; "the *factum probandum* was not a single isolated act or circumstance, but the result or conclusion derived from a series of similar acts or circumstances, creating and establishing in the mind of the jurymen a conviction or belief of the complex whole or comprehensive fact"). The following case is obscure: 1859, *Shackelford v. R. Co.*, 37 Miss. 262, 268.

Distinguish the question whether one witness to usage suffices (*post*, § 2003), and whether, when instances are given, one instance suffices (*ante*, § 279).

three entirely distinct principles, all of which may call for application at the same time:

(a) The principle determining the *respective functions of judge and jury* (*post*, § 2556); this question being, whose function it is to determine the effect of the words, written or oral. (b) The principle of the Parol Evidence rule, or Integration (*post*, §§ 2440, 2464), determining whether the *ordinary sense* of the words in the document is alone to control, or whether other negotiations or general usage, as fixing the *special sense* of the words, may be regarded; for example, we ask whether "free on board" in a document is to be construed with any reference at all to trade usage,—not how the trade usage is to be got at. The vast majority of the rulings upon the interpretation of phrases involve a dispute over this principle only. (c) Finally, the Opinion rule,—the one in hand. Here we assume that, by the preceding principle, resort may be had to usage or the like, and we ask how it is to be evidenced, and whether we need any testimonial aid. It is obvious that, by the principle of the Opinion rule (*ante*, § 1918), the judge (or the jury) will not resort to outside aid if the question is merely one of ordinary usage which will be as familiar to him (or to them) as to any one; while if it is one of the usage in special trade or locality, or if for another reason aid is necessary, it will be sought.

Three classes of cases, in this application of the Opinion rule, are to be distinguished: (1) expert interpretation of the meaning of *technical words or phrases*; (2) the application of a *description of premises* to marks on boundaries of a particular piece of land; and (3) a statement of the *contents of a lost document*.

(1) *Expert interpretation of technical words or phrases.* Here it is obvious that the interpretation of the meaning of the document in respect to ordinary words, being a part of the function of the Court (*post*, § 2556), is not for a witness to speak to. But so far as the words are technical, and the witness speaks to technical usage or meaning, there is no prohibition; the Court must determine anew in each instance whether it needs any testimonial aid to interpret the word or phrase in dispute.¹

¹ So much depends upon the circumstances of each case, and so trifling in value is any one ruling as an illustration of the principle, that no attempt is made to set out the words or passages in dispute: 1859, *Kirkland v. Nisbet*, 3 Macq. Sc. App. C. 766 (excluding a question on cross-examination, "what would the employer be entitled to expect?" to a witness to trade usage, when shown the terms of a specific letter; "Evidence as to mercantile usage may be received; . . . but you cannot ask a witness what is the meaning of a written document"); 1898, *Fuller v. Ins. Co.*, 70 Conn. 647, 41 Atl. 4 (insurance policy); 1893, *Wyllie v. Gann*, 69 Ga. 510 (auction-sale document); 1854, *Sigworth v. McIntyre*, 18 Ill. 136 (contract); 1889, *Pennsylvania R. Co. v. Connell*, 127 Id. 424, 30 N. E. 89 (telegram); 1898, *Louisville & N. E. Co. v. R. Co.*, 174 Id. 443, 51 N. E.

234 ("necessary signals and switchmen," interpreted by an expert); 1861, *Howe v. McBride*, 17 Ind. 499 (technical usage in general); 1859, *Campbell v. Busch*, 9 Ia. 341 (contract); 1872, *Haver v. Tenney*, 36 Id. 81; 1899, *Schwartz v. Wilmer*, 90 Md. 136, 44 Atl. 1059 (effect of the words "protest waived"; excluded); 1898, *Burton v. B. S. C. Co.*, 171 Mass. 439, 50 N. E. 1039 (explanation of patent specifications, allowed); 1875, *Clark v. Locomotive Works*, 32 Mich. 257 (contract); 1879, *Wilder v. De Con*, 26 Minn. 18, 1 N. W. 46; 1894, *Cargill v. Thompson*, 57 Id. 534, 59 N. W. 638 (hydraulic contract; experts may explain meanings of technical phrases but are not to construe the clauses); 1857, *Silverthorn v. Fowle*, 4 Jones L. 363; 1888, *Long v. Davidson*, 101 N. C. 175, 7 N. E. 758; 1897, *Clayton Co. v. R. Co.*, 179 Pa. 350, 36 Atl. 287 (meaning of

§ 1956. *Same*: (2) *Location of Descriptions in Deeds, Maps, and Surveys*. When a description of premises is to be interpreted, the distinction seems sound and simple that if a witness (usually a surveyor) is attempting merely to construe the untechnical terms of a deed, map, or the like, his testimony is unnecessary and improper; but if he is offering his judgment, being that of an experienced observer familiar with the ground, as to the specific actual place signified by a mark or line named in the description, his testimony is admissible; for in the latter case he has what the Court cannot possibly have, namely, an acquaintance with the features of the land and the other data which were probably associated in the mind of the map-maker or deed-maker with the phrases used and are therefore essential to be considered in interpreting these. In accordance with this view, most Courts have declared testimony of the latter sort admissible;¹ a few, however, have excluded it, misled by other analogies.² Testimony merely attempting to construe the untechnical passages of the description is of course usually inadmissible.³

§ 1957. *Same*: (3) *Contents of a Lost Document*. By the principle of Completeness (*post*, § 2105) it is regarded as unsafe to listen to any testimony of the contents of a lost writing unless that testimony purports to reproduce at least the substance of the contents; and some Courts even require the fairly complete details of its contents. In most of these instances, in spite of the occasional invocation by the Court of the Opinion rule, we are not dealing with that rule at all, but with the entirely distinct principle of Completeness. In a rare case only, the Opinion rule may properly be invoked to exclude testimony on this subject,—as when the witness, without reciting the substance of the contents, merely expresses his opinion as to the meaning or the legal sufficiency of it.¹ The theoretical difference between the Opinion

"excavated and prepared" as applied to a roadbed, admitted); 1871, *Nashville & C. R. Co. v. Carroll*, 6 Heisk. 368; 1897, *Winthrop v. Ins. Co.*, 2 Wash. C. C. 7, 10; 1899, *Ogden v. Parsons*, 26 How. 169 (what is a "full cargo").

It was common enough for the masters in Chancery to consult Scotch advocates upon the effect of a Scotch marriage-settlement or the like: 1841, *Williams v. Williams*, 8 Beav. 547; 1850, *Hitchcock v. Clendinning*, 12 Id. 584; 1854, *Re Todd*, 19 Id. 552.

¹ *Ala.*: 1901, *Barrett v. Kelly*, 181 Ala. 373, 20 So. 324 (by a surveyor familiar with the property, that the lines as shown upon a map were correct, allowed); *Ind.*: 1881, *Greenmeyer v. Logansport*, 76 Ind. 549, 552 (whether a place is within the limits of a city); 1893, *Indianapolis v. McAvoy*, 86 Id. 567, 569 (*same*); 1894, *Siroesser v. Ft. Wayne*, 130 Id. 443, 447 (*same*); 1897, *Shea v. Muncie*, 149 Id. 14, 48 N. E. 138 (*same*); *Pa.*: 1803, *Forbes v. Caruthers*, 3 Yeates 527 (source of an evident error in distances named); 1845, *Farr v. Swan*, 2 Pa. St. 247 (location of a deed); 1890, *Northumberland Coal Co. v. Clement*, 95 Id. 138 (*same*); 1898, *Jackson v. Lambert*, 121 Id. 191, 15 Atl.

508 (*same*); *Va.*: 1898, *Holleran v. Meisel*, 91 Va. 143, 21 S. E. 659 (location of a patent); *W. Va.*: 1898, *Randolph v. Adams*, 2 W. Va. 534 (accuracy of a survey); *Wis.*: 1885, *Toomey v. Kay*, 62 Wis. 167, 23 N. W. 266 (that a line was run correctly).

² 1901, *Il Estate v. Judd*, 13 Haw. 319, 323 (to a surveyor, what land was signified by the description in a will); 1898, *Hockmuth v. Des Grands Champs*, 71 Mich. 523, 39 N. W. 737 (whether corners of survey corresponded with government map); 1858, *Stevens v. West*, 6 Jones L. 59; 1859, *Clegg v. Fields*, 7 Id. 39 (identity of boundaries with those named in a deed, etc.); 1859, *Ormsby v. Ihmsen*, 34 Pa. 472 (application of a deed to premises); 1896, *Sulphur Mines Co. v. Thompson*, 93 Va. 230, 23 S. E. 232 (identity of land surveyed).

³ 1856, *Blumenthal v. Ball*, 24 Mo. 119; 1859, *Whittelsey v. Kellogg*, 26 Id. 408; 1860, *Schultz v. Lindell*, 30 Id. 331.

The question whether testimony may be received that a certain stone, post, mark, etc., was intended as a boundary, is a different one (*post*, § 1943).

⁴ 1873, *Alexander v. Handley*, 96 Ala. 250, 230, 11 So. 970 (whether a lost document made

rule and the Completeness rule here lies in this, that under the latter we require at least the substance to be given (instead of a mere fragment), while under the former we reject the opinion or inference from the substance, and require the latter alone.

§ 1958. *Testator's or Grantor's Capacity; Accused's Capacity.* It is easy to see that on principle the opinion of no witness whatever is needed to tell the Court whether testamentary capacity existed, because that is a matter of applying a legal definition to the data of the testator's mental condition, and the judge (in theory) needs no assistance on that point, even from a legal witness. The data of the mental condition are to be presented, and the jury, under the judge's instructions, are to apply the definition to them.

1802, *Albee, J.*, in *Fairchild v. Baccant*, 35 Vt. 416: "What is sufficient capacity to transact business or to make a will is a matter of law, depending somewhat upon the nature of the business. A witness may not correctly apprehend the rule of law, and if he uses such expressions may be misled himself or may mislead the jury. Hence the question should be framed so as to require him to state the measure of the testator's capacity in his own language, and by such ordinary terms or forms of expression as will best convey his own ideas of the matter."

But a difficulty arises. It is desirable to obtain from witness a compact statement of the general mental condition of the testator. It is, for instance, a better index of the witness' results of observation to say, "I would or would not trust him to buy property intelligently," than merely to say, "He once did this or that wise or foolish act." The general statement often conveys a more accurate understanding of his condition than a rehearsal of many single acts,—acts which indeed are in detail largely forgotten, cannot be reproduced in statement, and have left only the general impression. Such a general statement is perfectly legitimate; but the difficulty lies in distinguishing it from a statement involving the use of some legal definition of testamentary capacity. The ordinary witness, though using a compendious statement, may really have no desire to attempt a legal definition and may be thinking only of the deceased's general capacity to take care of himself and his property. Nevertheless, in distinguishing between the proper and improper forms of statement, an easy opportunity is offered for judicial quibbling. In the dilemma thus presented, the solution seems often to depend merely on whether the Court is disposed to stick at trifles and the forms of things, or to follow practical good sense:

1861, *Woodward, J.*, in *Daniel v. Daniel*, 30 Pa. 191, 211: "The Court would not allow Paul Schlegel to be asked whether the testator had capacity 'to understand a will.' The witness was allowed to answer, and did answer, that he was 'fit to make a will.' We

X a partner, excluded); 1882, *Murphy v. State*, 118 Id. 137, 23 So. 719 (that a document was a copy, allowed); 1882, *Massure v. Noble*, 11 Ill. 161 (testimony that the contents of a lost petition for partition were all that was necessary, excluded); 1897, *Ryder v. Jacobs*, 103 Pa. 624, 30 Atl. 471 (bookkeeping; whether accounts were in partnership form; excluded on the

facts). This principle probably explains the following ruling: 1895, *Edwards v. Riven*, 35 Fla. 69, 17 So. 416 (admitting the "existence of the contents," but not "the effect of the substance of the contents"; but of course this is after all mere quibbling).

For the rulings, superficially like these, under the Completeness rule, see post, § 2103.

think that throughout this cause there was too much refinement of distinctions in raising and ruling questions of evidence on the part both of counsel and of Court; and here is a remarkable instance of excessive nicety. What is the distinction between that mental condition which is competent to understand a will, and that which is fit to make a will? If a microscopic vision could detect a distinction, who has scales nice enough to tell how much it would weigh in the jury-box? The plaintiffs in error undertake to convince us that their cause was damaged by the witness testifying that the testator was fit to make a will, instead of testifying that he was competent to understand a will. We do not think the error, if error there was, did them any damage. We do not suppose the jury would have been swayed a hair's breadth by one form of answer, more than by the other."

By all Courts a mere abstract statement that the person was or was not "capable" of making a will or a contract or a deed seems to be held improper; but there is great variety of ruling upon other forms of statement.¹

¹ Compare with the following cases those collected ante, § 1938 (insanity); in the following citations, where nothing is specially noted, the Court excluded a general question as to capacity to make a will: *Can*: 1888, *Doe v. Gilbert*, 22 N. Br. 576, 583 ("Was he of sound disposing mind, memory, and understanding?" excluded); *Ala.*: 1889, *Walker v. Walker's Ex'r*, 34 Ala. 472; 1888, *Stackey v. Bellah*, 41 id. 707 (capacity to dispose of property at the time of a gift, admitted); 1873, *Hewlett v. Wood*, 55 id. 635 ("capacity for business," excluded); 1897, *Torrey v. Burney*, 113 id. 498, 21 So. 349 ("capable of transacting ordinary business," excluded); 1900, *Dominick v. Randolph*, 136 id. 557, 27 So. 481 ("capable of making a deed," allowed on cross-examination); *Cal.*: 1900, *Shapter v. Pillar*, 28 Colo. 209, 63 Pac. 303 (adjudication as lunatic; opinion as to "degree of incapacity," inadmissible); *Conn.*: 1899, *Turner's Appeal*, 73 Conn. 308, 44 Atl. 310; 1902, *Hayes v. Candes*, 75 id. 131, 82 Atl. 535 (whether the grantor was capable of transacting business, and whether she was capable of making a deed of real estate; the former held clearly allowable, and the latter also on the facts; good opinion); *Ga.*: 1898, *Jones v. Grogan*, 56 Ga. 552, 25 S. E. 590 (whether there was undue influence, allowed, if the data were stated); *Ill.*: 1887, *Schneider v. Manning*, 121 Ill. 296, 12 N. E. 267 (excluding "capacity to dispose by will or deed," but admitting "capacity to transact business"); 1888, *Keithley v. Stafford*, 136 id. 520, 18 N. E. 740 ("Was he capable of transacting ordinary business?" left undecided with a reference to the *Schneider* ruling); 1901, *King v. Lawson*, 190 id. 520, 60 N. E. 361 (opinions as to "capacity to transact the ordinary business affairs of life," admitted); 1901, *Reidy v. Shepard*, 16 637, 60 N. E. 232 (similar); 1902, *Baker v. Baker*, 202 id. 505, 67 N. E. 410 ("whether he had sufficient mind and memory to understand the will in question," "whether or not he was able to understandingly execute a will," not allowed); *Ind.*: 1892, *Hamrick v. Hamrick*, 134 Ind. 283, 34 N. E. 2 (opinion as to sanity, inadmissible; but not as to capacity to manage an estate); *Ia.*: 1899, *Pelousongus v. Clark*, 9 Ia. 16; 1876,

Ashcraft v. De Armond, 44 id. 233 (contract); 1899, *Furlong v. Carraber*, 108 id. 492, 79 N. W. 277; 1901, *Betts v. Betts*, 113 id. 111, 84 N. W. 975 (whether the testator was "capable of transacting business intelligently," excluded; such a ruling seems to render witnesses incapable of giving testimony intelligently); 1903, *McGibbons v. McGibbons*, 119 id. 140, 93 N. W. 55 ("ability to understand in a reasonable manner the nature and effect of her acts in business transactions," excluded); *Me.*: 1895, *Hall v. Ferry*, 87 Me. 569, 33 Atl. 160; 1896, *Hewett v. Hurley*, 94 id. 431, 34 Atl. 274 (by a doctor, that the person was "not capable of transacting business," excluded); *Md.*: 1903, *Jones v. Collins*, 94 Md. 408, 51 Atl. 388 (whether the testator was "capable of executing a valid deed or contract," allowed); 1902, *Berry v. Safe D. & T. Co.*, 94 id. 48, 53 Atl. 720 (medical experts not admitted upon the question of capacity to make a will; the opinion is unsound, and lengthily obscures the subject with technical refinements quite as objectionable as the theories of the medical experts denounced in the opinion); *Mass.*: 1879, *May v. Bradlee*, 127 Mass. 419; 1891, *Pool v. Dean*, 152 id. 590, 26 N. E. 406 ("usual and ordinary capacity for doing business," allowed); 1892, *Smith v. Smith*, 157 id. 389, 32 N. E. 348 (whether he was capable of making a contract or transacting important business, excluded); *Mich.*: 1862, *White v. Bailey*, 10 Mich. 154; 1870, *Kempsey v. McGuinness*, 28 id. 141 (various forms distinguished and discussed); 1903, *Page v. Beach*, — id. —, 95 N. W. 261 ("What was his capacity?" held improper; form of question discussed in detail); *Miss.*: 1889, *Finney's Will*, 27 Miss. 262, 6 N. W. 791, 7 N. W. 144 ("capacity to understand any disposition he might in a will make of his property," allowed); *Mn.*: 1882, *Farrell's Adm'r v. Brennan's Adm'r*, 55 Mo. 324 ("sound enough to make a will," excluded); *N. C.*: 1882, *Griffin v. Ing*, 3 Dev. 224; 1882, *Boat v. Boat*, 57 N. C. 478; *Horah v. Knox*, 16 435 ("mind and intelligence sufficient to enable him to have a reasonable judgment of the kind and value of the property he proposed to will, and to whom he was willing to"; "competent or of sufficient

The capacity of an accused person to be legally responsible for the crime charged depends also upon a legal definition; and it would therefore be equally improper to ask for the witness' testimony without first eliminating the element of law from the question. But an inquiry whether he knew the difference between right and wrong, or whether his will could control his actions, would be proper.²

§ 1959. *Solvency.* In testimony to solvency, the opportunity for quibbling arises anew, and for the same reason, namely, that in strictness solvency is a matter of legal definition, and yet it is also a term commonly employed without any thought of legal definition to designate briefly a certain mercantile condition as understood by all. There is here less plausibility and less judicial support for the technical attitude than in the preceding subject.¹

§ 1960. *Miscellaneous Instances (Possession, Ownership, Necessity, Authority, etc.).* In most of the remaining instances in which this application of the Opinion rule is concerned, the difficulty arises from the employment in statutory or common-law phraseology of terms having also an untechnical use. When the issue then arises on the application of the law to the facts, and it is desired to prove that the conditions or qualities named in the law do or do not exist, a direct question upon the point in issue is often forbidden by a strict application of the Opinion rule. It seems unfortunate that a term

capacity to transact business involving a disposition of her property"; allowed); 1894, *Smith v. Smith*, 117 Id. 326, 346, 39 S. E. 270 (that the testator's mental capacity was "good," admissible; but that he "was a man of great will power," "could not be influenced by any power on earth," inadmissible); a pacific splitting of hairs, which in the name of justice caused a new trial); *Id.*: 1894, *Runyan v. Price*, 15 Oh. St. 14; *Pa.*: 1834, *Wogan v. Small*, 11 S. & E. 148 (fit to make a will, allowed); 1854, *Wilkinson v. Pearson*, 29 Pa. 189 ("capable of making a contract or transacting important business," allowed); 1861, *Daniel v. Daniel*, 39 Id. 191, 311 (whether the testator was "fit to make a will," held not error; quoted *supra*); *Tenn.*: 1835, *Gibson v. Gibson*, 9 Yerg. 331; *Tex.*: 1890, *Brown v. Mitchell*, 65 Tex. 351, 31 S. W. 623 (capacity to make a will, excluded; distinguishing preceding rulings in which the testimony had been treated as involving the question of sanity only, not the question of the legal capacity of the person); *Vt.*: 1861, *Melendy v. Spaulding*, 54 Vt. 517 ("capacity to dispose," allowed, subject to the trial Court's discretion); 1890, *Blair's Estate*, 62 Id. 359, 19 Atl. 770.

The peculiar practical difference, it may be noted, between the present application of the Opinion rule and its application to the topic of sanity (*ante*, § 1933) is of course that here even an expert, medical or legal, may not speak so as to employ a legal definition, while there it is conceded that a medical expert may always give an opinion on sanity.

¹ 1893, *Shultz v. State*, 37 Nebr. 491, 497, 26 N. W. 1090 (whether he knew the difference

between right and wrong, excluded); 1895, *Mueger v. State*, 46 Id. 493, 64 N. W. 1094 (allowed; overruling *Shultz v. State* on this point). *Contra*: 1901, *State v. Palmer*, 161 Id. 152, 61 S. W. 651 (whether an accused could distinguish between right and wrong, not allowed).
² 1845, *Lawson v. Orear*, 7 Ala. 786, *semble* (not allowed for insolvency, but allowed for pecuniary worth or for embarrassment by debts); 1846, *Masey v. Walker*, 10 Id. 290 (same); 1848, *Chenault v. Walker*, 14 Id. 154 (same); 1896, *Swan v. Gilbert*, 175 Ill. 204, 51 N. E. 604 (allowed); 1897, *State v. Boomer*, 108 Ia. 166, 72 N. W. 434 (allowed); 1835, *Com. v. Thompson*, 3 Dana 301 (that he "considered them good," allowed); 1894, *State v. Myra*, 54 Kan. 306, 38 Pac. 296 (excluded); 1871, *Hayes v. Wells*, 34 Md. 518 (excluded); 1843, *Brandred v. Tuterson M. Co.*, 4 N. J. Kq. 294, 305 (admitted; though declaring a mere opinion insufficient); 1905, *State v. Stevens*, — S. D. —, 92 N. W. 439 (whether a bank was "insolvent," not allowed, on a prosecution for receiving money when insolvent); 1846, *Hard v. Brown*, 13 Vt. 97 (allowed); 1855, *Sherran v. Blodgett*, 28 Id. 149 (same); 1856, *Richardson v. Hitchcock*, *Id.* 763 (same); 1860, *Noyes v. Brown*, 32 Id. 431 (excluded in discretion of the Court, when all the facts have been shown).

Distinguish the question whether reputation is admissible under the Hearsay rule to prove solvency (*ante*, § 1922) or as a circumstance to prove another person's knowledge of solvency (*ante*, § 273), whether a witness to solvency is qualified as to opportunity for observation (*ante*, § 660), and whether the rule for documentary originals applies (*ante*, §§ 1244, 1260).

existing in common use among laymen should be tabooed because the law also has been obliged to use it. Among Pacific islanders, upon the death of a chieftain, certain words associated with his name were put under "taboo"; they passed out of the language, and could thenceforth be used by no other member of the community. Are we to exemplify in our law of evidence this custom of the primitive Polynesians? If a witness, in the course of his testimony, comes to mention that A "possessed" or B "owned" or C was "agent," let him not be made dumb under the law, and be compelled by evasions and circumlocutions to attain the simple object of expressing his natural thought. If there is a real dispute as to the net effect of the facts, those may be brought out in detail on cross-examination.

The phrases of this class of chief occurrence are the following: whether a person was in possession;¹ whether a person was owner;² whether there was a sale, or passing of title;³ whether a person had authority as agent;⁴ whether there was a "necessity" for a road, for infant's supplies, or the like;⁵ or a "public utility" for a ditch or highway.⁶ No more detailed classification of the miscellaneous instances seems useful or practicable.⁷

¹ With the following, compare the cases cited *ante*, § 1246: 1903, *Wright v. State*, 136 Ala. 139, 34 So. 223 (admitted; "possession is a collective fact"); 1899, *Knight v. Knight*, 178 Ill. 553, 53 N. E. 306 (allowed); 1902, *Chicago v. Peck*, 196 Id. 260, 63 N. E. 711 (whether possession was surrendered by a lessee, allowed); 1902, *State v. Brundige*, 118 Ia. 92, 91 N. W. 920 ("Who occupied the upstairs of that house?", allowed); 1898, *Jacob Toms Inst. v. Davis*, 87 Md. 591, 41 Atl. 166 (from whom possession was obtained, allowed); 1861, *Knapp v. Smith*, 27 N. Y. 291 (allowed); 1877, *Miller v. R. Co.*, 71 Id. 395 (who possessed land; allowed for "uninclosed, unoccupied woodland"); 1898, *Arents v. R. Co.*, 156 Id. 1, 50 N. E. 423 (excluded); 1896, *Tetrault v. O'Connor*, 8 N. D. 15, 76 N. W. 225 (fraud of creditors; that a person was "in possession," excluded).

² With the following, compare the cases cited *ante*, § 1246: 1892, *Steiner v. Tramm*, 96 Ala. 315, 13 So. 365 (personality; allowed); 1903, *Hannicutt v. Higinbotham*, — Id. —, 35 So. 469 (money; allowed); 1903, *Benson v. Files*, 70 Ark. 423, 68 S. W. 493 (that the witness was "owner" of land, excluded); 1899, *Murphy v. Abording*, 107 Ia. 547, 78 N. W. 306 (personality; allowed); 1859, *Danlap v. Hearn*, 37 Min. 478 (excluded); 1877, *Wolf v. Williams*, 69 N. Y. 421 (who owned a house; allowed); 1877, *Miller v. R. Co.*, 71 Id. 385 (who owned land; excluded); 1903, *Piehler v. Reese*, 171 N. Y. 577, 64 N. E. 441 (claimant's testimony to ownership of personality; admitted); 1882, *Gilbert v. Odum*, 69 Tex. 673, 7 S. W. 510 (land; excluded).

³ 1902, *Ward v. Shirley*, 131 Ala. 548, 32 So. 499 (that a sale was absolute and unconditional, excluded); 1896, *Blockley v. White*, 96 Ga. 594, 25 S. E. 592 (that "title passed from B. to R.," excluded); 1894, *Burnap v. Sharpsteen*, 149 Ill. 225, 235, 36 N. E. 1006 (that a deed was delivered, excluded); 1898, *Evans v. Gerry*, 174 Id. 593, 51 N. E. 615 (title-examiners not admitted,

in a bill for conveyance, to show title to be defective); 1896, *Ward v. Dickson*, 96 Ia. 706, 35 N. W. 998 (by an alleged vendor, whether he had sold the article; excluded); 1897, *Wright v. Wright*, 80 Kan. 529, 80 Pac. 444 (by one who merely heard testimony, as to the title to a certificate, excluded); 1880, *Nicolay v. Unger*, 80 N. Y. 57 (the issue being whether bonds were pledged or were sold, a statement that they were sold was excluded).

For the application of the rule about producing the original document, see *ante*, § 1247.

⁴ 1884, *Hendley v. Hammond*, 63 Ia. 608, 19 N. W. 794 (allowed); 1873, *Short Mountain Coal Co. v. Hardy*, 114 Mass. 197 (excluded); 1876, *Providence Tool Co. v. Mfg. Co.*, 120 Id. 57 (same); 33, *Knapp v. Smith*, 27 N. Y. 291 (whether a person had acted as agent or for himself, allowed); 1847, *Steamboat Albatross v. Wayne*, 16 Oh. 513, 514 (whether "he considered himself authorized," excluded); 1901, *Farrell v. U. S.*, 49 U. C. A. 183, 110 Fed. 942 (whether the witness as Indian agent had authority over a certain Indian, excluded; but whether he exercised control in fact, admitted).

⁵ 1899, *Miller v. Mayer*, 124 Ala. 434, 26 So. 698 (whether the sale of an intestate's property to pay debts was necessary, excluded); 1892, *Detroit v. Brennan*, 93 Mich. 338, 53 N. W. 526 (whether the opening of a street was necessary, excluded); 1895, *Grand Rapids v. Bennett*, 106 Mich. 523, 64 N. W. 585; 1892, *Merritt v. Seaman*, 6 N. Y. 175 (whether articles for an infant were necessities, excluded); 1889, *Barwell v. Sneed*, 104 N. C. 120, 10 S. E. 152 (whether a road was necessary, excluded).

⁶ 1883, *Loshbaugh v. Birdsell*, 90 Ind. 446 (excluded); 1883, *Yost v. Conroy*, 92 Id. 470 (same); 1896, *Johnson v. Anderson*, 143 Id. 493, 42 N. E. 818 (same).

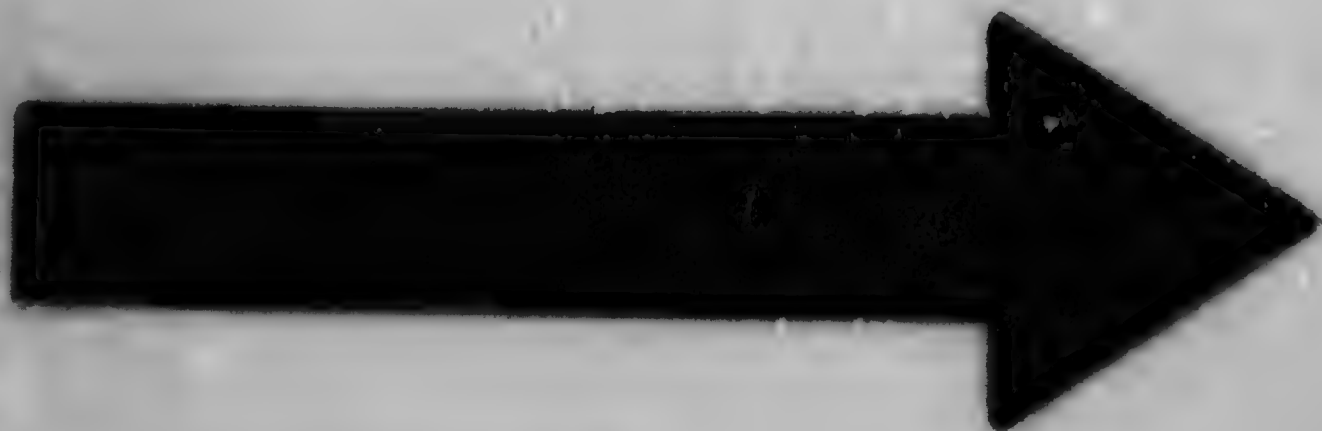
⁷ 1873, *Avary v. Searey*, 50 Ala. 55 (whether a fence was a "partition fence," allowed); 1853, *Lindaner v. Ina. Co.*, 13 Ark. 470 (whether a

6. State of Mind (Intention, Feelings, Knowledge, Meaning, Understanding, and the like).

§ 1962. **General Principle.** The application of the Opinion rule to these topics is involved in special difficulty. The difficulty lies in the necessity of distinguishing a number of principles potentially applicable, with varying results, to the same evidence, and in the plausibility of certain erroneous applications. The clearest understanding will perhaps be reached by taking up first the cases in which the Opinion rule is genuinely concerned, and afterwards those in which some other doctrine is involved. Among the former, moreover, we may distinguish conveniently between those in which the testimony is (1) as to another person's state of mind in general, as inferred from his conduct alone, and (2) those in which the special state of mind in question is the meaning or sense in which he used words.

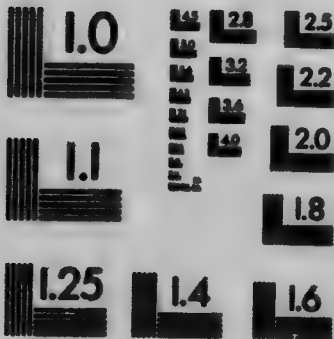
Now the theory on which the Opinion rule is invoked (*ante*, § 1918) is that the conduct and other circumstances, from which the eye-witness drew the inference as to the person's state of mind, may be detailed to the jury so as to equip them equally well to draw the inference. For instance, the witness (as in one ruling) may not be allowed to state whether in his opinion the person heard what was said to him; the witness must, that is, detail

defendant was bound by contract, excluded); 1922, *Kreuzberger v. Wingfield*, 96 Cal. 251, 264, 51 Pac. 109 (whether work had been done according to the terms of a contract, allowed); 1908, *Union Sheet M. W. v. Dodge*, 129 id. 390, 63 Pac. 41 (whether a bond was a statutory one, excluded); 1898, *People v. Reed*, — id. —, 52 Pac. 935 (whether a killing was done in self-defense, inadmissible); 1873, *Mobley v. Bred*, 48 Ga. 44, 47 (whether certain proceedings were according to law, excluded); 1895, *Cunneen v. State*, 95 id. 330, 32 S. E. 539 (on a charge of "carrying on" an illegal business, whether the accused did not carry it on, excluded); 1873, *Chicago & A. R. Co. v. R. Co.*, 67 Ill. 143 (whether there was duty to keep in repair, excluded); 1902, *People v. Lehr*, 196 id. 361, 63 N. E. 725 (whether certain conduct was "practicing medicine" under a statute, excluded); 1902, *Trout v. Merchants' Life Ass'n*, 198 id. 431, 64 N. E. 992 (on an issue of suicide, expert testimony that the deceased's wound was self-inflicted was held inadmissible); 1893, *Hilton v. Mason*, 22 Ind. 148 (whether a railroad was finished, allowed); 1901, *Hicks v. Williams*, 112 Ia. 601, 64 N. W. 935 (whether the witness had paid the amount due on a note, excluded); 1895, *Gentry v. McMinis*, 3 Dana Ky. 30 (whether a person was free, not slave, allowed); 1898, *Studebaker R. M. Co. v. Eudom*, 60 La. An. 674, 23 So. 572 (whether a note was owed, allowable); 1898, *Carter v. Clark*, 52 Mo. 225, 43 Atl. 398 (whether a fence was near the line of a certain estate, allowed); 1896, *Metropolitan Sav. Bank v. Munion*, 67 Md. 44, 29 Atl. 90 (whether a number of windows in a stable would create a nuisance, excluded); 1898, *O'Donnell v. Pollock*, 170 Mass. 441, 49 N. E. 745 ("who kept the dog" whose bite was cured for, excluded); 1898, *McIntee v. Lighting Co.*, 178 id. 89, 51 N. E. 534 (whether inspection was part of a lineman's work, excluded); 1900, *Mulhall v. Fallon*, 176 id. 264, 87 N. E. 395 (whether the mother of a deceased, in a statutory action for death, was "dependent" upon him, allowed); 1904, *Majors v. State*, — Minn. —, 35 So. 624 (whether a certain stick was a deadly weapon, excluded, the stick having been exhibited to the jury); 1897, *Peck v. Tingley*, 53 Nebr. 171, 73 N. W. 450 (to whom the consideration moved, excluded); 1884, *Sweet v. Tuttle*, 14 N. Y. 471 (on whose behalf services were rendered, this being a main issue, allowed); 1903, *State v. Ehinger*, 67 Oh. 51, 65 N. E. 148 (under a statute forbidding the sale of a substance in the form of butter and made as a substitute for and in imitation of butter, an expert was allowed to testify that a particular substance "looked like and was a substitute for or imitation of butter"); 1845, *Merts v. Detweiler*, 8 W. & S. 376 (physician's responsibility in case of a patient's disregard of advice, excluded); 1855, *McCandless v. McWha*, 25 Pa. 95 (*contra* to preceding case); 1895, *Owens v. Lancaster*, 193 id. 436, 44 Atl. 559 (whether a sewer was a nuisance, excluded); 1897, *Erickson v. Sophy*, 10 S. D. 71, 71 N. W. 759 (whether a thing was done according to contract, excluded); 1900, *Henry v. Taylor*, — id. —, 33 N. W. 641 (whether a person was adopted, and whether two persons were married, inadmissible); 1899, *National Cash-Register Co. v. Leland*, 37 C. C. A. 372, 84 Fed. 502 (patent-infringement; whether certain machine-parts were "mechanical equivalents," allowed; whether a certain omission was a "fatal fault," not allowed).



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where the persons were, their distance apart, the previous incidents of their meeting, their subsequent conduct, and anything else he can remember as bearing upon the matter; then the jury will be equally well fitted to draw the inference. Can anything be said in answer to this? One might argue that the witness could hardly be expected to recall on the stand every salient circumstance of the occasion; and that, so far as he could recall them, he would be unable to express or reproduce each subtle suggestion in its full significance; and that, so far as he did, there would thus be introduced by him new inferences, which must either call for a sacrifice of consistency or else must in turn be reanalyzed into a labyrinth of data which no human witness could cope with; and, finally, that this multifarious reproduction of data would in the end so confuse the jury that their own inference would be much less trustworthy than that of the witness. But after all, argument is of little service in such a matter. No reasoning can avail against the perverse and morbid attitude which will invoke the Opinion fetish to exclude such testimony.

§ 1963. (1) *Testimony to a State of Mind, in general (Intention, Motive, Purpose, Feelings, etc.).*¹ There are found numerous rulings excluding, under the Opinion rule, statements by observers involving *sundry inferences* as to another person's state of mind,² and even as to his own state of mind.³ In other jurisdictions, the testimony has been expressly sanctioned.⁴ In particular, a

¹ Testimony to external appearance of an emotion, or the like, is dealt with *post*, § 1974.

² 1886, *Hartman v. Rogers*, 69 Cal. 646, 11 Pac. 531 (nature of intention not specified); 1896, *Lovell v. Hammond Co.*, 66 Conn. 500, 34 Atl. 511 (whether another witness had any grounds for his assertion); 1892, *Gardner v. State*, 90 Ga. 310, 315, 17 S. E. 86 (by a bystander, as to the deceased's object in struggling for a pistol); 1876, *Carpenter v. Calvert*, 83 Ill. 70 (whether a devisee's influence was due to the testator's fear or affection); 1882, *Dyer v. Dyer*, 87 Ind. 19 (whether another person heard what was said); 1875, *State v. Maxwell*, 42 Ia. 209 (by an inmate of a house entered by defendant, that he did not intend to steal); 1883, *Sweet v. Wright*, 62 Id. 217, 17 N. W. 468 (good faith of a sale); 1884, *Crittenden v. Com.*, 82 Ky. 168 (whether defendant was impatient; whether he was looking for the deceased, was "mad," and would hurt him); 1899, *Tucker v. State*, 89 Md. 471, 43 Atl. 778 (as to the impression produced on R.'s mind by J.'s attack on R., defendant excusing the killing of J. as done in defence of R.; excluded); 1875, *Hathaway v. Brown*, 22 Minn. 214 (whether the witness-vendee knew that M. the vendor had a purpose to defraud creditors; not decided); 1893, *Cole v. R. Co.*, 95 Mich. 77, 80, 54 N. W. 638 (whether a person was shamming); 1881, *Abbott v. People*, 86 N. Y. 461, 471 (murder; a witness' opinion as to how he understood the deceased to mean in reaching for a wrench just before the fatal blow); 1896, *People v. McLaughlin*, 150 Id. 865, 44 N. E. 1017 (bribery; one who has paid money to B. for a police-captain cannot say that he paid

it to B. for the defendant, because it involves the "conclusions of the witness, his purpose, or the object of another person"; a ruling sufficiently ridiculous); 1885, *State v. Vines*, 93 N. C. 497 (whether the shooting of a pistol was accidental); 1876, *Sinnott v. Mullin*, 82 Pa. 337, 342 (purpose in building a wall); 1893, *Hamer v. Bank*, 9 Utah 215, 33 Pac. 941 (what motive P.'s words and conduct showed); 1901, *Watson v. Mining Co.*, 34 Id. 322, 66 Pac. 1067 (expert opinion as to defendant's intention in running a mine-incline); 1897, *Martin v. S. T. & T. Co.*, 18 Wash. 260, 51 Pac. 376 (action for damages by loss of suit through defendant's failure to transmit a message to a material witness; question to one present at the trial, whether the testimony of the absent witness would have changed the verdict, excluded).

³ 1885, *Brant v. Gallup*, 111 Ill. 487, 492 (opponent's explanation of his motives in writing certain letters introduced as admissions, excluded); 1890, *Flower v. Brumbach*, 131 Id. 646, 652, 23 N. E. 395 (fraudulent representations; defendant's testimony as to his intent not to mislead therein, excluded).

⁴ 1872, *People v. Sanford*, 43 Cal. 32 (whether a dying man's mind was clear or not); 1887, *People v. Ching Hing Chang*, 74 Id. 394, 16 Pac. 201 (by a person robbed, as to defendant's intention to rob him); 1895, *Taylor v. People*, 21 Colo. 426, 43 Pac. 653 (the accused, testifying that he thought the deceased was going to shoot); 1851, *Berry v. State*, 10 Ga. 514, 529 (that another person apparently knew of a certain fact); 1859, *Pelamoures v. Clark*, 9 Ia. 16 (feelings of another person toward the speaker);

surveyor may state whether certain monuments or marks were intended as boundaries;⁵ and a witness may state whether he has any bias or ill-feeling.⁶

How baseless the exclusionary rulings are in the orthodox practice of the common law may be seen in the following extracts from the annals of two generations of English trials:⁷

1793, *Frost's Trial*, 22 How. St. Tr. 484; the witness had testified to the defendant's utterance of seditious words at a coffee-house; "I said he ought to be turned out of the coffee-room; upon which he walked up the room and placed his back to the fire, and wished, I believe, rather to retract, if he could have retracted, what he had said." Cross-examined: "What do you mean by saying, he wished to retract?" "I rather thought he was sorry for what he had said; that is what I mean by it."

1799, *Earl of Thanet's Trial*, 27 How. St. Tr. 927; charge that the defendant obstructed the officers and aided O'Connor, a prisoner, to escape during his trial; Richard Brinsley Sheridan on the stand for the defence; Mr. Law (afterwards L. C. J. Ellenborough) cross-examining for the prosecution: "My question is whether, from what you saw of the conduct of Lord Thanet and Mr. Fergusson, they did not mean to favour the escape of O'Connor?" "I will say that I saw nothing that could be auxiliary to that escape." "I ask you again whether you believe [as above]?" "I have no doubt that they wished he might escape; but from anything I saw them do, I have no right to conclude that they did." "I will have an answer. I ask you again [as above]?" "If the learned gentleman thinks he can entrap me, he will find himself mistaken." Mr. Erskine, for the defence: "It is hardly a legal question." Kenyon, L. C. J.: "I think it is not an illegal question."

1820, *R. v. Hunt*, 1 State Tr. n. s. 171, 370, 377; seditious utterances; *Witness*: "My impression was [from the words and conduct] that you [the defendant] merely wished the people to stand, and to prevent danger from their running away"; Mr. Scarlett, for the prosecution, objected to any questions respecting the witness' impressions of what was said; *Bayley, J.*, "said the witness had a right to give his impressions of what he had seen and heard"; . . . "From what you observed and knew, had you reason to think that their spirits were somewhat exasperated?" "Yes; I think many of the working class were very much discontented."⁸

1896, *Kuen v. Upmier*, 98 id. 393, 67 N. W. 374 (whether another person understood English); 1896, *State v. Baldwin*, 36 Kan. 10, 12 Pac. 318 (in good spirits; in fear; nervous; apathetic, etc.); 1898, *Tobin v. Shaw*, 45 Mo. 348 (depression, after breach of promise of marriage); 1903, *Sellman v. Wheeler*, 95 Md. 751, 84 Atl. 512 (that an injury "made me nervous"); 1925, *McKee v. Nelson*, 4 Cow. 355 (that another person was sincerely attached); 1898, *Schmick v. Noel*, 72 Tex. 3, 8 S. W. 83 (good faith of a sale, the seller being the witness).

⁵ 1826, *Davis v. Mason*, 4 Pick. 157; 1877, *Knox v. Clark*, 123 Mass. 217; 1858, *Stevens v. West*, 6 Jones L. 53; 1859, *Clegg v. Fields*, 7 id. 39. Distinguish the rule about construction of documents (*ante*, § 1956).

⁶ 1879, *Butler v. State*, 34 Ark. 494 (ignoring the contrary *obiter dictum* in *Cornelius v. State*, 1832, 12 id. 801); 1901, *Blanchard v. Blanchard*, 191 Ill. 450, 61 N. E. 481; 1859, *State v. Adams*, 14 La. An. 630 ("Are you not anxious that the defendant should be convicted?"; admitted); 1881, *State v. Willingham*, 33 id. 537 (where the objection was a different and unconnected one); 1881, *State v. Gregory*, ib. 743; 1884,

State v. Kane, 36 id. 154 (like *State v. Adams*, with special features); 1885, *State v. Melton*, 37 id. 77, 78; 1880, *State v. Miller*, 71 Mo. 591.

For a question "whether A. is telling the truth, if he says so-and-so," see *ante*, § 787.

⁷ The Answer of the Judges (quoted *ante*, § 661), given in 1791, is explicit.

⁸ Other instances are as follows: 1794, *Horne Tooke's Trial*, 25 How. St. Tr. 420 ("From what you know of the professed objects of this Convention, . . . have you any reason to believe anything criminal was intended?" this question being put to many witnesses); 1800, *Tandy's Trial*, ib. 1215 (on the issue whether a person, who could have avoided attainder by surrender before a certain date, was able and intended at a certain time to surrender, the question to a competent person was allowed: "Can you form any belief of the object or intention with which he sought at any time to be set at liberty?"); 1817, *Watson's Trial*, 33 id. 67 (that a person must have heard a thing which was read, allowed); 1830, *Queen Caroline's Trial*, Linn's ed., I, 150 (whether the witness knew what a certain person's motions, said to be lewd, were intended to represent, allowed).

§ 1964. *Same: Rule of Testimonial Knowledge (of Another's Intention), distinguished.* It has sometimes been argued that one person's testimony to another's intention (or other state of mind) is always and radically inadmissible because one person *cannot possibly know* what another's state of mind is. This argument appeals to a rule of Testimonial Qualifications, requiring Knowledge (*ante*, § 661), and has sometimes received judicial sanction.¹

§ 1965. *Same: Rule of Testimonial Interest (One's Own Intention), distinguished.* Testimony to one's own intention, or other state of mind, has often been attacked on the ground of what is really a *disqualification by Interest* (*ante*, § 581); i. e. the argument is that, since a person's own intention can be known only to himself, his statement of what it is or was cannot be safeguarded by the possibility of exposing its falsity, through the aid either of conflicting circumstances or of opposing eye-witnesses; and that thus the influence of self-interest in falsifying is too dangerous, and that such testimony should consequently be forbidden. This argument has been generally repudiated.¹

§ 1966. *Same: Alabama Doctrines.* The foregoing supposed principles, i. e. disqualification by interest to speak of one's own intention, disqualification by lack of knowledge to speak of another's intention, and the Opinion rule proper (*ante*, §§ 1963-1965), have made hopeless confusion in the rulings of the Court of Alabama. By accepting in full the two former undesirable principles, by confusing them and the Opinion rule, and by occasionally ignoring some precedents and misusing others, the law there is now in such a state that not only is it difficult to say what the rule is, not only is heterodoxy disseminated by the citation of such precedents in other Courts, but it is hard to see, in view of the apparently comprehensive rules of exclusion, how any intelligent legal inquiry at all can there be conducted upon these points.¹

¹ The cases on both sides are collected *ante*, § 661. Whether a Court is ruling upon that ground or the present one is sometimes difficult to learn.

² The cases are collected *ante*, § 581.

³ The various rulings may be classed roughly into four series:

(1) In *Barnett v. Stanton*, 2 Ala. 187 (1841), it was said that a mere assertion of value by a seller is not a warranty, being "mere matter of opinion, not knowledge"; this case and its successors, *Williams v. Cannon*, 9 id. 350 (1846), and *Bradford v. Bush*, 10 id. 390 (1846), which had required the jury to determine the question whether the language was a mere assertion or something more, were then taken, in *Sledge v. Scott*, 56 id. 207 (1876), as involving this consequence, that on such a matter of opinion no witness, even the purchaser, could speak; this was, of course, a mere juggle on the word "opinion," and the absurd and unheard-of consequence was reached that a buyer could not testify that "he relied on the seller's representations as to soundness, and would not have made the purchase but

for the representations"; on the same theory similar evidence was rejected in *Baker v. Trotter*, 73 id. 281 (1882).

(2) At the same time a parallel line of decisions, dealing with cases of illegal transfers and other acts, took the course of excluding evidence by one person, however familiar with the transaction, of the intention of any other person, on the ground that "a witness can only depose to such facts as are within his own knowledge," and the intention of another person "however strongly he might be justified in believing to be as stated, he could not know," i. e. the requirement of a Knowledge-Qualification is wanting: 1843, *Planters', etc., Bank v. Borland*, 5 Ala. 546 (testimony of an alleged fraudulent grantor as to the grantee's fraudulent intention); 1845, *Pecke v. Stout*, 8 id. 547 (same); 1846, *Whetstone v. Bank*, 9 id. 586 (testimony of one party to an alleged illegal contract as to the other's intention); 1860, *Clement v. Cureton*, 36 id. 121, 124 (the motive of another person in selling a slave to a third person); 1877, *Sternan v. Marx*, 58 id. 609 (that another person would not have paid

§ 1967. Same: Rules of Substantive Law, distinguished (Dedication, Fraudulent Transfer, Will, Ballot, Crime, and the like). The substantive law may declare the intent of a person to be immaterial; in that case, testimony to his intent, from himself or from any one else, will be excluded, but not by virtue of the Opinion rule or of any other rule of evidence. For example, in considering whether land has become a *highway by dedication* of the owner, his intention to dedicate may be proper to regard; while, on the other hand, if his outward conduct has amounted to a dedication, a secret intention to the contrary may not be allowed to affect the result.¹

The fraudulent intent of an *insolvent debtor transferring his property* is

(for goods taken); 1886, *Adams v. Thornton*, 82 id. 263, 3 So. 20 (the reason why an assignment was made); 1895, *Bailey v. State*, 107 id. 151, 18 So. 234 (by A, that the defendant knew of a fact); 1896, *Gunter v. State*, 111 id. 23, 20 So. 632 (by an eye-witness, whether a shooting was accidental); *contra*: 1873, *Ray v. State*, 50 id. 107 (where the defendant admitted having the stolen article, and the witness was allowed to answer whether he "supposed" the defendant was jesting when he made the admission).

(3) It will be observed that in par. (1) the cases deal with the statement of a witness, usually a party to a warranty-contract, as to his own reliance or similar mental attitude, while in par. (2) they deal with one person's statement about another person's mental attitude in general; there come next a line of cases which the *decisions* in par. (2) are applied as precedents to the class of *situations* of par. (1) (representations, warranties, etc.), while a *reason* is given which differs totally from that in either of the above groups; i. e. there is laid down a general principle that no person may testify to his own mental attitude (motive, design, emotion), on the ground that "secret, uncommunicated motives of their own conduct" are "inaccessible to contradiction"; this is really on principle a disqualification on account of interest; and indeed most of the decisions confine the rule to the parties to a case; that this principle was a new one appears from the fact that in *Peake v. Stout*, 1845, *supra*, par. (2), the witness' statement of his own intention was admitted; the subsequent rulings are: 1875, *Oxford Co. v. Spradley*, 51 Ala. 176 (a note given for alleged illegal purposes; the defendant's testimony as to his intention or purpose was ruled out in the following language, which is so curious that it deserves recording: "It would embarrass the jury to do so [find as to the intention], if he simply told them what was his intention"); 1878, *Herring v. Skaggs*, 62 id. 167 (whether the buyer would have taken a safe, had he known the truth); 1891, *Wheless v. Rhodes*, 70 id. 420 (to which claim the witness intended to apply a payment); 1892, *Barns v. Campbell*, 71 id. 291 (whether a mortgagee approved a seizure); *Alexander v. Alexander*, ib. 299 (whether the grantor intended to deliver a deed); *Burke v. State*, ib. 323 ("a prisoner cannot state his own uncommunicated belief, motive, or intention"; here an assault case); *Whigenant v. State*, ib. 384 (same principle); 1893, *Wilson v. State*, 73 id. 527, 533 (whether a complainant

in seduction yielded in reliance upon a promise of marriage); 1894, *McCormick v. Joseph*, 77 id. 240 (testimony by a seller that he would not have sold had he known of the insolvency of the buyer); 1895, *Alabama F. Co. v. Reynolds*, 79 id. 506 (warranty-representations; *Sledge v. Scott, Baker v. Trotter, McCormick v. Joseph*, followed); 1898, *Sharpe v. Hall*, 86 id. 115, 5 So. 497 (the intention of a draughtsman as to making the document a will or a deed); 1899, *Dean v. State*, 105 id. 21, 17 So. 32; *Ellis v. State*, ib. 72, 17 So. 119; *Dent v. State*, ib. 14, 17 So. 24; 1899, *Manchester F. A. Co. v. Feibelman*, 118 id. 308, 23 So. 759 (by one giving consent for a transfer, as to who he thought the assignee was); 1893, *Hinds v. Keith*, 13 U. S. App. 232, 238, 6 C. C. A. 231, 57 Fed. 10 (creditor's good faith in purchasing from debtor); 1901, *Fitzpatrick v. Brigman*, 130 Ala. 450, 30 So. 500 (grantor's testimony to his intent in delivering a deed); 1903, *Holmes v. State*, 136 id. 80, 34 So. 180 (by a defendant, what he was going to do with a pistol); in some of the above excluding cases, *e. g.* *Sharpe v. Hall* (par. 3), the testimony was of course improper under the Parol Evidence rule, according to which the whole question of intention is irrelevant, without regard to mode of proof; but the above doctrine expressly treats it as relevant and merely excludes a particular mode of proof.

(4) Of late years, the practical disadvantages of these exclusions have apparently led to some sort of a conceded exception for testimony to one's own state of mind, resting on no particular principle and not precisely defined: 1894, *Johnson v. State*, 102 Ala. 1; 16 So. 99 (explanation of a witness' assertion of ignorance of a matter, "I did not want to talk about it," admitted); *Anderson v. State*, 104 id. 83, 16 So. 108 (similar); 1899, *Linehan v. State*, 120 id. 293, 25 So. 6 (manslaughter; defendant may be cross-examined as to his purpose and motive); 1899, *Williams v. State*, 123 id. 39, 26 So. 521 (admissible on rebuttal to explain a witness' self-contradiction or an accused's relevant act); 1904, *Dimmick P. Co. v. Wood*, — id. —, 35 So. 885 (loss of service of the plaintiff's son, hired without the plaintiff's consent by the defendant; "state whether you consented," to the plaintiff, held allowable).

¹ 1884, *Indianapolis v. Kingsbury*, 101 Ind. 213 (secret intention not to dedicate a way is immaterial, where the conduct amounts to a dedication).

usually material, under the law on the subject; but the fraudulent intent of the assignee is usually not material, because the transfer will under the usual statute be set aside if only the assignee had notice of the insolvency, and whether or not he intended to defraud creditors.² Whether it is an essential element of a *crime* that a guilty intent or some other specific intent should exist, or whether the doing of a given act is alone sufficient, depends on the law of crimes; for in many statutory offences no specific intent is essential.³ There are many other situations in which under the substantive law a state of mind may or may not be a part of the issue,—the mental state of a testator with reference to insanity or undue influence; in an action for deceit, the plaintiff's reliance upon the defendant's representations; in an action for a broker's commission, the purchaser's persuasion by the plaintiff's efforts as broker.⁴ Whether or not the motive, reason, or other state of mind, may be proved, is in all these not a question of evidence-law (*ante*, § 2).

The Parol Evidence rule (*post*, § 2400), which is in truth a doctrine of substantive law and involves the constitution of legal acts, sometimes raises questions of this sort. Whether a *testator* intended to place a certain clause in his will (*post*, § 2471), whether a *voter* intended to vote for the person whose name is on his ballot (*post*, § 2421), and the like, depends upon whether the actor's intention is to be allowed in substantive law to control the legal effect of his act. If it is, then testimony to that intent is receivable; if not, then inadmissible; but the exclusion has nothing to do with the Opinion rule or any other rule of evidence.

§ 1968. *Same: Declarations of Intent, distinguished (as involving a Verbal Act or a Hearsay Exception).* Supposing one's intent or other state of mind to be material under the substantive law, the question arises whether the person's extrajudicial declarations are receivable under an Exception to the Hearsay Rule (Statements of a Mental Condition), already dealt with (*ante*, § 1714). So, also, such declarations of intent may sometimes be receivable, apart from any exception to the Hearsay rule, so far as they are offered not as assertions, but as conduct qualifying or explaining other equivocal conduct which has to be interpreted; such utterances are receivable as Verbal Acts (*ante*, §§ 1772–1786).¹

§ 1969. (2) *Testimony to the Meaning of a Conversation or Other Utterance ("Impression" or "Understanding" conveyed by Language).* The Opinion rule is sometimes argued to exclude a witness' statement as to the *effect of a conversation* or the *meaning intended* to be conveyed, because that meaning or impression or effect is merely an inference from the observed data of

² 1871–72, *Hathaway v. Brown*, 18 Minn. 423 (fraudulent transfer; the assignee's notice, but not his intention, being held alone material, the question was held irrelevant).

³ 1879, *Halsted v. State*, 41 N. J. L. 553.

⁴ 1874, *Mansell v. Clements*, L. R. 9 C. P. 139 (the question being whether an agent had been the cause of a sale and thus earned his commission, the inquiry put to the purchaser was held proper: "Would you, if you had not

gone to the plaintiff's office and got the card, have purchased the house?").

¹ The following case will illustrate the frequent superficial resemblance between such a case and some of the preceding ones, as regards the mere form of the question or answer: 1895, *Swerdferger v. Hopkins*, 67 Vt. 136, 31 Atl. 153 (a former possessor said that he "understood" his line to run in a certain place; here his belief was treated as amounting to a claim).

the occasion, i. e. the words used, and these he should reproduce to the jury without his inferences.¹ The answer to this argument is that already set forth (*ante*, § 1962). It ought not to be necessary to point out that what is unsaid in words may yet be conveyed with equal clearness and positiveness. "You cram these words into mine ears, against the stomach of my sense." Common experience forbids us to assume that at every time and from every person mere words are a complete index of the meaning which the hearer knew to accompany them :

1881, *Smith, J.*, in *Fiske v. Gowing*, 61 N. H. 432 (effect of a conversation) : "It rarely happens that two persons are able to give precisely the same account of a conversation. Their narration will differ more or less according to their intelligence, their interest in the subject-matter, their opportunities for hearing, their prejudices for or against the parties, the lapse of time since the conversation occurred, and a variety of other circumstances. Emphasis thrown upon the wrong word might convey a meaning different from that originally intended. Often the manner in which a remark is made, and the conduct and appearance of the party, may have much to do in producing the understanding that was received, much of which it is difficult and sometimes impossible for a witness to describe."²

¹ Excluded: 1899, *Fields v. Copeland*, 121 Ala. 644, 26 So. 491 (whether the parties disputed or agreed in a conversation); 1899, *Baker v. State*, 122 id. 1, 26 So. 194 (that a person had "made arrangements" for his crop); 1894, *Whitmore v. Ainsworth*, — Cal. —, 38 Pac. 196 (that A had a paper which he wanted the witness to sign); 1892, *U. S. v. Cross*, 20 D. C. 576 (whether defendant's threats "amounted to anything," i. e. were seriously meant); 1873, *Peterson v. State*, 47 Ga. 524, 528 (the impression, made by the defendant's confession, that deceased was attacking him); 1879, *Hewitt v. Clark*, 91 Ill. 608 (effect of a conversation); 1859, *Williams v. Dewitt*, 13 Ind. 309, 311 (one who had given the facts as to an arbitration, not allowed to state his understanding whether the parties made a settlement); 1901, *Diehl v. State*, 157 id. 549, 62 N. E. 51 (witness' "understanding" as to defendant's representations of his relation to a woman, excluded); 1892, *State v. Brown*, 86 Ia. 121, 124, 53 N. W. 92 (the witness' understanding of what A said); 1903, *Plano Mfg. Co. v. Kautenberger*, — id. —, 96 N. W. 743 (that defendant "fully understood" the terms of a settlement); 1876, *Shepard v. Pratt*, 16 Kan. 311 (effect of a conversation); 1872, *Atchison v. King*, 9 id. 556 (name); 1873, *Da Lee v. Blackburn*, 11 id. 202 (same); 1843, *Whitman v. Freese*, 23 Me. 187, *semble* ("what place he supposed the defendant meant" by words used in forming a contract alleged to be illegal); 1819, *Burt v. Gwinn*, 4 H. & J. 509, 517, *semble* (where the witness "understood and presumed" that certain money was retained by a co-transactor for a certain purpose); 1850, *Ives v. Hamlin*, 5 Cush. 535 (effect of conversation); 1895, *Peerless Mfg. Co. v. Gates*, 61 Minn. 124, 63 N. W. 260 (whether the defendant agreed to do a thing and did do it, was excluded; but, whether a witness had authority to sell, was admitted); 1844, *Braley v. Braley*, 16 N. H. 431 (when the words have been given,

the witness cannot state what meaning was intended); 1844, *Hibbard v. Russell*, ib. 417 (same); 1850, *Hoitt v. Moulton*, 21 id. 588 (same); 1859, *State v. Flanders*, 38 id. 333 (same); 1823, *Cutler v. Carpenter*, 1 Cow. 62 (belief as to the unexpressed meaning in a conversation); 1887, *People v. Sharp*, 107 N. Y. 461, 14 N. E. 319 (the witness, an alderman, was given a roll of bills, said by the donor to be for election expenses, but the witness "supposed it was for the Broadway road," i. e. the franchise alleged to have been procured by bribery; excluded; an indefensible ruling); 1854, *Crowell v. Bank*, 3 Oh. St. 412 (understanding of what was meant; this opinion, often cited, is particularly full of fallacies); 1895, *Norton v. Parsons*, 67 Vt. 526, 32 Atl. 481, *semble* (the meaning of defendant in a conversation involving an admission). In *Goodman v. Kennedy*, 10 Nebr. 274, 4 N. W. 987 (1880), an "understanding" as to when title passed was declared improper, apparently as involving opinion upon matter of law.

The truth is that in some of the above rulings, while the Opinion rule is the ostensible weapon of exclusion, the real objection in the mind of the Court is the Completeness rule (*post*, § 2102), i. e. the principle that the evidence must furnish the substance or the entirety of the words used.

² Accord: 1903, *Shafer v. Hausman*, — Ala. —, 35 So. 691 (whether "the agreement" was as specified); 1894, *Garrett v. Tel. Co.*, 92 Ia. 449, 452, 58 N. W. 1064, 60 N. W. 644 (whether there was an understanding that a thing should be done; a contract being in issue); 1895, *State v. Earnest*, 56 Kan. 31, 42 Pac. 359 (who was referred to in a conversation); 1873, *Atwood v. Cornwall*, 28 Mich. 336, 339 (a statement "that he understood C. to admit the fact is not given as an expression of opinion but as a fact, and is the only way in which conversations can often be proven"); 1895, *Walker v. R. Co.*, 104 id. 606, 62 N. W. 1032 (that a person had "instructed" another to act); 1895, *Woodworth v.*

§ 1970. **Same: Rule of Testimonial Knowledge (excluding "Impression" or "Belief") distinguished.** (1) If a witness' "impression" or "belief" of what he speaks of appears to have been based, *not on personal observation*, but on a mere guess or upon rumor, he may be excluded, as not qualified by knowledge.¹ (2) If a witness, though speaking from personal observation, has only an *indistinct recollection*, so that he can venture no more than an "impression" or "belief," this is on principle no objection to his testifying to the best of his memory or impression; though some Courts do not concede it.² But it is clear that the propriety of excluding an "impression" on either of these grounds above-named is no excuse for excluding it because of the Opinion rule.

§ 1971. **Same: Rules of Substantive Law, distinguished; (a) Understanding of a Party to a Contract; (b) Intention in Libel or Slander; (c) Parol Evidence Rule.** One source of confusion which may have caused some of the exclusionary rulings in the preceding sections has been that facts of a similar sort are often *immaterial with reference to the issues of the case*, as determined by principles of substantive law. Here the *factum probandum* has no place in the case, and hence no testimony, however good, on that point is desired (*ante*, § 2).¹

(a) **Contract: "Understanding" of a Party or the Parties.** By the modern law of contract, the mere state of mind of the parties—with reference to a "meeting of minds"—is not the essential object of inquiry.² The terms of the promise-act, then, are to be determined by an external, not an internal standard, i. e. by the sense or significance of its words as reasonably understood by the promisee. Hence neither the particular "understanding" of the promisor, nor the particular "understanding" of the promisee, is necessarily the test of the sense to be accepted and enforced by the law; the promisee's "understanding," if not a reasonable one, may equally be rejected. Nevertheless, for two reasons it is usually necessary to inquire what the "understanding" of each party was; first, because it may appear that both gave the same sense to the words, and thus no conflict will exist and the common sense may be accepted and enforced; and, secondly, because, if there is a conflict, the different senses must be examined. It thus appears that we must discriminate between *enforcing* the private "understanding" of one party, and *receiving evidence* of such a private "understanding." Rulings of exclusion will usually or often mean in reality, not that the evidence should not be listened to, but that the private "understanding" will not be enforced; and practically this may in a given instance be a correct enough result.³

Thompson, 44 Nebr. 311, 62 N. W. 450 (that the opponent "agreed" to a contract).

Of course an opponent's admissions, on cross-examination, as to his "understanding" ought to be received. 1897, *De Graw v. Emory*, 113 Mich. 672, 72 N. W. 4.

¹ The cases are collected *ante*, § 653.

² The cases are collected *ante*, § 728.

³ The following citations are merely illustrative.

⁴ *Harriman, Contracts*, 2d ed., § 646.

⁵ Compare here the cases cited *post*, § 2466: 1844, *Bonfield v. Smith*, 12 M. & W. 403 (debt for goods sold; plea, that the defendant's firm was the real buyer; a question to plaintiff "With whom did you deal?" was rejected,

(b) *Intention of one charged with Libel or Slander.* When utterances are alleged to have been defamatory, the fundamental notion of defamation — a spreading of false information among the community — requires us to take the standpoint of the community, or of the particular hearers or readers, in determining whether such a charge was published, *i. e.* made known to them. A number of corollaries result from this; and, in particular, it follows (1) that the *intention* or secret meaning of the defendant in using the words is not to be considered; since the question is what his hearers or readers were reasonably caused to understand, and not what he intended;⁴ and (2) that the private *understanding of an individual hearer* (as distinguished from the ordinary sense of the words) cannot in theory be offered, until it is first shown that some circumstance was known to him which reasonably gave the words a special meaning.⁵

(c) The *Parol Evidence (Integration) Rule*, which is a rule of substantive law, constantly excludes various facts affecting the meaning, intention, usage, sense, or understanding of parties engaged in consummating a legal act (*post*, §§ 2400-2478). For this exclusion the Opinion rule is not responsible.

§ 1972. *Same: Rule of Explaining the Meaning of an Admission or Contradiction, distinguished.* It has already been seen (*ante*, §§ 1044, 1058) that the impeaching force of a party's apparent admission, or of a witness' apparently inconsistent statement, lies in the self-contradictory states of mind which it discloses, and that thus his credit may be restored by an explanation which shows that there was no inconsistency. This explanation may often be made by showing that words were used in a sense different from

because it amounted to asking "With whom did you believe you dealt?", and the fact that would make the persons liable as partners would not be the customer's belief, but the general holding themselves out by the parties as partners); 1896, *Slater v. D. S. & H. Co.*, 94 Ga. 687, 21 S. E. 715 (letter written by a debtor, alleged to involve a new promise; the writer's testimony as to his meaning, excluded); 1897, *First Nat'l Bank v. Booth*, 102 Ia. 333, 71 N. W. 238 (whether the promisee understood the promisor's language, excluded); 1903, *Sheldon v. Bigelow*, 118 id. 586, 32 N. W. 701 (whether R. was going to assume firm debts, excluded); 1878, *Paine v. Boston*, 124 Mass. 486, 490 (interpretation of a city council's vote as a settlement of a disputed claim; the motives and reasons of the members, *semble*, immaterial); 1868, *Delano v. Goodwin*, 48 N. H. 206 (showing that even in matters of contract the understanding of one party may be evidential towards the main issue of the effect which his conduct produced upon the mind of the other party); 1828, *Murray v. Bethune*, 1 Wend. 196 (the mere private understanding of one party to a contract is immaterial and cannot be testified to); 1872, *Wangh v. Fielding*, 48 N. Y. 681 (opinion by a vendor as to his intention with reference to representations made to the vendee, excluded); 1874, *Tracy v. McManus*, 58 id. 357 (by one charged as a copartner, explaining his motive and purpose in doing acts which were capable of construction as acts of

partnership, admitted); 1895, *Wheeler v. Campbell*, 68 Vt. 98, 34 Atl. 35 (understanding admissible, when it signifies the agreement as accepted by both parties). Of course the "understanding" of one not a party to the contract would usually be immaterial: 1874, *Nichols v. Ore Co.*, 56 N. Y. 618 (by one doing work for plaintiff, as to whether he supposed the work was to be paid for by defendant or by X; excluded).

⁴ 1866, *Bullard v. Lambert*, 40 Ala. 205, 209; 1888, *Republican Publ. Co. v. Miner*, 12 Colo. 85, 20 Pac. 345; 1837, *Allensworth v. Coleman*, 5 Dana Ky. 315; 1896, *Provost v. Brueck*, 110 Mich. 136, 67 N. W. 1114; 1902, *Davis v. Hamilton*, — id. —, 92 N. W. 512.

⁵ 1848, *Daines v. Hartley*, 3 Exch. 200; 1898, *Hearne v. De Young*, 119 Cal. 670, 52 Pac. 150; 1855, *Hawks v. Patton*, 18 Ga. 52; 1894, *Calahan v. Ingram*, 122 Mo. 355, 375, 26 S. W. 1020; 1846, *Morgan v. Livingston*, 2 Rich. 573, 582.

Some confusion, however, has been caused by the citation (*Best on Evidence*, § 512) of *Daines v. Hartley*, *supra*, as "a good illustration of the real nature" of the Opinion rule; yet this is precisely what it is not; it has nothing to do with the Opinion rule, and the judges' language does not so treat it; the same confusion is found in the following cases: 1887, *Gribble v. Pioneer-Press Co.*, 37 Minn. 277; 1900, *Soloman v. American Merc. Exch.*, 93 Mo. 436, 45 Atl. 510.

that claimed by the opponent, or that a different state of facts was in mind at the time of the utterance; and the Opinion rule should not interpose any bar.¹

7. Sundry Topics.

§ 1974. **Corporal Appearances of Persons and Things** ("looking" Sad, Ill, and the like; Intoxication, Age, etc.). The Opinion rule is often sought to be applied to forbid compendious descriptions of the appearances externally indicating internal states,—for example, whether a person "looked" sick or sad or angry. There is no more reason in this class of cases than in the preceding one for the Opinion rule to exclude the testimony.¹ The exclusionary

¹ E.g.: 1872, *Mickey v. Ins. Co.*, 35 Ia. 181 (explaining the understanding and intention of a party in using language offered against him as an admission; here an affidavit of loss by an insured); and cases cited ante, §§ 1044, 1058.

² From the ensuing cases, distinguish those involving the question of Testimonial Qualifications, whether a layman is experientially or otherwise qualified to speak of the existence or appearances of an illness (ante, §§ 548, 680); in the following citations the testimony was admitted, except as otherwise noted: *Alabama*: 1859, *Barker v. Coleman*, 35 Ala. 235 (looked sick); 1859, *Blackman v. Johnson*, ib. 355 (same); 1861, *Fountain v. Brown*, 38 id. 75 (same); 1863, *Raisler v. Springer*, ib. 705 (insulting manner); 1875, *Gassenheimer v. State*, 52 id. 317 ("looked excited," excluded); 1878, *South & N. Ala. R. Co. v. London*, 63 id. 275 ("looked bad," "was not able to use her arm"); 1885, *State v. Houston*, 75 id. 578, 585 ("he looked" so-and-so, admitted; "he impressed me with the belief of" so-and-so, excluded); 1885, *Carney v. State*, 79 id. 17 (acted towards a woman "as a suitor" and "as a lover," excluded); 1886, *Jenkins v. State*, 81 id. 28, 3 So. 150 ("appeared like he was mad," i.e. angry); 1893, *Miller v. State*, 107 id. 46, 19 So. 37 (same); 1894, *White v. State*, 108 id. 72, 16 So. 63 ("talked with his usual intelligence"); 1895, *Barton v. State*, 107 id. 108, 18 So. 283 ("looked paler than common"); 1897, *Thornton v. State*, 113 id. 43, 21 So. 356 ("looked frightened"); 1898, *Fuller v. State*, 117 id. 34, 23 So. 68 (appearance of wound); 1898, *Orr v. State*, ib. 69, 23 So. 696 (appearance of cartridge); 1899, *Evans v. State*, 120 id. 269, 25 So. 175 (appearance of wounds); 1899, *Terry v. State*, ib. 286, 25 So. 176 (same); 1899, *Hollis v. State*, 123 id. 74, 26 So. 231 (by one searching for property, that he did not find it concealed, excluded); 1900, *Birmingham R. & E. Co. v. Frankscomb*, 124 id. 621, 27 So. 509 ("seemed to be very weak"); 1900, *Higginbotham v. State*, — id. —, 29 So. 410 (sundry statements passed upon); 1903, *Hainsworth v. State*, 136 id. 13, 34 So. 203 (facial appearance of defendant, as indicating malice against deceased, admitted; repudiating *Gassenheimer v. State*); 1903, *Smith v. State*, 137 id. 22, 34 So. 396 (that tracks looked like those of a person running and walking); 1903, *Stevens v. State*, — id. —, 35 So. 122 (position of an assailant, as shown by the

wound); *Arkansas*: 1848, *Beebe v. DeBann*, 8 Ark. 520, 571 (whether a response was in a jocular or serious manner, excluded); *California*: 1897, *People v. Vehorn*, 116 Cal. 503, 49 Pac. 495 (intoxicated); *Columbia (Dist.)*: 1892, *U. S. v. Cross*, 30 D. C. 376 (threats in an angry or a playful manner); *Florida*: 1903, *Fields v. State*, — Fla. —, 35 So. 185 (whether the deceased appeared angry); *Georgia*: 1860, *Choise v. State*, 31 Ga. 467 (*Lumpkin, J.*, receiving testimony that a person seemed to be drunk: "Really, no other rule is practical. If the witness must be confined to a simple narration of facts, how the person leered or grinned, how he winked his eyes or squinted, how he wagged his head, etc., all of which drunken men do, you shut out not only the ordinary but the best mode of obtaining truth"); 1874, *Rose v. R. Co.*, 53 Ga. 369 (same); *Illinois*: 1897, *West Chicago St. R. Co. v. Fishman*, 169 Ill. 196, 48 N. E. 447 (whether a person was ill, whether he "answered right"); 1902, *Chicago & E. I. R. Co. v. Randolph*, 199 id. 126, 65 N. E. 142 (by a lay witness, that a person appeared to be "suffering," "weak," "sore," "in pain," etc.); *Indiana*: 1887, *Louisville N. A. & C. R. Co. v. Wood*, 113 Ind. 551, 14 N. E. 572, 16 N. E. 197 ("looked worse"); *Iowa*: 1877, *State v. Huxford*, 47 Ia. 17 (intoxicated); 1884, *State v. Shelton*, 64 id. 338, 20 N. W. 439 (angry); 1885, *Parsons v. Parsons*, 66 id. 757, 31 N. W. 570, 24 N. W. 564 ("acted childishly"); 1892, *State v. Brown*, 86 id. 121, 123, 33 N. W. 92 (that the defendant "kept company" with the prosecutrix, allowed; but that he treated her "very affectionately," excluded; this marks the lowest depths of quibbling); 1895, *Rever v. Spangler*, 93 id. 576, 61 N. W. 1300 (personal appearance); 1897, *McDonald v. Franchere*, 103 id. 496, 71 N. W. 427 ("appeared to be worried"); 1898, *Childs v. Mueckler*, 105 id. 279, 75 N. W. 100 (that a woman was nice-looking); 1899, *Bailey v. Centerville*, 108 id. 20, 76 N. W. 331 (that a person "looked bad" and could scarcely walk); 1899, *State v. Reinheimer*, 109 id. 624, 80 N. W. 669 (that a woman was pregnant, excluded, from a non-expert); 1900, *Bizer v. Bizer*, 110 id. 248, 81 N. W. 465 (that parties seen on a bed seemed to be having sexual intercourse); 1900, *Stewart v. Anderson*, 111 id. 329, 82 N. W. 770 (that a babe appeared to be nowborn); 1902, *Reininger v. Merchants' L. Ass'n*, 116 id. 364, 99

rulings perhaps here abound particularly in absurdities and quibbles,—highly fit for cynical amusement, were not the names of Justice and Truth involved in their consideration. One may wonder how long these solemn farces will be perpetuated in our law.

- X. W. 1113 (whether a person was "sick," "stronger," etc.); 1903, *State v. McKnight*, 119 id. 73, 53 N. W. 65 (testimony to such appearances of health, etc., other than sanity, need not state before); 1906, *State v. Cather*, — id. —, W. 722 (that he was intoxicated, and how he was affected by the intoxication); 1909, — and *Mfg. Co. v. Kantenberger*, — id. —, 96 N. W. 743 (that defendant "appeared to be satisfied" with a settlement); *Kansas*: 1898, *State v. Baldwin*, 36 Kan. 9, 12 Pac. 318 ("in good spirits"; "showed a good deal of fear"); 1909, *Handley v. R. Co.*, 61 id. 237, 50 Pac. 271 (that another person was "watching the boy," excluded); *Kentucky*: 1901, *Campbell v. Fidelity & C. Co.*, 109 Ky. 661, 60 S. W. 493 (intoxicated); *Louisiana*: 1896, *State v. Marceaux*, 50 La. An. 1137, 34 So. 611 (that a person looked as though he had not slept); *Miss.*: 1878, *Stacy v. Publishing Co.*, 69 Mo. 239 (intoxicated); 1872, *Parker v. Steamboat Co.*, 109 id. 451 (that a person is "worse," "not able to do so much work"); *Massachusetts*: 1897, *Burt v. Bart*, 148 id. 204, 46 N. E. 632 (that a person is intoxicated; also, by one who is skilled, that a person is under the influence of morphine); 1898, *Edwards v. Worcester*, 172 id. 104, 51 N. E. 447 (intoxicated); 1900, *O'Neil v. Hanson*, 173 id. 313, 54 N. E. 567 (that a person looked "sick," "invalid," etc.); *Michigan*: 1878, *Brownell v. People*, 38 Mich. 735 (personal qualities); 1890, *Cook v. Inn. Co.*, 24 id. 20, 47 N. W. 566 (intoxicated); 1890, *Will v. Mendon*, 108 id. 231, 66 N. W. 58 (unable to move a limb); 1901, *People v. Dowd*, 127 id. 140, 56 N. W. 546 (that a person was "envious," excluded); *Minnesota*: 1899, *McKillop v. R. Co.*, 53 Minn. 532, 534, 33 N. W. 739 (intoxicated); 1897, *Manahan v. Halloran*, 66 id. 463, 69 N. W. 619 (that a person appeared to be afraid of some one, admissible, but that he appeared to be afraid of a particular person, inadmissible; as to which it might have been added that tweedle-dee differs from tweedle-doo); 1898, *Hall v. Austin*, 73 id. 134, 75 N. W. 1131 (that a person appeared pale, is suffering); 1902, *Isherwood v. Lumber Co.*, 87 id. 388, 92 N. W. 230 (that a person appeared to be in pain); *Mississippi*: 1901, *Magouirk v. Tel. Co.*, 79 Miss. 632, 31 So. 206 (habits of an employee as to intoxication; witness' personal knowledge allowed); *Missouri*: 1877, *State v. Dearing*, 65 Mo. 533 (intoxicated); 1884, *State v. Ramsey*, 83 id. 137 (intoxicated; "looked scared"); 1886, *State v. Parker*, 89 id. 393 (that weeds looked as though a person had knelt on them); 1888, *State v. Parker*, 96 id. 393, 9 S. W. 728 (in general); 1890, *State v. Buchler*, 103 id. 206, 15 S. W. 331 (expressions of face); 1895, *State v. David*, 131 id. 390, 33 S. W. 26 (that a person had cramps and seemed in agony); *Montana*: 1900, *State v. Lacey*, 24 Mont. 293, 61 Pac. 994 (that a defendant when arrested "turned right away, as though he was about to be devoured"); 1903, *State v. Tighe*, 27 id. 327, 71 Pac. 3 (that a person "seemed to be scared"); *New Hampshire*: 1857, *Spear v. Richardson*, 34 N. H. 438 (diseased appearance of a horse); 1864, *Low v. Railroad*, 46 id. 24 (sulky and frightened appearance of a horse); 1869, *Taylor v. Railway*, 46 id. 309 (appearance of lameness); *New Jersey*: 1868, *Castner v. Sliker*, 38 N. J. L. 97 (intoxication); *New York*: 1829, *King v. Root*, 4 Wend. 129 (intoxicated); 1856, *People v. Eastwood*, 14 N. Y. 563 (same); 1897, *Feiska v. R. Co.*, 152 N. Y. 339, 46 N. E. 613 (same); 1902, *People v. Smith*, 172 id. 210, 64 N. E. 814 (whether a person's conduct "seemed to be natural and genuine," not allowed); *North Carolina*: 1893, *State v. Edwards*, 112 N. C. 901, 910, 17 S. E. 521 (appeared "mad or in fun"); 1890, *Sherrill v. Tel. Co.*, 117 id. 352, 28 S. E. 277 (mental anguish through failure to deliver a telegram announcing a child's illness; plaintiff's sister, living with him, was allowed to testify to his seeming "melancholy" and "severe mental anguish"); *Oregon*: 1895, *State v. Brown*, 28 Or. 147, 41 Pac. 1042 (intoxication); 1898, *First Nat'l Bank v. Fire Ass'n*, 53 id. 173, 53 Pac. 8 (whether a fire burned in a natural way or appeared to be assisted by some peculiarly inflammable matter; whether it would have spread, etc., as it did, without such assistance); *Pennsylvania*: 1856, *Lockey v. Bloner*, 24 Pa. 404 ("whether the conduct of the parties evinced a mutual attachment," excluded); *South Carolina*: 1899, *State v. James*, 31 S. C. 233, 9 S. E. 844 (whether the relations of persons were friendly); 1899, *State v. Davis*, 55 id. 229, 33 S. E. 449 (whether a gun seemed to have been recently fired); 1900, *State v. Taylor*, 57 id. 483, 35 S. E. 729 (whether a call was like that of one in distress); *Texas*: 1859, *Reynolds v. Dechaume*, 24 Tex. 175 (intoxicated); *Utah*: 1903, *Frits v. Tel. Co.*, 25 Utah 263, 71 Pac. 209 (that a person appeared "disgusted," etc., allowed); *Vermont*: 1885, *Knight v. Smythe*, 57 Vt. 530 (whether a person seemed in pain); 1888, *State v. Ward*, 61 id. 133, 17 Atl. 483 (a horse's tired appearance); 1896, *Bagley v. Mason*, 69 id. 175, 37 Atl. 255 (whether a plaintiff appeared to be feigning, admissible, *semble*); 1899, *State v. Marsh*, 70 id. 288, 40 Atl. 836 (that a man and a woman were intimate); 1898, *Wilkins v. Metcalf*, 71 id. 103, 41 Atl. 1035 (bastardy; whether there was "something not right" between plaintiff and defendant; held: not improperly excluded on the facts); *Washington*: 1897, *State v. Dolan*, 17 Wash. 499, 50 Pac. 472 (intoxicated); *West Virginia*: 1897, *State v. Muagrave*, 43 W. Va. 672, 28 S. E. 813 (whether marks on the deceased looked like finger-marks, etc., excluded); *Brannon, J., diss.*; *Wisconsin*: 1896, *Keller v.*

§ 1975. **Medical and Surgical Matters.** Testimony to the actual condition of health (for example, the existence of a disease or wound) differs from testimony to the preceding class of topics in that it concerns the internal actuality and not the external appearance. This difference is important with reference to the experiential qualifications of the witness, in that for the former a medical expert will usually be required (*ante*, § 568). But, assuming the witness qualified, there can seldom be any difference between the two classes of topics as regards the application of the Opinion rule; the exclusion of an opinion can rarely be justified. Nevertheless there often appears a special perversity in requiring the minutest analysis of the observer's data, instead of accepting his net conclusions.¹

§ 1976. **Probability and Possibility; Capacity and Tendency; Cause and Effect.** A large class of cases, embracing statements as to the probability or the possibility of an event, the capacity or tendency of an act or a machine, the cause or the effect of a fact, may fairly be grouped together, because the reason why the Opinion rule is urged against them is in general that the thing to which the witness testifies is not anything which he has observed, but is a

Gilman, 93 Wis. 9, 66 N. W. 800 (health appearances); 1900, *Werner v. R. Co.*, 105 id. 300, 81 N. W. 416 (that a person appeared to be suffering pain); *Wyoming*: 1903, *Horn v. State*, — Wyo. —, 73 Pac. 705 (defendant's sincerity of manner in making a confession).

In rulings upon testimony as to age or race, the distinction must be kept in mind between the question of Relevancy whether appearances are a sound basis (for a witness or for the jury) for inferring to age or race (*ante*, §§ 187, 222, 460), and the genuine Opinion-rule question, i. e. whether the witness should merely state the data of appearances, instead of giving his inference: 1873, *Marshall v. State*, 49 Ala. 21 (liquor-selling to a minor; whether the witness would not have taken the person for over 21; excluded); 1825, *Morse v. State*, 6 Conn. 13 (opinion of age; admitted); 1864, *Nave's Adm'r v. Williams*, 22 Ind. 371, *semble* (opinion of race from color; admitted, for expert); 1885, *Louisville N. A. & C. R. Co. v. Falvey*, 104 id. 423, 3 N. E. 389, 4 N. E. 908 (age; admitted); 1895, *State v. Grubb*, 55 Kan. 678, 41 Pac. 951 (age; admissible, after describing the person, and, *semble*, only when the person is not present; but the latter limitation is unsound for experts or for those who have had personal acquaintance with the person); 1863, *Com. v. O'Brien*, 134 Mass. 300 (age; admitted); 1889, *Elsner v. Supreme Lodge*, 98 Mo. 645, 11 S. W. 991 (age; admitted); 1867, *State v. Smith*, Phillips 303 (age; admitted, for an expert); 1897, *State v. Robinson*, 32 Or. 43, 48 Pac. 357 (age of a person in court; excluded, the witness having no special knowledge).

So, also, whether a child's resemblance to a man is evidence of the latter's paternity (*ante*, § 166) is distinct from the question of the Opinion rule, whether an opinion as to that resemblance is receivable (*post*, § 1977).

¹ It is sometimes difficult to distinguish between rulings in the preceding section, the

present one, and the next one: 1900, *Littleton v. State*, 128 Ala. 31, 29 So. 390 (that a woman was in a family way, allowed); 1874, *Southern Life Ins. Co. v. Wilkinson*, 53 Ga. 546 (disease; admissible when data are stated); 1885, *Carthage Turnpike Co. v. Andrews*, 102 Ind. 142, 1 N. E. 344 (health in general, admissible); 1868, *State v. Vincent*, 24 Ia. 576 (change of features after death, as making identification impossible, excluded); 1881, *Ferguson v. Davis Co.*, 57 id. 605, 10 N. W. 906 (whether ribs were fractured, allowed); 1901, *Long v. Ins. Co.*, 113 id. 359, 85 N. W. 24 (significance of powder stains, etc., allowed); 1907, *Broquet v. Tripp*, 36 Kan. 704, 14 Pac. 227 (disease, admissible); 1896, *State v. Ashell*, 57 id. 398, 46 Pac. 770 (characteristics of a near wound as to powder-marks, etc., admitted); 1898, *Franklin v. Com.*, — Ky. —, 48 S. W. 986 (whether a wound was made by a certain kind of shot and gun, admitted); 1895, *People v. Hare*, 87 Mich. 513, 24 N. W. 243 (qualities of injuries, etc., admitted); 1874, *Reid v. Ins. Co.*, 58 Mo. 425 (by a doctor, whether a person was in good health, excluded); 1863, *Kennedy v. People*, 39 N. Y. 257 (the force necessary to break a skull, admitted); 1875, *Lindsay v. People*, 63 id. 132 (whether a wound was recent, allowed); 1891, *People v. Fish*, 125 id. 136, 26 N. E. 319 (the force necessary to drive an iron instrument into the bone, allowed); 1868, *State v. Harris*, 63 N. C. 3 (that a burn was received after death, allowed); 1870, *Horton v. Green*, 64 id. 56 (that the disease of an animal was of long standing, allowed); 1874, *O'Mara v. Com.*, 75 Pa. 428 (quantity of blood that probably would flow, allowed); 1840, *Seibles v. Blackhead*, 1 McMull. 56 (unsoundness of slave, allowed); 1859, *Norton v. Moore*, 3 Head 480 (disease, allowed); 1877, *Garrison v. Blanton*, 48 Tex. 301 (existence of a stupor, allowed). For other rulings on medical topics, see also the citations in the next section.

quantity which lies in estimate only and is the result of a balancing of concrete data. This is no sufficient reason for excluding such statements; because it must almost always be impossible for a witness to reproduce in words absolutely all the detailed data which enter into his estimate, and there can be no danger in receiving such an estimate from a competent witness.¹ All that can be said of the rulings is that probably some of them, in

¹ Compare the cases cited under § 1961, *ante*, and § 1976, *post*; and also those cited *ante*, § 664 (negative knowledge); in the following citations the testimony was admitted, unless otherwise expressly noted: *Ireland*: 1867, *M'Fadden v. Murdock*, 1 Ir. C. L. 311 (probable general loss in handling goods in retail quantities; particular loss as explainable by the nature of the trade); *Alabama*: 1884, *Gibson v. Hatchett*, 24 Ala. 206 (possibility of seeing a thing from a given point); 1888, *Montgomery v. Taylor*, 33 id. 133 (capacity of a wall to withstand flow of water); 1878, *Bennett v. State*, 52 id. 370 (whether a co-lodger could have left the room without witness' knowledge, excluded); 1877, *Mobile Life Ins. Co. v. Walker*, 58 id. 294 (cause of death); 1880, *Blackman v. Collier*, 65 id. 312 (capacity of machinery); 1882, *Seale v. Edmondson*, 71 id. 515 (combustibility of cotton); 1888, *Sharp v. Hall*, 86 id. 110, 5 So. 497 (tendency of an overflow to cause illness); 1893, *McVay v. State*, 100 id. 110, 113, 14 So. 862 (whether a person could have heard certain words); 1893, *Alabama G. S. R. Co. v. Linn*, 103 id. 184, 139, 15 So. 306 (whether a train could have been stopped after a certain time); 1898, *Simon v. State*, 108 id. 27, 18 So. 731 (a blow as the cause of death); 1900, *Littleton v. State*, 128 id. 31, 29 So. 390 (what kind of instrument caused a wound); 1903, *Kansas C. M. & B. R. Co. v. Weeks*, 135 id. 614, 34 So. 16 (whether a train could be seen); *California*: 1870, *Grigby v. Water Co.*, 40 Cal. 405 (whether backwater would be caused by a dam); 1884, *Bland v. R. Co.*, 65 id. 627, 4 Pac. 672 (physical injury as the effect of an accident); 1896, *Tate v. Fraat*, 112 id. 613, 44 Pac. 1061 (which of two buildings was apparently first constructed); 1896, *People v. Worden*, 113 id. 569, 45 Cal. 844 (whether a track obstruction would have been seen, excluded); 1897, *People v. Hill*, 116 id. 542, 48 Pac. 711 (probable position of an assailant, as indicated by the wound's location, excluded); 1897, *People v. Baldwin*, 117 id. 244, 49 Pac. 186 (whether the appearance of a rape could have resulted from a conceded situation of the defendant); 1898, *People v. Milner*, 122 id. 171, 54 Pac. 833 (probable position of a gun, excluded); 1899, *People v. Valliere*, 123 id. 576, 56 Pac. 433 (whether a weapon could kill a man); 1899, *People v. Farley*, 124 id. 594, 57 Pac. 571 (by a surgeon, that the deceased's arm must have been by his side, and that he could not have been standing up, excluded); 1903, *Kahn v. Triest-Rosenberg Co.*, 139 id. 340, 73 Pac. 164 (whether a danger could have been detected; exclusion held proper on the facts); *Colorado*: 1893, *Colorado M. & I. Co. v. Rees*, 21 Colo. 435, 49 Pac. 42 (whether the light sufficed for showing whether an elevator was in place); *Colum-*

bia (District): 1891, *Guitau's Trial*, I, 265 ("Was that wound a mortal wound, and was it the cause of the death of President Garfield?"; "In my judgment it was a mortal wound, and was the cause of the death of President Garfield"); *Connecticut*: 1878, *Clinton v. Howard*, 43 Conn. 294 (tendency of a pile of stones to frighten horses); *Florida*: 1902, *Jones v. State*, — Fla. —, 32 So. 793 (necessary position of the person shooting, excluded); *Georgia*: 1878, *Everett v. State*, 62 Ga. 71 (whether a wound was the cause of death; whether it could have been self-inflicted); 1898, *Georgia R. & B. Co. v. Hicks*, 93 id. 301, 22 S. E. 613 (the probable effect of the fall of a piece of iron pipe in injuring a person holding it); 1900, *Perry v. State*, 110 id. 234, 36 S. E. 761 (that a weapon was likely to produce death); *Illinois*: 1893, *Chicago M. & S. P. R. Co. v. O'Sullivan*, 143 Ill. 48, 57, 32 N. E. 396 (whether the deceased could have seen the engine, allowable in discretion); 1897, *Chateworth v. Rowe*, 166 id. 114, 46 N. E. 763 (cause of a corporal injury); 1897, *Brink's Express Co. v. Kinnare*, 166 id. 643, 49 N. E. 446 (whether a driver could have stopped in time to avoid injury, excluded); 1900, *Hellyer v. People*, 186 id. 650, 58 N. E. 245 (whether death by blow from railroad train could be caused without producing other injuries, not allowed); 1901, *Chicago & A. R. Co. v. Lewondowski*, 190 id. 301, 60 N. E. 497 (whether a person could live after being struck by a locomotive at a certain speed, not allowed); *Indiana*: 1866, *Indianapolis v. Huffer*, 30 Ind. 237 (capacity of a sewer); 1882, *Bennett v. Needham*, 83 id. 568 (whether a ditch would injure public health); 1893, *Davidson v. State*, 135 id. 234, 261, 34 N. E. 972 (whether a wound would produce death); 1899, *Rains v. State*, 152 id. 69, 52 N. E. 450 (whether a pistol could injure at a certain distance, excluded); *Iowa*: 1868, *State v. Vincent*, 24 Ia. 570, 576 (impossibility of identifying a severed human head on account of physical changes, excluded); 1871, *State v. Morphy*, 33 id. 272 (blow as the cause of death); 1871, *State v. Porter*, 34 id. 133 (same); 1875, *Moreland v. Mitchell Co.*, 40 id. 401 (likelihood of horses being frightened); 1876, *Cooper v. Central R. Co.*, 44 id. 141 (effect of a locomotive in striking a cow); 1876, *Hughes v. Muscatine Co.*, ib. 676 (cause of a bridge failing, excluded); 1879, *Kline v. R. Co.*, 50 id. 659 (effect of an injury as to disability to work, excluded; but actual ability to work, allowed); 1882, *Allen v. R. Co.*, 57 id. 623, 11 N. W. 614 (probable life of timber); 1883, *Yahn v. Otsumwa*, 60 id. 432, 15 N. W. 257 (cause of horse's fright); 1885, *Moore v. R. Co.*, 65 id. 508, 23 N. W. 650 (ability to perform work, excluded); 1885, *Whitsett v. R. Co.*, 67 id. 154, 25 N. W. 104 (effect of a sudden increase of speed); 1885,

the final result of the litigation in hand, have done less actual harm to justice than others have done.

State v. Crom, 68 id. 192, 36 N. W. 62 (effect of a shot on flesh); 1886, *State v. Hackett*, 70 id. 451, 30 N. W. 742 (effect of shot, excluded); 1887, *Forcheimer v. Stewart*, 73 id. 312, 39 N. W. 665, 35 N. W. 145 (whether hams would endure transportation); 1887, *State v. Rainsberger*, 74 id. 204, 37 N. W. 153 (cause of wounds, excluded); 1895, *State v. Seymour*, 24 id. 699, 63 N. W. 661 (cause of a wound); 1899, *Brownfield v. R. Co.*, 107 id. 254, 77 N. W. 1036 (whether a broken axle might have derailed a train); 1900, *State v. Peterson*, 111 id. 647, 82 N. W. 329 (whether intercourse against a woman's consent was possible, excluded); 1901, *Trott v. R. Co.*, 115 id. 90, 36 N. W. 33 (whether an injury could have been received with blocked switches); 1903, *Sachs v. Manila*, 120 id. 562, 95 N. W. 196 (probable or possible cause of a corporal injury); *Kansas*: 1888, *Ball v. Hardesty*, 38 Kan. 542, 16 Pac. 606 (whether backwater was caused by the defendant's act); 1889, *State v. Jones*, 41 id. 309, 21 Pac. 265 (indications of a gunshot wound as to the probable distance of the assailant); 1898, *Erb v. Popritz*, 59 id. 264, 32 Pac. 871 (whether a derailment was the result of a defective track, excluded); *Louisiana*: 1896, *State v. Fontenot*, 50 La. An. 337, 33 So. 634 (whether cuts in clothing showed deceased's position, excluded); 1901, *State v. Breauz*, 104 La. 540, 29 So. 222 (how a wound could have been inflicted); *Maine*: 1835, *Cottrill v. Myrick*, 12 Mo. 230 (whether fish would ascend a stream); 1851, *State v. Smith*, 22 id. 370 (cause of death); 1857, *State v. Knight*, 43 id. 130 (kind of weapon causing a wound; whether a wound could have been self-inflicted with the right hand); 1876, *Holden v. Mfg. Co.*, 65 id. 316 (whether certain logging operations were possible, excluded); 1885, *Powers v. Mitchell*, 77 id. 369 (effect of blows); *Maryland*: 1873, *Davis v. State*, 33 Md. 36 (whether an accidental fall might have caused the injury); 1885, *Williams v. State*, 64 id. 392, 1 Atl. 887 (effect of a wound); 1889, *Baltimore Tarapike v. State*, 71 id. 584, 18 Atl. 864 (whether a wagon would frighten horses, excluded; here the witness had not seen the wagon and was asked hypothetically); 1898, *Baltimore C. P. R. Co. v. Cooney*, 87 id. 261, 39 Atl. 859 (whether a person could ride in a certain way on a car); 1900, *Baltimore City P. R. Co. v. Tanner*, 90 id. 315, 45 Atl. 168 (whether the plaintiff's deafness was the natural and probable result of the accident); 1931, *New England Glass Co. v. Lovell*, 7 Cush. 321 (whether goods could have been lost out of a vessel's hold, if stowed there, excluded); 1852, *Cook v. Castner*, 9 id. 274 (whether a timber could have been taken off without seeing the decay beneath); 1856, *Com. v. Cooley*, 6 Gray 352, 354 (by a bystander, who heard nothing, whether he was likely to hear anything if said, excluded); 1858, *Robinson v. R. Co.*, 7 id. 93, 96 (as to the only feasible approach to a place, excluded); 1860, *Seaver v. R. Co.*, 14 id. 471 (derailment accident); 1861, *Parsons v. Ins. Co.*, 16 id. 487 (cause of a leak); 1876, *Com. v. Piper*, 120 Mass. 180 (effect of

blows on the body); 1884, *Com. v. Flynn*, 163 id. 153, 42 N. E. 562 (whether a person could have been seen); 1897, *Tremblay v. M. R. C. Co.*, 169 id. 254, 47 N. E. 1010 (whether an arch would have fallen under certain conditions); 1899, *Knight v. Overman W. Co.*, 174 id. 455, 54 N. E. 890 (whether a strain was produced on a pulley); 1900, *Welch v. R. Co.*, 176 id. 393, 57 N. E. 668 (how far a voice could be heard in a storm, excluded); 1902, *Lawlor v. Wolff*, 180 id. 448, 62 N. E. 973 (possibility of rape against consent, excluded); *Michigan*: 1871, *Gilbert v. Kennedy*, 22 Mich. 136 (cattle-feeding; estimated growth in weight of cattle); 1874, *People v. Morrigan*, 29 id. 7 (whether a theft could have been committed in a certain way, excluded); 1875, *People v. Clark*, 33 id. 119 (physical possibility of sexual intercourse); 1876, *Underwood v. Waldron*, 33 id. 263 (action of water upon mortar in a wall, under certain circumstances); 1878, *Brownell v. People*, 38 id. 735 (effect of a pistol shot at certain distances, excluded); 1883, *People v. Hare*, 57 id. 512, 24 N. W. 843 ("What caused the wound," disallowed, but "What might have caused it" was declared proper; because "what did cause it was the real question for the jury"; in other words, the more useful, the less admissible); 1886, *People v. Sessions*, 38 Mich. 597, 26 N. W. 291 (cause of death or injury); 1897, *Bettys v. Denver Tp.*, 115 id. 228, 73 N. W. 138 (effect of loosening brace-timbers); 1902, *Furbush v. Maryland C. Co.*, 131 id. 234, 91 N. W. 135 (whether a body could have fallen, etc., not allowed); *Minnesota*: 1875, *Hathaway v. Brown*, 22 Minn. 214 (whether a conversation could have been had between two other persons in the same room, without the witness knowing it, excluded); 1881, *Krippner v. Bieble*, 28 id. 139, 9 N. W. 671 (probable spread of a stubble fire); 1885, *Davidson v. R. Co.*, 34 id. 55, 24 N. W. 324 (probable size and effect of locomotive sparks); 1893, *Watson v. R. Co.*, 53 id. 551, 554, 55 N. W. 742 (within what distance a car could be stopped); 1897, *Hamberg v. Ins. Co.*, 68 id. 335, 71 N. W. 388 (whether a fire could have occurred without certain results, excluded); 1897, *Donnelly v. R. Co.*, 70 id. 278, 73 N. W. 137 (cause of certain ailments, or their possible cause); 1897, *Joyce v. R. Co.*, ib. 339, 73 N. W. 158 (same); 1899, *Fonds v. R. Co.*, 77 id. 336, 79 N. W. 1043 (whether a team would have been seen from a certain point, admitted; "Hathaway v. Brown . . . seems to have become generally ignored by the Bar"); 1902, *Akin v. St. Croix L. Co.*, 88 id. 119, 92 N. W. 537 (cause of an overflow of water, excluded); *Missouri*: 1895, *State v. Gates*, 130 Mo. 351, 32 S. W. 971 (whether the defendant could have put an article in the room during witness' absence, excluded); 1899, *State v. McLaughlin*, 149 id. 19, 50 S. W. 315 (how far one could walk with a bullet through his heart); 1899, *Olsen v. R. Co.*, 152 id. 436, 54 S. W. 470 (how far a gong could be heard); *Montana*: 1899, *Bramlett v. Flick*, 23 Mont. 93, 57 Pac. 669 (whether a skilled surveyor could locate a claim by a certain description,

§ 1977. Distance, Time, Speed, Size, Weight, Direction, Form, Identity, and the Like. The Opinion rule has been used as a weapon against every conceivable sort of testimony, even against such simple statements as estimates

excluded); *Nebraska*: 1877, *Curry v. State*, 5 Nebr. 417 (probable result of personal injuries); 1895, *Gran v. Houston*, 45 id. 813, 64 N. W. 245 (cause of death); 1898, *Missouri P. R. Co. v. Fox*, 56 id. 746, 77 N. W. 130 (how a wound might have been inflicted, excluded); 1903, *Fruit Dispatch Co. v. Murray*, — Nebr. —, 96 N. W. 83 (effect of shipping decayed with sound fruit); *Nevada*: 1882, *McLeod v. Lee*, 17 Nev. 122, 28 N. W. 134 (a dam as the cause of an overflow); 1903, *State v. Burall*, — Nev. —, 71 Pac. 532 (probable position of assailant from appearance of wound); *New Hampshire*: 1854, *Fatterton v. Colebrook*, 29 N. H. 101 (cause of an accident, excluded); 1896, *Folsom v. R. Co.*, 68 id. 454, 38 Atl. 309 (likelihood of a train frightening a horse in a certain position); 1900, *Parent v. Nashua Mfg. Co.*, 70 id. 199, 47 Atl. 261 (cause of a loom accident; excluded, the data not having been proved); 1902, *State v. Greenleaf*, — id. —, 64 Atl. 38 (probable force and number of blows as inferred from bodily appearance); *New Jersey*: 1855, *Cook v. State*, 24 N. J. L. 852 (feasibility of a rape under certain circumstances, excluded); 1865, *Read v. Barker*, 30 id. 379 (capacity of a mill); 1868, *Castner v. Sliker*, 33 id. 97 (cause of an injury); 1895, *New Jersey Traction Co. v. Brubban*, 57 id. 691, 32 Atl. 217 (possibility of standing by the aid of an artificial leg, excluded; yet expert evidence of the feasibility of working at a trade was declared proper); *New York*: 1840, *Mayor v. Punt*, 24 Wend. 673 (whether a fire would have destroyed a building if it had not been blown up, excluded); 1854, *Woodin v. People*, 1 Park. Cr. C. 466 (whether a rape could in certain conditions be committed, excluded); 1865, *Walsh v. Ins. Co.*, 32 N. Y. 443 (cause of a ship's loss); 1873, *Van Zandt v. Ins. Co.*, 55 id. 179 (whether a suicide should be attributed to melancholia); 1874, *Eguler v. People*, 56 id. 642 (whether a particular wound was the cause of death); 1890, *Young v. Johnson*, 123 id. 232, 25 N. E. 363 (first intercourse and possibilities of pregnancy); 1899, *Cole v. Fall Brook C. Co.*, 159 id. 59, 53 N. E. 670 (what symptoms would ordinarily and necessarily accompany an injury); 1899, *Parish v. Baird*, 160 id. 302, 54 N. E. 724 (whether flagstones could be broken in a certain way, excluded); 1901, *Peck v. R. Co.*, 165 id. 347, 59 N. E. 206 (whether sparks capable of setting fire could be thrown a certain distance, etc.); 1901, *People v. Schmidt*, 168 id. 568, 61 N. E. 907 (whether a blow could have caused an injury); *North Carolina*: 1851, *State v. Clark*, 12 Ired. 182 (how a wound had been made); 1886, *State v. Morgan*, 95 N. C. 642 (possibility of other modes of killing, as indicated by certain appearances); 1900, *Burney v. Allen*, 127 id. 476, 37 S. E. 501 (whether the testator could have seen the witnesses signing); 1901, *State v. McDowell*, 129 id. 523, 39 S. E. 840 (whether it was light enough to recognize deceased); 1903, *Cogdell v. R. Co.*, 132 id. 622, 44 S. E. 618 (whether a plank could have borne a man, excluded); 1903, *State v. Wilcox*, ib. 1120, 44 S. E. 625 (cause of a wound); 1903, *Summerlin v. R. Co.*, 133 id. 550, 45 S. E. 898 (where an injury could have been caused by a certain fall, excluded on the facts); *North Dakota*: 1896, *Tullis v. Rankin*, 6 N. D. 44, 68 N. W. 187 (malpractice; cause of the condition of the limb); 1903, *Balding v. Andrews*, — id. —, 96 N. W. 305 ("the fire must have come that way," excluded); *Ohio*: 1850, *Stewart v. State*, 19 Oh. 302, 307 (whether there was time enough for an assailed person to get out of the way); 1877, *Insurance Co. v. Tobin*, 32 Oh. St. 91 (possibility of loss of vessel in a certain way); 1897, *Pittsburg C. C. & St. L. R. Co. v. Sheppard*, 56 id. 68, 46 N. E. 61 (effectiveness of the hammer-test as a means of detecting breaks in car-wheels); *Oklahoma*: 1899, *Boston v. Hewitt*, 8 Okl. 401, 58 Pac. 619 (effect of filling a well with stone); *Oregon*: 1875, *State v. Glass*, 5 Or. 79 (cause of death); 1882, *State v. Anderson*, 10 id. 455 (probability of an accidental shooting in a company of hunters, excluded); 1898, *State v. Barrett*, 33 id. 194, 54 Pac. 807 (probable position of a body, excluded); *Pennsylvania*: 1839, *Wilt v. Vickers*, 8 Watts 228 (whether an injury would probably heal); 1849, *Detweiler v. Groff*, 10 Pa. St. 376 (possibility of working a mill with a certain height of water); 1865, *Pennsylvania R. Co. v. Henderson*, 51 id. 321 (length of probable useful survival of deceased father); 1869, *Sorg v. Congregation*, 63 id. 161 (cause of the fall of a wall); 1876, *Continental Ins. Co. v. Delpenche*, 82 id. 226 (action of water currents); 1893, *Com. v. Crossmire*, 156 id. 304, 309, 27 Atl. 40 (cause of death); *Rhode Island*: 1898, *McGeary v. R. Co.*, 21 R. I. 76, 41 Atl. 1007 (whether a witness was in a position to be able to hear signals, excluded); *South Carolina*: 1900, *State v. Taylor*, 57 S. C. 483, 35 S. E. 729 (whether a cry of distress could have been heard, excluded); 1903, *Stambridge v. Southern R. Co.*, 65 id. 440, 43 S. E. 968 (whether an injury would probably affect other parts of the body); 1903, *State v. Johnson*, 66 id. 23, 44 S. E. 58 (whether wounds could have been caused in a certain way); *South Dakota*: 1900, *Olson v. R. Co.*, 12 S. D. 326, 81 N. W. 634 (whether a pin could have been pulled without injury, excluded); *Tennessee*: 1835, *Burns v. Welch*, 6 Yerg. 119 (capacity of saw-mill); 1903, *Cumberland T. & T. Co. v. Dooley*, — Tenn. —, 72 S. W. 457 (whether a fire could have been controlled but for an explosion, not allowed); *Texas*: 1870, *Shelton v. State*, 34 Tex. 666 (cause of death); 1889, *Fort Worth & D. C. R. Co. v. Thompson*, 75 id. 503, 12 S. W. 748 (cause of a derailment); *United States*: 1895, *Chicago St. P. & K. C. R. Co. v. Chambers*, 15 C. C. A. 327, 68 Fed. 148 (whether a headlight was visible); 1897, *Bram v. U. S.*, 148 U. S. 532, 18 Sup. 162 (of a medical man, whether a person striking another in a certain relative position with an axe, would necessarily

of distance, time, size, identity, and the like. Fortunately, however, such attempts have been usually unsuccessful in that class of cases. The categories of the concededly unimpeachable subjects are variously stated by various judges. A more liberal tendency appears in some Courts than in others:

1866, *Bellows, J.*, in *Whittier v. Franklin*, 46 N. H. 24: "[The opinions admitted] are formed from minute peculiarities of form, shape, color, sound, etc., that cannot be described in human language, so as to convey any accurate impression of the object, and, therefore, unless opinions are received there must be a failure of evidence. When the facts and peculiarities upon which the opinion is formed can be stated and described, they must be, and it is then for the jury and not the witness to form an opinion."¹

1875, *Foster, C. J.*, in *Hardy v. Merrill*, 56 N. H. 241: "All concede the admissibility of the opinions of non-professional men upon a great variety of unscientific questions arising every day and in every judicial inquiry. These are questions of identity, handwriting, quantity, value, weight, measure, time, distance, velocity, form, size, age, strength, heat, cold, sickness, and health; questions, also, concerning various mental and moral aspects of humanity, such as disposition and temper, anger, fear, excitement, intoxication, veracity, general character, and particular phases of character, and other conditions and things, both moral and physical, too numerous to mention."

1886, *Johnston, J.*, in *State v. Baldwin*, 36 Kan. 10, 12 Pac. 313: "Facts which are made up of a great variety of circumstances and a combination of appearances which from the infirmity of language cannot properly be described; . . . in this category may be placed

be spattered with blood); 1898, *Baltimore & O. R. Co. v. Hellenenthal*, 31 C. C. A. 414, 88 Fed. 116 (that a crossing was in plain unobstructed view); 1898, *Andersen v. U. S.*, 170 U. S. 481, 18 Sup. 689 (whether a certain view could be had from a ship's deck); 1899, *Chicago Great W. R. Co. v. Price*, 38 C. C. A. 239, 97 Fed. 423 (whether a rough track was liable to throw out a link-pin); 1900, *Denver & R. G. R. Co. v. Roller*, 41 id. 22, 100 Fed. 738 (whether a present physical condition was caused by an injury); 1900, *Southern Pacific Co. v. Hall*, ib. 50, 100 Fed. 760 (effect of use of artificial limb on capacity to labor); *Vermont*: 1846, *Clifford v. Richardson*, 18 Vt. 626 (probable amount of work done by a mill); 1862, *Fairchild v. Beacomb*, 35 id. 407 (effect of disease); 1868, *Cavendish v. Troy*, 41 id. 107 (possibility of a fact having occurred without coming to the witness' knowledge); 1885, *Carpenter v. Corinth*, 58 id. 216 (mode in which a bit could have broken, excluded); 1886, *Bemis v. Bishop*, 58 id. 640 (sufficiency of a machine for work); 1884, *Johnson v. R. Co.*, 56 id. 708 (capacity to labor); 1896, *State v. Nookes*, 70 id. 247, 40 Atl. 249 (whether an infant's skull could be fractured by hand-pressure); 1899, *Baker v. Sherman*, 71 id. 439, 46 Atl. 57 (whether it was feasible to make a road to get certain timber); *Virginia*: 1902, *Norfolk R. & L. Co. v. Corietto*, 100 Va. 353, 41 S. E. 740 (within what distance a street car could be stopped); *Washington*: 1892, *Robinson v. Marino*, 3 Wash. 435, 28 Pac. 752 (cause of a wound); *West Virginia*: 1891, *Bowen v. Huntington*, 35 W. Va. 693, 14 S. E. 317 (cause of an injury); *Wisconsin*: 1849, *Laning v. State*, 1 Chand. 183 (effect of floods on health of neighborhood, excluded); 1864, *Curtis v. R. Co.*, 18 id. 315 (effect of weather on fruit, etc.);

1866, *Blair v. R. Co.*, 30 id. 262 (probable falling off of business patronage); 1870, *Whitney v. R. Co.*, 37 id. 344 (liability of wool waste to spontaneous combustion); 1872, *Leopold v. Van Kirk*, 39 id. 555 (cause of goods deteriorating); 1874, *Montgomery v. Scott*, 34 id. 344 (effect of a wound upon health); 1875, *Oleson v. Telford*, 37 id. 331 (probability of a stage-coach tipping over, excluded); 1875, *Brabbins v. R. Co.*, 38 id. 293 (effect of a leaky throttle-valve); 1879, *Wylie v. Wausau*, 48 id. 507, 4 N. W. 682 (like *Blair v. R. Co.*); 1880, *Salvo v. Duncan*, 49 id. 157, 4 N. W. 1074 (possibility of performing a contract); 1882, *Hierbach v. Rubber Co.*, 54 id. 212, 11 N. W. 514 (like *Blair v. R. Co.*); 1882, *Noonan v. State*, 55 Wis. 260, 12 N. W. 379 (rape as the cause of certain symptoms, excluded); 1884, *Boyle v. State*, 61 id. 447, 21 N. W. 289 (cause of death, as gathered from an examination of body); 1885, *Rhinehart v. Whitehead*, 64 id. 44, 24 N. W. 401 (effect of a wound); 1893, *Vosburg v. Putney*, 86 id. 278, 280, 26 N. W. 480 (cause of a corporal injury, in action for battery); 1897, *Maitland v. Paper Co.*, 97 id. 476, 72 N. W. 1124 (cause of explosion of glass, excluded); *Wyoming*: 1899, *Ross v. State*, 8 Wyo. 351, 57 Pac. 924 (whether a weapon would have been seen, had there been one).

¹ Other less comprehensive but often-quoted summaries are these: 1864, *Bellows, J.*, in *Low v. Railroad*, 45 N. H. 383 ("size, weight, distance, speed, identity, sound, and the like"); 1875, *Endicott, J.*, in *Com. v. Sturtivant*, 117 Mass. 122: ("[Any one's opinion is receivable on] a question of identity as applied to persons, things, animals, or handwriting, and in regard to size, color, weight of objects, and in estimating time and distances").

matters involving magnitude or quantities, portions of time, space, motion, gravitation, value, and such as relate to the condition or appearance of persons or things."

* In the following citations the testimony was admitted, unless it is otherwise expressly noted: *Distance and Size*: 1903, *Rollings v. State*, 136 Ala. 124, 34 So. 348 (that persons were near enough to hear abusive language); 1900, *Central of G. R. Co. v. Bond*, 111 Ga. 13, 36 S. E. 299 (to what distance a railroad train would throw a person struck while on the track, not allowed for non-experts); 1863, *Hovey v. Sawyer*, 5 All. 554 (highest part of a hill, excluded); 1895, *Walker v. R. Co.*, 104 Mich. 606, 62 N. W. 1032 (height); 1873, *Fulsome v. Concord*, 46 Vt. 140 (whether a road was wide enough for two vehicles to pass); *Time and Temperature*: 1853, *Campbell v. State*, 23 Ala. 63 (time of day); 1895, *Brown v. R. Co.*, 34 La. 309, 63 N. W. 737 (dark); 1864, *Curtis v. R. Co.*, 18 Wis. 315 (temperature); 1873, *Leopold v. Van Kirk*, 29 Id. 554 (same); *Speed* (compare the citations ante, § 571): 1895, *Alabama G. Co. v. Hall*, 106 Ala. 599, 17 So. 176 (train); 1902, *Nesbit v. Crosby*, 74 Conn. 554, 51 A. 10 (question as to the speed of a horse, judge, by the sound, allowed); 1898, *Illinois C. R. Co. v. Ashline*, 171 Ill. 313, 49 N. E. 521 (that a train was running fast); 1899, *Overtown v. R. Co.*, 181 Id. 323, 54 N. E. 696 (same); 1896, *Louisville v. A. & C. R. Co. v. Jones*, 106 Ind. 565, 9 N. E. 476 (train); 1888, *Evansville & T. H. R. Co. v. Crist*, 116 Id. 457, 19 N. E. 310 (train); 1895, *Chipman v. R. Co.*, 19 Utah 68, 41 Pac. 563 (train); 1884, *Hoppe v. R. Co.*, 61 Wis. 369, 21 N. W. 237 (train); *Direction* (compare the cases cited ante, § 660): 1896, *McKee v. State*, 83 Ala. 38, 2 So. 451 (direction of the blow causing a wound, excluded); 1895, *People v. Chin Hane*, 108 Cal. 597, 41 Pac. 697 (that a pistol-shot sounded as though fired inside a building; the direction of a bullet); 1900, *People v. Clarke*, 130 Id. 642, 11 Pac. 136 (whether shots sounded from in or out of a house); 1882, *Territory v. Egan*, 3 Dak. 127, 13 N. W. 568 (direction of the blow causing a wound, excluded); 1875, *Com. v. Sturdivant*, 117 Mass. 122 (direction of blood causing a stain, excluded); 1890, *Dillard v. State*, 58 Miss. 387 (indications in blood-marks on clothes as to position of assailant, excluded); 1866, *State v. Shinborn*, 46 N. H. 497, 508 (direction of a sound); 1863, *Kennedy v. People*, 39 N. Y. 257 (direction of a blow delivered upon the body, admitted; position of the body when struck, excluded); 1873, *State v. Jones*, 63 N. C. 443, 38 S. E. 443 (direction of a shot); 1849, *Steamboat Clipper v. Logan*, 18 Oh. 394 (direction of a blow by a colliding vessel); 1895, *State v. Sullivan*, 43 S. C. 205, 21 S. E. 4 (place of an assailant as shown by the wound); 1859, *Cooper v. State*, 23 Tex. 335 (that the assailant was not on a level with the deceased, excluded); 1896, *Hopt v. Utah*, 120 U. S. 436, 7 Sup. 614 (direction of a blow delivered upon the body); *Identity*: 1874, *R. v. Castro* (Tichborne Case), charge of Cockburn, C. J., II, 124 (a question as to whether the defendant was Tichborne, excluded, so far as the witness proposed, not merely to speak of the apparent sameness of appearance

with the person he knew, but of the general fact of individual identity on the whole of the case); 1877, *Walker v. State*, 58 Ala. 395 (of parcels of wheat); 1882, *Whisenant v. State*, 71 Id. 383, 384 (that a description of stolen oxen corresponded with oxen seen, excluded); 1882, *Beale v. Posey*, 72 Id. 332 (of a person, by a mode of walking); 1895, *Chilton v. State*, 105 Id. 98, 16 So. 797 (that a person's description tallied, excluded); 1897, *Newell v. State*, 115 Id. 54, 22 So. 572 (of buttons); 1898, *Terry v. State*, 118 Id. 79, 23 So. 776 (of foot-prints, excluded); 1900, *Morris v. State*, 124 Id. 44, 27 So. 336 (of shoe-tracks); 1897, *People v. Lovren*, 119 Cal. 55, 51 Pac. 22 (of the texture and quality of cloth); 1897, *Ankew v. People*, 23 Colo. 446, 40 Pac. 524 (of a brand or a part of one); 1898, *Roberson v. State*, 40 Fla. 509, 24 So. 474 (of a person); 1882, *Wiggins v. Henson*, 68 Ga. 819; 1888, *Watt v. People*, 126 Ill. 29, 18 N. E. 340 (of hairs); 1890, *Ogden v. Illinois*, 134 Id. 599, 25 N. E. 755 (of a voice); 1901, *Keith v. State*, 157 Ind. 376, 61 N. E. 716 (of a corpse); 1890, *State v. Moelchen*, 53 Ia. 310, 312, 5 N. W. 186 (of shoe-tracks); 1897, *State v. Millmeier*, 102 Id. 692, 72 N. W. 275 (of footprints); 1874, *State v. Folwell*, 14 Kan. 110 (of a wagon); 1885, *Gentry v. McMinnis*, 3 Dana 383; 1895, *Shorten v. Judd*, 56 Kan. 43, 42 Pac. 337 (personal resemblance, excluded); 1862, *Eddy v. Gray*, 4 All. 438 (personal resemblance, excluded; though it does not appear that the persons compared were both in court); 1869, *Com. v. Pope*, 103 Mass. 440 (of footprints); 1897, *Com. v. Crowley*, 167 Id. 434, 45 N. E. 766 ("How do you know it was C. that struck you?", allowed); 1897, *Com. v. Kennedy*, 170 Id. 18, 49 N. E. 770 (of a person buying poison); 1900, *People v. Gotshall*, 123 Mich. 474, 82 N. W. 274 (that a person was "about the same size and height" as defendant, inadmissible); 1895, *State v. Powers*, 130 Mo. 475, 32 S. W. 284 (of persons); 1901, *Russell v. State*, 62 Nebr. 512, 87 N. W. 344 (of horse-tracks; excluded); 1902, *Russell v. State*, — Id. —, 92 N. W. 751 (of horse-tracks, admitted); 1866, *State v. Shinborn*, 46 N. H. 502, 503 (of a voice); 1878, *King v. R. Co.*, 72 N. Y. 608 (of a piece of iron); 1836, *Beverly v. Williams*, 4 Dev. & B. 237; 1880, *State v. Reitz*, 83 N. C. 636 (of footprints); 1874, *Uddersook v. Com.*, 76 Pa. 342, 353 (of a person); 1898, *Com. v. Farrell*, 167 Id. 406, 41 Atl. 362 (whether two pocketbooks were mended by the same person, excluded); 1899, *State v. Davis*, 55 S. C. 339, 33 S. E. 449 (that of shoe-marks as corresponding with certain shoes); 1874, *Woodward v. State*, 4 Baxt. 394 (of a person); 1896, *Templeton v. Luckett*, 21 C. C. A. 325, 75 Fed. 254 (one who knew the person in question and had examined a deed and the rolls of a military company where the name appeared in different spellings, not allowed to declare his belief of the identity of name); 1897, *State v. Cushing*, 17 Wash. 544, 50 Pac. 513 (correspondence of holes in the deceased's body and clothing); 1882, *Knoll v. State*, 55 Wis. 252, 12 N. W. 369 (of two specimens of hair as coming from the same

§ 1978. *Miscellaneous Topics of Testimony.* Further classification of the cases arising under the Opinion rule would be impractical.¹ It may be

person, excluded). For other principles affecting testimony to identify a person, see ante, §§ 167, 413, 660. For the presumption from identity of name, see post, § 2323. For the use of personal resemblance as evidence of paternity, see ante, §§ 166, 1154.

¹ In the following situations the testimony was admitted, unless it is otherwise expressly noted: *Eng.*: 1831, *Redford v. Birley*, 1 State Tr. n. s. 1071, 1134, 1171 (battery in dispersing a seditious assembly; whether the mob in the witness' judgment endangered the public tranquillity); *Ala.*: 1849, *Rumbert v. Brown*, 14 Ala. 360 (how much corn per month was needed for a plantation); 1876, *Smith v. State*, 55 Ala. 11 (the charge was of selling to a person of "known intemperate habits," and the witness was allowed to testify only to "intemperate habits"); 1877, *Campbell v. Gilbert*, 57 id. 568 (whether a guano benefited a crop); 1898, *Louisville & N. R. Co. v. Binion*, 107 id. 645, 18 So. 75 (whether a stack brake goes off violently); 1895, *Miller v. State*, ib. 40, 19 So. 37 (that a pistol must be "very close" for the powder to scorch); 1898, *Shrimpton Co. v. Brice*, 106 id. 640, 20 So. 10 (debt on account; "Is that account correct?", held proper); 1898, *Wager L. Co. v. Sullivan L. Co.*, 120 id. 556, 24 So. 249 (whether timber was "merchantable," allowed, but not whether it was "fit to go on the market"); *Cal.*: 1893, *Callan v. Bull*, 119 Cal. 593, 45 Pac. 1017 (strength of resistance of timber); *Conn.*: 1893, *Irring v. Shethar*, 71 Conn. 434, 43 Atl. 258 (cited ante, § 1918); *Ga. Code* 1895, § 5235 ("Where the question under examination and to be decided by the jury is one of opinion, any witness may swear to his opinion or belief, giving his reasons therefor; but if the issue is as to the existence of a fact, the opinions of witnesses, generally, are inadmissible"); § 5237 ("The opinions of experts on any question of science, skill, trade, or like questions, are always admissible; and such opinions may be given on the facts as produced by other witnesses"); 381, *Augusta & L. R. Co. v. Dorsey*, 68 Ga. 287 (code section construed generally); 1876, *Wynne v. State*, 56 Ga. 113, 119 (whether cartridges had been punctured before firing); *Ind.*: 1893, *Bennett v. Needham*, 83 Ind. 548 (area to be benefited by a ditch); 1893, *Mills v. Winter*, 94 id. 333 (whether a person was of sickle temper); 1908, *Green v. State*, 154 id. 635, 37 N. E. 637 (quantity and quality of moon's light); *Ia.*: 1843, *Thomas v. Lott*, 1 G. Greene 472 (injury to credit by seizure of goods, excluded); 1876, *Crawford v. Wolf*, 29 Ia. 567, 573 (profits on a contract, allowed); 1881, *Parkhurst v. Mac-teller*, 57 id. 476, 10 N. W. 264 (whether hay was burning, excluded); 1897, *Gould v. Schermer*, 101 id. 582, 70 N. W. 697 (whether a horse blind in one eye was likely to shy, excluded); 1898, *McMahon v. Dubaque*, 107 id. 62, 77 N. W. 517 (that a house was in good repair, excluded); 1902, *Hollenbeck v. Marion*, 116 id. 60, 39 N. W. 210 (that water was foul and nasty); *Kan.*: 1889, *State v. Jones*, 41 Kan. 312

(distance at which shot scatters); *Ky.*: 1869, *St. Louis M. Life Ins. Co. v. Graves*, 6 Bush 290 (that no sane man in a Christian country would commit suicide, excluded); 1878, *Claxton's Adm'r v. R. Co.*, 18 id. 643 (quality of iron); 1896, *Com. v. Tate*, — Ky. —, 33 S. W. 403 (net result of accounts); *La.*: 1903, *State v. Williams*, 111 La. —, 35 So. 521 (that a place was a "gambling-house," etc.); *Maine*: 1876, *State v. Watson*, 45 Me. 74 (whether a fire would probably spread in certain ways, excluded); 1900, *Boothby v. Lacasse*, 94 id. 392, 47 Atl. 916 (course of a fire; expert testimony excluded); 1903, *Caven v. Bodwell G. Co.*, 97 id. 381, 54 Atl. 851 (tensile strength of wire cables; a non-expert excluded on the facts); *Mass.*: 1870, *Com. v. Choate*, 106 Mass. 457 (that two broken pieces of stick formed originally one piece); 1872, *Jordan v. Osgood*, 109 id. 459, 444 (net amount of stock on hand as gathered from account-books); 1873, *Com. v. Dowdican*, 114 id. 257 (that the contents of a tumbler looked like whiskey); 1898, *Connolly v. Woolen Co.*, 163 id. 154, 39 N. E. 787 (machinery); 1898, *Flynn v. B. E. L. Co.*, 171 id. 395, 50 N. E. 937 (mode of stringing electric wires from poles across trees; expert not needed); *Mich.*: 1886, *Passmore v. Passmore Estate*, 60 Mich. 463, 27 N. W. 601 (whether detached and pasted leaves in a notebook belonged there originally, excluded); 1900, *People v. Jones*, 124 id. 177, 82 N. W. 806 (that tools produced in court were burglars' tools); *Minn.*: 1886, *Pock v. Small*, 35 Minn. 446 (influence of a person in the community, excluded); 1897, *Lane v. Agric. Soc.*, 67 id. 65, 60 N. W. 463 (effect of "track-bolting" in a running horse; purpose of using blinkers); *Mo.*: 1873, *Eyerman v. Sheehan*, 52 Mo. 323 (depth of a quantity of stone); *Nebr.*: 1900, *Bee Pub. Co. v. World Pub. Co.*, 59 Nebr. 713, 82 N. W. 28 (importance to a newspaper of reputation for solvency, stability, etc.); *N. H.*: 1899, *Little v. Head & D. Co.*, 66 N. H. 494, 43 Atl. 619 (sufficiency of a hook to sustain a weight); *N. J.*: 1898, *Bergen Co. T. Co. v. Bliss*, 62 N. J. L. 410, 41 Atl. 837 (how an accident occurred, excluded); *N. Y.*: 1873, *King v. R. Co.*, 73 N. Y. 608 (whether a piece of iron was cracked; allowed for experts, refused for others); 1879, *People v. Manks*, 78 id. 611 (whether a paper looked like wadding shot from a gun; undecided); 1884, *People v. Miller*, 96 id. 411 (whether a picture was obscene, excluded); 1888, *Collins v. R. Co.*, 100 id. 243, 247, 16 N. E. 50 (which of two engines emitted the more sparks); 1890, *Van Wycklen v. Brooklyn*, 118 id. 428, 24 N. E. 179 (tapping of a creek by pipes, excluded); 1896, *Witmark v. R. Co.*, 149 id. 393, 44 N. E. 73 (stating the results of an arithmetical calculation that could have been made by the Court, held not improper); 1897, *Plandreau v. Ellsworth*, 151 id. 473, 45 N. E. 853 (tonnage of the hull of a barge); *N. C.*: 1859, *State v. Jacobs*, 6 Jones L. 266 (African descent); *Oh.*: 1873, *Stambaugh v. Smith*, 23 Oh. St. 594 (existence of coal seams); *Pu.*: 1839, *Reed v. Dick*,

suggested that the use of these rulings as definite and inflexible precedents would indicate a misunderstanding of their effect. They merely illustrate the application of the general principle to the facts of a given case, and their employment as permanent, unvarying rules ignores the true significance of the general principle. The following passage will sufficiently illustrate the orthodox mode of applying the principle to a new instance:

1875, *Pardoe, J., in Clinton v. Howard*, 42 Conn. 394 (admitting the testimony of a skilled witness as to whether a certain pile of stones would make horses shy): "It would be difficult, if not impossible, to embody in words, so as to be fully understood by the triers, a description of all the appearances which make a particular pile of stones a source of terror to gentle horses, unaccustomed to the sight of such an object. The fright is the result of a combination of form, color, and relative position, which would elude the effort of any witness clearly and fully to describe. Knowledge of the reasons why one object arouses the instinct of fear in a horse and another does not, and why the pile of stones should be put in one class or the other, is not presumptively within the knowledge of all jurors."

8 Watts 481 (whether a cable was sound); 1896, Fifth Mut. B. Soc. v. Holt, 184 Pa. 572, 39 Atl. 293 (by a secretary of a society, whether it had not always recognized a person as owner of stock, excluded); Tex.: 1891, *Radam v. Microbe Destroyer Co.*, 81 Tex. 131 (whether a trademark-imitation was calculated to deceive, excluded); U. S.: 1896, *Kiesel v. Ins. Office*, 31 C. C. A. 618, 89 Fed. 243 (whether a burning roof was standing, not improperly excluded in discretion); 1896, *Fireman's Ins. Co. v. Mohlmann*, 33 Id. 247, 91 Fed. 85 (whether a building overloaded fell before it was burned, excluded); 1899, *Golden Reward M. Co. v. Buxton M. Co.*, 39 Id. 228, 97 Fed. 413 (character of ore mined);

Vt.: 1873, *Bates v. Sharon*, 45 Vt. 461 (indications of a road, as to being washed out); 1889, *Brown v. Doubleday*, 61 Id. 324, 17 Atl. 135 (shrinkage of bark; excluded on the facts); 1898, *State v. Bradley*, 61 Id. 465, 32 Atl. 240 (whether a stain was of blood); 1898, *Morse v. Bruce's Est.*, 70 Id. 378, 40 Atl. 1034 (certain arithmetical reckonings, excluded as superfluous); 1899, *Baker v. Sherman*, 71 Id. 439, 46 Atl. 57 (counting rings in a tree-trunk before the jury, allowed for an expert); W. Va.: 1883, *Welch v. Ins. Co.*, 23 W. Va. 306 (combustible peculiarities of wool, excluded); Wis.: 1876, *Wood v. R. Co.*, 40 Wis. 582 (whereabouts in a building a fire began, excluded).

Tome III: OPINION RULE,
AS APPLIED TO TESTIMONY TO
MORAL CHARACTER AND PROFESSIONAL SKILL

CHAPTER LXVII

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§ 1980. Introductory. In 1798, at the trial of the ardent young Irish gentleman, O'Connor, on the charge of breach of parole, a galaxy of person-ages famous in history were called to testify to the honor and uprightness of the accused. One after another, Erskine, Fox, Sheridan, and Grattan were admitted to the box, to express their personal belief in the integrity of their friend.¹ In 1803, at the trial of Captain Despard, one of the witnesses to character was the battle-scarred veteran of the seas, Lord Nelson, who, on behalf of an old messmate, testified, not to any reputation, but to his own belief founded on long personal intimacy.²

To-day this is changed. By a rule which is almost universal (in American courts, at least), the personal knowledge and belief of the witness to character is rigorously excluded, and the community-reputation is all that will be listened to. The policy of the change is highly questionable, but its consideration may be deferred for a moment. It is necessary first to examine the history of this change and the effects it has left upon the law of to-day. Looking at the cases first in England and then in the United States, it will be convenient to take up separately the cases of a defendant's character and a witness' character.

¹ 1798, O'Connor's Trial, 27 How. St. Tr. 39 (Thomas Erskine: "I feel myself not only entitled but bound upon my oath to say, in the face of God and my country, as a British gentleman, which is the best thing any man can be, that he is incapable in my judgment, of acting with treachery or duplicity to any man, but most of all to those for whom he professes friendship and regard"), 42 (Charles James Fox), 45 (Richard Brinsley Sheridan), 50 (Henry Grattan), 50 (Lord John Russell).

² 1803, Despard's Trial, 28 How. St. Tr. 460 (Vice-Admiral Lord Viscount Nelson: "We went on the Spanish Main together, we slept many nights together in our clothes upon the ground, we have measured the height of the enemy's wall together; . . . I formed the highest opinion of Colonel Despard"), 461 (testimony of Sir Evan Nepean: "You will state your opinion of him from your own knowledge of him; that opinion I understand to be a good one, so far as you have known him!") "Yes".

1. History and Present State of the Law.

a. ENGLAND.

§ 1981. *Accused's Moral Character.* a. That the original and unquestioned practice called for and allowed the witness' own belief, founded merely on personal intimacy, as to the trait of character in question, and did not insist on or necessarily ask for the community's reputation, is clear from the following passages:

1699, *Trial of Cowper, Marson, Stephens, and Rogers*, 18 How. St. Tr. 1180 ff.; murder; Sir T. Lane: "I never knew him [Cowper] discover any ill-nature in his temper; I think he cannot be suspected of this or any other act of barbarity"; Mr. Cox: "I have lived by him eight or nine years; . . . of all men that I know, he would be the last man that I should suspect of such a fact as this is; I believe nothing in the world could move him to entertain the least thought of so foul an act. . . . I have known Mr. Marson a long time, and had always a good opinion of him; I do not believe 5000*l.* would tempt him to do such a fact"; Major Lane: "My Lord, I have known Mr. Marson ever since he was two years old, and never saw him but a civilized man in my life; he was well bred up among us, and I never saw him given to debauchery in all my life."

1794, *Thomas Hardy's Trial*, 24 How. St. Tr. 909; John Stevenson sworn: "How long have you known Mr. Hardy?" "About eight or nine years, as near as I can recollect." "What character has Mr. Hardy borne during the eight or nine years you have known him?" "I have always esteemed him as a man of a mild, peaceable disposition." "Have you known him well during that time?" "Yes; . . . he always behaved with great uprightness as far as I had occasion to observe him, and I always esteemed him a man of a peaceable, mild disposition; and as to moral character, I know no man that goes beyond him." "Has that been his general character?" "It has been as far as I ever knew; I never heard anything to the contrary." Alexander Gregg sworn; he knew Mr. H. intimately: "Has he been a peaceable, orderly man?" "As far as ever I saw." "Have you known him well during this time?" "Yes, as a neighbor constantly." "Is this his general character?" "It is, as far as I ever heard."

1808, *Alexander Davison's Trial*, 31 How. St. Tr. 180; fraud in public accounts; Lord Moira sworn: "Had your lordship [as general-in-command, Mr. D. being commissary-general] an opportunity of observing his public conduct?" "His conduct was clear and punctual, answering every expectation I had formed, strictly delicate in refusing emoluments which he might well have claimed." "From your lordship's general knowledge of his conduct, is he a person whom your lordship would think capable of committing a fraud?" "Certainly not." [After an interruption on another point]: Lord Ellenborough: "The correct inquiry is as to the general character of the accused, and whether the witness thinks him likely to be guilty of the offense charged in the indictment." Sir Andrew Hammond sworn; Lord Ellenborough: "From your knowledge of Mr. Davison's character and conduct, do you think him capable of committing a fraud?" "I should have thought him the last man in the world that would have attempted anything of the kind, or even to have been a cause of it." Mr. James Davidson sworn: "From all that you have observed of him [Mr. D.] and all that you have known and heard of him, what is your opinion of his general character?" "You say 'known and heard'; all that I have known of him is that he has been an honest man, an honest dealer with me as a merchant." "From what you have heard in the world at large, what is your opinion of him?" "There are a variety of reports concerning Mr. Davison; those I know only as the world knows; but as to his dealings with me, I always found him an honorable and honest man."

1831, Lord Tenterden, C. J., in *R. v. Cobbett*, 2 State Tr. n. s. 789, 878: "The proper inquiry for a gentleman who has known Mr. C. many years is as to his general character,"

not as to any individual or particular acts. . . . You may ask persons who have been acquainted with you what their opinion is of your character and your views on subjects connected with this publication"; then witnesses testify, *e. g.*, "I have known him personally for five years, and I think him quite the reverse of a man likely to incite the laborers to outrage."

The constant practice in the State Trials illustrates this, in the earlier centuries¹ as well as in the 1800s.²

A few features of this orthodox practice may now be noticed.

b. The only doubt was as to whether the witness must stop with the specification of abstract qualities, or could go on to speak specifically as to the defendant's likelihood to commit the crime in question; *i. e.* whether, instead of merely asking, "Is he to your knowledge a man of peaceable disposition?" the further inquiry was allowable, "Is he in your judgment a man likely to have raised a disturbance or committed an act of violence?" The latter form of question, as involving an opinion on the merits, was excluded in 1794, in these words:

1794, *Eyre, L. C. J.*, in *Hardy's Trial*, *supra*: "I have often heard it put, and often heard it objected to. It is certainly not a strictly regular question. You are to ask his general character, and from thence the jury are to conclude whether a man of such a character would commit such an offense. At the same time, in justice to the question, I must say I have known it asked a hundred times; I have very often objected to it myself."

On the other hand, in 1808, throughout *Davison's Trial* (*supra*), Lord Ellenborough sanctioned that form of question, under the following ruling: "The correct inquiry is as to the general character of the accused, and whether the witness thinks him likely to be guilty of the offense charged in the information." The truth is that Lord Ellenborough's form of question had always been an orthodox one, and it was only towards the end of the century that the unfounded doubt arose.³

¹ 1685, *Fenley's Trial*, 11 How. St. Tr. 406, 435; 1696, *Sir John Freind's Trial*, 18 id. 40, 41, 42, 43; 1696, *Lowick's Trial*, ib. 291, 299; 1696, *Butler's Trial*, ib. 1290, 1261; 1702, *Swendsen's Trial*, 14 id. 589, 590; 1704, *Donew's Trial*, ib. 931, 932; 1710, *Willis's Trial*, 15 id. 630, 638; 1729, *Huggins's Trial*, 17 id. 849-854; *Acton's Trial*, ib. 500; 1741, *Captain Goodere's Trial*, ib. 1061-1063; *White's Trial*, ib. 1088; 1753, *Murphy's Trial*, 19 id. 725; 1758, *Barnard's Trial*, ib. 833, 834, 835, 837, 838, 840, 841; 1754, *Canning's Trial*, ib. 467, 504, 591; 1773, *Fabrigas v. Mostyn*, 20 id. 94; 1775, *Fowke's Trial*, id. 1184; 1780, *Anon.*, *McNally's Evidence*, 323; 1783, *Dean of St. Asaph's Trial*, 21 How. St. Tr. 932, 933; 1783, *Bembridge's Trial*, 22 id. 66, 67; 1796, *Sheare's Trial*, 27 id. 323, 362; *Byrne's Trial*, ib. 504.

² 1802, *Wall's Trial*, 28 How. St. Tr. 137; 1802, *Macfarlane's Trial*, ib. 305; 1803, *Hedge's Trial*, ib. 1402, 1403; *Kearney's Trial*, ib. 745; *Byrne's Trial*, ib. 830; *Killen's Trial*, ib. 1037, 1038; *Doran's Trial*, ib. 1067; *Donnelly's Trial*, ib. 1091; *McIntosh's Trial*, ib. 1226, 1237;

Keenan's Trial, ib. 1294; *Redmond's Trial*, ib. 1306, 1307; 1804, *Cobbett's Trial*, 29 id. 45, 46; 1805, *Pieton's Trial*, 30 id. 259; 1807, *Draper's Trial*, ib. 1017-1023; 1817, *Turner's Trial*, 32 id. 1053; *Weightman's Trial*, ib. 1382; 1839, *R. v. Collins*, 3 State Tr. n. s. 1149, 1170, 1174; *R. v. Lovett*, ib. 1177, 1185; 1839, *R. v. Frost*, 4 id. 35, 214, 370; 1843, *R. v. O'Connor*, ib. 935, 1161 ("From your knowledge of me for eight years, do you think I would do anything calculated to lead to a breach of the peace through any pecuniary motive?"); 1848, *R. v. Fussell*, 6 id. 723, 759; 1848, *R. v. Duffy*, 7 id. 795, 923; 1848, *R. v. Dowling*, ib. 332, 454; 1848, *R. v. O'Donnell*, ib. 637, 698 ("What in your opinion is his character for peacefulness and good behavior?") "I have always believed him to be a peaceful and well-behaved man").

³ As the following cases show: 1683, *Ward's Trial*, 9 How. St. Tr. 299, 330 (perjury: "Do you think he would forswear himself?"); 1696, *Butler's Trial*, 18 id. 1260, 1261 ("Whether you think she would be guilty of such a forgery?") "I cannot believe she would"; 1704,

c. The doctrine that *particular acts* could not be spoken of had very early been enunciated for testimony to a witness' character,⁶ but was not then fully established for testimony to a defendant's character,⁷ especially for testimony detailing his good deeds (as the above quotations show),⁸ and it is the judicial endeavor to enforce this prohibition that has sometimes been misunderstood as directed to the present subject, — with which, of course, it has nothing to do.⁹

d. The hesitation, if any, was as to receiving reputation, and not as to personal knowledge, — as is seen clearly in the quotation from O'Connor's Trial,¹⁰ and is discernible also in Hardy's and Hedge's Trials.¹¹ The witness constantly spoke from personal knowledge alone, and often (though less frequently) from personal knowledge plus reputation; but to speak from reputation alone is regarded in the 1700s as improper.¹² On this point the law afterwards changed and allowed reputation alone;¹³ but the earlier practice thus shows that it was only reputation, and not personal acquaintance, that could be attended by any suspicion of its orthodoxy.

e. The term "character" was normally applied to the actual qualities, and not to the community's estimate of these qualities,¹⁴ as the preceding quotations show. Moreover, the term "*general* character" while it was sometimes applied to the latter, to distinguish it from the former when spoken of at the same time (as in Hardy's Trial, quoted *supra*), was also and commonly applied to the former alone, — especially either to make the second distinction (in *b, supra*), or to distinguish (as in *c, supra*) the "*general*" traits themselves from the "*particular*" acts instancing them. This latter meaning (i. e. general disposition as opposed to the inadmissible particular acts showing it) seems to have been the original and natural source of the phrase and the orthodox application of it. This point, important in clearing up obscurities, is made evident by the following passage:¹⁵

1722, *Laver's Trial*, 16 How. St. Tr. 246; various discreditable facts being offered to discredit a witness, he was stopped, on objection; L. C. J. Pratt (to counsel): "Mr. Hungerford, you know what the rule of practice and evidence is, when objections are made to credit and reputation of the witness; you cannot charge him with particular offenses. For if that were to be allowed, it would be impossible for a man to defend himself. You are not to examine to the *particular facts* to charge the reputation of any wit-

Denew's Trial, 14 id. 981, 982 (murder; to defendant's witness: "Do you think he would have been guilty of an assassination?" "No, indeed I do not"); 1723, Bishop Atterbury's Trial, 16 id. 323, 572 (Alexander Pope, then engaged on his *Odyssey* translation, was called to give the accused a good character and was asked "whether he suspected the Bishop was engaged in such matters as were laid to his charge"); 1783, Dean of St. Asaph's Trial, 21 id. 932 ("Do you think him likely to be a man to stir up sedition?" "Far from it; I think him one of the first that would quell it"); 1796, O'Connor's Trial, 28 id. 39, 42 (quoted *supra*); 1831, *R. v. Cobbett*, 2 State Tr. N. S. 789, 876 (testimony that the defendant was not "likely to incite the laborers to outrage").

⁶ *Ante*, §§ 979, 987.

⁷ *Ante*, § 194.

⁸ *Ante*, § 195.

⁹ Compare the quotations next ensuing, *supra*.

¹⁰ Quoted *post*, § 1982.

¹¹ Quoted *ante*, this section.

¹² On this point, compare also the quotation *post*, § 1982, for witness character.

¹³ *Ante*, § 1910.

¹⁴ This should be clearly realized. Whatever ambiguities the phrase "general character" had, "character" meant just what it seems to mean. Compare what is said as to this distinction, *ante*, § 1608.

¹⁵ Italics are used to elucidate the emphasis.

ness, but only in general you are to ask what his character and reputation is. . . . You know, if there be any objection to him, to his general character, he can answer them; but if objections are grounded on particular charges of his being a base, an infamous, and an ill man, not having any notice of this, it is impossible for him to defend himself." 16

When it is remembered that up to this time nobody questioned the propriety of calling for personal knowledge as to actual character, it will easily be seen that "general character" could usually mean only one thing, viz.: the general or abstract trait as distinguished from particular instances of it.

We are now in a position to understand the remark of Lord Ellenborough, C. J., in *Jones' Trial*:¹⁶ "It is reputation; it is not what a person knows." This was called forth by the persistent attempt of counsel to bring out particular facts showing honesty, in violation of the above rule. The remark is easily interpreted in that sense in the light of the same judge's clear opinion and practice in *Davison's Trial*,¹⁷ in the preceding year, when he freely allowed the witnesses to speak from personal knowledge only, and distinctly sanctioned the question "whether he thinks him likely to be guilty of the offence charged," and there used the term "general character" simply as distinguished from particular acts. But the isolated phrase above in *Jones' Trial* somehow caught the attention of modern treatise-writers, and, being misunderstood, has proved a great stumbling-block; for example, in the argument of counsel in *R. v. Rowton*,¹⁷ where Mr. Taylor truly said: "There is only one judicial authority to exclude individual opinion, and that is what Lord Ellenborough said in *R. v. Jones*"; and that, he might have added, was really no authority if rightly understood.

f. The practice and the rule in England to the middle of the 1800s are thus plain. The statements of the early and classical writers (all writing from experience at the bar) are equally clear when we understand the usage of the term "character" in this connection.¹⁸ That personal belief, estimate, opinion, or knowledge — under whatever name — was proper and unquestionable testimony to character seems clear enough as the law and the practice throughout this whole period.

g. In 1865 came the decision in *R. v. Rowton*,¹⁹ surprising the profession,²⁰ and ignoring the long record of precedents.²¹ The effect of *R. v. Rowton* is to exclude testimony founded exclusively on personal knowledge, and to require the question in form to be directed to reputation alone. The ruling, it seems, is seldom acted on in practice.²²

¹⁶ So also: 1780, *Maskell's Trial*, 21 *id.* 667; 1817, *R. v. Watson*, 2 *Stark* 149; 1831, *R. v. Cobbett*, 3 *State Tr. n. s.* 789, 876.

¹⁷ 31 *How. St. Tr.* 310 (1809).

¹⁸ Quoted *supra*, in this section.

¹⁹ *Post* (1865), § 1982.

²⁰ 1801, *Peake, Evidence*, 2d ed., § 1802; McNally, *Evidence*, 324; 1814, *Phillippa, Evidence*, 1st ed., 72, 108; 1824, *Starkie, Evidence*, 1st ed., II, 366.

²¹ *Leigh & C.* 520, 10 *Cox Cr.* 25, with two judges dissenting.

²² See the remarks of Mr. J. Stephen, in his *Digest of Evidence*, 3d ed., Note XXV.

²³ The opinion of Cockburn, C. J., for the majority, does not cite a single precedent in its favor or discuss the question of policy, and even admits that "the strict rule is often exceeded in practice," and the conclusion seems to have been reached in a doctrinaire fashion, by attributing a supposed meaning to "character," which, as above shown, it does not have. The completeness of the historical misunderstanding in the mind of the learned but dogmatic Chief Justice

§ 1903. *Witness' Character.* There was in thought and in legal rule, under the original and orthodox practice, no different attitude towards proof of a witness' character. The witness to such character, as the following quotations illustrate, constantly, if not usually, spoke from a personal acquaintance; reputation was often, if not commonly, ignored:

1692, *Duke of Norfolk's Divorce Suit*, 12 How. St. Tr. 909, 919: "Witnesses produced to the credit of Rowland Owen [witness]; Edward Spilvester saith: He hath known Rowland Owen three or four years, and he hath trusted him in business, and he hath ever been very faithful; he hath trusted him in stores to the king, and he might have embossed, but ever found him honest, and he hath had three or four thousand pounds' worth of goods that he might have embossed, and hath had opportunities of doing ill things, but he never did; he hath trusted him with everything he hath; he hath had more than twenty pounds embossed by others, but he never embossed a halfpenny."¹

1723, *Loyd's Trial*, 16 How. St. Tr. 258; *Counsel*: "Is he a man as may be believed, even upon his oath, or not?" *Witness*: "I must tell you that I found him in so many mistakes about his own wife that, by God, I would not take his word for a halfpenny." *Counsel*: "Go on, but don't swear 'by God' any more."

1725, *Lord Chancellor Macclesfield's Trial*, 16 How. St. Tr. 1290; *Common Serjeant*: "We desire that Mr. Price may give your Lordships an account of what he knows of the character of Mr. Cothingham and how long he hath known him." *Mr. Price*: "My lords, I have known him upwards of twenty years; I never knew anybody say anything amiss of him. . . . I know no man in his place behave himself better than he hath done." *Common Serjeant*: "We desire to ask not only to what Mr. Price's opinion is, but to what is the opinion of others, as to his general character." *Mr. Price*: "I believe, if you ask his character of an hundred people, ninety of them will give him rather a greater character."

1798, *O'Connor's Trial*, 27 How. St. Tr. 83; *Mr. Dallas*: "Does your lordship [the witness, Earl of Moira] know a person of the name of Dutton, a quartermaster in the artillery?" "I have heard of him, I do not know him." "Does your lordship know what is his general character?" *Mr. Garraw*: "His lordship says that all he knows of Dutton's character is from hearing. . . . The constant practice, where character has been inquired into, has been to put the question thus: Are you acquainted with such a person? From your acquaintance with him, what is his general character? But I never heard that when a witness says, 'I do not know the person, but have heard of him,' that then

may be judged from his following statement, which should be compared with the preceding list of citations: "No one has ever heard the question, 'What is the tendency and disposition of the prisoner's mind?' put directly." The Chief Justice's citation of Phillpotts on Evidence seems to show that he reached his conclusion solely on that authority, the frailty of which may be seen in a few words. In the first edition, of 1814, at p. 72, was the following passage, quite consistent with the law as explained above: "In trials for felony the prisoner is always permitted to call witnesses to his general character"; repeated in substance up to the 3d edition; then, in the 4th, in 1820, comes the following insertion: "What, then, is evidence of general character? One medium of proof is by showing how the person stands in general estimation; proof that he is reputed to be honest is evidence of his character for honesty, and the species of evidence most commonly resorted to in such inquiries. It frequently occurs that

witnesses, after speaking to the general opinion of the prisoner's character, state their personal experience of his honesty; and this statement is admitted, rather from favor to the prisoner, than strictly as evidence of general character." This passage is made more emphatic in later editions, ending with the 10th (l. 507) in 1852. But not a single authority was vouchsafed for the above passage until in 1824, in the 6th edition, R. v. Jones, the single misleading utterance, above explained, was referred to; and, in spite of the score of instances in the 1800s alone, no other citation was made, nor could be, indeed, to justify that passage. Thus, curiously and unfortunately enough, the law of England as repeatedly declared for two centuries was overturned by a passage invented and inserted by a text-writer without the citation of a single precedent.

¹ Earlier precedents in the same century are: 1644, *Turner's Trial*, 6 How. St. Tr. 565, 607; 1680, *Earl of Stafford's Trial*, 7 id. 129^a, 1457.

It was asked, What have you heard of his reputation?" Mr. Dallas: "I admit that hearsay would not be evidence of any particular fact. But . . . I take it to be perfectly clear that it is no objection in this case, to an account of character, to say that it amounts only to hearsay; because when one man gives the character of another, it must be that which he has heard from others, for it extends beyond his own knowledge, and the question is generally put to an extent beyond his own knowledge." Mr. Justice Buller: "Did you ever hear that asked when the witness said he knew nothing about the person?" Mr. Justice Heath: "It must be founded in personal knowledge." Mr. Justice Lawrence: "The question is always put in this way: Do you know the witness? Yes. Then, what do you know of him?" Mr. Dallas: "It is my duty to acquiesce."

This was the established practice of the 1700s³ as well as of the 1800s.⁴ Some things are clear from these precedents:

a. The terms "character" and "general character" are used more or less flexibly, but do not have an orthodox meaning of "reputation." What has been said (*ante*, § 1981, c), applies equally to the terms as here used. Moreover, reputation alone, as O'Connor's Trial shows, was not regarded as sufficient; personal knowledge was the fundamental requirement.⁵

³ 1742, *Annesley's Trial*, 17 How. St. Tr. 1122; 1744, *Earl of Anglesea's Trial*, 18 id. 272, 273; 1754, *Canning's Trial*, 19 id. 589, 595; 1797, *Carty's Trial*, 26 id. 900; 1796, *Bond's Trial*, 27 id. 590, 584, 586, 588.

⁴ 1802, *Wall's Trial*, 23 id. 143; 1802, R. v. Taylor, cited in McNally, *Evidence*, 261, per Buller, J. ("swearing that from what they had observed in his conversation and manners they would not believe him on oath"); 1802, *Mawson v. Hartink*, 4 Rep. 102, Lord Kenyon, C. J. ("He was asked as to his knowledge of L., and whether he would believe him on oath"); 1804, *Carles v. Brook*, 10 Ves. Jr. 49, Lord Eldon, L. C. ("whether he would believe that man upon his oath"); 1805, R. v. Rudge, *Peake Add. Cas.* 232, Lawrence, J. ("by general evidence of persons who were acquainted with him as to their belief of his credibility on oath"); 1806, *McDonough's Trial*, 30 How. St. Tr. 20; *The Threshers' Trials*, ib. 214; 1806, *Piston's Trial*, ib. 259; 1813, *Plummer, V. C.*, in *Watmore v. Dickinson*, 2 Ves. & B. 225 ("The only proper question, as Mr. Cooke has observed, is whether the witness is worthy of belief upon his oath"); 1814, *Anon.*, 3 Ves. & B. 98 (an affidavit discrediting by particular facts was taken off the file; Eldon, L. C.: "You may ask, whether the witness is to be believed upon his oath; which is the matter at law, not going to particular facts"); 1817, R. v. Watson, 2 Stark. 164, 22 How. St. Tr. 495 (Abbott, J.: "The usual question put for the purpose of discrediting the testimony of a witness is, Would you believe that witness upon his oath?"; Bayley, J.: "The witnesses may state that he is not a man to be believed upon his oath"); 1817, R. v. Clarke, 2 Stark. 241, Holroyd, J. (after discrediting evidence of imprisonment, the superintendent of the House of Refuge was allowed to speak to the witness' good character while there); 1817, *Sharp v. Sooging*, Holt N. P. 541, Gibbs, C. J. ("When you endeavor to destroy the credit

of a witness, you are permitted to call other witnesses who know him, and to ask them this general question, Would you believe such a man upon his oath? . . . As no man is to be permitted to destroy a witness' character without having grounds to state why he thinks him unworthy of credit, you may ask him his means of knowledge and his reasons of disbelief"); 1820, *Thistlewood's Trial*, 33 How. St. Tr. 842; *Davidson's Trial*, ib. 1440, 1441; 1824, *May v. Brown*, 3 B. & C. 126, Bayley, J. ("When the credit of a witness is objected to, general evidence that he is not to be believed on oath is inadmissible; but specific evidence of that at some period he had committed a particular crime is not inadmissible"); 1830, R. v. Bingham, 4 C. & P. 292, Carrow, B. (repudiating the suggestion that a character-witness must have heard the impeached witness examined on oath at least once: "You have known him three years; have you such a knowledge of his general character and conduct that you can conscientiously say that, from what you know of him, it is impossible to place the least reliance on the truth of any statement that he may make?"; "Yes"); 1833, R. v. Hemp, 5 id. 463, Denman, L. C. J. (the question "whether from having heard Mr. J. give false evidence on the trial of a former cause, he considered that his testimony could be relied on," was excluded, and the question allowed: "From what you know of the general character of Mr. J., would you believe him on oath?"; 1833, R. v. Nichols, ib. 600, Parke, J. (whether the witnesses in question were "of very bad character" and whether "he would believe those persons on their oaths"; allowed); 1843, R. v. Timington, 1 Cox Cr. 46, Abinger, C. B., *semble*; 1848, R. v. Duffy, 7 State Tr. N. 795, 897.

⁵ The following passages show this as the historical starting-point: 1684, *Rosewell's Trial*, 10 How. St. Tr. 147, 230 ("Do you know this of your own knowledge? For we must not hear

1. The only doubt was whether, since credibility was the important thing in a witness, the attack could be made upon his "general character"—i. e. his qualities as a man generally—or only upon the specific trait of credibility. Towards the end of the 1700s, the opinion grew up that this "general character" (i. e. as a whole) had nothing to do with his credibility, and that the testimony must be specifically directed to the latter quality only.⁵ But a compromise was finally reached, and the witness was allowed to employ his knowledge of this "general" character, and to lay it before the Court with reference specifically to credibility, i. e. to say whether he would believe the other upon oath.⁶ The important thing here is that it was assumed that the witness spoke from personal knowledge, and the controversy was simply whether the statement of his experience should deal with the man's good or bad qualities as a whole, or with only the specific quality of credibility upon oath.

2. We are now in a position to understand the language of the classical treatise-writers of the early 1800s. In Phillipps' passage, for instance,⁷ so often quoted in this country, he used "general character," not in the sense of "reputation," but of general traits or qualities as distinguished from particular acts and from the specific quality of credibility. This is shown by a collation of the statements of other writers of the time.⁸ They had two important rules in mind: (1) that you cannot give evidence of particular acts, and (2) that (as just pointed out) you cannot against a witness speak of his general qualities unless you follow it up with the specific quality of credibility; and it was in trying to make this plain that they employed the term "general character"; any meaning of "reputation," as distinguished from personal knowledge, was far from their minds, and would have been repudiated.

3. In modern practice, the ruling in *R. v. Rowton*⁹ seems not to have been regarded as affecting testimony to a witness' character, and the orthodox and

evidence to take away people's reputation by hearsay"; 1686, Lord Delamere's Trial, 11 *id.* 560, 570 ("It is not what the town says, but what can be proved, that we must take for evidence").

⁷ 1794, Rowan's Trial, 23 *How. St. Tr.* 1065 (objected to and withdrawn); see particularly the language in *Carlos v. Brook*, *Watmore v. Dickinson*, *ante*, and the cases immediately thereafter, in which the quality of credibility is made the essential requirement of the testimony. This subject has been already more particularly examined *ante*, § 922.

⁸ This form appears as early as 1794, per Buller, J., in *De la Motte's Trial*, 21 *How. St. Tr.* 611; and later in *Mawson v. Hartink*, *Watson's Trial*, *R. v. Bispham*, and *R. v. Hemp*. It does not seem to have become usual till after 1830.

⁹ 1814, Phillipps, *Evidence*, 1st ed., 109: "The regular mode is to inquire whether they have the means of knowing the former witness' general character, and whether from such knowl-

edge they would believe him on his oath [citing *Rockwood's Trial* and *Mawson v. Hartink*]."

¹⁰ 1806, Evans, *Notes to Pothier*, 1st ed., II, 200 ("It is an established rule that witnesses examined with a view to discredit the testimony of others cannot be admitted to depose to particular facts of criminality, but can only express their general opinion whether the party is or is not entitled to be believed upon his oath"); 174, Starkie, *Evidence*, 1st ed., I, 145, 146 ("The credit of a witness may be impeached . . . by general evidence that he is not worthy to be believed upon oath, but no evidence can be given of particular collateral facts. . . . The proper question to be put to a witness for the purpose of impeaching the general character of another witness is, whether he could believe him upon his oath?"). If Starkie's passage had been used rather than Phillipps', our own Courts would hardly have led us into the maze of varying rulings which we now have.

¹¹ Cited *ante*, § 1901.

traditional use of personal knowledge still obtains, both in practice¹⁰ and in law.¹¹

B. UNITED STATES.

In this country the orthodox rule has been widely departed from, in both branches; though the tendency is just the opposite of that in England; i.e. the departure is more marked in the case of a witness' character.

§ 1983. *Moral Character of Accused, of Complainant in Rape, of Deceased in Homicide, and the Like.* In the application of the rule to a party (or quasi-party) in a criminal case, the matter has not received adjudication as generally as might be supposed; but so far as decisions have dealt with it, reputation is in the majority of jurisdictions made the exclusive mode of proof.¹ Apparently the result has been reached by accepting the analogy of

¹⁰ 1893, Stephen, *Hist. Crim. Law*, I, 437: "[The witness] may, however, be impeached by witnesses who will swear in general terms that he is not worthy of credit on oath."

¹¹ 1867, *R. v. Brown*, 10 Cox Cr. 458, before five judges; the question whether the witnesses "would believe the witnesses for the prosecution upon their oaths," was held proper, *R. v. Rowton* not being held to exclude it; Kelly, C. B.: "The practice now called in question has existed for centuries, and all of us have knowledge of it so far as our experience goes. The question reserved as to it ought not therefore to be argued at all." The argument, based on *R. v. Rowton* and *Phillips v. Kingfield*, post, was specifically directed against any use of the witness' personal opinion. Martin, B., however, while rejecting the argument emphatically, quoted as accurate a passage from Taylor on Evidence, § 1324, declaring the regular mode of question to be, "whether he knows his general reputation, what that reputation is, and whether from such knowledge he would believe him on his oath." This was not the form used in the case in hand; and yet the failure of Martin, B., to perceive any distinction detracts greatly from the force of the ruling.

¹ In the following list are also included cases dealing with the moral character of a complainant in rape and a deceased in homicide; the distinction being practicable between moral traits of all such persons, on the one hand, and the moral trait of veracity in a witness, on the other hand; there should of course be no distinction in principle. Where not otherwise noted, the character involved in the following rulings is that of an accused: 1885, *Jackson v. State*, 78 Ala. 472 (personal knowledge excluded); 1883, *Hussey v. State*, 37 id. 133, 6 So. 400 (same); 1889, *Holmes v. State*, 25 id. 26, 29, 7 So. 193 (excluded where the witness had known the defendant for only two years and not intimately); 1889, *Moulton v. State*, ib. 116, 118, 6 So. 758 (only reputation admissible); 1879, *People v. Casey*, 53 Cal. 361 (testimony of long personal acquaintance; "during that time his character has always been that of a quiet, peaceable citizen; I never knew of his having any other diffculty"; this was referred to by the Court as

"not the most satisfactory method of proving a previous good reputation"); 1893, *People v. Samonset*, 97 id. 448, 460, 32 Pac. 520 ("chaste character" of prosecutrix in seduction proved by one who had "never known of any improper conduct on her part"); 1897, *People v. Wade*, 118 id. 672, 50 Pac. 842 (chaste character of seduction-prosecutrix; personal opinion of the head of a family in which she lived, received); 1820, *Hosmer, C. J.*, in *Stowe v. Converse*, 3 Conn. 243 (to rebut a charge of infidelity, admitting a "uniform profession, conduct, and conversation from his youth up"); 1866, *State v. Jerome*, 33 N. H. 205, 269 (the defendant's character for chastity being in issue, questions were allowed as to the extent of the witness' personal acquaintance with the defendant, inasmuch as "there must be a great difference between the opinion of a next-door neighbor and that of a distant acquaintance"); 1900, *State v. Briscoe*, 3 Pen. Del. 7, 50 Atl. 271 (larceny; personal knowledge of defendant's character, based on business dealings, excluded); 1853, *Stamper v. Griffin*, 12 Ga. 453, 456 (personal knowledge used; no question raised); 1882, *Hirschman v. People*, 101 Ill. 568, 574 (personal knowledge excluded); 1891, *Bowlus v. State*, 130 Ind. 227, 230, 28 N. E. 1115 (in showing the deceased's character, as affecting the issue of self-defence, personal knowledge of the defendant is a proper source); 1885, *State v. Sterrett*, 68 Ia. 76, 78, 25 N. W. 936 (personal knowledge allowed); 1885, *State v. Cross*, ib. 180, 195, 26 N. W. 62 (same); 1850, *Com. v. Webster*, Mass., *Bemis' Rep.* 241 ("individual and personal opinion," inadmissible); 1876, *Com. v. O'Brien*, 110 Mass. 345 (quoting *R. v. Rowton*, Eng., but expressing no choice between the two rules); 1891, *Day v. Rosa*, 154 id. 13, 27 N. E. 676, *semble* (personal knowledge excluded); 1900, *People v. Turney*, 124 Mich. 542, 63 N. W. 273 (personal knowledge excluded); 1876, *State v. Lee*, 22 Minn. 407, 409 (personal knowledge admitted; quoted post, § 1987); 1894, *Berncker v. State*, 40 Nebr. 810, 315, 59 N. W. 373 (defendant's honest character, not provable by personal knowledge); 1897, *Golder v. Lund*, 50 id. 867, 70 N. W. 397 (plaintiff's character for peaceableness, excluded); 1890, *State v. Peares*, 15 Nev. 188, 190 (per-

the settled notion as to witness' character; and the reasons are therefore to be sought under the latter head.

§ 1984. *Character for Care, Competence, or Professional Skill, as Party or Witness.* The analogies of the rule for a witness' character (*post*, § 1985) seem to have been little considered in dealing with those qualities of character which are so frequently involved in the issue in civil cases,—the competence of an employee as to carefulness, the professional competence of a physician as to skill, the mental capacity of a testator as to sanity, and the like,—in short, the unmoral traits of character, as distinguished from the moral traits of peaceableness, honesty, chastity, and general goodness, which usually come into question for a defendant in a criminal case. As to the former class of traits, the orthodox rule in England was there equally followed, and personal knowledge and opinion was admitted.¹ In the United States there has been comparatively little departure from the orthodox rule. Personal knowledge, as the foundation of testimony to *sanity*, has everywhere been held admissible, though (for lay witnesses) only after a long controversy and with certain local qualifications of rule.² Testimony of the same sort to *carefulness* or *negligence* of disposition (when in issue or

actual knowledge of the defendant's good character, excluded); 1820, *People v. Mather*, 4 Wend. 258 (obscure); 1880, *Mayer v. People*, 80 N. Y. 377 (testimony to actual good conduct admitted; no question raised); 1888, *People v. Greenwall*, 108 id. 302, 15 N. E. 404 (same); 1827, *Pierce v. Myrick*, 1 Dev. 345, 346 (evidence held receivable of the "general good character, and orderly deportment" of a slave); 1855, *Bottoms v. Kent*, 3 Jones L. 160 (Pearson, J.: "Proof by the individual opinion of witnesses, formed from an observation of particular acts, which necessarily lets in the history of a person's whole life-time," is therefore objectionable; but, *semble*, is admissible on testamentary issues concerning undue influence, etc.); 1860, *Gandolfo v. State*, 11 Oh. St. 114 (Question: "From your knowledge of the defendant, what is his character for peace and quietness? By 'character,' I mean what the man is, not what people say about him"; held proper; except that the witness could not be asked for an opinion not found on sources "common to those acquainted with" the person; quoted *post*, § 1987); 1875, *Marta v. State*, 26 id. 162, 163 (character of the murdered person; admitted); 1855, *Zitzer v. Merkel*, 24 Pa. 408 (of the daughter, in an action for seduction; personal knowledge excluded); 1879, *Dufresne v. Weise*, 46 Wis. 290, 297, 1 N. W. 59 (in showing character as affecting damages for defamation, personal knowledge is admissible).

As to a *deceased's* character, in a homicide charge, it is to be noted that his *actual* character as evidence of his probable aggression, offered under § 63, *ante*, ought to be provable by personal knowledge, as in *Bowlus v. State*, Ind., *supra*; but his *reputed* character, as evidence of the defendant's reasonable apprehension, under § 266, *ante*, could be proved only by reputation:

1899, *State v. Shadwell*, 22 Mont. 559, 57 Pac. 281.

¹ 1807, *R. v. Williamson*, 8 C. & P. 635, *Ellenborough*, L. C. J. (women, to the skill of a midwife who had attended them); 1831, *R. v. Long*, Old Bailey, before Bayley, B., *Pelham's Chronicles of Crime*, ed. 1891, II, 217, 227 (quoted *ante*, § 221); 1844, *Greville v. Chapman*, 5 Q. B. 738 (here the action was for libel in charging the plaintiff with dishonorable conduct in betting against his own horse and then withdrawing him; the witness, who had testified that no rule of the Jockey Club forbade this conduct, was allowed to explain that a person doing this would still be regarded as lacking in honor and would probably be expelled from the Club); 1848, *R. v. Whitehead*, 3 C. & K. 202, *Maule, J.* (a patient who had been treated for cancer, to his physician's competence). In *Ramadge v. Ryan*, 9 Bing. 333 (1832) where the defendant had praised T., a physician who refused to consult with the plaintiff, a quack physician, a physician-witness B. was not allowed to state whether T. had "honorably and faithfully discharged his duty to the medical profession" as alleged by the defendant; the Court's reason was that such an answer would depend entirely on the temper of each witness; but the real reason seems to be that it was not the witness' individual standard, but the general professional standard which alone was of consequence. In *Bremer v. Freeman* (1857), 10 Moo. P. C. 306, 362, Lord Wensleydale, referring to the difficulty of weighing the conflicting testimony of certain experts to foreign law, remarked that "a proper sense of professional delicacy precludes them from giving evidence as to the merits of each other."

² This has already been examined *ante*, §§ 1983-1985.

evidential as to an employee or a party) has also usually been received.³ Testimony to *professional skill*, concerning either party or witness, when furnished by professional persons qualified to know, is also generally regarded as receivable.⁴

³ Compare with the following the cases cited *ante*, §§ 199, 208 (particular acts), and § 1621 (reputation): 1896, *Columbus & R. R. Co. v. Christian*, 97 Ga. 56, 25 S. E. 411 ("such general character [of an incompetent employee knowingly employed] must rest largely upon the opinions of witnesses, based upon their observation of the conduct of the individual, and upon the impressions formed upon their minds by reports of other persons"); 1893, *Butler v. R. Co.*, 87 Ia. 206, 210, 54 N. W. 208 (whether an engineer was skilled, excluded); 1895, *Cherokee Co. v. Dickson*, 55 Kan. 62, 39 Pac. 691 (inadmissible; yet it was held admissible to speak of "the general manner in which he does his work" and "wherein his work differed from that of a skillful miner"); 1855, *Baldwin v. Co.*, 4 Gray 333 (negligent character of the plaintiff's driver; provable by one having personal knowledge); 1861, *Gahagan v. R. Co.*, 1 All. 190 (a flagman shown to be "careful, attentive, and temperate" by "witnesses who had seen his conduct and could testify to the facts which they had observed"); 1894, *McGuerty v. Hale*, 161 Mass. 51, 36 N. E. 692 (that an employee was careful, able, etc., allowed); 1896, *Lewis v. Emery*, 106 Mich. 641, 66 N. W. 569 (whether a person was a competent workman, admitted); 1900, *Nitzmann v. Ins. Co.*, 78 Minn. 504, 81 N. W. 518 (the skill and experience needed to operate a hydraulic elevator; allowed); 1896, *Boettger v. Iron Co.*, 136 Mo. 531, 88 S. W. 298 (whether an employee was competent; excluded); 1898, *Langston v. R. Co.*, 147 id. 457, 43 S. W. 835 (manager's opinion of employee's competency, excluded); 1860, *Fraser v. R. Co.*, 38 Pa. 104, 111 (negligence of the defendant in knowingly employing a careless servant; defendant's officer's personal estimation of the servant as a careful man, admitted); 1874, *Hays v. Millar*, 77 id. 239, *semble* (where a carrier's selection of competent servants is material to the issue, their competency and skill may be shown by persons well acquainted with them, and cannot be shown by reputation); 1902, *Hicks v. R. Co.*, 63 S. C. 559, 41 S. E. 753 (competency of an engineer; witness' opinion excluded); 1888, *Houston & T. O. R. Co. v. Patton*, — Tex. —, 9 S. W. 175 (fellow-servant's testimony to an engineer's careless character, admitted); 1898, *Galveston H. & S. A. R. Co. v. Davis*, 92 id. 372, 43 S. W. 570 (engineer's incompetence; opinion of railroad man knowing him, admitted); 1896, *Crane Co. v. Columbus C. Co.*, 20 C. C. A. 233, 73 Fed. 984 (whether workmen were men of experience or skill, allowed); 1899, *Stoll v. Daly Min. Co.*, 19 Utah 271, 57 Pac. 295 (fellow-servant's incompetence; personal opinion excluded).

⁴ Compare with the following the cases in the sections cited in note 3, *supra*: 1847, *Tullis v. Kidd*, 12 Ala. 650 (competency of a physician,

allowed); 1903, *Birmingham R. & E. Co. v. Ellard*, 135 id. 433, 33 So. 276 (opinion of one expert as to another's skill, excluded; the ruling gives confused reasons); 1881, *Guitcan's Trial*, D. C., II, 1421 (Mr. Reed, for the defendant: "I submit that one expert cannot go upon the stand and swear that another expert is a fool"; the Court: "There is no legal objection, but as a matter of expediency it is not generally to be encouraged, I think"; compare Lord Wensleydale's remark, quoted *ante*, § 1984); 1883, *State v. Maynes*, 61 Ia. 120, 15 N. W. 864 (qualifications of another expert witness, allowed); 1896, *Kuen v. Upmire*, 98 id. 393, 67 N. W. 374 (whether another person was able to speak English, admitted); 1898, *Lacy v. Kossuth Co.*, 103 id. 16, 75 N. W. 689 (incompetency of a physician, under statute; "mere individual opinion," excluded); 1901, *Clark v. Com.*, — Ky. —, 63 S. W. 740 (abortion; the operation being bunglingly done, and the issue being whether it had been done by the deceased herself or by the defendant, testimony as to the defendant's skill, by those who had personal knowledge of his conduct of cases, was held admissible); 1892, *Brabo v. Martin*, 5 La. 177 (qualifications of another expert, excluded, as confusing the issues); 1882, *Mason v. Phelps*, 48 Mich. 131, 11 N. W. 413 (qualifications of another expert witness, allowed); 1897, *People v. Holmes*, 111 id. 364, 69 N. W. 501 (similar); 1899, *Martin v. Courtney*, 75 Minn. 255, 77 N. W. 813 (malpractice; testimony to a medical witness' qualifications on doctrines of a certain school of treatment, admissible); 1889, *Thompson v. Ish*, 99 Mo. 106, 12 S. W. 510 (expert witness' qualifications as a physician, allowed to be proved by another physician who knew him personally); 1855, *Leighton v. Sargent*, 31 N. H. 119, 132 (malpractice; whether the defendant had more than ordinary skill, excluded); 1876, *Laros v. Com.*, 84 Pa. 208 (the qualifications of another expert witness, allowed; "If I have seen a workman doing his work frequently, and know his skill myself, surely, if I myself am a judge of such work, I can testify to his skill").

Of course, this might not justify asking one expert as to the *value* of another expert witness' opinion: 1862, *Haverhill L. & F. Ass'n v. Cronin*, 4 All. 163; nor asking one witness as to the *truth* of another's testimony: 1869, *Holliman v. Cabanne*, 43 Mo. 569; and cases cited *ante*, § 787.

Distinguish (1) testimony to the quality or significance of a particular act (*ante*, § 1949); for example, to the propriety or due care of a specific act of a surgeon or employee under certain circumstances, as contrasted with the general competence of the surgeon or employee performing it; both sorts of testimony should be received; but the objection of the Opinion rule has a different force in the two cases; (2)

§ 1985. *Witness' Moral Character.* Here the departure from the orthodox rule has been almost complete; in nearly all of the jurisdictions, reputation appears as the sole source of proof. It has already been seen (*ante*, §§ 1981, 1982) that in England the use of reputation was at first heterodox, and only late in time became established as permissible. But in this country we find the Courts starting very early with the opposite assumption, i. e. that reputation is not only a permissible, but the orthodox and exclusive, mode of proof. Thus, historically, in our Courts, the anomalous and variant forms of the rule as to witness' character are due to an effort to reconcile the traditional and orthodox question as to personal belief with this supposed principle that reputation alone was the proper source of proof.

(1) But, first, how did they come to accept this supposed principle? With the long series of English precedents, calling for personal belief directly and clearly, how did the notion of reputation as the exclusive source find its way into our practice? The exact course of the change is obscure; but the influences were chiefly two. (a) The first American treatise on Evidence, appearing in 1810, by Chief Justice Swift of Connecticut, explicitly laid down the unqualified rule that reputation alone is the admissible source, and that the witness' "private opinion" was inadmissible.¹ There is some reason for believing that his language does not mean all it appears to;² but at any rate it served as authority for many early American Courts. (b) In the phrase of Phillipps ("whether he knows the general character of the witness, and from such knowledge would believe him on oath"), already quoted and explained (*ante*, § 1983), the word "character" came to be understood, by some obscure process, as meaning exclusively "reputation," and not the person's actual qualities; and thus the foundation was laid for the notion that reputation was the essential and fundamental thing.³ By these influences a great body of precedents was early created, the effect of which was to establish the notion that reputation was the fundamental source of proof. Of

conduct of other persons as circumstantial evidence of skill, reasonableness, etc. (*ante*, § 461).

Testimony based on personal knowledge of an animal's disposition is receivable: 1876, *Syde-man v. Beckwith*, 48 Conn. 11 (horse). *Contra*: 1900, *Hayes v. Smith*, 62 Oh. 161, 56 N. E. 879, *semble* (keeping a dangerous dog; witness' opinion to his peaceableness, held inadmissible).

¹ 1810, Swift, *Evidence*, 143: "A witness called to impeach or support the general character of another [witness] is not to speak of his private opinion or of particular facts in his own knowledge; but he must speak of the common reputation among his neighbors and acquaintances. The only proper questions to be put to him are, whether he knows the general character of the witness intended to be impeached, in point of truth, among his neighbors? and what that character is, whether good or bad? The witness may be inquired of as to the means and opportunity he has of knowing the character of the witness impeached, — as, how long he has known him, how near he lives to him, and whether his character has been a subject of

general conversation; but his testimony must be founded on the common repute and understanding of his acquaintance as to his truth, and not as to honesty or punctuality. In England, [citing 4 Esp. 162,] the first question is, whether the witness impeaching has the means of knowing the general character of the other witness; and from such knowledge of his general character, whether he would believe him on oath!"

² (1) The witness' personal knowledge of the other is evidently assumed to exist; (2) On p. 141, personal belief as to a defendant's character is evidently allowed; (3) The real point of difference, in Swift's mind, between English practice and that of his own country, was as to the kind of character, i. e. general qualities, or veracity only.

³ Thus, Greenleaf (§ 461), in a passage almost identical with this, substitutes "reputation" for "character." But it is worth noting that Mr. J. Story, in *Gass v. Neeson*, 3 Sumn. 610, *ante*, did not make this mistake.

the two influences (Swift's book and the misunderstood English passage), the difference was in time rather than in degree. The early Courts (before the appearance and vogue of Phillippe's treatise, say, before 1820) that did not know of Swift's book seem to have allowed personal knowledge freely, as in England;⁴ but the Phillippe passage in due time brought around many, and the Greenleaf utterance,⁵ together with the then existing body of precedents, account for the more modern Courts.

(2) But the matter has been complicated by the traditional use of the question, "Would you believe the person on oath?" This, as our Courts could not help seeing in all the precedents and text-books, was the perfectly accepted form of the English common law; and the problem which they had to face was, to reconcile this with the notion, otherwise established in their minds, that reputation was the essential and sole source of proof. This problem was solved in various ways. There are at least five different types of solutions, — more than one of them, indeed, being often found in the rulings of the same Court.

(a) One solution squarely excludes any such question as inconsistent with the principle that reputation is the sole source. A minority of the Courts take this radical step.⁶

(b) Another takes the opposite extreme, i. e. preserves the common-law tradition, and distinctly allows the personal belief of the witness to be used. This is early and rare.⁷

(c) Still another solution is to require the witness to say whether he knows the "character" or "reputation" of the other witness, and then to allow the question, "Knowing that character (or, reputation), would you believe him on oath?" This preliminary clause was supposed to be a traditional part of the question as used in the original English practice, the authority of Professor Greenleaf⁸ serving as the basis of this notion. Yet it is entirely erroneous, as the already quoted English precedents show; for the traditional English question asked directly for the witness' personal belief; and the preliminary clause (historically later in time), when there was one, asked for "character" and not "reputation."⁹ This form of solution, however simple, evades the issue; for it does not require the witness to say whether his personal experience, or his knowledge of the reputation, is to be the ground of his belief; the preliminary clause is formally necessary,

⁴ *E. g.* the opinion of Mr. J. Wright, in Ohio (*Seely v. Blair*, post).

⁵ In 1842.

⁶ *E. g.* Connecticut, Iowa, Maine, Massachusetts, the later North Carolina rulings, Washington.

⁷ *E. g.* the early Ohio cases, some early South Carolina cases, early Illinois cases.

⁸ § 461.

⁹ As late as 1836 and 1837, Mr. J. Story, in *Wood v. Mann* and *Gass v. Stinson*, 2 Sumn. 32, 610, cited *infra*, states the English practice as asking directly for belief on oath, without the preliminary clause — understood the Eng-

lish practice better than Professor Greenleaf; for it must be remembered, as explained in § 1982, that the fundamental notion of the English rule after 1800 was to get at the specific quality of credibility by asking for belief on oath; and thus the preliminary clause, used after 1830, was not required, but merely permitted to those who wished to bring to bear the impeached person's character as a whole; moreover, its presence, as above explained, was not due to any importance of getting at reputation, but to the supposed irrelevancy of general disposition unassociated with a reference to the trait of credibility.

but the real issue of principle is left unsettled.¹⁰ A hybrid form, more nearly approaching the next one as an expression of principle, is "From such knowledge [of reputation], would you believe him on oath?" thus more or less explicitly basing the belief on the reputation alone; no theory, however, being vouchsafed.¹¹

(d) A peculiar and original solution is to insist upon one of these preliminary clauses, "Knowing his reputation [or, From such knowledge], would you believe him on oath?" and to harmonize this with the reputation-principle by distinctly excluding any element of personal knowledge, and by treating this expression of personal belief as a mere mode of measuring the quality of the reputation and of better expressing to the jury the exact degree of the community's positiveness of opinion on the subject.¹² This solution, though it is forced and fantastic, and though historically it is due merely to the necessity of reconciling fixed precedent with an invented principle, has at least the merit of facing the question and solving it rationally; and it is probably the real basis of most of the rulings adopting the form just described, under (c), as hybrid.

(e) There are sub-varieties of (c) and (d) in jurisdictions where character for veracity only (not general good or bad character) is usable for or against a witness; i. e. the preliminary clause in such jurisdictions calls for a knowledge of the reputation for veracity specially, not of reputation for general character.¹³

Just which of these solutions is the accepted law of a given jurisdiction to-day is not always easy to say;¹⁴ a careful collation of the precedents, even

¹⁰ E. g. Georgia, Virginia, several Federal rulings.

¹¹ E. g. the later Illinois cases, the later New York cases, New Hampshire, Pennsylvania; this is perhaps the most frequent form of all.

¹² 1875, Per Curiam, in *Hillis v. Wylie*, 26 Oh. St. 576: "To say that the reputation of the witness is 'bad' gives but imperfect information; 'bad' is a relative term, and the inquiry at once arises in the mind, 'How bad is it?' Is his reputation so bad that he ought not to be believed under oath? The mode of inquiry allowed is only a means of ascertaining what the reputation of the witness for truth really is. The object of the testimony is not to introduce as evidence the opinion of the impeaching witness as to the truthfulness of the witness against whom he testifies, but to enable the jury to ascertain the true character of his reputation for truth as the impeaching witness understands it, and thereby enable them to determine the extent to which it ought to discredit the witness. The question would be the same in effect if the witness were asked if the reputation of the witness in question were such as to go to his discredit when under oath." This reasoning seems to have been first advanced by Ruffin, C. J., in 1834, *Downey v. Murphy*, 1 Dev. & B. 85; other clear phrasings of it are found in opinions by Cowen, J., in

People v. Rector, 19 Wend. 579 (1835), and Campbell, J., in *Hamilton v. People*, 29 Mich. 185 (1874).

¹³ In number these jurisdictions far exceed the others; yet the form in (c) and (d), calling for general character only, must be treated as the original, from which these are variations, because the clause, when used in English practice, called for general character only, as already noticed (*ante*, § 1982).

¹⁴ The precedents are as follows: *Alabama*: 1839, *McCutchen v. McCutchen*, 9 Port. 655 ("he must know the general estimation in which he is held by his neighbors"); 1846, *Sorrelle v. Craig*, 9 Ala. 539 (general reputation, followed by personal belief, from the reputation, upon oath); 1848, *Hadjo v. Gooden*, 18 id. 721 (same); 1853, *Dave v. State*, 22 id. 23, 38 ("individual opinions" in general excluded; but "an exception to this rule sometimes obtains" in impeaching other witnesses); 1854, *Martin v. Martin*, 25 id. 211 ("personal knowledge of the witness' unworthiness," held improper); 1856, *Ward v. State*, 28 id. 63 (like *Hadjo v. Gooden*); 1860, *Mose v. State*, 36 id. 211, 220, 230 (personal opinion of the witness, based on personal acquaintance, excluded); 1866, *Bullard v. Lambert*, 40 id. 210, *semble* (like *Sorrelle v. Craig*); 1874, *Artope v. Goodall*, 53 id. 318, 325 (the "general character," what it is, and then the belief on oath founded upon it; and

in the light of the principles and tendencies above mentioned, often leaves us in doubt,—an unfortunate result, in a matter so easily capable of an exact and uniform rule.

the second element may be fulfilled by saying that he has not a bad reputation; here the evidence was in rebuttal); 1889, *Smith v. State*, 88 id. 76, 7 So. 52 (he cannot even consider facts personally known to him); 1896, *Crawford v. State*, 112 id. 1, 31 So. 214 (belief on oath, founded on reputation); 1898, *McAlpine v. State*, 117 id. 93, 23 So. 190 (estimate based partly on reputation, partly on personal knowledge, excluded); *Arkansas*: 1855, *Pleasant v. State*, 15 Ark. 624, 650, 653 ("his own opinion . . . founded on general reputation," admissible); 1874, *Snow v. Grace*, 29 id. 131, 136 (belief on oath, based on reputation, admitted, with some hesitation); *Majors v. State*, ib. 112 (similar evidence received); 1888, *Hudspeth v. State*, 50 id. 534, 543, 9 S. W. 1 (same); *California*: 1859, *Stevens v. Irwin*, 12 Cal. 306, 308 (belief on oath, admissible, as justified by long practice; here the witness had already spoken as to reputation, but this was not referred to as essential); 1868, *People v. Tyler*, 25 id. 553 (belief on oath must be founded on reputation, but need not exclude the element of personal knowledge); 1878, *People v. Methvin*, 53 id. 63 (belief on oath must exclude the element of personal knowledge); 1890, *People v. Ramirez*, 56 id. 533, 538 (approving *People v. Methvin*); 1897, *Wise v. Wakefield*, 118 id. 107, 50 Pac. 310 (belief based on reputation, admissible; not affected by C. C. P. § 2051, quoted ante, § 987); *Connecticut*: 1856, *State v. Randolph*, 24 Conn. 363, 367 (Ellsworth, J., stating the customary question in that court to be, "Is the character of the witness for truth on a par with that of mankind in general?", as distinguished from the English form, "What is his general character?"; "Would you believe him under oath?"; "Our rule . . . does not leave anything to the mere inference of the impeaching witness whether he would or would not believe the witness under oath"); *Delaware*: 1851, *Robinson v. Burton*, 5 Harringt. 335, 339 ("general report," "followed by the witness' own judgment as to the effect of such general reputation"); *Florida*: 1866, *Long v. State*, 11 Fla. 295, 297 (personal knowledge, received); 1878, *Robinson v. State*, 16 id. 835, 840 (belief founded upon reputation, admitted); *Georgia*: 1855, *Stokes v. State*, 18 Ga. 17, 37 (general character, followed by opinion as to belief on oath); 1858, *Smithwick v. Evans*, 24 id. 463 (same); 1883, *Flemister v. State*, 81 id. 763, 771, 3 S. E. 443, *semble* (personal knowledge, admissible); 1896, *Savannah F. & W. R. Co. v. Wideman*, 29 id. 245, 25 S. E. 400 ("individual opinion," excluded); Code 1895, § 5293 (the question is to seek knowledge of general character, what it is, and "if, from that character, he would believe him on oath"); *Illinois*: 1849, *Frye v. Bank*, 11 Ill. 867, 378 (reputation, followed by opinion as to belief on oath); 1858, *Eason v. Chapman*, 21 id. 33 (same

ruling; the personal opinion of the witness declared admissible, and apparently supposed to be founded on personal knowledge; *Brown, J., diss.*); 1859, *Crabtree v. Kile*, ib. 183 (personal belief stated to be—evidently relying on *Greenleaf*—the English peculiarity; no notice taken of the preceding cases, the opinion being by another judge); 1860, *Cook v. Hunt*, 24 id. 525, 545, 550 (knowledge of reputation is essential); 1861, *Crabtree v. Hagenbaugh*, 25 id. 238 (the form stated as in *Frye v. Bank*; by the same judge as in the preceding case); 1871, *Foult v. Eckert*, 61 id. 318, 320 (personal opinion, improper); 1892, *Massey v. Bank*, 104 id. 327, 334 (the form in *Frye v. Bank* sanctioned, but the opinion required to be based solely on the reputation, and the question "Would you believe, etc., in a case where he was personally interested?", held improper, by a petty quibble); 1894, *Bank v. Keeler*, 109 id. 385, 390 (preceding doctrine affirmed; personal belief held not an essential part of the testimony); 1897, *Spies v. People*, 122 id. 1, 209, 12 N. E. 865 ("The unwillingness to believe under oath must follow from and be based upon two facts; first, the fact that the witness knows the reputation for truth and veracity among the man's neighbors; second, the fact that such reputation is bad"); 1893, *Gifford v. People*, 148 Ill. 173, 176, 35 N. E. 754 (personal knowledge, excluded; reputation is the only proper inquiry); *Indiana*: 1873, *Indianapolis P. & C. R. Co. v. Anthony*, 43 Ind. 133, 133 (reputation, followed by belief on oath; obscure); *Iowa*: 1848, *Carter v. Carver*, 1 Greene 171, 177 (reputation only; following *Swift's Treatise* and *Phillips v. Kingfield, Me.*, in reasoning); 1882, *State v. Egan*, 59 Ia. 636, 13 N. W. 730 (same; interpreting "character," in C. C. § 3649, as meaning "reputation"); *Kansas*: 1888, *State v. Johnson*, 40 Kan. 268, 269 (belief, founded on reputation, not on personal knowledge, admissible); *Kentucky*: 1819, *Mobley v. Hamit*, 1 A. K. Marsh. 591 (general character to be used as the basis of the witness' inference to credibility); 1857, *Thurman v. Virgin*, 18 B. Monr. 792, *semble* (same); 1859, *Henderson v. Haynes*, 2 Metc. 342, 348 (reputation alone mentioned); 1869, *Young v. Com.*, 6 Bush 316 (same); *Louisiana*: 1843, *Stanton v. Parker*, 5 Rob. 108 (belief on oath admissible, provided it is based on knowledge of "character," "standing," "reputation"); 1851, *Paradise v. Ins. Co.*, 9 La. An. 596, 598 (reputation, followed by belief on oath, admissible); 1852, *State v. Parker*, 7 id. 83, 85 (belief on oath, based on "rices and general bad character," received); 1892, *State v. Christian*, 44 id. 950, 952, 11 So. 589 (belief on oath, based on reputation, admitted; following *Paradise v. Ins. Co.*); *Maine*: 1841, *Phillips v. Kingfield*, 19 Me. 375 (reputation only); *Maryland*: 1868, *Knicht v. House*, 29 Md. 198

2. Policy of the Rule.

§ 1986. Policy of the Exclusionary Rule, repudiated. Looking back now at the orthodox practice of the common law, and contrasting it with the

("the practice in Maryland, we believe, has always been in conformity with the ancient English rule," which is approved; but the form thus approved is the personal belief founded on reputation, and the belief is said to "test the extent or degree of badness of the general reputation"; so that the rule is really of the fourth sort, *supra*); *Massachusetts*: 1849, *Bates v. Barber*, 3 Cush. 110 ("What was the reputation for truth and veracity of the person impeached, — that is, what was his character in this respect by report; what was said in regard to it; this was the proper inquiry, and the only proper inquiry"); 1866, *Com. v. Lawler*, 12 All. 586, *semble* (personal belief excluded); *Michigan*: 1856, *Webber v. Hanke*, 4 Mich. 196 (reputation only; following *Phillips v. Kingfield*, Me.); 1874, *Hamilton v. People*, 29 id. 173, 185 (repudiating the former opinion as *obiter*, and allowing the witness to be asked whether he would believe the other on oath, this opinion "not left to depend on any basis but the reputation for truth and veracity"); 1875, *Keator v. People*, 32 id. 486 (same; here held proper on the direct as well as on the cross-examination); *Minnesota*: 1872, *Rudadill v. Slingerland*, 16 Minn. 380, 383 (belief on oath, admitted, following a statement of reputation); *Mississippi*: 1885, *French v. Sale*, 63 Min. 386, 393 (belief on oath, founded on knowledge of reputation, admitted); 1901, *Benson v. State*, 79 id. 538, 81 So. 200 (witness' personal belief excluded; the opinion, a net of fine-spun logical cobwebs, is an example of the judicial tendency to award new trials for the sake of irrelevant trifles); *Missouri*: 1850, *Day v. State*, 13 Mo. 425 (belief on oath, founded on "general character," admitted without objection); 1883, *State v. King*, 83 id. 555 (personal opinion, excluded); 1903, *State v. Boyd*, — Mo. —, 76 S. W. 979 (same); *New Hampshire*: 1838, *State v. Howard*, 9 N. H. 436 (the proper inquiries are, first, as to general reputation for truth, and, next, "from what you know of that reputation, etc., would you believe him under oath as quick as you would men in general?"); 1850, *Holt v. Moulton*, 31 id. 592 (same); 1860, *Kelley v. Proctor*, 41 id. 139, 145 (same); *New Jersey*: 1869, *King v. Ruckman*, 20 N. J. Eq. 316, 357 (reputation only; "saying that the witness, from what he knew of his reputation, would not believe him on oath, is not sufficient"); 1900, *State v. Polhemus*, 65 N. J. L. 387, 47 Atl. 470 (personal belief, allowable only when based on reputation); *New York*: 1818, *Troup v. Sherwood*, 3 John. Ch. 555, Kent, Ch. (personal knowledge excluded); 1829, *Fulton Bank v. Benedict*, 1 Hall Sup. 493, 499, 505, 533, 558, per Oakley, J. (personal knowledge alone, improper; but if preceded by inquiry as to "general character," the impeaching witness' belief

on oath may be used "to fix the extent and nature of the general bad character imputed"); 1837, Marcy, Sen., in *Bakeman v. Rose*, 18 Wend. 151 (says that "in this State the form prescribed by Swift is, I believe, most commonly adopted," but that there had been no judicial decision of the question, and prefers himself Lord Ellenborough's form in *Mawson v. Hart-sink*; apparently using "character" as distinct from reputation); 1838, Cowen, J., in *People v. Abbot*, 19 id. 199 (approves the form used in *R. v. Bispham*, but upon the theory of (d), *supra*); 1838, Cowen, J., in *People v. Rector*, ib. 579 (cited *supra*, note 12); 1839, *People v. Davis*, 21 id. 309, 315, *semble* (the witness knew the other witness and his associates but had never heard his veracity-character spoken of; he was allowed nevertheless to say whether he would believe him on oath; following the form given by *Phillips* and *Starkie*); 1842, *Johnson v. People*, 3 John. 178 (belief on oath admitted, founded on knowledge of "general-character" or of veracity-character); 1856, *Stacy v. Graham*, 14 N. Y. 492, 501 (in supporting a witness' character, admissions by the opponent "that he held the witness in estimation as an honest and worthy man" were received; no authorities cited; Wright, J., diss.); 1864, *Wehrkamp v. Willet*, 4 Abh. App. 548 (Wright, J.: "The only proper inquiry . . . was as to her general moral character and her public reputation as a truthful or untruthful woman"); 1874, *Foster v. Newbrough*, 53 N. Y. 482 (whether from the plaintiff's general reputation for truth and veracity they would believe him on oath, held, improperly rejected); 1877, *Adams v. Ins. Co.*, 70 id. 166, 170 (a witness held competent to speak as to his belief on oath of one whom he had known for 10 years, whose associates he had known, and whose character he had heard questioned, though he did not know "from the speech of the people" what that character was); 1895, *Carlson v. Winterston*, 147 id. 652, 723, 42 N. E. 347, *semble* (belief, founded on reputation, admissible, on the theory (d), *supra*); *North Carolina*: 1829, *State v. Boswell*, 2 Dev. 211 (the question, "whether he would believe the other upon his oath," is proper; but it must first be learned whether his opinion is founded on "the general moral character of the witness as known among his neighbors and acquaintances," and if it rests on "particular facts," it cannot be received); 1834, *Downey v. Murphy*, 1 Dev. & B. 84 (belief on oath allowed, on theory (d), *supra*); 1843, *State v. O'Neale*, 3 Ired. 88 ("an estimation by the witness himself" of the other's character, improper); *State v. Parks*, ib. 297, *semble* (the witness must first show a knowledge of the general reputation, and may then say whether he personally would believe on oath); 1856, *Hooper v. Moore*, 2 Jones L. 428 (the additional question,

modern change of rule, effected in so many jurisdictions by such a curious misunderstanding of precedents, what is to be said of the reason and policy of the rule? Was the earlier practice sounder and better?

whether he would believe the other upon oath, excluded; "the great objection to the [English] rule is that the impeaching witness is called upon to do that which belongs exclusively to the jury," since his statement is "an opinion or conclusion"; repudiating *State v. Boswell*, and approving *Phillips v. Kingfield, Me.*; 1878, *State v. Caveness*, 78 N. O. 486 (following *Hooper v. Moore*); *Ohio*: 1884, *Seely v. Blair*, Wright 685 (personal knowledge sufficient, and mere knowledge of reputation alone not sufficient); 1884, *Wilson v. Runyon*, 1b. 662 (same); 1881, *Bucklin v. State*, 20 Oh. 18 (overruling the prior cases and excluding personal knowledge; chiefly on the authority of *Starkie and Greenleaf*); 1888, *French v. Millard*, 2 Oh. St. 44, 80 (same); 1884, *Craig v. State*, 5 id. 607 (same); 1878, *Hillis v. Wylie*, 26 id. 576 (reputation, followed by opinion as to belief on oath, admitted, on theory (d); quoted *supra*, note 12); *Oregon*: O. C. P. 1892, § 840 (the opponent may show "that his moral character is such as to render him unworthy of belief"); *Pennsylvania*: 1817, *Kimmel v. Kimmel*, 3 S. & R. 336 (personal knowledge excluded); 1824, *Wike v. Lightner*, 11 id. 179 (personal belief "not objectionable, provided the belief was founded on the witness' knowledge of his general character [reputation]," since personal belief alone might be founded on "knowledge of a particular fact"); 1864, *Bogle v. Kreitzer*, 46 Pa. 465, 470 (knowledge of the other witness, and of his reputation for truth; then personal belief on oath, founded on reputation); 1867, *Lyman v. City*, 56 id. 488, 502, *semble* (belief on oath, founded on knowledge of reputation); *South Carolina*: 1819, *Kitchen v. Tyson*, 8 Murph. 314 (the plaintiff was allowed "to introduce witnesses to prove that the defendant was a man not of credit, and unworthy of belief when upon oath"); 1833, *Anon.*, 1 Hill 286 ("he merely answers as to general reputation, and upon that gives his own opinion"); 1839, *State v. Ford*, 3 Strobb. 521 ("Dill's character was attacked by the prisoner; but ten out of fourteen witnesses swore that they would believe him"); 1860, *Wardlaw, J.*, in *Chapman v. Cooley*, 12 Rich. 661 ("the belief of the community, and not of the individual testifying," is the testimony desired); 1892, *State v. Turner*, 36 S. C. 539, 15 S. E. 602 (belief on oath, founded on knowledge of reputation); 1896, *State v. Murphy*, 43 id. 1, 7, 25 S. E. 43 ("from his general reputation he would not believe him on his oath," allowed); 1898, *Sweet v. Gilmore*, 52 id. 530, 30 S. E. 895 ("general character," followed by belief on oath); *Tennessee*: 1820, *Gardenhire v. Parks*, 2 Yerg. 23 ("men of bad character, and could not be believed upon oath," allowed); 1846, *Ford v. Ford*, 7 Humph. 92, 100 (the trial judge laid down the traditional English rule; but the Supreme Court, after citing *Greenleaf*, declared the opinion of the

witness, as to believing the other on oath, admissible only so far as founded on reputation); 1858, *Gilliam v. State*, 1 Head 38 (admitting belief on oath, founded on reputation); 1879, *Morrison v. State*, 2 Lea 393, 394 (belief on oath, founded on reputation); *Texas*: 1859, *Boon v. State*, 28 Tex. 678, 679, 696 (belief founded on reputation, admitted, on theory (d), *supra*); 1864, *Ayres v. Duprey*, 27 id. 593, 599 (same); 1879, *Johnson v. Brown*, 51 id. 65, 77 (same); *United States*: 1896, U. S. v. White, 5 Cr. O. C. 38, 42 (belief on oath, founded on reputation); 1886, *Story, J.*, in *Wood v. Mann*, 2 Sumner 82 ("The general interrogatory only, whether he (the proposed witness) would believe the other on his oath (which is the usual form of putting the interrogatory in England, and differs widely from that in which it is usually put in America)" is alone usually allowed, i. e. no examination to particular facts); 1887, *Story, J.*, in *Gass v. Stinson*, 2 Sumner 610 ("When the examination is to general credit, the course in England is to ask the question of the witnesses whether they would believe the party, sought to be discredited, upon his oath. With us the more usual course is to discredit the party by an inquiry what his general reputation for truth is, whether it is good or whether it is bad"); 1840, *McLean, J.*, in U. S. v. Vansickle, 2 McLean 221 ("the witness cannot advert to particular facts, or to his personal knowledge, of the character of the individual impeached"; but he may say, from knowing the reputation, whether he would believe on oath); 1851, *Wayne, J.* (the others not touching the point), in *Gaines v. Belf*, 13 How. 554 (he is to state the reputation, and "whether from that reputation he would believe him upon his oath"); 1850, *Toome v. Huntington*, 23 id. 2, 13 ("he is not required to speak from his own knowledge of the acts and transactions from which the character of the witness has been derived, nor indeed is he allowed to do so"); *Utah*: 1898, *State v. Marks*, 16 Utah 204, 51 Pac. 1089 (belief on oath, from reputation); *Vermont*: 1854, *Powers v. Leach*, 36 Vt. 279 (personal belief excluded; no authority or reason given); 1858, *Willard v. Goodenough*, 20 id. 396 (same; "if we were now called on to institute a rule on the subject, instead of administering and applying an old one, we might not have much difficulty in copying the rule of the English and some of the American Courts"; but the long-settled usage was held to be conclusive); *Virginia*: 1849, *Uhl v. Com.*, 6 Gratt. 708, 708 (the general reputation for truth, then the witness' opinion whether he would believe on oath, but this may be founded on general moral reputation as well as on reputation for truth); 1882, *Langhorne v. Com.*, 76 Va. 1022, *semble* (the witness' own knowledge of the other, excluded); *Washington*: 1896, *State v. Miles*, 15 Wash. 534, 46 Pac. 1047 (reputation only, not belief

(a) So far as concerns abstract principle, the Opinion rule has of course been usually invoked as the theoretical support of the modern practice:

1841, *Shopley, J.*, in *Phillips v. Kingfield*, 10 Me. 378: "The opinions of a witness are not legal testimony except in special cases, — such, for example, as experts in some profession or art, those of the witnesses to a will, and, in our practice, opinions on the value of property."

And yet the principle of that rule is amply satisfied by the orthodox type of testimony; i. e. the test (*ante*, § 1918) whether the witness can adequately detail to the jury the data on which his summary estimate rests and from which his inference is drawn. The fact is, of course, that here he is doubly unable by any possibility to do so; for even if he could in memory recall and in language rehearse every incident and act indicative of character, the law explicitly forbids him (*ante*, § 979) to detail particular acts; so that there is nothing left but to state summarily the general trait. Never was the Opinion rule more misapplied than to exclude the present class of testimony:

1858, *Caton, C. J.*, in *Eason v. Chapman*, 21 Ill. 35 (after pointing out that persons may have a bad name for truthfulness, and yet "from their daily walk and conversation in other respects, none would doubt their truthfulness when solemnly called to testify in a court of justice"): "Yet it would be impossible to detail all the minutiae of the circumstances which would inspire that confidence so as to impart their full and just impression to the jury. . . . Hence witnesses, who must be always impressed with these indescribable circumstances if they exist, have always been allowed to express the opinion whether they would or not believe the impeached witness under oath."

1876, *Berry, J.*, in *State v. Lee*, 22 Minn. 410: "But evidence of the disposition of a person, by one who knows such disposition from personal observation, is not evidence of opinion in any objectionable sense. It is evidence of a fact, — just as much evidence of a fact as is evidence of the disposition of a horse."¹

(b) So far as practical policy and utility is concerned, there ought to be no hesitation between reputation and personal knowledge and belief. A perusal of the records of State trials will show how natural, straightforward, and useful was this method of asking after belief founded on personal experience and intimacy. Put any one of us on trial for a false charge, and ask him whether he would not rather invoke in his vindication, as Lord Kenyon said, "the warm, affectionate testimony"² of those few whose long intimacy and trust has made them ready to demonstrate their faith to the jury, than any amount of colorless assertions about reputation. Take the place of a jury-

on oath); 1900, *State v. Coates*, 22 id. 601, 61 Pac. 726 (belief on oath, excluded); *Wisconsin*: 1854, *Wilson v. State*, 3 Wis. 798 (belief founded "upon general reputation, and upon that only," admissible, as "the conviction produced upon him by the common reputation").

So far is the notion carried that one of its logical but unpractical consequences has occasionally been laid down, namely, that the speaker to reputation need not be acquainted personally with the other witness: 1892, *State v. Turner*, 36 S. C. 540, 15 S. E. 603; a conclusion which even *Cockburn, C. J.*, in *R. v. Rowton*, *supra*, § 1981, would not accept.

Distinguish the propriety of testing a reputation-witness on cross-examination by asking him what misconduct he knows or has heard of (*ante*, § 1111).

¹ So also *Campbell, J.*, in *Hamilton v. People*, 29 Mich. 186 (1874), calls this "a fallacious objection."

² 1794, *Lord Kenyon, C. J.*, in *R. v. Thelwall*, *McNally, Evidence*, 323 ("An affectionate and warm evidence of character, when collected together, should make a strong impression in favor of a prisoner").

man, and speculate whether he is helped more by the witnesses whose personal intimacy gives to their belief a first and highest value, or by those who merely repeat a form of words in which the term "reputation" occurs. Look at it from the point of view of the prosecution, and apply the principle in such a case as *R. v. Rowton*,⁴ and then decide whether the witness who was there excluded was not, if believed, worth more than forty opposing witnesses testifying to that intangible, untestable creation called "reputation." The Anglo-American rules of evidence have occasionally taken some curious twistings in the course of their development; but they have never done anything so curious in the way of shutting out evidential light as when they decided to exclude the person who knows as much as humanly can be known about the character of another, and have still admitted the second hand, irresponsible product of multiplied guesses and gossip which we term "reputation."⁵ Many judges have come to the rescue of the traditional and orthodox class of testimony in passages of force and clearness which ought to avail for persuasion:

1865, *R. v. Rowton*, Leigh & C. 530, 532, 530; Erie, C. J.: "Disposition cannot be ascertained directly; it is only to be ascertained by the opinion formed concerning the man; which must be founded either on personal experience or on the expression of opinion by others, whose opinion again ought to be founded on their personal experience. . . . I think that each source of evidence is admissible. You may give in evidence the general rumor prevalent in the prisoner's neighborhood, and, according to my experience, you may have also the personal judgment of those who are capable of forming a more real, substantial, guiding opinion than that which is to be gathered from general rumor. I never saw a witness examined to character without an inquiry being made into his personal means of knowledge of that character. The evidence goes to the jury depending entirely upon the personal experience of the witness who has offered his testimony. Suppose a witness to character were to say: 'This man has been in my employ for twenty years; I have had experience of his conduct; but I have never heard a human being express an opinion of him in my life: for my own part, I have always regarded him with the highest esteem and respect, and have had abundant experience that he is one of the worthiest men in the world.' The principle the Lord Chief Justice has laid down would exclude this evidence, and that is the point where I differ from him. To my mind, personal experience gives cogency to the evidence; whereas such a statement as 'I have heard some persons speak well of him,' or 'I have heard general report in favor of the prisoner,' has a very slight effect in comparison"; Willes, J.: "I apprehend that the man's

³ Take for example the following kind of testimony: 1860, *Gandolfo v. State*, 11 Oh. St. 116 (an apprentice was tried for murder; and his master testified: "He is the most quiet, peaceable boy I ever saw or had; . . . none ever knew him to give an uncivil answer to any one in the shop, in the 8 years he worked there, either to those above or below him; if I spoke roughly to him, it would bring tears to his eyes, but no retort; . . . he was the pet of the shop from his uniform kindness of disposition").

⁴ 1865, Leigh & C. 530, 10 Cox Cr. 25 (indecent assault upon a boy; the witness for the prosecution was asked, "What is the defendant's general character for decency and morality of conduct?"; and answered: "I know nothing of the neighborhood's opinion, because I was only

a boy at school when I knew him; but my own opinion and the opinion of my brothers who were also pupils of his is that his character is that of a man capable of the grossest indecency and the most flagrant immorality").

⁵ This is well put by Mr. Taylor, arguing in *R. v. Rowton*, at p. 535: "Reputation is only the repetition of the judgment of others. There is no rule of law that, to make evidence of reputation admissible, it must be founded on the judgment of a definite number. If, then, the judgment of ten or a less number of men is admissible under the name of reputation, how can the judgment of one only, that is, how can the estimate of disposition formed by one man only — or, in other words, individual opinion — be excluded?"

disposition is the principal matter to be inquired into, and that his reputation is merely accessory, and admissible only as evidence of disposition. . . . The judgment of the particular witness is superior in quality and value to mere rumor. Numerous cases may be put in which a man may have no general character — in the sense of any reputation or rumor about him — at all, and yet may have a good disposition. For instance, he may be of a shy, retiring disposition, and known only to a few; or again, he may be a person of the vilest character and disposition, and yet only his intimates may be able to testify that this is the case. One man may deserve that character [reputation] without having acquired it, which another man may have acquired without deserving it. In such cases the value of the judgment of a man's intimates upon his character becomes manifest. In ordinary life, when we want to know the character of a servant, we apply to his master. A servant may be known to none but members of his master's family; so the character of a child is known only to its parents and teachers, and the character of a man of business to those with whom he deals. . . . According to the experience of mankind, one would ordinarily rely rather on the information and judgment of a man's intimates than on general report; and why not in a court of law? . . . The evidence in this particular case was of a very peculiar character, because the prisoner was charged with an offence which would not only be committed in secret if it were committed at all, but would be likely to be kept secret by the persons who were subjected to it. Such being the case, in order to ascertain the prisoner's character for morality and decency, the persons of whom you would inquire would be those who had been within reach of his influence, — persons who would not be likely to communicate his conduct to the neighborhood or to one another."

1876, 1883, Sir James Stephen, Digest of Evidence, note XXV, History of the Criminal Law, I, 450: "One consequence of the view of the subject taken in that case [of *R. v. Rowton*] is that a witness may with perfect truth swear that a man, who to his knowledge has been a receiver of stolen goods for years, has an excellent character for honesty, if he has had the good luck to conceal his crimes from his neighbors. It is the essence of successful hypocrisy to combine a good reputation with a bad disposition, and according to *R. v. Rowton* the reputation is the important matter. The case is seldom if ever acted on in practice. The question always put to a witness to character is, What is the prisoner's character for honesty, morality, or humanity?, as the case may be; nor is the witness ever warned that he is to confine his evidence to the prisoner's reputation. It would be no easy matter to make the common run of witnesses understand the distinction. . . . The case expressly decides that if a man gains a reputation for honesty or morality by the grossest hypocrisy, he is entitled to give evidence of it, which evidence cannot be contradicted by people who know the truth."

1834, Wright, J., in *Seely v. Blair*, Wright 686: "Those who know the character of the man, his moral habits, are by law competent to give their opinion whether it is equal for truth to that of men in general, while those who know nothing but the witness' reputation, or what is generally said of him, are not competent. The character of persons is known to those who are acquainted with them before it is known abroad; they have character before they have reputation. A man's actions are his character; they speak louder than words. A man's character must be true; his reputation may be most false. If I have raised a child, and his character which has been subject to my scrutiny is bad, and I know him to be subject to no moral restraint, I can testify to his character; yet he may have no reputation abroad."

1876, Berry, J., in *State v. Lee*, 22 Minn. 400: "As it is the fact of disposition which is important and material, there can be no reason why this fact may not be proved by any witness who knows what it is. There is certainly no reason why general repute is any better or more satisfactory evidence of disposition than the testimony of one who

⁴ For a good illustration of this fallacy of rule of law, see the testimony in *Kehoe's Trial* trying to make the straightforward lay mind (Molly Maguire), Pa., 1876, West's Rep. 146-165.

knows what the disposition is from his own personal observation. . . . Whether the witness knows what he pretends to know in regard to the disposition of a person in question, whether his opportunities for acquiring such knowledge have been sufficient, or his ability to acquire it has been competent, are matters which there is no practical difficulty in testing, either upon a preliminary or cross-examination, or both."⁷

⁷ A powerful argument against the rule may be found in Mr. William Johnston's Arguments (Cincinnati, Clarke & Co., 1867), p. 104.

TOPIC IV: OPINION RULE,
AS APPLIED TO HANDWRITING-EVIDENCE.

CHAPTER LXVIII.

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A. HISTORY OF HANDWRITING-EVIDENCE.

- § 1991. Original Meaning and Rule for "Comparison of Handwriting."

(1) In proving a document or a signature to have been written by A, two distinct kinds of evidence offer themselves: first, testimony by a person who saw the act of writing, or some circumstance leading up or pointing back to that act; secondly, evidence of the kind of handwriting. The difference is that in any and all ways of the second mode there is involved the establishment of a personal type or character of writing, and an estimate, based on

comparison, that the disputed writing belongs to the type; and this is so whether we employ witnesses who know that type and examine the disputed writing, or whether the jury is given the means of knowing the type and making the examination. By the first mode we are not in any way concerned with the character of the person's writing; the witness testifies directly to seeing the act done, just as he would testify to seeing a blow struck. By the second mode, there is always an inference from the type to the genuineness of the disputed instance.¹ It is obvious how wide the difference is.

Now the first and most important point of legal history here is that, at a certain stage of our law, all of the ways of proving handwriting by its type, while not entirely repudiated, were greatly discountenanced and strictly limited in their use. For instance, a paper being offered as written by X, A's testimony that he saw X actually write it would be always received; but A's testimony that he had often seen X write and that this was X's writing would not be. The next point of importance is that the term "comparison of hands" (or, in the older phrase, "similitude of hands") was indiscriminately applied to all of the modes of proving by type, i. e. to any way of proving except by one who had seen the very document in the act of being written. What we find is the gradual admission, one after another, of various modes of this sort; but they were all at first known by the general phrase "similitude" or "comparison of hands;" and when that phrase was used, it covered even the testimony of one who had seen X write and thus knew his hand. Thirdly, with reference to the limited use of these modes, we find (a) that the only kind of witness who could be heard was one who had seen X write; no other sort of knowledge was orthodox; (b) that such testimony was conceded to be proper in civil causes only (and perhaps in petty causes alone, i. e. causes under forty shillings in amount), and that though (at the stage when these questions arise, the era of the Restoration and the Revolution), the Crown was endeavoring to extend its use, this extension was strenuously opposed and was evidently against orthodox practice.

These features are sufficiently illustrated by the following passages from the trials of the late 1600s:

1688, *Algernon Sidney's Trial*, 9 How. St. Tr. 851, 864; "Mr. Sheppard sworn. *Att'y-Gen.*: "Pray, will you look upon these writings [showing the libel]. Are you acquainted with Colonel Sidney's hand? *Sheppard*: Yes, my lord. *Att'y-Gen.*: Is that his handwriting? *Sheppard*: Yes, sir; I believe so. I believe all these sheets to be his hand. *Att'y-Gen.*: How come you to be acquainted with his hand? *Sheppard*: I have seen him write the indorsement upon several bills of exchange. *Col. Sidney*: My lord, I desire you would please to consider this, that similitude of hands can be no evidence. *L. C. J. Jefferies*: Reserve yourself until anon, and make all the advantageous remarks you can. . . . *Sidney*: Now, my lord, I am not to give an account of these papers; I do not think they are before you, for there is nothing but the similitude of hands offered for proof. The similitude of hands is nothing; we know that bonds will be counterfeited, so that no man shall know his own hand." Remarks² by Sir John Hawles, Solicitor-General under

¹ This distinction has already been examined under Relevancy (*ante*, § 883).

² *Ib.* 1003.

William III: "The evidence was, proving the book produced to be Col. Sidney's writing, because the hand was like what some of the witnesses had seen him write; an evidence never permitted in a criminal case before. The case of the Lady Carre^a was well cited by Col. Sidney, against whom there was an indictment information of perjury, in which it was resolved that comparison of hands was no evidence in any criminal prosecution."

1688, *Trial of the Seven Bishops*, 12 How. St. Tr. 406; several witnesses were offered, most of whom had not seen the Bishops write, but had only had correspondence; after their testimony, which was very hesitating, Serj. Levins: "My lord, before this paper is read, we hope you will let us be heard to it. For what is all the proof that they have given of this paper? They have a proof by comparison of hands, which in a criminal case ought not to be received. . . . For them to come to prove hands only by those that saw letters, but never saw the persons write, this I hope will not amount to so much as comparison of hands. . . . It is an easy matter for any man's hand to be counterfeited; that they sure will agree, for frequent daily experience shows how easily it may be done; is it not easy then to cut any man down in the world by proving it like his hand? And proving that likeness by comparing it with something that he hath formerly seen? This strikes mighty deep. The honestest man in the world, and the most innocent, may be destroyed, and yet no fault to be found in the jury or in the judges." . . . Sol.-Gen. (opposing): "It is a wonderful thing, they say, that such evidence should be offered, but truly, my lord, it is a much stranger thing to hear Mr. Serjeant Pemberton say it was never done before. . . . [In Sidney's case] there was no person that swore he saw him write it; there was nothing proved but similitude of hands to make the jury believe it his handwriting." . . . Mr. J. Holloway: "In civil matters we do go upon slight proof, such as the comparison of hands, for proving a deed, or a witness' name; but in criminal matters we ought to be more strict and require positive and substantial proof." The judges being divided (Powell and Holloway, JJ., against, and Allybone, J., and Wright, L. C. J., in favor, the difference turning on the fact that the case was a criminal one), the evidence was not considered.

1691, *Trial of Sir R. Graham* (Lord Preston), 12 How. St. Tr. 736; "L. C. J. Holt (to jury): Mr. Townesend says he has seen my lord write several times and does believe the writing to be in his hand; and to the same purpose says Bland. Lord Preston: I hope your lordship will please to observe to the jury that this is only a proof of similitude of hands; nobody see me write them."

1695, *R. v. Crosby*, 12 Mod. 72: "At this trial several treasonable papers were produced, which they swore they believed to be the handwriting of the prisoner; and on this a question arose whether comparison of hands were sufficient; and *per Curiam* [L. C. J. Holt], it is not sufficient for the original foundation of an attainder, but may be well used as a circumstantial and confirming evidence, if the fact be otherwise fully proved; as in my lord Preston's case, his attempting to go with them into France, and principally where they were found on his person. But here, since they were found elsewhere, to convict on a similitude of hands was to run into the error of Colonel Sidney's case."⁴

These passages illustrate, then, (1) that the term "similitude" or "comparison of hands" covered *all modes of proving handwriting* (in the strict sense, i. e. every way in which the type of writing was the source of belief); (2) that the orthodox use of such proof was confined at least to *civil causes*;⁵

^a 1 Sid. 418.

⁴ See also: 1684, *Hayes' Trial*, 10 How. St. Tr. 312-314; 1723, *Bishop Atterbury's Trial*, 16 id. 546. For other illustrations, from the general literature of the time, of the then meaning of the phrase, see the note of the learned compilers of *Adolphus and Ellis' Reports*, vol. 5, p. 752.

⁵ There can be little doubt that the use was not limited to petty causes, but was common in civil causes generally, particularly in the proof of witnesses' signatures to wills, deeds, etc.; for example: 1693, *Bath and Mountague's Case*, 3 Ch. Cas. 55, 58, 80; 1695, *Blurton v. Tooten*, Skinner 639.

(3) that the only accepted mode of such proof was by those who had *seen the person write*. We have now to notice a gradual expansion of the limits of the doctrines under (2) and (3); and first of (2):

(2) We first find the doctrine that in *criminal cases* proof by "similitude of hands" is admissible if the disputed paper was found in the accused's possession; in such a case of *prima facie* authorship, this doubtful kind of evidence was acceptable as "circumstantial and confirming evidence," in Lord Holt's language.⁶ This form of the rule begins before 1700,⁷ and becomes common in the trials of the next century, and even as late as 1802 we find Mr. McNally writing:

1802, Mr. T. McNally, Evidence, 403: "But though mere comparison of handwriting be not evidence on an indictment or information, yet papers found in the custody of the defendant and the writing thereof proved to be in his hand by persons who have *seen him write*, is sufficient *preliminary* evidence to entitle the counsel for the Crown to have them read."⁸

This modification in its broad form (confining this kind of proof in criminal cases to corroborative purposes only) was embodied in the treatises of the 1700s.⁹ But by the end of the century the limitation had disappeared entirely, and we find Mr. McNally able to say, in 1802, as the result of the latest rulings:¹⁰

"In proving the handwriting of a defendant, there is no legal distinction between that which is legal evidence in a civil action¹ and that which is legal evidence in a criminal prosecution."¹¹

⁶ 1695, Crosby's Case, *supra*. It is perfectly clear, however, that this admission of it as "confirmatory" only was not genuinely an innovation upon the practice in criminal cases; but merely settled within the above limits the hitherto doubtful orthodoxy of such evidence in criminal cases. It had been used all through the 1600s: 1645, Lord Macguire's Trial, 4 How. St. Tr. 653, 685; 1660, Harrison's Trial, 5 id. 1010, 1021; Scroop's Trial, ib. 1034, 1042; Carew's Trial, ib. 1048, 1051; Scot's Trial, ib. 1058, 1062; Jones' Trial, ib. 1072, 1073; 1662, Sir Henry Vane's Trial, 6 id. 119, 149; 1663, Twyn's Trial, ib. 513, 524; 1678, Coleman's Trial, 7 id. 1, 22, 34; Ireland's Trial, ib. 79, 118; 1679, Whitebread's Trial, ib. 311, 335.

⁷ The settlement of it with these limits was probably due to the belief that the act of 1689 (quoted *post*, § 1992), reversing Sidney's attainder, was intended as a legislative disparagement of this use in criminal cases.

⁸ 1688, Serj. Pemberton, in Seven Bishops' Trial, *supra*, for the defence, distinguishing Sidney's Case: "My lord, that case differs from this *totò caelo*; the writing was found in his possession, in his study; there was the proof that nailed him," a distinction not at the former time put forward. Compare also: 1684, Hayes' Trial, 10 How. St. Tr. 312-313; 1696, Sir John Fenwick's Trial, 13 id. 625-627; 1719, Matthews' Trial, 15 id. 1323, 1375; 1723, Lyster's Trial, 16 id. 199, 205; 1753, R. v. Henney, 1 Burr. 511.

⁹ 1726, Gilbert, Evidence, 53 ("The proof of false swearing to an affidavit or answer may be further illustrated by the comparison of hands, which possibly may be evidence in concurrence with other proof that out of the answer itself evinces the identity of the person. But that the comparison of hands only should be a proof in a criminal prosecution was never law but only in the time of King James, and the distinction has ever been taken that the comparison of hands is evidence in civil and not in criminal cases. The reason why the comparison of hands is allowed to be evidence in civil matters is because men are distinguished by their handwriting as well as by their faces, for it is very seldom that the shape of their letters agree any more than the shapes of their bodies; therefore, a comparison of hand serves for a distinction in civil commerce, for the likeness does induce a presumption that they are the same. But in criminal prosecutions the presumption is in favor of the defendant, therefore, when comparison of hands is the only evidence in a criminal prosecution, there is no more than one presumption against another, which weighs nothing"); 1707, Buller, Trials at Nisi Prius, 234.

¹⁰ Evidence, 417.

¹¹ The first cases accepting this, the conceded rule of to-day, seem to have been: 1781, De la Motte's Trial, 21 How. St. Tr. 810; 1792, R. v. Tandy, K. B. Ives, McNally's Evidence, 409.

(3) Taking up now the other limiting doctrine already mentioned, we find that here, too, an expansion was taking place. The orthodox witness had been one who had *seen the person write*. This was the only clear and accepted foundation for the witness' knowledge of the hand. In the Bishops' Trial, Serj. Levinz, in defence, had argued: "For them to come to prove hands only by those that saw letters, but never saw the persons write, this I hope will not amount to so much as a comparison of hands." Nevertheless, the Crown lawyers had already begun and incessantly kept up the practice of offering witnesses who had an inferior knowledge, based on specimens seen by them and somehow *known to them as genuine otherwise than by seeing them written*; for example, one who had bought a bill indorsed by the person and had afterwards demanded and received payment of it from him, — a kind of witness perfectly acceptable to-day (*ante*, § 699). In the Seven Bishops' Trial, for example, all but one of the witnesses had apparently this sort of knowledge only, and this circumstance probably weighed much with the judges who were for rejection. Although in Crown cases of the 1700s the judges were able to force in this sort of testimony (especially where the papers were found in the accused's custody),¹³ yet the acceptance of such a witness was distinctly a new thing, a loose practice, and an expansion of the orthodox requirements:

1696, *R. v. Culpepper*, Skinner 673: "Then they produced a witness to swear to the contents of another letter [of Sir Francis Wythens]; which was denied, he never having seen Sir Francis write, but deposed that it was the same hand with the letter produced. *Non allocatur*; for, per Holt, C. J., . . . here the witness cannot prove a letter written, for he never had seen Sir Francis write, wherefore it was disallowed."

The great case of Lord Ferrers *v. Shirley*, in 1731,¹⁴ stamped this new doctrine as orthodox. For the rest of the century, however, it seems to keep a secondary place; it is usable only in case of "necessity," i. e. when witnesses who have seen the person write cannot be had.¹⁵ By the beginning of the 1800s this class of testimony takes its place on an equal footing with the older kind,¹⁶ but its distinctly modern and parvenu character may be perceived from the following well-known passage of Lord Eldon's:

¹³ *E. g.* Laver's Trial, *supra*; Grahme's Trial, *supra*.

¹⁴ Fitzgibbon, 195; a clerk of Earl Ferrers had received or seen several letters, which one C. (whose signature was in question) had purported to write; "The counsel insisted that in all cases where a witness would swear to the handwriting, he must be able to say that he saw such person write"; the witness was rejected, but only because he could not show that the letters were really C.'s; Page, J., wanted to confine the use of such witnesses to cases of necessity, as where the person in question was abroad; but Raymond, C. J., would not concede any such limitation.

¹⁵ 1767, Buller, Trials at Nisi Prius, 236: "The reason why the comparison of hands is allowed to be evidence is because men are distinguished by their handwriting as well as by

their faces. In general cases the witness should have gained his knowledge from having seen the party write; but under some circumstances that is not necessary, as where the handwriting to be proved is of a person residing abroad, one who has frequently received letters from him in a course of correspondence would be admitted to prove it, though he had never seen him write. So where the antiquity of the writing makes it impossible for any living witness to swear he ever saw the party write." As late as 1798, Sheares' Trial, 27 How. St. Tr. 323, the old notion is found.

¹⁶ In early American cases we find instances of failure to recognize the new sort; the judge regards testimony as inadmissible when based on anything less than seeing the person write: Huger, J., in *Cantey v. Platt*, 2 McCord 260 (1822); Tlghman, C. J., in *Vickroy v. Skelley*,

1803, *Eldon, L. C.*, in *Eagleton v. Kingston*, 8 Ves. 478: "When I first came into the profession, the rule as to handwriting in Westminster Hall in all the Courts was this. You called a witness, and asked whether he had ever seen the party write. If he said he had, whether more or less frequently, that was enough to introduce the further question, whether he believed the paper to be his handwriting. . . . Or you might ask a witness who had not seen him write for a length of time, if you could not get a witness of a subsequent date. . . . This rule was laid down with so much clearness that till very lately I never heard of evidence in Westminster Hall of comparison of handwriting by those who had never seen the party write."¹⁴

§ 1992. *Enlargement of the Rule; Modern Change of Meaning.* The result at this point was that the opposition to proof by "comparison of hands" had been forced to give way, and that the use of such proof had been enlarged with reference to the kind of case — civil and criminal — in which it could be used, and the sources of the witness' knowledge which would be recognized as sufficient. But the old stigma remained, and the old literature discountenancing it was still perused. Thus, when now still other varieties of it were attempted to be availed of, it came about that the argument against them was that they involved "comparison of hands" and were thus unlawful. The attitude of mind was: "Yes, to be sure, you may bring a witness who saw X write, or even received letters which X treated as genuine, or had old records in his possession purporting to be signed by X; that is well enough; *that* is not comparison of hands, but this that you are offering *is* comparison of hands, which has from of old been unlawful." In other words, we now come to a stage in which "comparison of hands" received a *new and restricted sense*, and was in this sense used to cut off the introduction of new varieties of testimony. It was now applied to all witnesses who had *no previous knowledge* of the hand, but were *shown specimens in court* and asked to compare them with the disputed writing. This change of meaning in the phrase is the key to the confusing sources of the early 1800s.¹ The following passages will illustrate it; the second one, of Mr. J. Buller, is the most striking, because in his own book of fifteen years before² he had used the phrase in the old sense:

1770, *Yates, J.*, in *Brookbald v. Woodley*, Peake N. P. 20; rejecting old register-entries offered as standards: "I do not know any case where comparison of hands has been allowed to be evidence at all. . . . Where a witness has seen the party write, . . . that is evidence. But where it is merely opinion on similitude of the writing collected from barely comparing them, the jury may compare them as well as anybody else."

1781, *Buller, J.*, to the jury, in *De la Motte's Trial*, 21 How. St. Tr. 810: "The counsel on the part of the prisoner have first objected that similitude of handwriting is no

14 S. & R. 373 (1826). Yet as early as 1810 Mr. J. Duncan accepted the newer mode, in *Com. v. Smith*, 6 S. & R. 571. In Louisiana the old restriction, receiving only a witness who had seen the very document signed, persisted as late as 1812, under the first Civil Code: *Sauvé v. Dawson*, 2 Mart. 202; yet experts were by the same Code received. The past of the law in this respect is often ignored, as where it is said, in *Bennett v. Mathewes*, 5 B. C. 482 (1874), that this sort of testimony "has never been questioned."

The rules for this class of testimony have been already examined in detail, *ante*, §§ 699-708.

¹ So also in *Wade v. Broughton*, 3 Ves. & R. 172 (1814).

² In an anonymous treatise on High Treason, dated 1793, and published with the edition of 1873 of Kelyng's Crown Cases, is one of the latest instances of the old sense of the words (p. 149).

³ Quoted *ante*, § 1991, note 14.

evidence. They certainly are right in that argument; but the objection does not apply to this case. Similitude of handwriting is where a paper is produced not sworn to by anybody that has ever seen him write or has any knowledge of his hand, but the inference is made that it is his handwriting because it is like some other which is so. But that is not the evidence which has been offered to you respecting any one of the papers which you have heard read; they have all been proved by persons who were acquainted with his handwriting. They speak not from the similitude of the writing only, but from their knowledge of his handwriting, having seen the prisoner write before. That, gentlemen, is the only evidence which can be given of handwriting, except it happens that there be a person who saw the prisoner actually write the papers."

1792, *R. v. Tandy, Ira, McNally's Evidence*, 409; prosecution for sending a challenge to Mr. Toler; Mr. Toler testified: "I have seen him write, and received letters from him"; Counsel for defendant argued that "as the evidence offered was merely upon comparison of hands, without any previous ground to show that it was sent by Mr. Tandy to Mr. Toler, it could not be read. . . . From the reversal of Algernon Sidney's attainder to the present case, in criminal prosecutions comparison of handwriting is not evidence"; *Boyd, J.*: "This is not comparison of hands. Mr. Toler says he knows the handwriting."

To understand the new meaning of the phrase, it is necessary to look back at the scope of the early use of "similitude of hands" and see how far it included juxtaposition by the witness *coram judicio*. The first thing to note is that it was not the process of juxtaposition by the witness that was repro- bated, but the use of such testimony at all. Remembering that the early restricted practice in civil cases was confined to witnesses who had seen the person write, we here find that no discrimination was made between the different ways in which he might give his testimony, i. e. he could either merely look at the disputed writing and give his opinion upon it, or better still (they thought) bring in the other writing he had seen made and juxtapose it, and even show it to the Court and jury, — which last, indeed, had been the practice from time immemorial for authenticating seals.⁴ In other words, when they did allow proof by "similitude of hands" at all, they made no special discrimination against juxtaposition in court; it was all "similitude of hands," equally good or equally bad. Thus, Serjeant Levinz said, arguing for the Seven Bishops, in 1688, and conceding what he felt obliged to:⁵

"Your lordship knows that in every petty cause where it depends upon comparison of hands, they used to bring some of the party's handwriting which may be sworn to to be the party's own hand, and then it is to be compared in court with what is endeavored to be proved; and upon comparing them together in court the jury may look upon it and see if it be right. In such manner of proofs by comparison of hands the usage is that the witness is first asked, concerning the writing he produces, Did you see this writ by the defendant whose hand they would prove? If he answers, Yes, I did, then should the jury, upon comparison of what the witness swears to with the paper that is to be proved, judge whether those hands be so like as to induce them to believe that the same person writ both."

⁴ This change of meaning was observed by Mr. Starkie, with his usual acumen and accuracy: 1824, *Starkie, Evidence*, II, 515; so also (1849) *Mr. Best, Evidence*, § 243.

⁵ 1889, *Breslau, Handbuch der Urkundenlehre*, I, 439, 547; 1898, *Déclercq, Les*

preuves judiciaires dans le droit français du V^e au VIII^e Siècle, *Nouv. revue hist. de droit fr. et étr.*, vol. 22, p. 759; 1900, *Thayer, Cases on Evidence*, 2d ed., note, p. 710; 1895, *Pollock and Maitland, Hist. of English Law*, II, 222.

⁶ 12 How. St. Tr. 297.

1729, *Hales' Trial*, 17 How. St. Tr. 273; forgery of a promissory note; *Counsel*: "Mr. Lincoln, those receipts which you produced, did Mr. Kinneraley actually write them?" *Mr. Lincoln*: "I saw him write them all"; *Counsel*: "Show them to the jury"; *Regnolds, J.*: "Gentlemen of the jury, in that book you will find some receipts wrote by Mr. Kinneraley, which Mr. Lincoln swears are his hand."⁶

In short, the struggle that was then going on was against "similitude of hands" in general, and, later, against witnesses who had merely received correspondence; and where there were witnesses who had seen the person write, they were either competent or incompetent, and no objection was founded merely on their bringing the specimens into court.⁷

§ 1993. *State of the Law by the 1800s*; (I) *Classes of Witnesses*. What we have, then, as the 1800s came in (the time when reasons and principles for the rules of evidence began much to be thought about) is (1) the acceptance of witnesses who had seen the person write; (2) the acceptance of witnesses who had received writings subsequently treated by him as genuine or who had had the custody of ancient documents of the same person's; (3) the permission, for such persons, equally of merely examining the disputed writing and of bringing into court the specimens they knew and juxtaposing them; (4) the exclusion of any other mode of testimony under the condemnatory phrase "comparison of hands." The other kinds of witnesses that were thus excluded would be (a) an ordinary witness who knew nothing about the handwriting but merely juxtaposed specimens and compared; (b) the same testimony by one skilled in handwriting generally.

(a) Now the former was of course barred absolutely by the Opinion rule, well expounded in this connection in the following passage:

⁶ 1684, *Hayes' Trial*, 10 How. St. Tr. 312, 313; 1693, *Bath and Mountague's Case*, 3 Ch. Cas. 55, 58, 80 (validity of a deed; the judges refer in their opinions to the "multitudes of instruments that were produced in Court" to prove genuineness by comparison); 1700, *Feilding's Trial*, 18 How. St. Tr. 1353, 1359, 1367; 1714, *Carbone v. Cotton*, *Viner's Abr.*, "Evidence," T. b. 48, 11; 1723, *Atterbury's Trial*, 16 How. St. Tr. 547; 1731, *Ferrers v. Shirley*, cited *ante*, § 1991; 1781, *De la Motte's Trial*, 21 *id.* 675, 782.

⁷ This seems to be the explanation of the much discussed and much misunderstood act reversing Algernon Sidney's attainder, which ran as follows: 1 W. & M. 24 (1689), printed in 9 How. St. Tr. 996; Act for annulling and making void the attainder of Algernon Sidney, Esq.: "Whereas . . . there being at that time produced a paper found in the closet of said Algernon, supposed to be his handwriting, which was not proved by the testimony of any one witness to be written by him, but the jury was directed to believe it by comparing with it other writings of the said Algernon," the attainder is reversed. This recital is apparently incorrect, according to the printed report of the trial, since no writings appear to have been brought in and juxtaposed as standards. But

the fact is that, according to the law at the time of the Act, any use of "similitude of hands," as already explained, was unlawful in criminal cases; and, when the legislature wished to repudiate the proceedings at that trial, it was perfectly natural for them, whether by inadvertence or otherwise, to use the phrase "comparing it with other writings," because either and any mode of proof by "similitude" was bad. Conversely, if it had been good, it would have been equally good whether the witness brought in or did not bring in the specimens he had seen written. Perhaps the phrase of the Act "not proved by the testimony of any one witness to be written by him" is the best proof, for those who are familiar with the language of the State Trials. That phrase, as often there used, means only one thing, namely, the lack of any witness who saw the actual writing of the disputed document; and the Act contrasts that kind of a witness with a witness who judges merely by the style of writing. Finally, the Legislature could hardly have used the phrase by inadvertence, because in the testimony set forth *ib. p.* 969, it appears that the Legislature had received freshly and accurately an account of just what evidence was offered, and it did not include the juxtaposition of specimens.

1770, Yates, J., in *Brookbald v. Woodley*, Peake N. P. 21, note: "Where it is merely opinion on similitude of the writing collected from barely comparing them, the jury may compare them as well as anybody else, and any two people may think differently."

It was because, when the judges stopped to think, this Opinion rule clearly excluded the ordinary witness who spoke only from juxtaposition, that they began to see that logically it also effected the exclusion of the opinion of *any lay witness whatever*, so far as based on a comparison in court. Hence we find that even witnesses of the sort (2) above, who had seen the person write or had received letters or possessed old records, were now for the first time denied the old orthodox process (*ante*, § 1992), of juxtaposing documents in court. But this came about slowly. For witnesses who had seen the person write, it was enforced in 1801 in *Garrells v. Alexander*,¹ though in some American jurisdictions the old practice survived.² For witnesses who testified through having long had the custody of ancient documents, the prohibition was longer in being applied. *Doe v. Tarver*, in 1824,³ maintained the old practice; and it does not seem ever to have been expressly outlawed.⁴ Whether it would be regarded as lawful to-day cannot be told; though it is certainly anomalous, because obnoxious to the Opinion rule.

(b) The other kind of testimony thus excluded was that of *experts speaking from juxtaposition*. This it was now strenuously sought to introduce. It is no matter of surprise that the judges instinctively hesitated; for the idea of expertism in handwriting was then a novel one.⁵ But the significant circumstance is that those who tried to use this kind of testimony were obliged to strive to remove from it the stigma of being "comparison of hands." Thus:

1802, Mr. *Garroo*, in *R. v. Cator*, 4 Esp. 117, contending for the admission of expert testimony: "I come now, then, to see what comparison of handwriting is. I call somebody out of the crowd; I show him a paper of Mr. Cator's handwriting, and say 'that is a paper of Mr. Cator's handwriting,' he not being a man of skill; then I show him the libel, and do the same by the jury. Half of them may think it is Mr. Cator's handwriting, and half may think it is not. . . . [Thus, in the present case] I am not contending for a comparison of handwriting; I am referring to the skill and judgment of a person with respect to whom the jury are to judge."

They failed for a long time to introduce the new kind of testimony, and

¹ 4 Esp. 37, Kenyon, L. C. J.

² The authorities are collected *post*, § 2005.

Of course so far as the inspection of the standard, known to the witness to be genuine, is necessary by way of *refreshing recollection*, its use is legitimate. To this extent, but to this only, its propriety is still recognized: 1816, *Burr v. Harper*, Holt N. P. 420. But the opinion in *Burr v. Harper* reads like an afterthought intended to justify existing practice. The authorities are collected *post*, § 2007.

³ Ry. & Moo. 143, Abbott, C. J.

⁴ The authorities are collected *post*, § 2006.

⁵ It seemed objectionable even to the most progressive thinkers: *Life of Sir S. Romilly*, 3d ed., II, 105 (1809); debate on the conduct of the Duke of York; "they agreed to receive this

most dangerous species of evidence. . . . a comparison of hands"); this hesitation is found at a much later time, in *Murphy v. Hagermann*, Wright 297 (1833).

The earliest introduction of expert testimony in this country seems to have been under the first Civil Code of Louisiana: 1812, *Sauvé v. Dawson*, 3 Mert. 202. In the Ecclesiastical Courts the practice had been well known: 1809, *Beaumont v. Perkins*, 1 Phill. Eccl. 78, Sir J. Nicholl; 1822, *Saph v. Atkinson*, 1 Add. 214 (the same judge); though in 1824, in *Robson v. Rocke*, 2 Add. 86, he made a singular *volte-face*, and uttered nearly opposite declarations as to the common law, the Prerogative Court practice, and his own opinion of the value of such evidence.

the Legislature had finally to step in with its aid.⁶ But the result of the discussion was that the stigmatized "comparison of hands" now obtained definitely the narrow meaning just illustrated; it covered the testimony of all witnesses whose knowledge was acquired solely by examination of specimens for the purpose of the trial; it no longer applied to witnesses who had gained a knowledge by seeing the person write or by receiving correspondence or the like. When a judge now refused to accept a witness because "comparison of hands is not evidence," he meant to exclude any person, either skilled or unskilled, who was not of the last two classes and who was shown, either in court or before trial, specimens as a standard of whose genuineness he had no personal knowledge;⁷ and he also meant (by the end of the half century) the process of juxtaposition in court even by one who had a personal knowledge of the hand. In other words, the "comparison" in the old sense was the mental process of comparing the remembered type with the disputed instance; the "comparison" in the new sense is the manual juxtaposition of specimens to form a notion of the type, or to see if the type tallies with the disputed writing.

It was not, however, until *Doe v. Suckermore*, in 1836,⁸ that any real threshing-out of reasons came. At the first part of the century the explanation rests largely on instinct; the judges had already, almost within a generation, allowed great additions in this mode of proof, by enlarging the class of those who could testify at all, and by removing the limitation to civil cases; and they set themselves against any further enlargement of the class.

§ 1994. *State of the Law by the 1800s: (II) Submission of Specimens to the Jury.* There is, of course, a sole remaining way of attempting to prove the genuineness of handwriting, namely, without asking the opinion of any

* In 1792, Lord Kenyon, C. J., in *Goodtitle d. Revett v. Braham*, 4 T. R. 497, had refused to recognize the objection of "comparison of hands" when made against an expert who had studied specimens of the handwriting. Lord Kenyon's supposed recantation in *Carey v. Pitt*, Peake Add. Cas. 181 (1797), apparently refers to testimony that a writing appears to be feigned (on mere inspection of it and nothing else), and not to comparison of hands by an expert, as claimed in *R. v. Cator* by counsel and assented to by Hotham, B.; and this is the construction put on this ruling by his contemporary, Peake (Evidence, 74). Nevertheless Lord Kenyon seems to have been in the meantime of an opposite opinion, for in 1793, *Stanger v. Searle*, 1 Esp. 14, he excluded an expert's testimony on this ground. For the next generation a series of rulings availed to exclude such testimony: 1802, *R. v. Cator*, 4 Esp. 117, Hotham, B.; 1803, Lord Eldon, L. C., in *Eagleton v. Coventry*, 3 Ves. 474 ("That evidence was admitted by Lord Kenyon in one case. It was first introduced by Mr. Justice Buller. . . . [But] these latter cases appear to have brought the law back to the state in which it stood twenty-five years ago"); 1814, The same judge, in *Wade v. Broughton*, 13 Ves. & B. 172; 1820, Clermont

v. Tullidge, 4 Cl. & P. 1, Lord Tenterden, C. J.; 1830, *Griffith v. Williams*, 1 C. & J. 47 (Exchequer). In 1836, in *Doe v. Suckermore*, 5 A. & E. 710, where the whole subject was reasoned out, a division of opinion prevented a settlement of the law, Coleridge and Patteson, being for absolute exclusion, and Lord Denman, C. J., and Williams, J., being for admission under restrictions. In 1843, *Fitzwalter Peerage Case*, 10 Cl. & F. 198, expert comparison was excluded. In 1845, in *R. v. Shepherd*, 1 Cox Cr. 237, Erie, J., declared such testimony admissible to prove, but not to disprove genuineness. Finally, in 1854, came the Common Law Procedure Act, 17 & 18 Vict. c. 125, § 27, which admitted it with the proper restrictions.

⁷ This is the modern sense, of course. Thus; 1819, *Duncan, J.*, in *Com. v. Smith*, 6 S. & R. 571: "Comparison of handwriting is when other witnesses prove a paper to be the handwriting of a party, and the witness is desired to take the two papers in his hand, compare them, and say whether they are or are not the same writing. There the witness collects all his knowledge from comparison only; he knows nothing of himself, he has not seen the party write, nor held any correspondence with him."

⁸ 5 A. & E. 710, cited *supra*, note 6.

witness, to lay before the jury some specimens of the writing of the person in question.

It has already been seen (*ante*, § 1992) that in the early practice there was no objection to the jury's examination purely as such. The witness who had seen the person write (or, later, had received papers or possessed old documents learned to be genuine) might bring the writing in, if he had it, and the jury would incidentally look at it. Thus the stigma of "comparison of hands" was not applicable to the fact of the jury's examination as such; the struggle was against the use of a certain kind of witness, not against what he did if admitted. There were towards the end of the 1700s only two kinds of witnesses — those who had seen the person write, and those who had held correspondence or possessed ancient documents —, and it seems entirely clear¹ that not only could these witnesses bring in and compare the specimens they had, but the specimens could be laid before the jury for their inspection.

But now the controversy over expert testimony by juxtaposition was in full array; the new and narrow sense of the stigmatized "comparison of hands" naturally associated itself with any and every process of "comparison" or manual juxtaposition; and doubts about the propriety of the time-honored inspection by the jury thus arose. They had never arisen before, simply because the only witnesses who could be used at all were persons who had already a personal knowledge of the hand and were thus otherwise competent, and to whom juxtaposition in court was not essential, while for the new kind of witness, the expert, it was the essential source of knowledge; and thus the stigma began to be attached to the process itself as well as to the witness who had to depend upon it. And now, as often happens in our law, the doubts which owed their source to a mere confusion of precedents began to have reasons supplied *ex post facto*. It was suggested that inspection ("comparison") by juries who could not read was absurd; and other and real objections, with which we need not at this moment concern ourselves, were later searched out.² But the old tradition, hitherto unquestioned, that the jury could always have specimens for comparison, was for a long time too strong. Lord Kenyon's remarks in *Allesbrook v. Roach*,³ in 1795, illustrate the judicial state of mind:

"Some judges have doubted the policy of that rule of evidence respecting the allowing of the jury to judge by comparison of hands, because often at a distance from the metropolis the jury are composed of illiterate men, incapable of drawing proper conclusions from such evidence. For my part, I have always been inclined to admit it, and shall do so in this case."⁴

It is possible that the old practice of handing to the jury all specimens brought in by witnesses who had seen the person write persisted for some

¹ As illustrated in the passages *ante*, § 1992.

² They are considered *post*, § 2001.

³ 1 Esp. 252.

⁴ Singularly enough, Lord Kenyon had already himself once excluded jury-comparison on this very ground of illiteracy: 1791, *Mac-*

erson v. Thoytes, Peake 20. In 1797 he seems still wavering; for in *Da Costa v. Pym*, Peake N. P. 144, he disapproved of comparison by the jury, yet "the jury, nevertheless, compared the different signatures"; i. e., the old tradition was too much for his scruples.

time into the 1800s;⁵ in 1836 the counsel in *Waddington v. Cousins*⁶ argues as if it had continued; and in 1830, in *Allport v. Meek*,⁷ Lord Tenterden would apparently have allowed it if the specimens had been properly authenticated.⁸ But the Court of Exchequer, in 1830,⁹ and the King's Bench, in 1836,¹⁰ after canvassing the whole subject from the point of view of policy, put a limitation upon the practice (confining it to documents already in the case), which remained the law,¹¹ until the Common Law Procedure Act of 1854 speedily reverted to the early tradition, and substituted its more satisfactory rule.

Thus the phrase "comparison of hands," by the first half of the century, might mean either juxtaposition by a witness or juxtaposition for the perusal of the jury; the former being not allowed at all, even for experts, and the latter after a time suffering a marked limitation of use. But what seems certain is that, so far as juxtaposition for the jury was discountenanced, not because of the real difficulties involved in it (confusion of issues, and the like), but by the stigma of the phrase "comparison of hands," this was due to its modern association by confusion with that modern sense of "comparison of hands" (juxtaposition) as applied to expert witnesses. The stigma of that phrase attached properly to a kind of witness — in the beginning to a large class, at the end to a small class —, but it had originally no reference to the mere process of juxtaposition.

If the foregoing exposition has been clear, we may understand (1) that the classes of witnesses who may testify to handwriting have increased in number by successive enlargements; (2) that the whole meaning of "comparison of hands" has changed; (3) that the mere process of juxtaposition *coram judicio*, whether for witness or for jury, was historically orthodox and unquestionable; and (4) that the opposite fates at common law of juxtaposition by experts and juxtaposition by jury — exclusion for the former, but limited

⁵ Certainly into the first decade: 1805, *Mr. Justice Johnson's Trial*, 29 *How St. Tr.* 487; 1806, *Roe v. Rawlings*, 7 *East* 279, 282, note.

⁶ 7 C. & P. 595.

⁷ 4 *id.* 267.

⁸ Compare Lord Denman, C. J. (1836), in 5 A. & E. 751, who says: "My brother Parke has informed me that at Nisi Prius he has felt himself bound to permit them [the jury] to see the documents on which the witness judged" when they were in court.

The tradition of allowing jury-comparison was in some places perpetuated in this country, as appears in the following passages, the first of which also illustrates the old sense of the phrase, as well as the custody-limitation mentioned *ante*: 1792, Addison, P. J., in *Pennsylvania v. McKee*, Add. 35 ("Comparison of hands, or proof by witnesses acquainted with the handwriting, is proper proof to be left to a jury, especially where, as in the present case, the writing is found in the possession of the party"); 1814, Parker, C. J., in *Homer v. Wallis*, 11 *Mass.* 312 ("Whatever doubts there may now

be in England as to this species of evidence — for in former times it was holden admissible, and has never yet to our knowledge been absolutely settled otherwise —, we have no doubt that it has become by long and invariable usage in this State competent evidence here"); so also in Connecticut (*post*, § 2016).

⁹ *Griffith v. Williams*, 1 C. & J. 47.

¹⁰ *Doe v. Newton*, 1 Nev. & P. 1. There were also individual rulings: 1831, *Solita v. Yarrow*, 1 Moo. & Rob. 133, Lord Tenterden, C. J.; 1831, *R. v. Morgan*, *ib.* 134, Bolland, B.; 1836, *Bromage v. Price*, 7 C. & P. 548, Littledale, J.; 1836, *Waddington v. Cousins*, *ib.* 595, Lord Denman, C. J. (after *Doe v. Newton*).

¹¹ 1836, Lord Denman, C. J., in *Doe v. Suckermore*, 5 A. & E. 750; 1841, *Hughes v. Rogers*, 8 M. & W. 123 (apparently treating the matter as not settled); 1845, *Ovenston v. Wilson*, 2 C. & K. 1; *R. v. Shepherd*, 1 Cox Cr. 237, Erie, J.; 1852, *R. v. Taylor*, 6 *id.* 58, Wightman, J.; 1855, *Doe v. Wilson*, 10 Moore P. C. 529 (trial held before the Act of 1854).

sanction for the latter—were due simply to the fact that the former had never been attempted till the 1800s and was merely prevented from coming into existence, while the latter had always existed and was thus able to survive the attempts on its life.

B. GENERAL THEORY.

§ 1996. *Classes of Handwriting-Evidence, discriminated.* In order to have precisely in mind the scope of the ensuing rulings, and their relation to those already examined elsewhere, a brief re-survey of the various modes of evidencing handwriting is necessary.

At the outset, testimony directly to the *act of inscribing* the disputed writing may be disposed of as not concerning the present subject; it does not differ from direct testimony to the doing of any other act. So also *circumstantial evidence* appropriate to proving any other act is without the present purview,—for example, the fact that the person had expressed an intention to sign the writing, or that he left a room and the signed writing was found in the room (*post*, § 2181). These involve no special principle peculiar to handwriting-evidence.

What is peculiar to that subject is the use of a *type* or general style or standard of handwriting, as indicating that a particular disputed writing was or was not made by the person possessing the general style of handwriting. This use may be made by two general kinds of evidence, one testimonial, the other circumstantial. (1) We resort to *testimonial* evidence when we ask a witness, who possesses a knowledge of a certain type of handwriting, to say whether the disputed document is in that type of handwriting. (2) We resort to *circumstantial* evidence when we furnish the jury directly with a knowledge of the type, so that they may apply it for themselves, and, in order to prove that type to the jury, produce sundry specimens as a basis for learning the character of the type or standard.

(1) When *testimonial evidence* is used, then, the only preliminary requirement is that the witness shall appear qualified, *i. e.* sufficiently acquainted by personal observation with the type of handwriting which he is to apply to the disputed writing. The natural requirements for this purpose, broadly speaking, would be two, namely, he must have seen specimens which were genuinely those of the person whose handwriting he claims to know, and those specimens must have been numerous and representative enough to furnish an adequate basis of judgment; and these requirements show their effect from time to time in the rules of law.

The actual grouping of the kinds of witnesses thus available has been made on the lines of the first requirement, namely, according to the *mode in which the witness knows the genuineness of the specimens seen by him*. (a) He may know this *ex visu scriptoris*, *i. e.* by having seen the person in the act of writing something; this leads to rules of qualification already examined (*ante*, §§ 694-698). (b) Or he may know this *ex scriptis olim visis*, *i. e.* by having had before him writings known to him in some other way (*e. g.* through receiv-

ing payment from the purporting writer) to be genuinely those of the person in question; this also leads to rules of qualification, already examined (*ante*, §§ 699-707). (c) Or, finally, he may not know their genuineness at all, but may offer his opinion *hypothetically on specimens now shown to him* (*ex scriptis nunc visis*), and their genuineness will be *otherwise proved by the party* offering him; the common case of this sort is that of the expert who is shown alleged specimens in court.

Now, for this last class of witness, it is obvious that by studying the specimens he may become as well qualified as the other classes of witnesses who had seen specimens elsewhere; so that no further *estoppel* arises as regards the principle of Testimonial Qualifications. But a difficulty arises in another field. In the first place, the *Opinion rule* would ordinarily forbid such testimony (*ante*, § 1918), because the specimens are in court and the jury can obtain no special assistance from the opinion of a layman no better skilled than themselves. In the next place, the specimens have still to be *proved genuine*, and this proof (on the principle of § 1904, *ante*) may be objectionable because of multiplicity and confusion of issues. Thus, this third class of witness (*ex scriptis nunc visis*) cannot properly be received until these objections are somehow disposed of. The consideration of this sort of testimony falls therefore under the present part of the subject; the simpler cases of the other two classes (*ex visu scriptoris*, *ex scriptis nunc visis*) having been already dealt with in the appropriate place (*ante*, §§ 694-707). The theory of the present class of testimony — the witness being either a layman or an expert in handwriting — is dealt with in the ensuing sections (§§ 1997-2000); the state of the rulings in the various jurisdictions, with the detailed questions that arise, is then examined (§§ 2003-2015).

(2) When *circumstantial evidence* is used, the process is to furnish the jury directly with the type or standard of handwriting, by offering specimens exhibiting the person's style. Here, first of all, questions of *relevancy* arise. The specimens, to afford a fairly trustworthy inference, must of course be genuine, and they must also be numerous and representative enough to serve as an adequate basis for inference to the general style.¹ But, furthermore, the process of proving their genuineness may result (as in the case of the expert's use of them) in a multiplicity and *confusion of issues* and may thus be objectionable on that score (*ante*, § 1904). Finally, the jury's inability to read, or some other characteristic peculiar to juries, may furnish a special objection. Thus the use of specimens submitted directly to the jury does not involve the Opinion rule, and might in theory be disposed of under the doctrines of Relevancy (*ante*, § 383). But the coincidence of some of the objections with those urged (as noted above) against expert testimony, and the importance of discriminating the state of the law applicable to the two kinds of evidence, render it necessary to consider under one head the rulings on both subjects. The theory of submitting specimens directly to the jury is

¹ This principle of Relevancy has already been briefly noticed, without citing the authorities, *ante*, § 383.

§§ 1901-2027] COMPARISON OF HANDWRITINGS; PRINCIPLE § 1908

therefore here examined (*post*, §§ 2001, 2002), together with the state of the rulings in the various jurisdictions. (§§ 2016-2021).

Theory of (1) Lay and (2) Expert Testimony based on Specimens *Nunc Vista*.

§ 1907. **Opinion Rule: Lay Witnesses excluded, Experts alone admitted.** The effect of the application of the Opinion rule (*ante*, § 1918) is at once to exclude the testimony of lay witnesses. Where specimens are brought into court, there is no need of any opinion based on them except from persons skilled in handwriting; for the jury can judge as well as any other laymen; moreover, they won't always have to be brought into court, where the witness does not have personal knowledge of their genuineness, because their genuineness would have there to be proved by other witnesses:

1896, *Donnan*, L. C. J., in *Dee v. Suckermore*, 5 A. & E. 740: "If the proved document and the controverted are both in court, and the witness speaks to their resemblance or difference from immediate observation, he seems to perform a task for the jury which every one of them, even though illiterate, might as well perform for himself. But if he is a person of some skill (however low in degree and however generally shared with him), he does what possibly the jury may be incompetent to do."

1837, *Weston*, C. J., in *Page v. Homans*, 14 Me. 482: "In the case under consideration the witness had no previous knowledge. He was called upon to exercise his judgment upon a comparison then to be made. What light could he afford upon the point in controversy? He possessed no peculiar skill. It must have been more satisfactory to the jury to see with their own eyes than to ask the aid of his. He could only state how the evidence impressed his mind; the same evidence was before the jury; and it was their duty to determine its force and effect."

§ 1908. **Testimonial Knowledge Rule: (a) Objection based on the supposed inferiority of an Expert's Opinion.** Though the Opinion rule, then, would admit expert testimony, yet there is further urged an objection resting mainly on the instinctive aversion of the earlier judges to a novel method of testimony—an objection which, the more explicitly it is framed, the weaker its legitimate influence appears; namely, the objection that the opinion of a handwriting-expert is in general inferior to that of an ordinary person who has seen the party write or has corresponded with him. There was a time when the scientific aspects of such testimony did not commend themselves even to great judges, who were at first found to distrust it in all its novel forms:

1836, *Coleridge*, J., in *Dee v. Suckermore*, 5 A. & E. 705: "The test of genuineness ought to be the resemblance, not to the formation of the letters in some other specimen or specimens, but to the general character of the writing, which is impressed on it as the involuntary and unconscious result of constitution, habit, or other permanent cause, and is therefore itself permanent. And we best acquire a knowledge of this character by seeing the individual write at times when his manner of writing is not in question, or by engaging with him in correspondence; either supposition giving reason to believe that he writes at the time not constrainedly, but in his natural manner. . . . Assuming that no dispute exists as to the genuineness of the standard or the fairness with which it has been selected, [still] such a comparison leads to no inference as to the general character of the handwriting."

This objection has often been answered:

1806, Mr. W. D. Evans, Notes to Pothier, II, 189 (No. 16, § VI): "But where, in point of reason, is the objection to a proof by comparison of hands, as founded upon an inspection at the trial? It will surely be admitted that the real object is the investigation of truth, and by the indiscriminate rejection of a means of establishing the truth, which in many instances must be more convincing than the evidence actually received, there is a frequent risk of the failure of justice. Every danger which may result from the case of forgery must operate at least with equal force when the deception is aided by the comparison being made, not with the immediate object of the senses, where the erroneous impressions of one person may be corrected by the more accurate inspection of another, but with the traces in the memory, the errors and imperfections of which are beyond the reach of scrutiny. What is the common evidence of knowledge but an act of comparison, — a comparison of the object presented to the sight with the object imprinted by memory in the mind, with the image and copy of the supposed reality? And when the comparison is made, not with this imperfect and fallacious copy, but with an undisputed original, applied with the skill and experience of persons habitually devoted to similar inquiries, it is deemed not only a matter of technical caution, but an essential point of constitutional liberty, to reject the assistance which it may naturally be expected to afford. An expert of the most accurate talents, comparing the characters of the admitted writing of an individual through a continued series of years with the character of a disputed piece, cannot be heard to offer his opinion; whilst the knowledge and familiarity that the mind may be supposed to have acquired from the previous perusal of those very writings or even from the casual inspection of a single act is received and acted upon without objection."

1886, Dickinson, J., in *Morrison v. Porter*, 35 Minn. 426, 29 N. W. 54: "In such cases [of acquaintance by seeing the person write or by correspondence] the conception of the handwriting retained in the mind of the witness becomes a standard for comparison, by reference to which his opinion is formed and given in evidence. It would seem that a standard generally not less satisfactory, and very often much more satisfactory, is afforded by the opportunity for examining side by side the writing in dispute and other writings of unquestioned authenticity."

§ 1999. Same: (b) Objection based on Unfair Selection of Specimens. Still further, in determining whether the witness' sources of knowledge or opinion are adequate, it has to be considered, whether the specimens taken as indicating the type of writing are fair ones. An objection based on this ground was one of the principal ones urged against the employment of expert testimony *ex scriptis nunc visis*, as distinguished from ordinary testimony *ex visu scriptioris* or *ex scriptis olim visis*. Thus:

1816, Dallas, J., in *Burr v. Harper*, Holt N. P. 421: "Comparison of handwriting has been rejected upon two grounds: . . . 2. That the specimens may be unfairly selected, calculated to serve the party producing them, and therefore not exhibiting a fair example of the general character of the handwriting."

1836, Coleridge, J., in *Dee v. Suckermore*, 5 A. & E. 706: "A conviction of forgery might pass on the opinion which a single witness might form, founded solely on the examination of signatures or a single signature presented to him the night before by a prosecutor, who need not be called as a witness on the trial to explain when and where such specimen had been procured or from how many selected, the prisoner on the other hand being wholly unprepared to enter into this explanation. It is no answer to this to say that a similar result might follow upon the evidence of a witness who had seen the prisoner write but once. That is an extreme case upon a principle unobjectionable in itself; . . . here the danger is in the principle itself."

This argument has been one of the two leading arguments mentioned in almost every judicial discussion of the subject. How is it to be disposed of?

(1) First, it is pointed out that the possibility is exactly the same in the case of other handwriting-testimony and indeed of all testimony whatever, *i. e.* the party offering a witness may, if there was a choice, have avoided those whom he knew would speak unfavorably and have taken the one who would help his cause; yet this possibility has never been considered a ground for excluding testimony:

1831, *Daggett, J.*, in *Lyon v. Lyman*, 9 Conn. 61: "It is said by Starkie that an unfair selection of specimens may be made for the purpose of comparison. It is not suggested, however, that any advantage would thereby be given to one party over the other. . . . The same objection lies against the introduction of witnesses who are to testify to their knowledge of the handwriting. In both cases proof may be expected favorable to the party introducing it; and it will always be selected with that view."

(2) This argument is sometimes further disposed of by establishing a limitation to avoid it, namely, by allowing the expert to use only *documents conceded to be genuine* and thus making unfair selection impossible:

1836, *Williams, J.*, in *Doe v. Suckermore*, 5 A. & E. 726: "Supposing, however, for the present purpose that it is [the objection is applicable], I cannot perceive how it can be affirmed that this was a partial selection by those who wished to use the papers. The selection was not depending upon their power merely. The whole was subject to the answer of the witness. The papers produced might all have been admitted to be of his handwriting, or one half, or any other portion of them, or all, might have been denied."¹

(3) Another method of disposing of this argument is to limit the documents usable by the expert to those which are *already otherwise in the case* as a part of the pleadings or the other evidence. The effect of this is to determine the selection usually by the chance requirements of the litigation and not to leave it to a prejudiced choice from all sources.²

As between these three solutions, the first is the sensible and practical one. It is the part of prudence to avoid adding to the complicated rules of evidence, especially for the mere sake of avoiding a possible danger.

§ 2000. *Principle of Confusion of Issues.* The qualification of every handwriting-witness, testifying from a type or standard already fixed in his mind, rests on the assumption that the specimens taken by him as forming the type were genuine (*ante*, § 1996). Now the sort of witness, the expert in handwriting (*ex scriptis nunc visis*), with whom we are here concerned, has himself no knowledge of the specimens' genuineness; his testimony will be based hypothetically on the assumption of their genuineness; their genuineness must therefore be otherwise established (for example, by other witnesses), in order that his testimony may be receivable. It is just here that the second great and common objection has arisen, invoking the principle of confusion of

¹ See also, as instances of this answer: 1863, *Wilder, J.*, in *Calkins v. State*, 14 Oh. St. 227; 1836, *Denman, L. C. J.*, in *Doe v. Suckermore*, 5 A. & E. 726.

² Illustrated in the following opinions: 1831, *Bolland, B.*, in *R. v. Morgan*, 1 Moo. & R. 134; 1878, *Hand, J.*, in *Miles v. Loomis*, 75 N. Y. 296.

issues (*ante*, §§ 1904, 1906), namely, that this additional proof of genuineness would so complicate and confuse the issues as to be undesirable, and that therefore the expert's testimony, to which it is the essential foundation, must fall with it:

1836, *Coleridge, J.*, in *Des v. Suckermore*, 7 A. & E. 706: "If the points which I have just supposed to be conceded [genuineness of specimens and fairness of selection] be brought into question, other and most serious objections arise to this mode of proof. If the genuineness be disputed, a collateral issue is raised, and that upon every paper used as a standard, — an issue, too, in which the proof may be exactly of the same nature as that used in the principal cause, namely, mere comparison; with the additional disadvantages that the former standard is not produced, and that the opposing party can avail himself of no counter-proof. . . . If the fairness with which the standard has been selected is disputed, this again must lead to a collateral inquiry, in which the parties meet on unequal terms if no notice has been given (and none is required by our law), and which must tend to distract the jury, if notice be given, and the discussion on the circumstances under which each specimen was written be fully gone into. It must always be borne in mind, in considering the rule of the English law on this subject, that it has reference to a trial by jury, and that we have no provisions for limiting the standard of comparison or regulating the manner of conducting the inquiry; both of which, it seems, have been found necessary where such a mode of proof has been admitted."¹

In observing how this argument is to be disposed of, it must be remembered that there are three conceivable ways of supplying the fact of genuineness, on the hypothesis of which the expert forms his opinion: (1) By *testimony directed to the jury's* consideration, like all ordinary evidence, — the jury, on retiring, to consider the witness' opinion if the hypothesis of genuineness is proved and to ignore it, like other hypothetical testimony (*ante*, § 672), if the hypothesis is not proved; (2) By *testimony directed to the judge*, in the nature of proof preliminary to the admission of any piece of evidence (*post*, § 2550) and calling for the judge's decision only; (3) By an *admission of the opponent* in the pleadings or for the purpose of the trial.

(1) It will be observed, then, that the objections of Mr. Justice Coleridge assume that the first of these modes is the only one either possible or proper, and upon that assumption the objection is a strong one. It is not a conclusive one, because it proceeds on the old fallacy, so common in our law of evidence, that for the sake of avoiding a possible danger, or a harm likely to appear on one occasion in ten, a real and present good is to be rejected in every instance whatever.² It is, nevertheless, this argument which has chiefly availed with those Courts which reject entirely the expert comparison of hands. On the other hand, no Court has found it necessary to go so far as to deny the objection entirely; for by resorting to one of the other two above modes of evidencing genuineness, the objection is avoided and yet the benefit of the expert testimony retained. To these we may now turn:

(2) The only solution at once judicious and practical lies in choosing the *second* mode of evidencing genuineness, *i. e. proving it to the judge*. Here the

¹ So also *Patterson, J.*, *ib.* 739; 1836, *Jack-son v. Phillips*, 9 Cow. 112. opinions: *Daggett, J.*, in *Lyon v. Lyman*, 9 Conn. 62 (1831); *Wilder, J.*, in *Calkins v. State*, 14 Oh. St. 227 (1842).

² See the answers to this objection in these

evidence in question takes its true scientific place, namely, as evidence bearing on the admissibility of testimony, and is thus addressed to the judge (*post*, § 2550). By this mode the jury are not confused by a multiplicity of collateral issues, because the issues are not submitted to them. Thus at once the objection is obviated and the benefit of expert testimony is retained. The argument of Mr. Justice Coleridge that "the English law has no provisions for regulating the manner of conducting the inquiry" illustrates that perverse disposition of the Anglo-Saxon judge — the despair of the jurist — to tie his own hands in the administration of justice, — to deny himself, by a submission to self-created bonds, that power of helping the good and preventing the bad which an untechnical common sense would never hesitate to exercise. The enlightened procedure on this subject is that which had subsequently to be introduced in England by the statute of 1854, that which the Court of Massachusetts had already adopted from the beginning, and that which now prevails by statute in many of our jurisdictions, namely, the method of addressing all evidence of genuineness to the judge and of leaving the control of its length, its quality, and its effect to the trial judge's discretion:

1902, *Remick, J.*, in *University of Illinois Spalding*, 71 N. H. 163, 51 Atl. 731: "The third objection — that to permit comparison with specimens not otherwise in evidence, and admitted for the mere purpose of comparison, would introduce collateral issues, and confuse and distract the jury — is, when applied to specimens neither admitted by the parties nor found by the Court to be genuine, firmly grounded in reason and authority. The whole doctrine of comparison presupposes the existence of genuine standards. Comparison of a disputed signature in issue with disputed specimens would not be comparison, in any proper sense. When the identity of anything is fully and certainly established, you may compare other things with it which are doubtful, to ascertain whether they belong to the same class or not; but, when both are doubtful, and more likely comparison is not only useless as to any certain result, but clearly dangerous, and more likely to bewilder than to instruct a jury. If disputed signatures were admissible for the purpose of comparison, a collateral inquiry would be raised as to each standard; and the proof upon this inquiry would be comparison again, which would only lead to an endless series of issues, each more unsatisfactory than the first, and the case would thus be filled with issues aside from the real question before the jury. . . . The true rule is that, when a writing in issue is claimed on the one hand and denied on the other to be the writing of a particular person, any other writing may be admitted in evidence for the mere purpose of comparison with the writing in dispute, whether the latter is susceptible of or supported by direct proof or not; but, before any such writing shall be admissible for such purpose, its genuineness must be found as a preliminary fact by the presiding judge, upon clear and undoubted evidence. This involves, indeed, a marked departure from the common law. It does away with the common-law limitation of comparison to standards otherwise in the case, and hence with its exceptions, and the controversy and confusion which have grown out of them. . . . In some States, as already shown, legislation has been deemed essential to bring about such changes; but in others, as we have also shown, the same result has been accomplished by judicial action. As the common-law rule was based primarily upon the assumed incapacity of jurors to make intelligent comparison, such judicial action would seem warranted under the power to adapt the common law to new conditions. The value of comparison as a method of proof being now generally conceded, juries being no longer too ignorant to derive benefit from that source, and the danger of spurious specimens and the objections to collateral issues being fully met by

requiring the genuineness of the standard to be determined as a preliminary fact by the trial judge, there remains, it would seem, no satisfactory reason for the old limitations and exceptions. And it is fair to assume that, had no statute been enacted, the common law of England, adjusting itself to changed conditions, would now accord with the rule we have announced. Such a tendency was indicated by the discussion and decision in [*Doe d.*] *Mudd v. Suckermore*, which was so soon followed by the act of Parliament referred to. In any event, the essential principle of the common law is preserved, and the dangers and objections against which it was aimed met, by requiring the genuineness of the standard to be found by the Court as a preliminary fact, upon clear and positive testimony."

(3) The *third* mode of establishing genuineness is also effective in obviating the objection in question, *i. e.* that of using only *documents conceded by the opponent to be genuine*; for thus there is no necessity for further evidence of genuineness.

1886, *Dickinson, J.*, in *Morrison v. Porter*, 85 Minn. 425, 29 N. W. 54: "When the writings presented are admitted to be genuine, so that collateral issues are not likely to arise, nor the adverse party to be surprised by evidence which he is unable to meet, these objections seem to us to be insufficient as reasons for excluding the evidence."

It is obvious that this solution is not as desirable a solution as the one just considered, for it limits seriously the documents to be used, and may sometimes leave none at all available. But this limitation coincides with one of those proposed (*ante*, § 1999, par. 2) for obviating the argument from the possibility of unfair selection; and this result — the disposition of the two great objections by a single expedient — has given a specious plausibility to the claims of this limitation.

(4) There is still another limitation (preferred by some Courts) which equally obviates the general objection of confusion of issues; though, like the one just mentioned, it does so only at the expense of unnecessarily shutting out good sources of testimony; namely, the limitation of the standard-specimens to *documents already otherwise in the case* under the pleadings or evidence.⁸ It is here assumed that the jury is to determine the genuineness (*i. e.* it is not given to the judge for preliminary decision); and the reason for fixing this particular limitation is that, as the question of the documents' genuineness would in any event call for the production of evidence on the point, their use as the basis of expert testimony does not introduce any issues (and therefore any confusion or delay) which are not otherwise incident to the case. This limitation also possesses, equally with the preceding one, the advantage of coinciding with one of the methods of overcoming the argument from unfair selection (*ante*, § 1999, par. 3), and thus, by a single expedient or rule, disposes of the two leading objections.

The foregoing expedients comprise all that are possible in principle or recognized in rulings; and it is obvious that each one has its own reasons,

⁸ 1878, *Hand, J.*, in *Miles v. Loomis*, 75 N. Y. 296: "This limitation, it must be conceded, is not very philosophical or logically satisfactory, but is justified by the necessity of the case, and at all events answers the objection of collateral issues."

more or less satisfactory in themselves.⁴ But the same rules have in some Courts been adopted and applied without a due appreciation of their reasons. Hence, while we ought to find the various judicial attitudes comprised in four sorts, depending on the above four solutions (namely, (a) total exclusion, (b) no limitation except the judge's discretion, (c) limitation to documents admitted genuine, (d) limitation to documents otherwise in the case), there are also found, in some Courts, rules involving a combination, more or less arbitrary and irrational, of the third and fourth of the above rules; thus, in one jurisdiction the limitation is (e) to documents otherwise in the case and admitted to be genuine; in another, (f) to documents *either* otherwise in the case, or admitted to be genuine; and in another, (g) to documents otherwise in the case, if admitted genuine, and to documents not in the case, if admitted genuine, i. e. the same rule in effect as (c) above. The additional varieties, however, so far as any reason can be found or imagined for them, all hark back to the objections above examined and the expedients noted as meeting those objections.

(3) Theory of Jury's Perusal of Specimens.

§ 2001. *Foregoing Principles Applied.* When specimens are offered to the jury to form a standard for the character of the person's handwriting, we are dealing not with testimonial evidence, but with circumstantial evidence, and the first question to be considered is that of Relevancy. It has already been seen (*ante*, § 1996) that the objection of unfairness of selection may be raised from this point of view. It has also been seen (§ 1996), that from the point of view of Relevancy, the specimens must be genuine, and thus, proof of genuineness becoming essential, the objection of confusion by Confusion of Issues again arises. In short, the two leading objections which have just been examined — expert comparison (§§ 1999, 2000), are again available as against jury-comparison. It follows that the same expedients may be resorted to, in avoiding these objections.

There is, however, a difference in attractiveness as between the second and the third expedients (*ante*, § 2000, par. 3, 4). The first expedient — putting the matter in the hands of the judge — is of course, here as before, the best, and is the one introduced by the English statute of 1854. But, as between the second and the third — the limitation to documents admitted genuine and the limitation to documents otherwise in the case —, the third is the more natural one, since it is obviously impossible to keep the jury from considering all documents otherwise in the case and incidentally using them for light upon the handwriting issue. This consideration, indeed, was so strong with the judges in the decisive case of *Doe v. Newton* that they sanctioned jury-comparison to that extent, in spite of a belief that such comparison was against good policy.¹

⁴ In the Second Report of the Common Law Practice Commission for 1853, p. 25, the various reasons are fully stated and answered.

¹ 1836, *Doe v. Newton*, 1 Nev. & P. 1; Denman, L. C. J., accounted for the exception in

favor of documents otherwise in the case by suggesting (for the first time) that "the real ground is that comparison in such a case is unavoidable. . . . No human power can prevent the jury from forming some opinion, . . . and consequently

The important thing to note, however, is that there may conceivably be one rule for jury-comparison of specimens and a *different rule for expert-testimony* based on specimens. This result may be reached, as it was in England, on the score of controlling precedents; and it may also be reached, though not so easily, on the ground of expediency. In fact, such a divergence of rules, however undesirable and unnecessary, does exist in many jurisdictions, and hence the precedents on the two questions have to be considered separately.²

§ 2002. *Jury's Inability to Read.* When in the history of jury-comparison (*ante*, § 1994) the propriety of it began to be argued about, the first opposing reason that came up for consideration was that the jury frequently could not read writing and hence it was useless to submit writings to them:

1791, Lord Kenyon, C. J., in *MacFarren v. Thoytes*, Peake N. P. 20: "Comparison of hands is no evidence. If it were so, the situation of a jury who could neither read nor write would be a strange one; for it is impossible for such a jury to compare the handwriting."¹

This reason, by the time of *Doe v. Newton*,² was no longer considered sufficient to exclude such comparison; and in this country it was almost unanimously repudiated,³—not on the sensible reason that it was unsound, but for the reason, more satisfying to national pride, that juries here could seldom be reproached with it. So far as its soundness on precedent is concerned, the circumstance is certainly suspicious that the reason did not come to be mentioned (*ante*, § 1994) until a modern period when juries were even more likely than ever before to be able to read, and that so powerful a reason did not avail in all departments of proof to keep written evidence from the jury. So far as soundness of principle is concerned, it was not creditable to eminent judges to argue that, because some juries could not read and thus could not compare, therefore juries that could read and could compare should not be allowed to compare. There is a solemn absurdity in such a *non sequitur*.

C. PRESENT STATE OF THE LAW UPON THE ABOVE KINDS OF EVIDENCE.

§ 2003. *In general.* After thus examining the history of handwriting-testimony, and the theory and policy applicable from the point of view of principle, we are in a position to consider the present state of the law in the various jurisdictions, on the general question and upon the minor details

when the mind of the jury must be so employed, it is better for the Court to enter into the consideration."

¹ 1870, Nott, J., in *Medway v. U. S.*, 6 Ct. of Cl. 428: "The admission of this letter in evidence [to the jury for comparison] is not to be confounded with that practice . . . of allowing witnesses to testify as to handwriting whose knowledge is but opinion, resting on comparison alone. It comes in under a different rule, resting upon a distinct principle . . . [that] comparison of handwriting may be made by Courts and juries without the intervention of witnesses, if," etc.

² *Accord*: 1770, *Brookhard v. Woodley*, Peake N. P. 21, note, Yates, J.; 1803, *Eagleton v.*

Kingston, 3 Ves. 475, Eldon, L. C.; 1821, *Burr v. Harper*, Holt N. P. 421, Dallas, C. J. It was however disapproved on other occasions: 1795, *Allesbrook v. Roach*, 1 Esp. 352, Kenyon, L. C. J.; 1836, *Williams, J.*, in *Doe v. Suckermore*, 5 A. & E. 723.

³ 1836.

⁴ *E. g.*: 1812, *Tilghman, C. J.*, in *McCorkle v. Binns*, 5 Binney 348; 1828, *Savage, C. J.*, in *Jackson v. Phillips*, 9 Cow. 112; 1831, *Daggett, J.*, in *Lyon v. Lyman*, 9 Conn. 62; 1836, *Shaw, C. J.*, in *Moody v. Howell*, 17 Pick. 490; 1863, *Wilder, J.*, in *Calkins v. State*, 14 Oh. St. 227. But it was treated as a valid reason in an early Virginia case: 1829, *Bowt v. Kile*, 1 Leigh 216.

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that arise. The attempt is here made to keep separate the two questions of an expert's testimony as based on handwriting-specimens and of the jury's examination of such specimens. Yet the broad and loose phrase "comparison of hands" has sometimes done service for both, in the utterances of Courts, and it is thus not always easy to say whether the rule of a given Court is intended for the former only or for the latter only or for both.

(1) Lay Testimony based on Specimens *Mune Visu*.

§ 2004. Excluded in general by the Opinion Rule. The effect of the Opinion rule, as already noted (*ante*, § 1997), is of course to exclude comparison of specimens before the Court by a *lay-witness* in general.¹

§ 2005. Old Exception for Witnesses *ex visu scriptioris* or *ex scriptis olim visis*. It has been already noted (*ante*, § 1993) that the traditional practice, down to the 1800s, made no discrimination against the use of the specimens in Court; and that thus, wherever a lay-witness was to speak from having already seen the person write or from correspondence, he could originally (and it was sometimes urged, he must) bring the documents into court, and he might then use them in testifying. The perception in England that the Opinion rule prevented this² did not always avail with American Courts to destroy the old tradition. Accordingly there occur a number of rulings perpetuating it, either as a direct local survival of the tradition, or by the improper application of early precedents elsewhere. These rulings must be regarded as anomalous.³

§ 2006. Same: Old Exception for Ancient Documents. Another part of this exception due to the survival of the tradition of the 1800s (*ante*, § 1993) prevails for comparison made in court by the *possessor of ancient documents*. Such a person is qualified to speak as to that handwriting (*ante*, § 704), and, by the traditional practice, might bring them into court and compare them with the disputed writing. The Opinion rule should exclude this kind of

¹ 1864, *R. v. Wilbain*, 9 Cox Cr. 448 (police-inspector's testimony of comparison between an anonymous letter and writings found in defendant's possession, excluded); 1886, *Mixer v. Bennett*, 70 Ia. 331, 30 N. W. 587 (under Code § 3655); 1849, *Smith v. Walton*, 8 Gill 86; 1867, *Niller v. Johnson*, 27 Md. 18; 1857, *Pige v. Homans*, 14 Ma. 478; 1860, *Woodman v. Dana*, 52 id. 13; 1899, *Lowe v. Dorsett*, 125 N. C. 301, 34 S. E. 442; 1852, *Kinney v. Flynn*, 2 E. I. 319, 327. This is also implied in most of the statutes noted *post*, § 2008.

² In England, *Garrella v. Alexander* (1801, Kenyon, L. C. J., 4 Esp. 37) probably effected ultimately the change; though for some time afterwards the Bar seems to have clung to the tradition.

³ 1866, *Vinton v. Peck*, 14 Mich. 292; 1860, *Woodman v. Dana*, 52 Ma. 11; 1880, *Worth v. McConnell*, 42 Mich. 475, 4 N. W. 198; 1878, *State v. Clinton*, 67 Mo. 335. In *Pennsylvania*, in *Bank v. Jacobs*, 1 Pa. 180 (1829), comparison was allowed, according to the old doctrine, for

those already knowing the writing; but this was repudiated in *Travis v. Brown*, 43 Pa. 9 (1862), which represents the accepted rule. In *South Carolina* the decisions all allowed non-experts to compare until *Weaver v. Whilden*, in 1890 (cited *post*, § 2008), which, in apparently intending to maintain the rule, left the matter doubtful. In *Tennessee* such comparison was perhaps allowable: *post*, § 2008. In the *Federal Courts*, in *Smith v. Fenner*, 1 Gall. 175 (1812), Mr. J. Story allowed this; so also are the following: 1805, *Hopkins v. Simmons*, 1 Cr. C. C. 250; 1833, *U. S. v. Larned*, 4 id. 312. But *Strother v. Lucas*, 6 Pet. 766 (1832), finally placed the Court against it. In *West Virginia* apparently this comparison is allowed for one who has personal knowledge of the writing: 1874, *Clay v. Robinson*, 7 W. Va. 359, 10 id. 53; and later rulings in § 2008, *post*.

Whether a *lost disputed document* may be proved by handwriting-testimony is considered *ante*, §§ 697, 1185.

comparison as well as the preceding one; but the tradition persisted in this respect, and may be said to be still the law.¹

§ 2007. *Refreshing Memory by Perusing Specimens.* There seems no reason why, on principle, one who comes to court with a knowledge of handwriting (by having seen the act of writing or by having had correspondence or by having possessed old documents) should not be allowed to refresh his memory (*ante*, § 758) by a perusal in court of the specimens forming the foundation of his knowledge. The doctrine seems, so far as its original promulgation is concerned, to have arisen in consequence of the attempt of the Bar to perpetuate the old tradition (overthrown by *Garrells v. Alexander*), allowing comparison in court by a layman knowing the handwriting (*ante*, § 2005).¹ On principle, if this perusal was desired, not as in itself the foundation for the opinion, but as a means of refreshing the memory of an opinion already formed, it could be permitted so far as it served that end:

1826, *Coalter, J.*, in *Redford's Adm'r v. Peggy*, 6 Rand. 326, 345: "There can be no doubt, I presume, that if a witness knows he is about to be examined as to handwriting, and has frequently seen the party write, and has in his possession papers that he saw him write, and looks at them so as to refresh his memory as to the character and manner of writing, and then deposes, that this would not destroy his testimony. A witness is called on to identify a man he had before known, but, before he sees him, he looks at a picture which he recognizes to be a likeness, which recalls the features and expression of countenance, and notwithstanding alterations by age, etc., he testifies to his identity; [this is allowable]."

That by way of refreshing memory such inspection is allowable seems clearly the law to-day in the United States.²

¹ *England*: 1824, *Doe v. Tarver*, R. & Moo. 143, Abbott, C. J. (allowed). In *H. v. Barber*, 1 C. & K. 456 (1844), it does not appear why the testimony was rejected. In 1836, *Doe v. Suckermore*, 5 A. & E. 717, *passim*, all the judges seemed to concede the exception; and in 1847, *Doe v. Davies*, 10 Q. B. 314, a witness produced an old register and compared it. In 1806, *Roe v. Rawlings*, 7 East 282, and 1811, *Morewood v. Wood*, 14 id. 338, ancient documents were used, but whether by witnesses or not does not appear. From rulings, not elsewhere reported, mentioned by Mr. Phillips (I, 492, note) and Mr. Starkie (II, 517, note), the usage prior to the above later cases seems to have been without uniformity.

United States: The exception was recognized in the following cases: 1849, *Smith v. Walton*, 8 Gill 86; 1820, *State v. Allen*, 1 Hawks 9, *semble*; 1874, *Clay v. Robinson*, 7 W. Va. 359, 10 id. 53. Judges constantly mention *either* an exception in favor of "ancient documents," but it is impossible to be certain whether they are referring solely to the laying of such documents *before the jury* (a use undoubtedly established; *post*, § 2017), or also to their use by the witness who brings them as the foundation of his knowledge. Moreover, it is impossible to tell whether they mean also, by this broad phrase, to sanc-

tion the examination of ancient documents by experts, in jurisdictions where expert comparison is otherwise limited or rejected; in *Doe v. Suckermore*, however, expert use is evidently mentioned.

It should be added that in some jurisdictions the old tradition is misunderstood, and is expressly said to mean that ancient documents may be compared in court by experts; this is right enough on principle, but it is not, as represented, the old doctrine, for the old doctrine made no limitation to experts: 1878, *State v. Clinton*, 67 Mo. 384; 1849, *West v. State*, 22 N. J. L. 241; 1837, *Williams v. Conger*, 125 U. S. 413, 3 Sup. 933.

² In *England* this practice was allowed in the following cases: 1816, *Burr v. Harper*, Holt N. P. 420; 1845, *R. v. Shepherd*, 1 Cox Cr. 237. In *Doe v. Suckermore*, 5 A. & E. 724, 752 (1836), contrary opinions were expressed by the judges as to the propriety of the ruling in *Burr v. Harper*; *Williams, J.*, and *Patteson, J.*, respectively approving and disapproving it.

United States: The practice was approved in the following cases: 1860, *Clark v. Wyatt*, 15 Ind. 272, *semble*; 1855, *Thomas v. State*, 103 id. 419, 481, 2 N. E. 808; 1849, *Smith v. Walton*, 8 Gill 85; 1896, *National Bank v. Armstrong*, 96 Md. 115, 6 Atl. 584 (here the

§§ 1991-2027] COMPARISON OF WRITINGS; LAY WITNESS. § 2008

(2) Expert Testimony based on Specimens *Fune Vitis*.

§ 2008. Whether admissible at all; and, if so, for what Classes of Writings. The decisions and the statutes in the various jurisdictions exhibit a great variety of rules; even within the same jurisdiction there is often obscurity and inconsistency. The types of possible rules have already been summarized (*ante*, § 2000); and the rule in each jurisdiction is either one of those stated or else some qualified variety of one of the chief forms.¹

signature was used on cross-examination, and was one not in the case but already admitted by the party to be genuine; 1856, *McNair v. Com.*, 26 Pa. 390 (provided there is a genuine refreshment of memory, otherwise not; so far as this case allows a mere comparison irrespective of memory refreshment, it is overruled by *Travis v. Brown*, *post*, § 2008; but on the present point the decision seems still to be law). In *Redford v. Peggy*, quoted *supra*, two of the three judges held the testimony still admissible though the witness declared that without such refreshment he could not have identified the writing; but these two would apparently have excluded the witness had his comparison produced no actual refreshment but formed in itself the sole basis of his testimony.

¹ To avoid repetition, the statutes are placed *post*, § 2016, where the jury's use of specimens is dealt with; the statutes usually regulate the two modes in the same enactment; the decisions in § 2016 should also be compared:

ENGLAND AND CANADA: The rulings at common law have been placed *ante*, §§ 1993, 1994, in considering the history; the statutes and rulings thereunder are placed *post*, § 2016, in dealing with the jury's use of specimens.

UNITED STATES: *Alabama*: In an early case it was said that testimony by "comparison of hands" was not allowable at all, though the witness here offered was not an expert: 1843, *State v. Given*, 5 Ala. 784; but whether expert comparison is now recognized is uncertain: 1882, *Moon's Adm'r v. Crowder*, 72 id. 88 (apparently confining expert comparison to "writings of unquestioned genuineness" in the case; 1891, *Gibson v. Trowbridge*, 96 id. 357, 361, 11 So. 385 (excluded entirely); 1898, *Curtis v. State*, 118 id. 125, 24 So. 111 (excluded on the facts); *California*: Expert comparison is allowed by the statute cited *post*, § 2016: 1890, *Carter's Estate*, 56 Cal. 470, 474 (doubted whether expert comparison could be made with specimens on which the testator had not "acted or been charged" and which had not "been admitted or treated as genuine" by the opponents; this ignores the last clause of C. C. P. § 1944); *Colorado*: Expert comparison is allowed by the statute cited *post*, § 2016; *Columbia (District)*: 1894, *Keyser v. Pickrell*, 4 D. C. App. 198, 206 (expert testimony allowed; no limitations named); *Florida*: Expert comparison is allowed by the statute cited *post*, § 2016; *Georgia*: Expert comparison seems not to be sanctioned by the statute cited *post*, § 2016: 1886, *Smith v. State*, 77 Ga. 708, 711, *semble* (expert testimony

to other letters proved genuine, admissible); *Idaho*: 1900, *Bane v. Gwinn*, 7 Ida. 439, 63 Pac. 634 (allowable for only such papers as are "in the cases for other purposes, and such as are admitted to be genuine," except in very exceptional cases; no authority cited); *Illinois*: The use of expert comparison was at first rejected altogether: 1846, *Pate v. People*, 8 Ill. 664, *semble*; but the rulings about submitting specimens to the jury (*post*, § 2016) seem to have been taken as authorities in the present connection, and expert comparison is now allowable, though under what conditions no one can dare to say; compare those rulings and the following: 1892, *Riggs v. Powell*, 142 Ill. 453, 456, 32 N. E. 482 ("comparing an alleged signature with a genuine one," excluded; citing *Putnam v. Wadley*, *Board v. Meisenheimer*, Ill.); 1892, *Rogers v. Tyley*, 144 id. 652, 665, 32 N. E. 398 (admissible, if "properly in evidence in the case for other purposes"; yet, in the next sentence, if "admitted to be genuine, already in the case"; citing *Brobeton v. Cahill*; ignoring *Riggs v. Powell*; perhaps to be distinguished from it because the one was filed at Springfield, Nov. 2, 1892, the other at Ottawa, Oct. 31, 1892); 1892, *Himrod v. Gilman*, 147 id. 293, 295, 300, 35 N. E. 378 (genuineness of notes secured by a trust deed; "it seems to be well settled in this State" that comparison cannot be made "with an admitted genuine signature to papers or documents not in evidence in the cause and which are collateral to the issue"; an expert's comparison with a trust-deed signature was here held proper; the preceding two cases are not cited in either brief or opinion); 1897, *Greenbaum v. Bornhofen*, 167 id. 640, 646, 47 N. E. 857 (expert's testimony, founded on "papers offered in evidence," admitted; no question raised); *Indiana*: Here the use of documents seems to have been at first confined to those which are admitted to be genuine, whether they are otherwise in the case or not: 1870, *Chance v. Gravel Road Co.*, 32 Ind. 474; 1873, *Burdick v. Hunt*, 43 id. 386; at this stage came: 1877, *Jones v. State*, 60 id. 241 (requiring also that the documents be otherwise in the case); but it is not followed on that point: 1879, *Forney v. Bank*, 68 id. 124; 1881, *Hazard v. Vickery*, 78 id. 64; 1881, *Shorb v. Kinsie*, 80 id. 502; 1889, *Walker v. Steele*, 121 id. 440, 22 N. E. 142, 23 N. E. 271; but at this stage the rule was enlarged by allowing the use of papers either already in the case or admitted genuine; the line of cases beginning some distance back: 1874, *Huston v. Schindler*, 46 id. 38, 42, *semble* (papers admitted genuine

or in the case, usable); 1884, *Shorb v. Kinzie*, 160 id. 429; 1896, *White & M. Co. v. Gordon*, 164 id. 466, 494, 24 N. E. 1053; 1896, *McDonald v. McDonald*, 142 id. 55, 41 N. E. 840; 1896, *Tucker v. Hyatt*, 144 id. 635, 41 N. E. 1047, 43 N. E. 572 (an affidavit for change of venue, and a verified plea); *Iowa*: Expert comparison is allowed by the statute cited *post*, § 2016; documents admitted to be genuine may be used, though the Code does not say so; 1884, *Riordan v. Guggerty*, 74 Ia. 691, 30 N. W. 107; *Kansas*: Expert comparison was at first permitted when the standard-documents were otherwise in the case, and when, though not otherwise in the case, they were admitted to be genuine; 1872, *Macomber v. Scott*, 10 Kan. 339; but the rule is now uncertain; 1898, *Gillmore v. Swisher*, 50 id. 172, 52 Pac. 426 (conveyance in fraud of creditors; to prove the genuineness of a material admission of the debtor's, proof by comparison of specimens was limited to specimens conceded to be genuine, the disputed document being only incidentally material; the Court disclaims any "attempt to declare a definite rule on the subject" ()); *Kentucky*: Expert comparison was at first entirely excluded, so far as it involved an opinion of the writing based on specimens studied; 1852, *Hawkins v. Grimes*, 13 B. Monr. 261; 1885, *Fee v. Taylor*, 33 Ky. 263; but the statute, cited *post*, § 2016, now permits it; 1903, *Storey v. Bank*, — id. —, 72 S. W. 318 (comparison by expert of specimens not otherwise in the case, allowed, under C. C. P. § 604 as amended); *Louisiana*: Expert comparison is allowed by the statute cited *post*, § 2016; 1812, *Maupé v. Dawson*, 2 Mart. 202 (allowable, under the old Civil Code); 1835, *Plique v. La Branche*, 9 La. 560, 562 (allowable under C. C. P. § 325); 1853, *Whitney v. Bannell*, 3 La. An. 429 (same); 1866, *McDonogh's Succession*, 18 id. 419, 445 (same); 1869, *Huddleston v. Coyle*, 21 id. 148 (same); 1869, *Leonard's Succession*, ib. 523 (same); *Maine*: The expert may use any documents admitted or proved to be genuine; 1860, *Woodman v. Dana*, 52 Me. 13; 1888, *State v. Thompson*, 80 id. 201, 18 Atl. 693; *Maryland*: Expert comparison was at first excluded entirely; 1873, *Touss v. R. Co.*, 30 Md. 80 (Alvey, J., diss.); 1891, *Herrick v. Swowley*, 56 id. 459 (as bound by the preceding case); but it is now permitted by the statute cited *post*, § 2016; *Massachusetts*: Expert comparison is allowed for any documents admitted or clearly proved to be genuine; the authorities for jury-comparison in § 2016, *post*, are also to be taken as applying here; 1836, *Moody v. Rowell*, 17 Pick. 490; 1874, *Demeritt v. Randall*, 116 Mass. 331; *Michigan*: Experts may compare documents already in the case; 1866, *Vinton v. Peck*, 14 Mich. 267; *Minnesota*: Experts may compare documents otherwise in the case, and documents not otherwise in the case but admitted to be genuine; 1890, *Morrison v. Porter*, 35 Minn. 425, 29 N. W. 54; *Mississippi*: Experts may compare documents otherwise in the case, and documents not otherwise in the case but admitted to be genuine; 1874, *Wilson v. Beauchamp*, 50 Miss. 32; *Missouri*: Experts may

compare documents otherwise in the case, if admitted genuine, and documents not otherwise in the case but admitted genuine, — in short, any documents admitted to be genuine; 1870, *State v. Scott*, 45 Mo. 304 (adding to the first class *supra*, "or clearly proved genuine"); 1878, *State v. Clinton*, 67 id. 286; 1890, *State v. Tompkins*, 71 id. 616; 1894, *Springer v. Hall*, 83 id. 697; but in *Hess v. First Nat'l Bank*, 91 Mo. 401, 3 S. W. 376 (1886), documents not in the case, yet "conceded to be genuine," were rejected by a misunderstanding of *State v. Clinton* and the succeeding cases; finally came the statutory rule cited *post*, § 2016; *Montana*: Experts might compare documents otherwise in the case and admitted or clearly proved to be genuine; 1878, *Davis v. Fredericks*, 3 Mont. 262, *semble*; but the statute cited *post*, § 2016, now regulates the use; *Nebraska*: Expert comparison is permitted by the statute cited *post*, § 2016; *New Hampshire*: Experts may compare any documents proved to be genuine; 1873, *State v. Hastings*, 53 N. H. 440; 1877, *Carter v. Jackson*, 58 id. 157; which apparently displaces the old limitations of *Bowman v. Sanborn*, 25 id. 110 (1852); *New Jersey*: Experts at first could not testify at all from a study of specimens; 1849, *West v. State*, 22 N. J. L. 241 (except for ancient documents; *ante*, § 2006); until the enactment of the statute cited *post*, § 2016; applied in *Mutual Ben. Life Ins. Co. v. Brown*, 30 N. J. Eq. 201 (1878); *New York*: Here, at first, testimony by the study of specimens was unconditionally excluded; 1806, *Jackson v. Van Dusen*, 5 John. 153, *semble*; 1826, *Jackson v. Phillips*, 9 Cow. 112; 1843, *Wilson v. Kirkland*, 5 Hill 182; but later it was allowed for experts when based upon documents otherwise in the case; 1878, *Miles v. Loomis*, 75 N. Y. 292; 1880, *Hynes v. McDermott*, 82 id. 49; the enlarging statutes of 1880 and 1888, and their peculiar interpretation, are dealt with *post*, § 2016; *North Carolina*: The state of the law is not easy to determine; 1840, *Pope v. Askew*, 1 Ired. 16, 19 ("Testimony as to handwriting, founded on what is properly termed comparison in *habeas*, seems to be now generally exploded"; citing *Doe v. Suckermore*; but the witness here was not an expert); 1856, *Otey v. Hoyt*, 3 Jones L. 409, *semble* (comparison not allowed for any one); 1877, *Yates v. Yates*, 76 N. C. 149, *semble* (allowed for documents otherwise in the case and admitted genuine); 1881, *McLeod v. Bullard*, 84 id. 509 (a deed was claimed to have been signed while drunk, and a comparison was allowed, with documents otherwise in the case, to show the difference between that and the normal signature); 1891, *Tunstall v. Cobb*, 109 id. 320, 14 S. E. 23 (allowed for documents otherwise in the case and admitted genuine, and for documents not otherwise in the case if admitted genuine); 1892, *Croom v. Suggs*, 110 id. 359, 14 S. E. 743 (action on defendant's testatrix's bond; defendant allowed to use the will's signature, as one admitted genuine); 1893, *State v. De Graff*, 113 id. 683, 693, 18 S. E. 507 (*Tunstall v. Cobb* approved); 1896, *State v. Noe*, 119 id. 849, 25 S. E. 812 (allowed where genuineness "is

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not denied or cannot be denied"; here allowed for a bond for appearance of the defendant); *Ohio*: Here expert comparison was first allowed for documents otherwise in the case and admitted genuine, any broader limits being left for future settlement: 1850, *Hicks v. Person*, 19 Oh. 441; later, it was allowed also for all documents otherwise in the case, and also for those not in the case if admitted to be genuine or if clearly proved genuine by witnesses speaking "directly and positively": 1863, *Caikins v. State*, 14 Oh. St. 222; 1860, *Bragg v. Colwell*, 19 id. 407; 1876, *Parcy v. Parcy*, 30 id. 609; 1880, *Koons v. State*, 36 id. 190; 1887, *Bell v. Brewster*, 44 id. 604, 10 N. E. 679; *Oklahoma*: 1900, *Archer v. U. S.*, 9 Okl. 540, 60 Pac. 368 (expert may testify upon specimens "admitted or proven to be genuine"; but the proof of genuineness cannot itself be made by comparison with other standards); *Oregon*: Expert comparison is allowed by the statute cited *post*, § 2016; applied in these cases: 1894, *Osmun v. Winters*, 30 Or. 177, 46 Pac. 780; *Mankers v. Ins. Co.*, 1b. 211, 48 Pac. 850; 1897, *State v. Tice*, 1b. 457, 48 Pac. 367 (allowing the comparison of no other documents than those admitted or treated as genuine); *Pennsylvania*: The following decisions exhibit the checkered history of the rule: 1824, *Lodge v. Phipper*, 11 S. & R. 385 (partly because the witness was not an expert, the proposal to compare writings, here of S. with a paper purporting to be written by P., to show S. to be the real writer, was declared to be valueless); 1829, *Bank v. Jacobs*, 1 Pa. 180 (here comparison was allowed by one who already knew the handwriting, but not by an expert who had no previous knowledge of it; following *Lodge v. Phipper*, but proceeding upon rather impalpable grounds; note that at this time and in this case comparison by the jury was accepted as proper); 1856, *McNair v. Com.*, 26 Pa. St. 390, *semble* (mentions expert comparison as proper; no reference to the preceding rulings); 1862, *Travis v. Brown*, 43 id. 9 (follows *Bank v. Jacobs* as to experts, but also repudiates comparison even by those familiar with the writing; the *McNair* case is not mentioned, but probably would be regarded as overruled on these points); 1869, *Haycock v. Greup*, 57 id. 441 (excludes all comparison by witnesses); 1876, *Aumick v. Mitchell*, 33 id. 211 (*same*); 1880, *Berryhill v. Kirchner*, 36 id. 492 (*same*); 1884, *Foster v. Collier*, 107 id. 313 (*same*); 1893, *Rockey's Estate*, 155 id. 453, 456, 28 Atl. 656 ("mere experts" are not to compare); since these decisions the statute of 1895, cited *post*, § 2016, controls the matter; *Rhode Island*: The judicial rule excluded expert comparison: 1833, *Avery's Trial*, Newport, R. I., Hildreth's Rep. 41 (before Eddy, C. J., Brayton and Durfe, JJ.; comparison of hands by a writing-master, not allowed, to prove a letter written by the defendant); 1853, *Kinney v. Flynn*, 3 R. I. 319, 326, *semble* (comparison by experts inadmissible); but it is now allowed by the statute cited *post*, § 2016; *South Carolina*: Here the rule is a mixture; for the qualification as to "corroboration," see the note under *Pennsylvania*, *post*,

§ 2016); 1841, *Hird v. Miller*, 1 McMull. 124 (admitting comparison by any one, as confirmatory proof; yet here the witness had knowledge of the handwriting); 1874, *Bennett v. Mathewson*, 5 S. C. 478 (permitting comparison, as confirmatory proof, in doubtful cases, of specimens admitted genuine; the witnesses were put forward as experts, but nothing was said as to this); 1882, *Benedict v. Flanagan*, 18 id. 506 (following *Bennett v. Mathewson*, and further settling that the witness need not be an expert, and the trial judge is to determine, subject to review, what is a "doubtful case"); 1890, *Weaver v. Whilden*, 23 id. 190, 11 S. E. 666 (*same*; yet certain non-experts were here excluded "because not familiar with handwriting"; this would have been a proper enough limitation; but the trial judge, whose ruling was affirmed, had, in sustaining an objection that they were not experts, excluded them as not "having any familiarity with handwriting," apparently an expression synonymous with "experts"; query, what does the case decide?); *Tennessee*: The state of the law was for some time uncertain: in 1870, *Clark v. Rhodes*, 2 Heisk. 207, documents not in the case, laid before witnesses not said to be experts, were rejected; in 1872, *Kannon v. Galloway*, 2 Bart. 232, witnesses, not said to be experts, were allowed to compare documents in the case; in 1889 a statute was passed, cited *post*, § 2016, similar to that of 1894 in New York; its interpretation is dealt with under New York and under Tennessee, in § 2016, *post*; *Texas*: The state of the law is uncertain: in 1866, *Hanley v. Candy*, 28 Tex. 211, comparison by witnesses was entirely excluded; but in 1885, *Kennedy v. Upshaw*, 64 id. 420, a rule was adopted permitting it, apparently, where the specimens were otherwise in the case and admitted to be genuine; in 1887, *Smyth v. Caswell*, 67 id. 572, 4 S. W. 848, the first of these limitations was relaxed for a specimen introduced by the opponent and admitted genuine; *Wagoner v. Ripley*, 69 id. 703, 7 S. W. 80 (1888), is a confused opinion, apparently to the same effect; in 1894, *Jester v. Steiner*, 86 id. 416, 420, 6 S. W. 411, a specimen not sufficiently shown genuine was excluded; *United States Courts*: It is not easy to learn the exact rule in these Courts to-day, even if we assume that the modern Supreme Court decisions on jury-comparison (*post*, § 2016) are to be taken as applicable to expert comparison: 1832, *Strother v. Lucas*, 6 Pet. 766 (excluding comparison by a non-expert); 1851, *Gaines v. Relf*, 12 How. 472, 530, *semble* (comparison of hands held properly made, under the Louisiana statute); 1870, *Rogers v. Ritter*, 12 Wall. 321 (question left undecided); 1855, *U. S. v. Darnaud*, 3 Wall. Jr. 181 (allowed for documents admitted or proved genuine and, *semble*, otherwise in the case); 1870, *Medway v. U. S.*, 6 Ct. of Cl. 428 (comparison by experts not allowed); 1886, *U. S. v. McMillan*, 29 Fed. 247 (documents at least must be admitted genuine); 1888, *U. S. v. Mathias*, 36 id. 593 (documents must be otherwise in the case and admitted genuine); 1893, *Hickory v. U. S.*, 151 U. S. 303, 305, 14 Sup. 284 (*Moore v. U. S.* cited, but no rule laid

§ 2009. *Unfair Selection of Specimens.* In jurisdictions where any documents proved genuine may be used, the question often arises whether the specimen is a fair one, for example, when it was written in court by the party offering it, and whether it is material that it is an opponent or a hostile witness who writes it. But the rulings of this sort have almost all been made for documents offered under jury-comparison, and the principle and the policy are the same in both instances (*post*, § 2018).

§ 2010. *Photographic Copies as Specimens.* Here the question is, again, in effect, whether the photographic copies afford a fair ground of inference as to the peculiarities of the handwriting in question. That they are sufficient for this seems to be conceded (and properly) by the weight of authority. However, inasmuch as they are only copies, the documentary rule requires the production of the originals, if they are available; when they are not available, the use of photographic copies should usually be permissible.¹

§ 2011. *Studying the Specimens In or Out of Court.* Must the specimens be used in court only? The answer to this question depends on the principle involved. (1) First, since a *cross-examination* to the grounds of the expert's conclusions (*post*, § 2015) will usually be desired, the specimens must be in court for that purpose at that time; as also, at the proper time, for the purpose of *proving genuineness*, if that is necessary. No one can doubt this much.¹ (2) Next, if the purpose of the *expert's study* and formation of opinion be considered, it is preposterous to expect him invariably to obtain by a brief inspection on the stand the necessary data for an opinion. Close measurements, detailed enlargement, and other expedients of the expert, may often require not only a length of time but a quantity of apparatus and a certain degree of seclusion. For this reason the opportunity of extrajudicial study is often indispensable.² Nevertheless, to prevent

down); 1894, *Richardson v. Green*, 9 C. C. A. 565, 61 Fed. 428, 15 U. S. App. 488, 507 (applying the Oregon statute); 1897, *National Acad. Soc. v. Spiro*, 24 C. C. A. 324, 78 Fed. 775 ("probably" expert testimony is inadmissible); *Utah*: 1887, *Durnell v. Sowden*, 5 Utah 213, 222, 14 Pac. 324 (the opinion is obscure, but seems to allow comparison by experts of all documents admitted or proved genuine); 1892, *Tucker v. Kellogg*, 8 Id. 11, 13 (expert may use specimens admitted genuine if otherwise in the case; the opinion, however, in other places omits the proviso); *Vermont*: Expert use seems to have been conceded with the jury's use; finally, it was settled by *State v. La Vigne*, 30 Vt. 236 (1867), that it is proper for documents either admitted genuine or proved genuine by evidence "clear, positive, and direct"; compare the later rulings for jury-comparison, *post*, § 2016; *Virginia*: The rule seems not yet settled; 1829, *Rowt's Adm'r v. Kile's Adm'r*, 1 Leigh 216 (referred to by one judge as a question not yet settled); *Washington*: 1896, *Moore v. Palmer*, 14 Wash. 124, 44 Pac. 142 (allowed; no limits fixed); *West Virginia*: 1874, *Clay v. Robinson*, 7 W. Va. 350, new trial, *a. v. Clay*

v. Alderson's Adm'r, 10 Id. 53 (the rule adopted seems to be that (1) admitted writings may be employed for comparison, certainly if in the case, and apparently also if not; (2) ancient writings may be so used; (3) writings which are the source of a witness' handwriting-knowledge may be used by him in confirmation); 1898, *State v. Koontz*, 31 Id. 129, 5 S. E. 328 (the above decisions were approved; yet an expert was apparently allowed to testify that certain letters in a signature were feigned); 1903, *Tower v. Whip*, 53 Id. 158, 44 S. E. 179 (opinion based on comparison with four pieces filed in the case by the defendant, and purporting to be signed by him, admitted); *Wisconsin*: Expert use is allowed by the statute cited *post*, § 2016.

¹ The various questions that here arise have been, for convenience of distinction from other questions as to photographs, dealt with together *ante*, § 797. The use of *press-copies* is noticed *post*, § 2019.

² 1869, *Tyler v. Todd*, 26 Conn. 222; 1880, *Hynes v. McDermott*, 82 N. Y. 49.

³ Compare the suggestions in Hagan, *Disputed Handwriting* (1894), p. 24.

alteration or other fraud, it would be entirely proper to allow stated times for inspection in the presence of the opponent. But this latter restriction is needed only for the disputed writing. It would be wholly impracticable for the standard-specimens.² (3) When the expert has made a comparative study before the trial and the disputed writing is lost when the trial occurs, the opponent is deprived of the fullest opportunity of cross-examination; but this should not in itself exclude the testimony, unless there is clear fault, in the party offering the expert, as to the loss.⁴

§ 2012. *Qualifications of the Expert as to Skill.* Here we are not dealing with the ordinary doctrine of Experiential Qualifications (*ante*, § 570), for any one whatever (provided only he can read writing) is competent to form an opinion as to character of handwriting; the main question there is whether he is qualified by his grounds of knowledge of the handwriting in question (*ante*, § 693). But the Opinion rule declares it useless to listen to the views of an ordinary or lay witness when based merely on the inspection of specimens which the jury, having them at hand, can judge as well as he (*ante*, § 1997); hence, an "expert" under the Opinion rule, signifies one who by a study of or experience with writings is able to afford the tribunal a special assistance.

The determination of this skill must of course depend on the discretion of the trial Court as applied to the circumstances of each case.¹ Various forms of test have been offered; no test should be regarded as absolute.² Instances of the exclusion or admission of such witnesses are of no proper service as precedents.³ Special considerations arise where the detection of counter-

¹ 1878, *Miles v. Loomis*, 75 N. Y. 292, apparently not to be regarded as overruled by *Hynes v. McDermott*, *supra*; but if so, then erroneously. In *Doe v. Suckermore*, 5 A. & E. 743, Denman, L. C. J., discussed the relative value of inspection before and inspection at the trial; his statement, at p. 751, that the fact of inspection *post litem motam* does not exclude the testimony is of course unquestioned law; but the partitanship of experts hired *ad litem* has long been a subject of grave concern to judges (*ante*, § 562).

² In the few rulings on this point, it has been held, without taking the above distinction, merely that the loss of the disputed writing does not *ipso facto* exclude the testimony of the expert: 1879, *Abbott v. Coleman*, 22 Kan. 252; 1886, *State v. Shinborn*, 46 N. H. 502. Compare § 1185, *ante* (testifying to a lost original), and *Arhou v. Fussell, Eng.*, *post*, § 2016.

³ 1879, *Forgey v. Bank*, 66 Ind. 125.

⁴ 1836, Denman, L. C. J., in *Doe v. Suckermore*, 5 A. & E. 749 ("The witness must be conversant with handwriting, — a banker, a printer, the officer of a court of justice, . . . to be entitled to any degree of authority"); 1882, *Moon's Adm'r v. Crowder*, 72 Ala. 38 ("accustomed to and skilled in the matter of handwriting, genuine and spurious"); 1878, *Hand, J.*, in *Miles v. Loomis*, 75 N. Y. 298 ("engaged in occupations in which it was their duty to

scrutinize handwritings and detect forgeries, and had acquired more or less skill by practice"). Compare the suggestions in Hagan, *Disputed Handwriting* (1894), p. 30.

⁵ The following cases involve such rulings: 1894, *R. v. Silverlock*, 2 Q. B. 746, 768, 771 (the expert need not be a professional one nor a person who has obtained the experience in his ordinary business); 1896, *Birmingham Nat'l Bank v. Bradley*, 108 Ala. 205, 19 So. 791 (cashier of a bank, admitted on the facts); 1876, *Goldstein v. Black*, 50 Cal. 464; 1896, *Bradford v. People*, 22 Colo. 157, 43 Pac. 1013 (a bank-bookkeeper accustomed to examine checks as to their genuineness, admitted); 1884, *Winch v. Norman*, 65 Ia. 187, 21 N. W. 511; 1887, *Elisfield v. Dill*, 71 id. 448, 22 N. W. 420; 1897, *Christman v. Pearson*, 100 id. 634, 69 N. W. 1055 (the witness need not make a living by judging handwriting); 1884, *Ort v. Fowler*, 31 Kan. 485, 2 Pac. 580; 1861, *Sweetser v. Lowell*, 35 Me. 450; 1895, *State v. David*, 181 Mo. 280, 23 S. W. 28 (one skilled in clerical pursuits, admitted); 1897, *Wheeler & W. M. Co. v. Buckhout*, 60 N. J. L. 102, 36 Atl. 772 (a county clerk, admitted; scientific study of chirography not necessary); 1877, *Yates v. Yates*, 76 N. C. 145, 149; 1892, *State v. De Graff*, 113 id. 688, 693, 18 S. E. 507; 1896, *Kornegay v. Kornegay*, 117 id. 242, 23 S. E. 257 (registrar of deeds, admitted).

fe't bank-notes is in question,⁴ and also in other cases not purely concerning handwriting.⁵

§ 2013. "Admitted or Proved Genuine." Where documents are admitted to use by an expert under the statutory limitation that they must be "admitted or proved genuine," questions arise as to the mode in which the admission must be made, or the sufficiency of the proof, or the proper part of the tribunal — judge or jury — to whom the evidence must be addressed. These questions are the same both for expert-use and jury-use (*post*, § 2016).

§ 2014. Rules applicable to both Experts and Lay-Witnesses; (a) Giving the Grounds of Belief. On direct examination, the witness may¹ and, if required, must point out his grounds for belief in the identity of the handwriting, on the principle already considered (*ante*, § 655). Without such a reinforcement of testimony the opinions of experts would usually involve little more than a counting of the numbers on either side.

§ 2015. Same: (b) Modes of Testing the Opinion on Cross-Examination. With reference to the principle involved, there are two distinct modes of testing by showing specimens on cross-examination: (1) where it can be done *without special proof of the genuineness* of the testing specimens; (2) where it can be done only *with special proof of that*.

(1) The first sort of testing has of course a limited range in the choice of specimens. There are several feasible methods. For instance, the counsel denying the genuineness of the main writing in issue may in court imitate the signature in dispute and ask the opposing witness whether it does not look equally like the alleged signer's writing; or he may take a signature admitted genuine or already in the case, and endeavor to have the opposing witness deny its genuineness. Or, as in *Griffits v. Ivory*, *infra*, the counsel may put before several witnesses successively, who have all sworn positively against his contention, another signature (without regard to its genuineness), and by exhibiting their hopeless disagreement about it, show an apparent bias or corruption as the source of their former unanimity. Or, as in *Murphy's Case* and *Caldwell's Case*, the counsel may put any signature (without regard to its genuineness) before the witness and test his judgment by obtaining successive different opinions from him within a few moments. Or

⁴ It must be remembered that the following rulings deal with the question whether a person can add to the jury's knowledge about papers before them; whether a witness is competent to form an opinion about papers, etc., *not in court*, is the ordinary question of Experiential Qualifications, and is treated *ante*, § 570; rulings on the present point are as follows: 1860, *May v. Dorsett*, 30 Ga. 118 (bank-officer admitted as to counterfeit money); 1878, *Atwood v. Cornwall*, 26 Mich. 339 (bankers generally, admissible as to treasury-notes); 1887, *Payson v. Everett*, 12 Minn. 219 (counterfeit bank-notes, witness excluded on the facts); 1884, *Dubois v. Baker*, 30 N. Y. 361 (erasures in notes, etc.; bank-officer admitted).

⁵ 1888, *Vinton v. Peck*, 14 Mich. 287 (kind of ink; a writing-master and bookkeeper held competent); and cases cited *ante*, § 570.

¹ 1852, *Keith v. Lothrop*, 10 Cush. 457 (on direct examination); 1885, *Langley v. Wadsworth*, 99 N. Y. 63, 1 N. E. 106 (an expert's reasons for his opinions on different specimens of handwriting; excluded in the trial Court's discretion). Compare the suggestions in *Hagan, Disputed Handwriting* (1894), p. 127.

That a mere "belief," or testimony that one writing "looks like" the other, is admissible and need not be more positive, is noticed *ante*, § 658.

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the counsel may substitute, after an interval, one signature for another already testified to and thus get the witness to express the same opinion, with the same reasons, upon concededly different specimens. Where any of these expedients is available and useful, there is no objection of any kind on principle.

(2) But when the testing-signature is one whose genuineness is not admitted or (because it is not otherwise in the case) must be specially proved or disproved, a new element is introduced. The various expedients here available are the same (except that the choice of specimens is broader) as those above noted; with this difference, that where the object of the counsel (whether alleging or denying genuineness for the main writing in issue) is to induce the opposing witness to affirm the genuineness of a false specimen (e.g. one just written by the counsel himself), or to deny the genuineness of an authentic specimen, this expedient is not possible in any form, unless the counsel is allowed specially to disprove or prove its genuineness. Now this necessity of specially producing testimony as to the specimens' genuineness brings into play the whole argument of multiplicity of issues as otherwise applicable against the ordinary use of specimens (*ante*, § 2000). There is perhaps also a certain possibility of surprise and of unfairness of selection (*ante*, § 1999).¹ There are thus two solutions possible. The *first* is to acquiesce as valid these arguments of surprise, of danger of unfair selection, and of confusion of issues, and to follow, in obviating them, the limitations already adopted, in the jurisdiction in hand, for the ordinary use of specimens (*ante*, § 2008), i. e. to limit the use to specimens admitted genuine, to specimens already in the case, or the like. The *second* is to deny that these arguments, whatever their force as applied to the ordinary use of specimens, can here avail to cut off this method of testing opinions on cross-examination. That the latter is the better course seems clear. The reason is that the deprivation of this weapon for the cross-examiner is a loss so serious as to outweigh the inconveniences of its sanction. When, for example, the witness has sworn positively that the disputed signature is genuine, and then, on examining a new signature submitted to him, he declares with equal positiveness that it is a forgery and perhaps points out the (to him) unmistakable marks of difference, the testimony of a single unimpeachable witness that he saw the supposed forgery written by the person bearing that name disposes at once of the trustworthiness of the first witness and the certainty of his conclusion. In many other similar ways a single test of this sort will serve to demolish the most solid fabric of handwriting-testimony. There should be no limitations whatever on the power of employing these tests. The following passages illustrate both the orthodoxy and the efficacy of such a practice:

1723, *Bishop Atterbury's Trial*, 16 How. St. Tr. 571; treasonable letters imputed to the defendant were claimed by him to be forgeries; experts were asked as to the genuineness

¹ The following opinion states the arguments: 1861, Dixon, C. J., in *Pierce v. Northey*, 14 Wm. 12.

of the seals on the letters, especially whether certain impressions were from the same seal; for one of them, "several impressions of a seal or seals were put into his hand, to try his skill; but a doubt arising as to the method of putting the matter to a proper trial," the House voted that it should be done only under proper conditions; and accordingly it was ordered that "two of the clerks do forthwith withdraw, and that a person to be appointed by the Bishop do in their presence, from one or more seal or seals, such as he shall think fit, take impressions in wax of one or more sorts, to be provided by the clerks; that the impressions be numbered; and that the clerks write down in paper from what seal and in what manner every impression was taken, and deliver such paper in at the table, sealed up, making oath that the same is true; and that the seal or seals from which such impressions shall be made shall be detained by one of the clerks till called for by the House; and that the clerks and the person so to be appointed by the prisoner be sworn to secrecy and not to disclose to any person whatsoever anything which shall pass in that transaction, till after the paper so delivered in shall be opened"; which being done, "Mr. Rollins [the expert] was called in, and the said impressions were put into his hands, to make the best judgment thereupon he could"; he retired for awhile; "then Mr. Rollins was called in and acquainted the House 'that he had viewed the impressions of seals before delivered to him in the House, and conceived they were taken from two cast seals from one original.' And the papers delivered in sealed up being read, it appeared that he had formed a right judgment thereon."

1903, *Per Curiam*, in *Hoag v. Wright*, 174 N. Y. 36, 66 N. E. 579 (permitting the witness to be shown spurious signatures as a test): "It tended to cast doubt upon the credibility of the witness and his skill as an expert. It suggested the question whether, if the witness was at fault as to the spurious signatures, he was not at fault as to the signatures in question. It made a direct attack upon the value of his opinion. . . . Owing to the dangerous nature of expert evidence, and the necessity of testing it in the most thorough manner in order to prevent injustice, we are disposed to go farther, and to hold that, where a witness makes a mistake in his effort to distinguish spurious from genuine signatures, and he does not acknowledge his error, it may be shown by other testimony. The test sought to be applied in this case was one of the most practical and conclusive that can be employed to determine whether the witness is really an expert or not. It bears not only upon his competency to express an opinion, but upon the value of his opinion when expressed. . . . The good sense of the trial judge will confine it within proper bounds, and prevent an unnecessary consumption of time. It is better to take a little time to see whether the opinion of the witness is worth anything, rather than to hazard life, liberty, or property upon an opinion that is worth nothing. The evils and injustice arising from the use and abuse of opinion evidence in relation to handwriting are so grave that we feel compelled to depart from our own precedents to some extent, and to establish further safeguards for the protection of the public. As the hostility of witnesses to a party may be shown as an independent fact, although it protracts the trial by introducing a new issue, so, as we think, the incompetency of a professed expert may be shown in the same way and for the same reason; that is, because it demonstrates that testimony, otherwise persuasive, cannot be relied upon."

The decisions are in a hopeless state of confusion, and represent every variety of rule, from complete prohibition to entire freedom of use; nor is there usually any attempt to reason out the result on principle.²

² *England and Ireland*: In two Irish cases it was held that the witness could not be impeached by showing to her other documents, not in the case, and getting her to make contrary admissions, the reason being that by allowing it there would result indirectly a comparison of specimens by the jury: 1841, *R. v. Murphy*,

A. M. & O. (Ir.) 207, Pennefather, C. J.; 1842, *R. v. Caldwell*, ib. 324, Perrin, J., and Richards, B.; in the latter case the Court went slightly farther in allowing the discrediting questions; Mr. Keatinge showed the prosecutrix, after she had denied the genuineness of four letters alleged to have been written to her

by the defendant, two other letters (not in the case), which she admitted to be in her own writing; he then asked her, Was not the handwriting in the letters she had admitted like the handwriting in the four letters she had denied? and in particular, Was there not a similarity between the words "my dearest"? The witness first said there was "no similarity," then that there was "a similarity," and in fact "a great similarity"; this course of examination was objected to; Mr. Keatinge argued, "I have a right to do this. Her manner of denying them is very important for the jury. She said first there was no similarity, — now a great similarity; she may be obliged to go on to admit the four letters to be her handwriting"; the Court ended by allowing the questions as to different passages, provided they were pointed at, not read aloud, and thus the indirect effect of a comparison of the documents before the jury was prevented. In England, in *Griffiths v. Ivery*, 11 A. & E. 322 (Q. B., 1840), the Court declined to allow the testing of the opposing witnesses by asking their opinions about another signature, not in the case, so as to show their disagreement and hence untrustworthiness; the reason for rejection being that in effect such testing introduces the general inconveniences of proof of specimens prohibited by *Doe v. Newton* (ante, § 2000); but a contrary position had already been taken in 1839 by Parke, B. (as cited in 11 A. & E. 134); and in 1840, in *Young v. Honner*, 2 Moo. & Rob. 586, the Court of Exchequer refused to follow *Griffiths v. Ivery*, and when a witness, who testified that the defendant's signature was always written "E. W. Honner," was shown a document signed "Robert Honner" and admitted it to be genuine, they allowed him to be asked whether he would then stand by his original statement; the Court thought that as here the genuineness was admitted, the collateral-issue difficulty did not arise; yet in *Griffiths v. Ivery* no issue of genuineness was raised; the specimen was used merely to show that the witnesses could not agree.

United States: 1868, *Kirksey v. Kirksey*, 41 Ala. 636 (cannot test by specimens); 1893, *First Nat'l Bank v. Allen*, 100 id. 476, 489, 14 So. 835 (plaintiff suing for money paid out by his bank on forged checks, allowed to be asked, as a test, to point out the forged from the genuine); 1831, *Neal v. Neal*, 58 Cal. 287 (a defendant denying his signature to a document, allowed to be questioned as to the genuineness of his signature to another document, already in the case for comparison); 1869, *Tyler v. Tol.*, 36 Conn. 222 (cannot test by asking an opinion as to a signature not proved genuine); 1902, *Brown v. Woodward*, 75 id. 254, 53 Atl. 112 (testing a witness, who denies his signature to a note, by submitting to him other specimens, held not improper on the facts); 1874, *Melvin v. Hedges*, 71 Ill. 424 (obscure; allows testing by asking an opinion as to other signatures); 1882, *Macey v. Farmers' Bank*, 104 id. 353 (cannot test by asking the witness to pick out genuine signatures from others); 1885, *Thomas v. State*, 103 Ind. 439, 2 N. E. 808, *semble* (may test by asking for an opinion on other specimens already

in the case); 1890, *White S. M. Co. v. Gordon*, 104 id. 496, 24 N. E. 1053 (testing on cross-examination may be made with the same documents as are provable in chief); 1896, *McDonald v. McDonald*, 142 id. 55, 41 N. E. 340 (same); 1895, *Tucker v. Hyatt*, 144 id. 635, 42 N. E. 1047 (same); 1892, *Bruner v. Wade*, 84 Ia. 698, 51 N. W. 251 (an expert was tested with other signatures; the exclusion of a question as to their nearer resemblance than the disputed signature, held not harmful where it was never evidenced that they were genuine); 1894, *Browning v. Goenell*, 91 id. 448, 456, 59 N. W. 340 (testing an expert by offering genuine mingled with spurious signatures, allowed on cross-examination); 1894, *Gaunt v. Harkness*, 53 Kan. 405, 409, 36 Pac. 739 (testing an expert by fabricated signatures not otherwise in the case, improper); 1889, *Andrews v. Hayden's Adm'r*, 88 Ky. 455, 459, 11 S. W. 423 (testing by spurious signatures mingled with genuine ones, excluded, as "deceiving the minds of honest men"; this is absurd, for the result showed that perhaps the disputed signature was also a forgery "deceiving the minds of honest men"); 1837, *Page v. Homans*, 14 Me. 432, *semble* (allowing the contradiction of handwriting-witnesses by calling a person whose name had been submitted to the former in several specimens, and denying or affirming the genuineness of those of which the witness had affirmed or denied the genuineness); 1880, *Howard v. Patrick*, 43 Mich. 128, 5 N. W. 84 (testing by asking as to genuine and false documents not in the case; excluded); 1888, *Harvester Co. v. Miller*, 72 id. 272, 40 N. W. 429 (testing by showing a third person's writing, if already in the case, and asking whether it is that of the person in question; allowed); 1886, *Rose v. First Nat'l Bank*, 91 Mo. 401, 3 S. W. 876 (testing by documents not already in the case; excluded); 1856, *Van Wyck v. McIntosh*, 14 N. Y. 439, 443 (testing by submitting other notes, not in the case, to experts denying the disputed writing's genuineness and also that of the specimens submitted, and then offering to prove the specimens to have been admitted genuine; excluded, as involving collateral issues and therefore improper for contradiction, under the principle of § 1002, ante); 1892, *People v. Murphy*, 135 id. 455, 32 N. E. 188 (testing as in *Griffiths v. Ivery*, Eng., was allowed; but a demonstration of error by showing that opinions as to genuineness or spuriousness of the test-specimens were wrong was excluded); 1903, *Hong v. Wright*, 174 id. 36, 66 N. E. 579 (quoted *supra*; testing an expert witness to genuineness, by showing him other signatures, and then by their obvious condition or by other testimony proving these to be spurious, allowed; here the expert was on a second trial allowed to be asked whether he had not on a former trial committed such an error); 1842, *Fogg v. Dennis*, 3 Humph. 48 (testing by showing other signatures; forbidden); 1876, *Brown v. Chenoweth*, 51 Tex. 477 (testing by showing other signatures; allowed; here they were upon documents already in the case).

Compare the general principle for testing a witness' skill (ante, § 901).

3. Jury's Personal of Specimens.

§ 2016. Whether allowable at all; and, if so, for what Classes of Writings. The decisions and the statutes represent a great variety of rules; and even within the same jurisdiction there is often obscurity and inconsistency. The types of possible rules have already been summarized (*ante*, § 2000); the rule in each jurisdiction is either one of those there stated or else some qualified variety of one of the chief forms.¹

¹ The rulings cited *ante*, § 2008, for expert use of specimens, should also be compared, as sometimes implying something upon the present subject; the statutes covering both subjects have been placed here, to avoid repetition: ENGLAND: The English rule is now settled by statute (the common-law rule has been examined *ante*, § 1994): 1854, Common Law Procedure Act, 17 & 18 Vict. c. 125, § 27 ("Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the Court and jury as evidence of the genuineness, or otherwise, of the writing in dispute"); this was confined by ib. § 104, to courts of civil jurisdiction in England; but extended by St. 1865, 28 & 29 Vict. c. 12, §§ 1, 8, to criminal courts; it follows under this statute that it is immaterial whether the documents are already in the case or not: 1858, *Birch v. Ridgway*, 1 F. & F. 270, Pollock, C. B., consulting the other judges; 1860, *Cresswell v. Jackson*, 2 id. 24, Pollock, C. B.; 1864, *Cresswell v. Jackson*, 4 id. 1, 5 (as bearing on the authenticity of disputed codicils, documents in the handwriting of the supposed forger were received); 1865, *Corbett v. Kilminster*, ib. 490, Martin, B. (where the witness wrote the evidential writing while in the box). The following is perhaps erroneous; compare § 2011 par. (3), *ante*: 1862, *Arbon v. Fussell*, 3 F. & F. 152 (where the disputed document is lost, comparison of specimens cannot be resorted to).

CANADA: *Dow*, Crim. Code 1892, § 693 (like Eng. St. 1854, c. 125, § 27); *B. C. Rev. St.* 1897, c. 71, § 45 (like Eng. St. 1854, c. 125, § 27); *N. Br. Consol. St.* 1877, c. 46, § 24 (like Eng. St. 1854, c. 125, § 27); 1880, *R. v. Tower*, 20 N. Br. 168, 205, 219 (R.'s signature of an invoice, held provable by a comparison with his signature on a bill of exchange as prior indorser to the defendant, the defendant's indorsement being an admission of genuineness; *Weldon, J.*, *disa.*); 1888, *Vye v. Alexander*, 28 id. 80, 94 (jury entitled to see signatures of the defendant written since litigation begun, the defendant having testified, when shown them, that he had not changed his signature); 1889, *Alexander v. Vye*, 16 Can. Sup. 501 (foregoing case affirmed); 1890, *Halifax Bkg. Co. v. Smith*, 29 id. 462, 473, 475, 481, 485 (comparison by a layman with a genuine document not produced, held not improper, the witness being otherwise qualified through business transactions; opinions

obscure); *Newf. Consol. St.* 1892, c. 57, § 22 (like Eng. St. 1854, c. 125, § 27); *N. Sc. Rev. St.* 1900, c. 163, § 33 (like Eng. St. 1854, c. 125, § 27); 1897, *R. v. Dixon*, 29 N. 462 (threatening letter; another letter conceded genuine, allowed to be used by the jury, under the statute; two judges *disa.* on various grounds); *Ont. Rev. St.* 1897, c. 72, § 55 (like Eng. St. 1854, c. 125, § 27); 1902, *Thompson v. Thompson*, 4 Ont. L. R. 442 (under the statute, judge or jury may make comparison even though no expert has done so); *P. E. I. St.* 1889, c. 2, § 20 (like Eng. St. 1854, c. 125, § 27).

UNITED STATES: *Alabama*: A long line of precedents adopts the rule that documents otherwise in the case, and those only, may be used: 1841, *Little v. Beasley*, 2 Ala. 703; 1843, *State v. Givena*, 5 id. 754; 1852, *Orist v. State*, 21 id. 145; 1857, *Bishop v. State*, 30 id. 41; 1863, *Kirksey v. Kirksey*, 41 id. 686; 1877, *Bestor v. Roberts*, 53 id. 323; 1878, *Williams v. State*, 61 id. 59; 1887, *Snider v. Burks*, 84 id. 56, 4 So. 225, nevertheless the following occurs: 1882, *Moon's Adm'r v. Crowder*, 72 id. 88 (apparently confining the use of writings in the case to those "of unquestioned genuineness"); *Arkansas*: The rule of documents otherwise in the case is adopted: 1877, *Miller v. Jones*, 33 Ark. 343; *California*: *C. C. P.* 1872, § 1870, par. 3 (evidence may be given of "the opinion of a witness respecting the identity or handwriting of a person, when he has knowledge of the person or handwriting; his opinion on a question of science, art, or trade, when he is skilled therein"); § 1944 ("Evidence respecting the handwriting may also be given by a comparison made by the witness or by the jury, with writings admitted or treated as genuine by the party against whom the evidence is offered, or proved to be genuine to the satisfaction of the judge"); 1900, *People v. Storke*, — Cal. —, 57 N. E. 1090 (libel; letters admitted to be G.'s, shown to an expert for the defendant as evidence that G. and not the defendant wrote the libel, were required to be shown also to the jury); *Colorado*: *St.* 1893, p. 264, § 1 ("Comparison of a disputed writing, with any writing proved to the satisfaction of the Court to be genuine, shall be permitted to be made by witnesses in all trials and proceedings, and the evidence of witnesses respecting the same may be submitted to the Court and jury as evidence of the genuineness or otherwise of the writing in dispute"); 1880, *Wilber v. Eicholtz*, 5 Colo. 240, 243 (comparison allowed for a plea verified by affidavit and for an affidavit of merits,

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these papers being "in the case"); 1896, *Bradford v. People*, 23 id. 187, 43 Pac. 1013 (a defendant denying a signature, required to write; admitted as an exception to the ordinary limitation to documents already in the case or proved genuine); *Columbia (District)*: 1894, *Keyser v. Pickrell*, 4 D. C. App. 198, 204, 210 (papers already otherwise in the case and papers conceded to be genuine, admitted); *Connecticut*: Any documents may be used which are first either proved or admitted to be genuine: 1831, *Lyon v. Lyman*, 9 Conn. 60 (establishing the rule after contradictory precedents on the circuit, and approving *State v. Brunson*, 1791, 1 Root 307, which probably deals with a different point; but *State v. Nettleton*, 1791, 1b 308, decides what the former case is said to decide); 1869, *Tyler v. Todd*, 36 Conn. 232; *Delaware*: Laws 1881, c. 536 (like the English statute); *Florida*: Rev. St. 1892, § 1121 ("Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the jury, or to the Court in case of a trial by the Court, as evidence of the genuineness, or otherwise, of the writing in dispute"); *Georgia*: The rule of documents otherwise in the case was at first adopted: 1854, *Doe v. Roe*, 16 Ga. 535; 1866, *Boggs v. State*, 34 id. 278, *semble*; but the Code has since then established different limits: Code 1895, § 5247 ("Other writings, proved or acknowledged to be genuine, may be admitted in evidence for the purposes of comparison by the jury. Such other new papers, when intended to be introduced, shall be submitted to the opposite party before he announces himself ready for trial"); 1877, *Thomas v. State*, 59 Ga. 784 (statute applied to receive a specimen extrajudicially acknowledged genuine); 1895, *McVicker v. Conkle*, 96 id. 595, 24 S. E. 23 (specimen's genuineness must be proved); 1898, *Axon v. Belt*, 103 id. 578, 30 S. E. 263 (plea filed by defendant in another case and bearing a signature; not admitted, because not shown to have been submitted to defendant before trial); *Hawaii*: Civil Laws 1897, § 1426 (like Eng. St. 1854); *Idaho*: 1900, *Bane v. Gwinn*, 7 Ida. 439, 63 Pac. 634 (cited *ante*, § 2008); *Illinois*: The use of specimens by the jury was for some time forbidden altogether: 1846, *Pate v. People*, 8 Ill. 664, *semble*; 1859, *Jumpertz v. People*, 21 id. 407; 1865, *Kernin v. Hill*, 37 id. 309; 1866, *Putnam v. Wadley*, 49 id. 346, 349 (an instruction that proof "cannot be made by comparison with other signatures," held correct; no authority cited); then the rule of using "documents otherwise in the case" was adopted: 1872, *Brobston v. Cahill*, 64 id. 358; but thereafter ensued uncertainty: 1892, *Rogers v. Tyler*, 144 id. 652, 665, 32 N. E. 393 (admissible if admitted genuine and otherwise in the case); 1897, *Greenbaum v. Bornhofen*, 167 id. 640, 645, 47 N. E. 857 (papers "properly in evidence in the case," allowed to be considered by the chancellor; citing *Brobston v. Cahill*); compare the citations under *Illinois*, *ante*, § 2008, for an expert's use; *Indi-*

ana: The documents used, it was at first said, must be not only otherwise in the case, but also admitted to be genuine: 1870, *Chance v. Gravel Road Co.*, 32 Ind. 474; 1874, *Huston v. Schindler*, 46 id. 38, 41 (papers admitted genuine, but not in the case, excluded); 1877, *Jones v. State*, 60 id. 241; 1884, *Shorb v. Kinzie*, 100 id. 429; but later rulings seem to be satisfied if the writings are either already in the case or admitted genuine: 1895, *Tucker v. Hyatt*, 144 id. 635, 41 N. E. 1047; 1898, *Bowen v. Jones*, 13 Ind. App. 193, 41 N. E. 400 (where, however, the language of the Court applies to writings admitted genuine only if already in the case); compare the citations under *Indiana*, *ante*, § 2008; the rulings are in confusion; *Iowa*: Code 1897, § 4620 ("Evidence respecting handwriting may be given by experts, by comparison, or by comparison by the jury, with writings of the same person which are proved to be genuine"); the following rulings apply the statute: 1864, *Morris v. Sargent*, 18 Ia. 97; 1871, *Borland v. Walrath*, 33 id. 182; 1883, *Wilson v. Irish*, 62 id. 263, 17 N. W. 511; 1887, *State v. Oakins*, 73 id. 128, 34 N. W. 777 (signature in a hotel-register, allowed to be compared with signature to a note); 1888, *Riordan v. Guggerty*, 74 id. 691, 39 N. W. 107; 1894, *State v. Farrington*, 90 id. 673, 679, 57 N. W. 606 (genuine specimens, "wherever found," are admissible; here, a hotel-register and a check); 1901, *Coppock v. Lampkin*, 114 id. 664, 37 N. W. 665, *semble* (writings of A, not otherwise in the case, not receivable under Code § 4620, to prove that A wrote a disputed document claimed by the opponent to be written by B; citing *Peck v. Callaghan*, N. Y., and ignoring the later rulings); rulings interpreting the word "proved," and specifying the improper modes of proof, are dealt with *post*, § 2020; *Kansas*: The use of documents is permitted when they are otherwise in the case, and when, though not otherwise in the case, they are admitted to be genuine; but the later cases also admit proved documents: 1872, *Macomber v. Scott*, 10 Kan. 329; 1876, *Joseph v. National Bank*, 17 id. 260; 1879, *Abbott v. Coleman*, 22 id. 252; 1884, *Ort v. Fowler*, 31 id. 485, 2 Pac. 580; 1891, *Holmberg v. Johnson*, 45 id. 197, 25 Pac. 575 (papers "admitted or proved to be genuine," receivable); 1901, *State v. Stegman*, 62 id. 476, 63 Pac. 746 (specimens "must either be admitted to be genuine" or "at least clearly proved to be genuine"); *Kentucky*: At first, comparison by the jury was forbidden: 1833, *Woodard v. Spiller*, 1 Dana 180; but it was then allowed, for documents otherwise in the case and clearly proved genuine: 1847, *McAllister v. McAllister*, 7 B. Monr. 270; 1885, *Fee v. Taylor*, 83 Ky. 262; then a lengthy statute entered to make improvements: *State*, 1899 (Act of 1886), § 1649 (in any proceeding whatever, "upon a dispute as to the genuineness of the handwriting of a person, other handwritings of such person, though not in the case for any other purpose, may be introduced for the purpose of comparison by witnesses with the writing in dispute; and such writings, and the testimony of witnesses respecting them, may be

submitted to the Court or jury as evidence concerning the genuineness of the writing in dispute; provided that (1) the genuineness of such writings shall be proved, to the satisfaction of the judge, by other than opinion evidence; (2) it must be proved, to the satisfaction of the judge, that they were written before any controversy arose as to the genuineness of the writing in dispute, and that no fraud was practiced in their selection; (3) a party proposing to introduce such writings must give reasonable notice of his intention to the opposite party or his attorney, with reasonable opportunity to examine them before the commencement of the trial; (4) the judge may limit the number of such writings; (5) an error of the judge shall be subject to revision and correction in the same manner as if the error had been committed by the Court"; 1897, *Froman v. Com.*, — Ky. —, 42 S. W. 728 (an affidavit certified by a lawful officer, held properly used); 1899, *Bogard v. Johnstone*, — Id. —, 53 S. W. 661 (specimens excluded because of no notice under the statute); 1902, *Birchett v. Bank*, — Id. —, 67 S. W. 371 (notice held sufficient, on the facts); *Louisiana*: Comparison was allowed by the first Code: 1812, *Sauvé v. Dawson*, 2 Mart. 202, *semble*; 1835, *Plique v. La Branche*, 9 La. 560, 562, *semble*; the modern statutes are as follows: Rev. Civ. C. 1885, § 2245 ("If the party [to a private act] disavow the signature, or the heirs or other representatives declare that they do not know it, it must be proved by witnesses or comparison, as in other cases"); C. Pr. 1894, § 325 (signature of private act denied must be proved "either by witnesses who have seen the defendant sign the act, or who declare that they know it to be his signature because they have frequently seen him write and sign his name. But the proof by witnesses shall not exclude the proof by experts or by a comparison of the writing, as established by the Civil Code"); applied in the following: 1866, *McDonough's Succession*, 18 La. An. 419, 445, 448; 1869, *Huddleston v. Coyle*, 21 Id. 148; 1869, *Leonard's Succession*, ib. 523; 1871, *State v. Fritz*, 23 Id. 56 (the jury may be given documents otherwise in the case and proved genuine); 1902, *State v. Batson*, 108 La. 479, 32 So. 478 (documents "otherwise irrelevant and which have not been admitted in evidence," held not receivable in criminal cases; C. P. § 325, and C. C. § 2245, do not apply to criminal cases); *Maine*: The jury may use any documents admitted or proved to be genuine: 1858, *Chandler v. LeBarron*, 45 Me. 534; 1860, *Woodman v. Dana*, 52 Id. 13; 1888, *State v. Thompson*, 80 Id. 194; *Maryland*: Comparison by the jury was at first excluded entirely: 1873, *Tome v. E. Co.*, 30 Md. 93 (here the standard-signatures were presented in photographic enlargement; but the decision was put on the general principle); but it is now allowed by statute: Pub. Gen. L. 1888, Art. 35, § 6 (like the English statute); *Massachusetts*: The jury may obtain a standard from any documents either proved or admitted to be genuine; it may be added that the rule in this jurisdiction best represents the early tradition continuing the English usage of the last century; the

arguments and doubts raised in *Doe v. Sucker*, more, which left so noticeable an impression on the decisions in most other jurisdictions, never affected the result thus early reached in this State: 1812, *Hall v. Huse*, 10 Mass. 39, 1914, *Homer v. Wallis*, 11 Id. 312; 1820, *Salem Bank v. Gloucester Bank*, 17 Id. 526; 1836, *Moody v. Rowell*, 17 Pick. 490 (Shaw, C. J.); 1838, *Richardson v. Newcomb*, 31 Id. 317; 1848, *Com. v. Eastman*, 1 Oush. 317; the further decisions, dealing with the proper mode of proving genuineness, are noted *post*, § 2020; *Michigan*: The jury may examine only documents otherwise in the case: 1866, *Vinton v. Peck*, 14 Mich. 237; 1874, *Van Sickle v. People*, 29 Id. 64; 1878, *Posters' Will*, 34 Id. 26; 1879, *First Nat'l Bank v. Robert*, 41 Id. 711, 3 N. W. 199; 1887, *People v. Parker*, 67 Id. 222, 224, 34 N. W. 720; and it would also seem that their genuineness must clearly appear before comparison can be allowed: 1874, *Van Sickle v. People*, 29 Id. 65 (where mere possession and ownership of a diary was held not sufficient to establish the defendant's authorship); *Minnesota*: The jury may examine documents already in the case, and documents not otherwise in the case but admitted genuine: 1886, *Morrison v. Porter*, 35 Minn. 425, 29 N. W. 54; *Mississippi*: The jury may examine documents otherwise in the case, and documents not otherwise in the case but admitted genuine: 1874, *Wilson v. Beauchamp*, 50 Miss. 32; 1876, *Garvin v. State*, 52 Id. 209 (adding "or proved genuine"); *Missouri*: Here the jury, as at first held, might compare documents otherwise in the case, if admitted genuine, and documents not otherwise in the case, but admitted genuine, — in short, any documents admitted genuine: 1870, *State v. Scott*, 45 Mo. 304, *semble* (adding to the first class "or clearly proved genuine"); 1878, *State v. Clinton*, 67 Id. 385 (following *Greenleaf, Evidence*, § 581); 1884, *Springer v. Hall*, 63 Id. 697; 1890, *State v. Tompkins*, 71 Id. 616; but the effect appeared, in the ensuing rulings, of the misunderstanding of *State v. Clinton* shown in *Ross v. Bank*, mentioned *ante*, § 2008, under *Missouri*, and new and uncertain limits were for a while declared: 1893, *State v. Minton*, 116 Id. 605, 614, 22 S. W. 808 (only when conceded genuine or otherwise in the case); 1896, *State v. Thompson*, 132 Id. 301, 34 S. W. 31 (same); 1896, *Geer v. M. L. & M. Co.*, 134 Id. 85, 34 S. W. 1099 (only documents admitted genuine and in the case); finally a statute came to enlarge and settle the rule: St. 1895, p. 234, Rev. St. 1899, § 4679 (like N. Y. St. 1880, c. 36, omitting "in all trials and proceedings"); 1898, *State v. Goddard*, 146 Mo. 177, 48 S. W. 82 (under the statute; checks said to be payable by deceased's wife to defendant; defendant allowed to offer, in proving them forgeries, other writings of deceased); *Montana*: C. C. P. 1895, § 3146, par. 9 (like Cal. C. C. P. § 1870); § 3235 (like Id. § 1944); 1897, *Baxter v. Hamilton*, 20 Mont. 327, 51 Pac. 265 (statute applied to evidence offered after its enactment on the trial of a suit begun before); *Nebraska*: The jury might examine any documents admitted or proved to be genuine: 1881, *Huff v.*

Nims, 11 Neb. 345, 9 N. W. 543; but by statute the following provision is made: Comp. St. 1896, § 5918 ("Evidence respecting handwriting may be given by comparisons made, by experts or by the jury, with writings of the same person which are proved to be genuine"); under the statute the writings need not be otherwise in the case: 1891, Grand Island Banking Co. v. Shoemaker, 81 Neb. 134, 47 N. W. 896, *semble* (approving *Huff v. Nims*); 1892, Capital National Bank v. Williams, 35 id. 410, 53 N. W. 202, *semble*; 1896, First Nat'l Bank v. Carson, 48 id. 763, 67 N. W. 779; *New Hampshire*: Here the peculiar rule first obtained that where the specimens were already in the case and admitted genuine, comparison was unconditionally allowed; but where the specimens were offered for the special purpose, there must first be testimony from some one knowing the hand: 1852, Bowman v. Sanborn, 25 N. H. 110, interpreting Myers v. Toscan, 3 id. 47 (in which it was not clear whether specimens might be proved or were usable only when admitted by the opponent); 1860, Reed v. Spaulding, 42 id. 121; 1866, State v. Shimbora, 46 id. 503; but later the English statutory rule was judicially substituted for that above, the proof of the genuineness being for the jury: 1873, State v. Hastings, 53 id. 460; 1877, Carter v. Jackson, 58 id. 157; 1902, University of Illinois v. Spaulding, 71 id. 163, 51 Atl. 781 (rule laid down in the English statute, adopted as a result of common-law principles and as a consequence of the conflict of prior rulings in this State; quoted *ante*, § 2000); *New Jersey*: The jury might not compare any specimens: 1849, West v. State, 22 N. J. L. 241; until the enactment of the statute: Gen. St. 1896, Evidence, § 19, reenacted in St. 1900, c. 150, § 20 (English form; with the added proviso that specimens offered by a party to disprove the genuineness of his hand must be shown "to have been written before any dispute arose as to the genuineness of the signature or writing in controversy"); applied: 1878, Mutual Ben. Life Ins. Co. v. Brown, 30 N. J. Eq. 201; *New York*: Comparison of specimens was at first unconditionally excluded: 1809, Jackson v. Van Dusen, 5 John. 155, *semble*; 1823, Jackson v. Phillips, 9 Cow. 112; it had been in some cases left undecided: 1801, Tittford v. Knott, Kent, J., 2 John. Cas. 214; 1816, Orwood v. Dewey, 13 John. 239; but in later rulings comparison was allowed to be employed by the jury for documents otherwise in the case: 1856, Van Wyck v. McIntosh, 14 N. Y. 439; 1864, Dubois v. Baker, 30 id. 361; 1872, Randolph v. Loughlin, 48 id. 459; 1873, Miles v. Loomis, 75 id. 292; then came an enlarging statute: Laws 1880, c. 36, § 1, Laws 1888, c. 555 ("Comparison of a disputed writing, with any writing proved to the satisfaction of the Court to be genuine, shall be permitted to be made by witnesses in all trials and proceedings, and such writings and the evidence of witnesses respecting the same may be submitted to the Court and jury as evidence of the genuineness, or otherwise, of the writing in dispute"); § 2 (amendment of 1888; same for the first eighteen words; then "handwriting of any person claimed

on the trial to have made or executed the disputed instrument or writing, shall be permitted and submitted to the Court and jury in like manner"); the first statute, authorizing a comparison of "a disputed writing with any writing proved . . . to be genuine" received an astounding construction in 1884 (*Peck v. Callaghan*, 95 N. Y. 73) when the Court refused to admit genuine specimens of the alleged forger of a document in order to prove it his forgery; thus (1) the words "any writing" were made meaningless, and (2) the statute was made to help all forgers and to handicap their victims; compare the contrary rulings in England and Missouri; perverse legal thinking could hardly go further; and in 1888 (c. 555) the Legislature was obliged again to correct the Court; whether the authenticity of the "disputed writing" of this statute must be the main issue of the case (as a will, deed, or the like), or the statute applies to every writing in the case whose authenticity is material, could hardly cause any doubt, especially to persons not ignorant of the history of the subject; yet the invitation was issued to litigants to raise the point, as the Court declared itself unwilling to settle it lightly and unaided by the Bar: 1892, *People v. Murphy*, 135 N. Y. 463, 32 N. E. 135; this doubt it then settled: 1901, *People v. Molineux*, 168 N. Y. 264, 61 N. E. 286 (the disputed writing, to be proved by specimens, need not be a main document in issue, either at common law or under the statute, but may be merely an evidential one; repudiating the contrary *obiter dictum* in *Peck v. Callaghan*); 1902, *People v. Truck*, 170 id. 203, 63 N. E. 281 (papers proved to be genuine, allowed to be used as standards for a letter in B.'s name alleged to have been forged by defendant); under this statute, it must appear that the writing was admitted below as deemed genuine by the Court, not merely as alleged to be genuine: 1895, *People v. Corey*, 148 N. Y. 476, 42 N. E. 1066; *North Carolina*: The following rulings leave the state of the law somewhat difficult to determine: 1853, *Outlaw v. Hurdle*, 1 Jones L. 165; 1856, *Otey v. Hoyt*, 3 id. 410, *semble* (excluded even for documents otherwise in the case); 1872, *State v. Woodruff*, 67 N. C. 91 (following *Outlaw v. Hurdle*); 1877, *Yates v. Yates*, 76 id. 149, *semble* (allowed for documents otherwise in the case and admitted genuine); 1887, *Tuttle v. Rainey*, 98 id. 514, 4 S. E. 475; 1888, *Fuller v. Fox*, 101 id. 120, 7 S. E. 589; 1891, *Tunstall v. Cobb*, 109 id. 320, 14 S. E. 28 (excluded entirely, following *Pope v. Askew*, *ante*, § 2008); 1902, *Ratliff v. Ratliff*, 131 id. 425, 42 S. E. 837 (*Tunstall v. Cobb* followed); the following singular ruling seems to belong here: 1896, *Riley v. Hall*, 119 id. 406, 26 S. E. 47 (a deed said to contain an erasure or a forgery cannot, if its genuineness is in issue, be submitted to the jury, the question being solely one of expert opinion); *North Dakota*: Here the point has expressly been left undecided: 1890, *Dakota v. O'Hare*, 1 N. D. 43; *Ohio*: Here no distinction is taken between the expert's and the jury's use of specimens, and the same rule is laid down for both: *ante*, § 2008; *Oregon*: C. C. P. 1892, § 706, par. 9 (like Cal.

C. C. P. § 1870; § 768 (like *id.* § 1844; inserting, after "witness," "skilled in such matters," and omitting "or proved to be genuine, etc."); statute applied: 1806, *Omura v. Wintola*, 30 Or. 177, 46 Pac. 780; *Munkers v. Ins. Co.*, 10, 211, 46 Pac. 850; *Pennsylvania*: Here, as in *Massachusetts*, the old tradition of free comparison survived; but it was yoked with the rule that there must first be preliminary corroborative evidence, — an old qualification peculiar to the use of all handwriting-evidence in criminal cases (*ante*, § 1991), and already at this time abandoned in England; 1812, *McCorkle v. Biann*, 5 Binney 348, Tilghman, C. J. (here it is required that other evidence shall first be given in support; but this is founded on a statement of Peake's, and Peake was not referring specially to this "comparison of hands," but to the general evidence formerly known as such, and in that respect his qualification was already abandoned elsewhere); 1823, *Farmers' Bank v. Whitehill*, 10 S. & R. 111, Dunoon, J. (here many English names of the 1700s are cited for the admission of "similitude of hands," and its rejection is said to be "recent doctrine" at Westminster, — which was true, but the judge is unaware of the different senses employed for that phrase; here, also, it is said that there must first be other corroborative evidence given); 1829, *Bank v. Jacobs*, 1 Pa. 180 (here other corroborative testimony was regarded as indispensable; and the writings unable are intimated to be such as are admitted genuine or were seen by a witness to be written); 1834, *Callan v. Gaylord*, 3 Watts 331 (here also other preliminary proof of some sort is required; but nothing is said as to the degree of proof of the standard's genuineness; one witness' testimony was taken as sufficient); 1840, *Baker v. Haines*, 6 Whart. 201 (here the question is fully discussed and settled; there must be preliminary evidence in support; and the writings used must be thus tested: "Strict proof of the genuine or test paper should first be given; no reasonable doubt should remain on that point; and nothing short of evidence of a person who saw him write the paper, or an admission of being genuine, or evidence of equal certainty, should be received for that purpose"); 1843, *Dupue v. Place*, 7 Pa. St. 428 (here no general rule was stated, but the standards were held not sufficiently proved); 1862, *Travis v. Brown*, 43 *id.* 9 (the whole subject discussed and cleared up; the jury may compare, after other preliminary evidence, other "well authenticated writings," "established by the most satisfactory evidence"); 1868, *Haycock v. Group*, 57 *id.* 441 (affirms the rule of *Travis v. Brown*, and excludes the evidence in hand because no preliminary evidence had been offered for which comparison of hands was to serve as corroborative); 1876, *Amick v. Mitchell*, 33 *id.* 211 (same rule, and same reason for rejection); 1880, *Berryhill v. Kirchner*, 50 *id.* 492 (same rule); 1884, *Foster v. Collner*, 107 *id.* 313 (same rule); 1893, *Rockey's Estate*, 155 *id.* 456, 26 *Atl.* 656 (same rule); at this point a statute intervened, probably on account of the uncertainty of the rule for experts (*ante*, § 2008), but it cannot be said to improve on the English form of statute: St. 1895, May 15, Pub.

L. 69, § 1 ("Where there is a question as to any simulated or altered document or writing, the opinions of the following persons shall be deemed to be relevant: (a) The opinion of any person acquainted with the handwriting of the supposed writer. (b) The opinion of those who have had special experience with or who have pursued special studies relating to documents, handwriting, and alterations thereof who are herein called experts"); § 2 ("It shall be competent for experts in giving their testimony, under the provisions of this act, to make comparison of documents and comparison of disputed handwriting with any documents or writing admitted to be genuine, or proven to the satisfaction of the judge to be genuine, and the evidence of such experts respecting the same shall be submitted to the jury as evidence of the genuineness or otherwise of the writing in dispute"); § 3 ("It shall be competent for experts in formulating their opinions to the Court and jury to place the genuine and disputed signatures or writings in juxtaposition and to draw the attention of the jury thereto; and it shall furthermore be competent for counsel to require of an expert a statement of the principles on which he has based his work, the details of his work, and his opinion that the results are important to the point at issue, or the reasoning, analysis, and investigation by which he has arrived at his opinion"); § 4 ("The opinions of the witnesses to handwriting being submitted as competent testimony to the jury, the final determination as to whether any particular handwriting is genuine or simulated shall remain, as heretofore, a question for the jury on all the evidence submitted"); *Rhode Island*: Gen. L. 1896, c. 244, § 44 (like Eng. St. 1854); *South Carolina*: Here the rule is peculiar, favoring of the former Pennsylvania doctrine: 1823, *Boman v. Plunkett*, McCord 518 (receiving documents admitted genuine, in aid of "doubtful proof"); 1841, *Bird v. Miller*, 1 McMill. 124 (approving *Boman v. Plunkett*, but not accurate in the understanding of its doctrine); 1874, *Bennett v. Mathewes*, 5 S. C. 478 (following the limitations of *Boman v. Plunkett*); 1882, *Benedict v. Mathewes*, 18 *id.* 506 (same; adding that the trial judge is to determine, subject to review, what is a "doubtful case"); *Tennessee*: In 1870, *Clark v. Rhodes*, 2 Heisk. 207, documents not in the case were rejected; in 1872, *Kannon v. Galloway*, 3 Hart. 231, documents not in the case went to the jury by consent; in 1873, *Wright v. Hensley*, 3 *id.* 44, *Clark v. Rhodes* was followed; in 1889, a statute (Act Feb. 26, now Code 1896, § 5560) was passed, similar to that of 1890 in New York (quoted *supra*); its interpretation, for the case of documents of an alleged forger offered to prove a writing a forgery, was made to conform to that of the New York statute, *Peck v. Calaghan*, N. Y., *supra*, being followed; 1890, *Franklin v. Franklin*, 90 Tenn. 50, 16 S. W. 557; *Powers v. McKenzie*, 10, 179, 16 S. W. 559; but it does not appear that the error has been corrected, as it was in New York, by another statute; *Texas*: The state of the law is uncertain, owing to the failure to observe precedents: 1866, *Hanley v. Gandy*, 26 Tex. 211 (comparison of hands ex-

§ 2017. *Ancient Documents.* It has been noticed, in examining the history of the rule (*ante*, § 1994), that by the early practice no limitation was

drawn entirely); 1877, *Ebern v. Zimpeiman*, 47 *Id.* 518 (without reference to local precedents, comparison was apparently regarded as allowable, with the single limitation that the specimens must be either admitted to be or clearly proved to be genuine); 1885, *Kennedy v. Upshaw*, 64 *Id.* 430 (not citing *Ebern v. Zimpeiman*; comparison allowed, apparently for such specimens only as were already in the case and admitted genuine); 1885, *Matlock v. Glover*, 63 *Id.* 236 (comparison refused, without naming reason or precedent); 1887, *Smyth v. Caswell*, 67 *Id.* 572, 43 *W. & A.* 848 (the first limitation of *Kennedy v. Upshaw* was relaxed where the specimen was introduced by the opponent and admitted genuine); 1893, *Wagoner v. Ruple*, 69 *Id.* 703, 7 *S. W.* 50 (a confused opinion, apparently to the same effect); the following statute is doubtless supposed to have cleared up the law in criminal cases: *C. Cr. P.* 1895, § 794 ("It is competent in every case to give evidence of handwriting by comparison, made by experts or by the jury; but proof by comparison only shall not be sufficient to establish the handwriting of a witness who denies his signature under oath"); *United States*: It is not easy to state the exact limits of the rule of the Federal Courts to-day: 1804, *Macubbin v. Lovell*, 1 *Cr. C. C.* 184 (comparison not allowed with a note in another case on which the opponent had confessed judgment); 1812, *Smith v. Fenner*, 1 *Gall.* 175 (deeds not in evidence were allowed to be shown by a witness; *Story, J.*, said that this was not "comparison of hands"; yet of course it was, even in the modern sense); 1822, *Strother v. Lucas*, 6 *Fet.* 766 (comparison excluded, *semble*); 1870, *Rogers v. Ritter*, 12 *Wall.* 321 (question left undecided); 1870, *Medway v. U. S.*, 6 *Oct. of Cl.* 435 (allowed for documents otherwise in the case and proved or admitted genuine, and, *semble*, also where the disputed document has so recently come to the party's notice that he cannot obtain testimonial evidence of the handwriting); 1891, *U. S. v. Jones*, 10 *Fed.* 470 (allowed for documents otherwise in the case and, *semble*, admitted or proved genuine); 1875, *Moore v. U. S.*, 91 *U. S.* 270 (allowed for documents otherwise in the case and admitted genuine); 1837, *Williams v. Conger*, 125 *Id.* 413, 8 *Sup.* 303 (allowed for documents otherwise in the case and admitted or proved genuine); 1893, *Holmes v. Goldsmith*, 147 *Id.* 150, 163, 13 *Sup.* 238 (comparison allowed according to the Oregon statute); 1893, *Hickory v. U. S.*, 151 *Id.* 303, 308, 14 *Sup.* 334 (*Moore v. U. S.* cited, but no rule laid down); 1897, *National Acc. Soc. v. Spiro*, 24 *C. C. A.* 334, 78 *Fed.* 775 ("admittedly genuine signatures already in evidence for other purposes" may be used); 1899, *Smith v. New Orleans C. & B. Co.*, 35 *C. C. A.* 646, 93 *Fed.* 309 (to prove the signature of a Spanish colonial secretary of Louisiana, other signatures of his, to documents unconnected with the case, were admitted); 1899, *U. S. v. Ortiz*, 176 *U. S.* 422, 20 *Sup.* 466 (signatures on ancient Mexican official

documents, never before questioned as genuine, but not otherwise in the case, admitted; no authorities cited); *Utah*: 1867, *Durnell v. Bowden*, 5 *Utah* 232, 14 *Pac.* 334 (opinion obscure); 1892, *Tucker v. Kellogg*, 8 *Id.* 11, 13, 28 *Pac.* 370, *semble* (comparison allowed for specimens admitted genuine, if otherwise in the case); *Vermont*: Here the rule is of the same type as in Massachusetts and Pennsylvania; 1803, *Rich v. Trimble*, 3 *Tyler* 349 (the Court refused to employ "comparison of handwriting" when it did not appear that the signer's deposition was not available; the phrase is probably used in the older sense); 1833, *Gifford v. Ford*, 5 *Vt.* 535 (comparison was allowed, the specimen here being admitted genuine); 1849, *Adams v. Field*, 21 *Id.* 264 (settled that comparison is allowable of all documents, provided only that their genuineness is admitted or is proved by "clear, direct, and positive testimony"); 1867, *State v. LaVigne*, 39 *Id.* 234 (same); 1870, *State v. Horn*, 43 *Id.* 20, 23 (allowed for specimens admitted or "directly and very clearly" proved genuine); 1887, *Rowell v. Fuller*, 59 *Id.* 692, 10 *Atl.* 353 (same); *Virginia*: The following early rulings occur: 1828, *Gardner's Adm'r v. Vidal*, 6 *Hand.* 106 (question expressly reserved); 1829, *Rowt's Adm'r v. Kile's Adm'r*, 1 *Leigh* 216 (except where no living witnesses to handwriting can be had, comparison by the jury is entirely excluded); *Washington*: 1896, *Moore v. Palmer*, 14 *Wash.* 134, 44 *Pac.* 142 (specimens admitted; no limits fixed); *West Virginia*: 1874, *Clay v. Robinson*, 7 *W. Va.* 359, new trial *a. v.* *Clay v. Alderson's Adm'r*, 10 *Id.* 53 (the opinion is obscure, but seems to allow comparison (1) for all writings admitted genuine, (2) for ancient writings, (3) for writings used in explanation by a witness for whom they have served as the basis of knowledge of handwriting); 1896, *State v. Henderson*, 29 *Id.* 153, 1 *S. E.* 235 (witnesses were allowed to show, by writing on papers, how the person in question wrote the letter L in a peculiar manner, distinguishing this from comparison of specimens); 1888, *State v. Koontz*, 31 *Id.* 129, 5 *S. E.* 328 (the foregoing cases were approved, and the writing for the jury of a letter M by the prosecuting witness, whose name was alleged to have been forged, was held improper); *Wisconsin*: 1861, *Pierce v. Northey*, 14 *Wis.* 9, 13 (question was discussed, but expressly reserved); 1873, *Hazleton v. Union Bank*, 32 *Id.* 47 (rule adopted that comparison of specimens should be allowed only where the documents were already in the case and were "clearly proved" genuine, or where they were ancient and living witnesses could not be had); then a statute interposed: *Stats.* 1893, § 4189 a ("Comparison of a disputed writing with any writing proved to the satisfaction of the Court to be the genuine handwriting of any person claimed on the trial to have made or executed the disputed instrument or writing shall be permitted to be made by witnesses, and such writings and the evidence respecting them may be submitted to the Court or jury").

imposed against the exhibition of specimens to the jury. When, in the series of rulings culminating in *Doe v. Newton* (*ante*, § 1994), the limitation was established that exhibition to the jury was confined to specimens otherwise in the case, an exception was reserved for ancient writings, which, if properly authenticated, could be so used whether otherwise in the case or not. In *Doe v. Newton*, and later opinions, a reason has been found in "the necessity of the case," — the necessity lying in this, that where the disputed writing is alleged to be that of a person as to whose handwriting living witnesses are or may be assumed to be unavailable, and as to whom there are not therefore other specimens in the case that can be proved by such witnesses, a resort to any available standards whatever must be permitted. This exception is undoubted law to-day, whatever the limitations may be as to the use of ordinary specimens by the jury.¹

§ 2018. *Unfair Selection of Specimens.* In those jurisdictions where the use of specimens is freely allowed, for expert or for jury, and no artificial and rigid rules are laid down to obviate the supposed danger of unfair selection, the objection based on unfair selection remains open to be decided for each case or class of cases. What canons are there for determining when a specimen is to be rejected on this ground?

(1) To take the commonest case, Is it proper to receive a specimen *written at the trial by a party* alleging that he is or is not the writer and offering such a specimen on his own behalf as a standard for judgment? This is plainly sufficient where the party does not volunteer it but the judge orders him to write his name.¹ Otherwise, the prevailing rule has been to exclude such specimens absolutely.² After all, however, the more sensible plan is to

¹ *Reg.*: 1806, *Doe v. Rawlings*, 7 East 282; 1811, *Morewood v. Wood*, 14 id. 328; 1820, *Doe v. Newton*, 1 Nev. & P. 6, per Coleridge, J.; 1826, *Doe v. Buckmore*, 5 A. & E. 710, *passim*; *Conn.*: 1872, *Thompson v. Bennett*, 23 U. C. C. P. 393, 405, per Gwynne, J.; *U. S.*: *Cal. C. C. P.* 1872, § 1945 ("Where a writing is more than thirty years old, the comparisons may be made with writings purporting to be genuine, and generally reported and acted upon as such by persons having an interest in knowing the fact"; this is a distortion of the principle, borrowing partly from the rules of §§ 701, 1297, *ante*); 1880, *Clark v. Wyatt*, 15 Ind. 272; 1847, *McAllister v. McAllister*, 7 B. Monr. 270; *Mont. C. C. P.* 1895, § 3226 (like *Cal. C. C. P.* § 1945); *Or. C. C. P.* 1892, § 766 (like *Cal. C. C. P.* § 1945, substituting "twenty" for "thirty"); 1899, *U. S. v. Ortiz*, 176 U. S. 422, 90 Sup. 466 (cited *ante*, § 2016); 1829, *Rowt v. Kile*, 1 Leigh 216 (cited *ante*, § 2016); 1874, *Clay v. Robinson*, 7 W. Va. 259, 10 id. 53; 1872, *Hazleton v. Bank*, 33 Wis. 47.

² 1705, *Osbourne v. Hosier*, 6 Mod. 167, *Holt*, L. C. J.; 1829, *Williams' Case*, 1 Lew. Cr. C. 127, Bayley, B.; 1866, *Corbett v. Kilminster*, 4 F. & F. 490, Martin, B.; 1901, *People v. Molineux*, 108 N. Y. 264, 61 N. E. 286

(specimens written by a defendant when under suspicion of the crime, but voluntarily, at the request of the prosecuting attorney, held admissible against him). Whether the witness may refuse, if the writing would tend to criminate him, is noticed *post*, § 2264.

³ 1793, *Stanger v. Searle*, 1 Esp. 14, Kenyon, L. C. J.; 1878, *Williams v. State*, 61 Ala. 29; 1856, *Chandler v. LeBaron*, 45 Me. 524, *unanimous*; 1878, *First Nat'l Bank v. Robert*, 41 Mich. 711; *N. J. Gen. St.* 1896, *Evidence* § 19 (quoted *ante*, § 2016); 1897, *McGlasen v. State*, 37 Tex. Cr. 628, 40 S. W. 508 (forgery of K.'s name; held improper to let the jury consider a specimen written by K., for the prosecution, during trial and after being shown the disputed signature); 1902, *Whittle v. State*, 43 id. 468, 66 S. W. 771 (forgery; specimen written at the trial by the person whose name was alleged to be forged, excluded); 1894, *Hickory v. U. S.*, 151 U. S. 303, 307, 14 Sup. 324 (specimen made by the party in court on the same day to disprove genuineness, excluded). In a decision upon a trial taking place before the Act of 1854 such a specimen was rejected as not a writing already in the case: 1855, *Doe v. Wilson*, 10 Moore P. C. 523.

have it to the judge in each instance to decide whether the specimen is manifestly unfair.²

(2) A different case is presented, however, where the *opponent* chooses to demand and offer such a specimen; he is the one who suffers by any unfairness, and if he chooses to take the risk, certainly the other party cannot object.⁴

(3) Specimens written out of court but after controversy begun may equally be subject to suspicion, and the judge may refuse to let the writer use them on his own behalf.⁵

(4) No other circumstances call for any settled rule.⁶

§ 2019. *Photographic copies as Specimens; Press-Copies.* The use of *photographic-copies* as specimens is subject to certain necessary distinctions already elsewhere considered in connection with photographs in general (*ante*, § 797).¹ *Letter-press copies* might under some circumstances be usable as well as the originals, or in default of them.²

§ 2020. *Specimens "Proved" Genuine; Mode of Proof.* In those jurisdictions in which free comparison is permitted of specimens "proved" genuine, the question arises whether the proof of genuineness is to be determined by

¹ 1872, *King v. Donahue*, 110 Mass. 155; 1879, *Com. v. Allen*, 128 Id. 50.

² 1722, *Laver's Trial*, 16 How. St. Tr. 192 (the witness said she would know certain papers by her private mark; she was required to make it for the Court, to test her knowledge of it); 1806, *Bradford v. People*, 22 Colo. 157, 43 Pac. 1613 (defendant required to write; cited *ante*, § 2016); 1893, *Smith v. King*, 63 Conn. 515, 531, 36 Atl. 1049 (writing in Court, when demanded by opponent, allowable); 1856, *Chandler v. LeBaron*, 45 Ma. 524; 1881, *Huff v. Rima*, 11 Nebr. 363, 9 N. W. 548; 1897, *U. S. v. Mullane*, 23 Fed. 370 (cross-examination of a defendant, testifying in denial of certain signature, by requiring him to write the names for exhibition to the jury, held proper); 1880, *Sanderson v. Osgood*, 52 Vt. 312.

Whether the witness may refuse, on the ground of self-accrimination, is noticed *post*, § 2264. Whether a change of signature evidences consciousness of guilt, is noticed *ante*, § 278.

³ 1884, *Shorb v. Kinzie*, 100 Ind. 429, 433 (signed answer under oath in the same cause, not usable by the signing party as a specimen); 1880, *Singer Mfg. Co. v. McFarland*, 53 Ia. 541, 5 N. W. 739 (signature in pleadings, admitted); 1898, *Weidman v. Symes*, 116 Mich. 619, 74 N. W. 1008 (notes written after time of note in dispute, excluded); 1884, *Springer v. Hall*, 83 Ma. 606 (the party's signature to a pleading, where his own witness uses it, excluded); N. J. Gen. St. 1896, Evidence § 19 (cited *ante*, § 2016); 1894, *Hickory v. U. S.*, 151 U. S. 303, 14 Sup. 324 (excluding handwriting specially prepared); 1880, *Sanderson v. Osgood*, 52 Vt. 312 (admitting specimens written either before controversy or afterwards, if in the usual course of business and under unexceptionable circumstances).

⁴ 1902, *Phoenix Nat'l Bank v. Taylor*, — Ky. —, 67 S. W. 27 (specimens signed by mark may not be compared with a script signature); 1902, *Gambrell v. Schooley*, 95 Md. 360, 52 Atl. 500 (slander; a specimen of the defendant's handwriting, containing political utterances calculated to prejudice his position, held inadmissible where other specimens were available); 1902, *University of Illinois v. Spalding*, 71 N. H. 163, 51 Atl. 731 (specimens made after the date of the disputed document, but not after controversy nor otherwise open to suspicion, held admissible); 1892, *Mutual Life Ins. Co. v. Suiter*, 131 N. Y. 557, 29 N. E. 323 (the mere age of the specimens should not exclude them; compare § 695, *ante*); 1897, *Redding v. Redding's Est.*, 69 Vt. 500, 33 Atl. 220 (*same*).

⁵ Add the following, which belong in that place: 1901, *People v. Mooney*, 132 Cal. 13, 63 Pac. 1070 (photographs, of an unspecified sort, held admissible); Cal. C. C. P., 1872, as amended in 1901, § 1307 (quoted *ante*, § 1310); 1901, *First National Bank v. Wisdom's Ex'rs*, 111 Ky. 135, 63 S. W. 461 (enlarged photographs admitted).

For expert illustration by blackboard diagrams and the like, see *ante*, § 791.

⁶ *Press-copies* of handwriting were rejected as standards in the following cases: 1885, *Spottiswood v. Weir*, 86 Cal. 525, 523, 6 Pac. 331; 1848, *Com. v. Eastman*, 1 Onah. 217. In *Howard v. Russell*, 75 Tex. 171, 12 S. W. 528 (1889), traced copies were considered, but no decision rendered, the exclusion below being immaterial on the facts.

For the use of an early copy to show alterations since made in the original, see *ante*, § 1226, note 7.

the Court or by the jury. Having regard to the general principle (*post*, § 2550) and to the argument from confusion of issues (*ante*, § 2000), the only proper solution is the former. In this way at once free choice of specimens is obtained and yet all inconvenience from confusion of issues before the jury is avoided. This is the result almost unanimously accepted.¹ Several statutory enactments, following that of England, make similar provision.²

As to the mode of proving this genuineness, it is usually said that it may not be made by again resorting to expert testimony based on comparison; and thus the usual mode would be by witnesses speaking *ex visu scriptoris* or *ex scriptis olim visis* (*ante*, § 1996, §§ 694, 699). Yet possession of the documents, or any other mode (*post*, § 2131) appropriate for evidencing their execution (apart from handwriting-evidence), would equally be proper. It is often said that the proof must be "clear" or "positive," and this requirement, left to the discretion of the trial judge to administer, seems all that is desirable.³

§ 2021. *Specimens "Admitted" to be Genuine.* In those jurisdictions in which the use of specimens is limited, in part or solely, to those "admitted" to be genuine, questions of further detail occasionally arise. It is enough to notice that the admission must of course be the opponent's, not the witness';⁴

¹ *For the judge*: 1874, *Com. v. Coe*, 118 Mass. 505; 1882, *Costello v. Crowell*, 138 Id. 264; 1885, *Costello v. Crowell*, 139 Id. 590, 2 N. E. 668; 1888, *State v. Thompson*, 80 Me. 194, 197, 13 Atl. 392; 1892, *Travis v. Brown*, 43 Pa. 9; 1897, *State v. La Vigne*, 39 Vt. 235; 1897, *Rowell v. Fuller*, 59 Id. 692, 10 Atl. 353; *for the jury*: 1873, *State v. Hastings*, 55 N. H. 440; 1877, *Carter v. Jackson*, 55 Id. 157.

² Cited *ante*, § 2016; the following rulings apply them: 1856, *Cooper v. Dawson*, 1 F. & F. 550 (letter "proved" genuine to the judge's satisfaction); 1867, *Roid v. Warner*, 17 Low. Can. 499.

³ The rulings are as follows: 1895, *McVicker v. Conkle*, 96 Ga. 584, 595, 24 S. E. 29 (attested writing offered as standard, not sufficiently "proved" by proving the attesting witness' signature; see *ante*, §§ 1511, 1513); 1896, *Little v. Rogers*, 39 Id. 95, 24 S. E. 856 (evidence of genuineness of the standards may be circumstantial as well as testimonial; here the finding of the notes among the deceased's papers was held sufficient); 1900, *McConchs v. State*, 109 Id. 496, 34 S. E. 1021 (possession of papers by accused, not sufficient evidence of their genuineness as standards); 1855, *Hyde v. Woolfolk*, 1 Ia. 159 (proof by persons familiar with handwriting, excluded; the proof must be "positive"); 1884, *Winch v. Norman*, 65 Id. 184, 21 N. W. 511 (proof by comparison of hands, excluded); 1891, *Saukey v. Cook*, 52 Id. 125, 47 N. W. 1077 (testimony by one who did not see the specimen written, excluded); 1900, *Renner v. Thornburg*, 111 Id. 515, 82 N. W. 950, *semble* (proof by persons familiar with his hand, excluded); 1890, *McKay v. Leaser*, 121 N. Y. 477, 482, 24 N. E. 711 (mode of proof depends "upon the general rules of evidence applicable," "the

only condition" being the satisfaction of the judge); 1901, *People v. Molinoux*, 168 Id. 284, 81 N. E. 296 (under the statute, the Court may use any kind of evidence admissible at common law, i. e. any but expert testimony based itself on other specimens; the degree of persuasion must be in criminal cases beyond a reasonable doubt; the jury also must afterwards be satisfied of their genuineness before using them); 1900, *Archer v. U. S.*, 9 Ohl. 549, 60 Pac. 265 (proof by expert comparison of hands, inadmissible); 1849, *Dupue v. Place*, 7 Pa. 430 (rejecting twenty specimens some of which the witness had seen signed and others not, the witness being unable to separate the two sorts).

⁴ In Massachusetts, there have been stages of doctrine; with reference to the principle that the genuineness must be "proved," it was at first said that the testimony of no person who had not seen the document written would suffice: 1836, *Shaw, C. J.*, in *Moody v. Rowell*, 17 Pick. 490; and it has also been said that testimony by one who merely knew the handwriting and knew it from correspondence only would not suffice: 1871, *McKeone v. Barnes*, 103 Mass. 346 (the witness had only received the specimens in answer to her letters); but the general tendency has been, while excluding testimony merely from knowledge of handwriting, to lay down no fixed rules but only a general canon as to the quality of the evidence: 1848, *Com. v. Eastman*, 1 Oush. 217 ("clear and undoubted proof, that is, either by direct evidence of the signature or by some equivalent evidence," excluding specimens proved merely from a knowledge of the handwriting); 1854, *Ward v. Fuller*, 7 Gray 178; 1859, *Baron v. Williams*, 13 Id. 527; 1874, *Com. v. Coe*, 115 Mass. 503.

⁵ 1851, *Shorb v. Kinzie*, 30 Ind. 502.

and that only the true judicial admission—i. e. a concession made in the pleadings, or during the trial, or for the purpose of the trial (*post*, § 2588)—will suffice,² not the quasi-admission, i. e. an inconsistent extrajudicial statement of claim (*ante*, § 1048).³

D. SUNDRY EXPERT TESTIMONY TO GENUINENESS OTHER THAN BY KNOWLEDGE OF HANDWRITING-TYPE (DECIPHERMENT, ALTERATIONS, AND THE LIKE).

§ 2023. *In general.* There remains a class of topics which may conveniently be dealt with here together, some involving a question of principles, others attended by no reason for raising a question other than early rulings creating a doubt. The principles most commonly involved are those of the Opinion rule, permitting expert aid whenever it can add to the tribunal's light upon the subject, and of the Knowledge rule (*ante*, § 659), that a witness' data of knowledge must be such as to afford sound data for inference and imply something more than mere guess.

Throughout the law, so far as expert testimony is involved, we have to do with the comparative novelty which certain forms of such testimony possessed before the middle of the 1800s, and the consequent predisposition of judges of the time to reject the pretensions of many such witnesses to throw useful light on the subject, and in particular of witnesses skilled in handwriting and the like. This disinclination, and not any difficulty of pure principle, will account for some of the following questions, which would hardly have been raised for the first time to-day.

§ 2024. *Ink, Paper, Spelling, and the Like.* The qualities of the ink or paper or type of a document are proper indicia to consider in investigating the genuineness or the age of a document,¹ and expert testimony may be employed to aid in this.² Identification by *spelling* (on the analogies of the rules for handwriting) may be made either by a witness who knows the usage of the person in question or by specimens produced and authenticated.³

¹ 1877, *Jones v. State*, 60 Ind. 241.

² Other points ruled upon are as follows: 1865, *Hyde v. Woolfolk*, 1 Ia. 161 (rejecting an acknowledgment of a deed recorded, because the grantor does not necessarily acknowledge the handwriting of the signature as his); 1869, *Bragg v. Colwell*, 19 Oh. St. 407 (admitting the making of a note is not necessarily to admit the genuineness of the signature). In *Hughes v. Rogers*, 8 M. & W. 123 (1841), when the witness denied the handwriting to be his, other witnesses to prove its genuineness were rejected, regard being had to the rule against contradicting on an immaterial point.

³ 1822, *Furber v. Hilliard*, 2 N. H. 482, *omble* (type, paper, etc.); 1898, *Porrell v. Cavanaugh*, 60 Id. 364, 41 Atl. 860 (differences of ink of two signatures to a document, as indicating different times of signing, admitted); 1864, *Dubois v. Baker*, 30 N. Y. 361; 1812, *McCook v. Binna*, 5 Binney 348 (type, paper, etc.).

So also the *style of penmanship* as being of a different epoch: 1839, *Tracy Peckage Case*, 10 Ct. & F. 161, 176.

⁴ 1718, *Masters v. Masters*, 1 P. Wms. 421; 1801, *M'Guire's Case*, 2 East Pl. Cr. 1002 (ink, paper, etc.); 1851, *Johnson v. State*, 2 Ind. 654 (appearance of a bank-bill); 1858, *Jones v. State*, 11 Id. 360 (same); 1868, *Vinton v. Peck*, 14 Mich. 287; 1859, *Jones v. Finch*, 37 Miss. 468; 1893, *Owen v. Mining Co.*, 9 C. C. A. 238, 61 Fed. 6, 13 U. S. App. 248, 270 (expert opinion as to a Mexican printed document, based on paper, ink, and type, admitted).

⁵ 1728, *Hales' Trial*, 17 How. St. Tr. 178 (the habitual use of a form of promissory note, the use of capitals, etc., admitted to disprove genuineness); 1799, *Norman v. Morrell*, 4 Ves. 770 (letters used to show a peculiar style of figure made by a testatrix and thus decipher an ambiguous figure in a will); 1850, *Brookes v. Tichborne*, 5 Exch. 929 (Parker, B.: "It was hardly

§ 2025. *Deciphering Illegible Writings.* One skilled in writings may be called to assist in deciphering a writing illegible or uncertain to the ordinary observation.¹

§ 2026. *Imitations, Forgeries.* That any doubt should be raised as to the possibility of an expert forming an opinion, by mere inspection of a disputed signature, as to its being an imitation or forgery—in the old phrase, a “feigned hand”—would perhaps seem incredible to-day to the handwriting expert, with his powerful aids of microscope and photograph.¹ Even before these aids became common, the scientific study of the subject had made such trustworthy opinions possible. Nevertheless, there was a time of legal doubt; there were contrary rulings in England in the early part of the 1800s;² and the controversy left its mark on our own precedents. To-day, of course, there is no room for difference of opinion, even where the aids of microscope and enlarged photograph are not employed.³

disputed that if a habit of the plaintiff so to spell the word was proved, it was some evidence against the plaintiff to show that he wrote the libel. Indeed, we think that proposition cannot be disputed, the value of such evidence depending on the degree of peculiarity in the mode of spelling, and the number of occasions in which the plaintiff had used it”; 1864, *Cresswell v. Jackson*, 4 F. & F. 1, 5 (as bearing on the genuineness of codicils, a habit in the supposed forger of misspelling as in the codicils, admitted); 1865, *Parnell Commission's Proceedings*, 55th day, *Times' Rep.*, pt. 14, p. 252 (Pigott's fabrication of the criminal letters alleged to have been written by Mr. Parnell was detected in part by his misspelling “hesitancy” and by a skillful cross-examination founded on this; quoted *ante*, § 1868); 1816, *Osgood v. Dewey*, 13 John. 239 (habit of spelling, admitted). Compare the cases cited *ante*, § 27 (skill in composition, etc.), and *ante*, § 98.

¹ 1718, *Masters v. Masters*, 1 P. Wms. 426 (experts summoned in chancery to decipher a scarcely legible will); 1838, *R. v. Williams*, 8 C. & P. 434 (expert evidence as to the decipherment of pencil-marks not now visible on the paper); Cal. C. C. P. 1872, § 1863 (“When the characters in which an instrument is written are difficult to be deciphered, or the language of the instrument is not understood by the Court, the evidence of persons skilled in deciphering the characters, or who understand the language, is admissible to declare the characters or the meaning of the language”); 1851, *Stone v. Hubbard*, 7 Cosh. 597; 1892, *Kux v. Bank*, 98 Mich. 511, 513, 53 N. W. 828 (whether a bank-book figure was 4 or 1, allowed); 1854, *Hardin v. Ho-yo-nubby*, 27 Miss. 563, 565 (meaning of red and black ink-marks, etc., in an official map, not allowed to be explained by an expert, partly because any legal effect of such marks would better appear from other entries, etc.); *Mont. C. C. P.* 1895, § 3140 (like Cal. C. C. P. § 1863); 1843, *Sheldon v. Benham*, 4 Hill N.Y. 131; 1891, *Dresler v. Hard*, 127 N. Y. 226, 27 N. E. 823 (whether a word read “Jany” or “July,” allowed); *Or.*

C. C. P. 1892, § 699 (like Cal. C. C. P. § 1863); 1878, *Beach v. O'Riley*, 14 W. Va. 58; 1898, *State v. Wetherell*, 70 Vt. 274, 40 Atl. 728 (defendant sent to the prosecutrix a magazine with certain words and letters marked; decipherment of the message by an expert, allowed).

The cases cited *ante*, § 1955, as to expert interpretation of technical usage or of ciphers, should be compared; there is no difference of principle; the parol-evidence rule (*post*, § 2461) may also be involved. For testimony to an illiterate's mark, see *ante*, § 693, n. 2, § 1321.

² Compare Hagan, *Disputed Handwriting* (1894), p. 57.

³ *Admitted*: 1723, *Bishop Atterbury's Trial*, 16 How. St. Tr. 574, 581 (whether a seal could be counterfeited so as not to be detected); 1792, *Goodtitle d. Revett v. Braham*, 4 T. R. 497, *Kenyon*, L. C. J. (who apparently recanted in *Carey v. Pelt*, *Peake Add. Cas.* 131; see note 6, § 1993, *ante*); 1802, *R. v. Cator*, 4 Esp. 117; 1845, *R. v. Shepherd*, 1 Cox Cr. 237, *Erie*, J. *Excluded*: 1822, *Gurney v. Langlands*, 5 B. & Ald. 330 (a new trial was refused for rejecting such evidence, but its inadmissibility was not affirmed); 1823, *Clermont v. Tullidge*, 4 C. & P. 1, *Tenterden*, L. C. J., *construed*. As late as 1836, *Deanman*, L. C. J., said, in *Doe v. Suckermore*, 5 A. & E. 751: “I do not indeed understand how such evidence could be rejected, if a witness should swear that his habits gave him the requisite skill; but I do not think that either Court or jury would believe him, or place the least reliance on his opinions; practically, therefore, this chapter may be considered as expunged from the book of evidence.” So too the following: 1852, *R. v. Coleman*, 6 Cox Cr. 163 (whether the names of a drawer, an indorser, and an acceptor were written by the same person, excluded; “it eventually amounts to a mere comparison of handwriting”).

⁴ *Admitted*: 1831, *Lyon v. Lyman*, 9 Conn. 60; *Ind. Rev. St.* 1897, § 1802 (“Persons of skill may be called to testify to the genuineness of a note, bill, draft, or certificate of deposit, or other instrument of writing”); 1837, *Page v.*

§§ 1991-2037] HANDWRITINGS; IMITATION, ERASURE, ETC. § 2027

§ 2027. *Erasures, Alterations, Time of Writing.* Probably as an echo of the early controversy just noticed, the question has also seriously been considered whether an expert may testify as to the existence or time of erasures, alterations, or interpolations. Such testimony is often not to be distinguished practically from testimony deciphering illegible writing (*ante*, § 2025), which has uniformly been held proper. There is, at any rate, no scintilla of reason for doubt.¹

Hemans, 14 Ma. 478 (whether exact imitation is possible); 1850, *Com. v. Webster*, 5 Cush. 301; 1838, *Moody v. Rowell*, 17 Pick. 490; 1844, *Robertson v. Stark*, 15 N. H. 118, *anobile*; 1868, *Ludlow v. Warshaw*, 108 N. Y. 520, 522, 15 N. E. 532; 1862, *Travis v. Brown*, 43 Pa. 9 (*anted post*, § 2027); 1898, *Holmes v. Goldsmith*, 147 U. S. 150, 162, 13 Sup. 288 (whether a person's handwriting indicated inability to imitate, etc., allowed on the facts); 1899, *State v. Webb*, 18 Utah 441, 56 Pac. 159 (larceny of cattle; title claimed by the defendant under two bills of sale signed by different persons; expert testimony that the two signatures were made by the same person, admitted).

Distinguish the following: 1872, *Kowing v. Mauly*, 49 N. Y. 308 (evidence that a writing was not simulated was rejected merely because of irrelevancy); 1902, *Hopkins' Will*, 172 id. 380, 65 N. E. 173 (expert testimony to identity of authorship of a will-signature and of perpendicular marks of cancellation across the signature, held inadmissible); 1900, *State v. Moore*, 83 La. An. 603, 605, 26 So. 1001 (whether a forged letter could have been written in 20 minutes, excluded).

The ruling in *Neall v. U. S.*, 56 C. C. A. 31, 113 Fed. 699 (1902), that a person qualified by knowledge of A's writing, but not an expert in handwriting, may not testify whether a signature of B's name, charged to be a forgery of B's name by A, was written by A, is unsound; compare § 693, *ante*.

¹ *Admitted*: 1799, *Norman v. Morrell*, 4 Ves. Jr. 770 (alteration); 1899, *Tally v. Cross*, 124 Ala. 567, 26 So. 912 (whether two papers were written at the same time); 1846, *Fate v. People*, 6 Ill. 664 (erasure); 1896, *Ram v. Sebastian*, 160 id. 674, 43 N. E. 708 (time of alteration); 1862, *Black v. Dale*, 18 Ind. 334 (alteration);

1852, *Hawkins v. Grimes*, 13 B. Monr. 261 (erasure); 1885, *Fee v. Taylor*, 83 Ky. 263 (erasure); 1850, *Com. v. Webster*, 5 Cush. 301 (instrument used in alteration); 1866, *Vinton v. Peck*, 14 Mich. 237 (alteration before or after execution); 1833, *Ives v. Leonard*, 50 id. 293, 15 N. W. 463 (alteration); 1855, *Moye v. Herndon*, 30 Min. 118 (alteration); 1864, *Dubois v. Baker*, 30 N. Y. 361 (erasure, before or after execution); 1859, *Fulton v. Hood*, 34 Pa. 370 (whether a concluding sentence was written at the same time as the body of the writing; preliminary evidence, as in comparison of specimens, *ante*, § 2016, Pennsylvania, was assumed necessary; no previous rulings in this State were cited; the following cases in this State keep the same qualification); 1862, *Travis v. Brown*, 43 Pa. 9 (whether a hand is feigned); 1874, *Ballentine v. White*, 77 id. 26 (whether an alteration was made at the time of execution); 1879, *Shaffer v. Clark*, 90 id. 94 (whether the body and the signature of a writing were in the same hand); 1892, *Stevenson v. Gunning's Estate*, 64 Vt. 601, 25 Atl. 697 (whether a figure had been altered, allowable; but here the witness was not qualified). *Excluded*: 1863, *Jewett v. Draper*, 6 All. 436 (that certain words were interpolated). In *Missouri*, *Swan v. Polk*, 7 Mo. 237 (1841), excluded such testimony; but in *Wagner v. Jacoby*, 26 id. 531 (1858), this decision was erroneously taken to exclude only the opinion of non-experts, and the use of expert testimony in such cases was declared permissible; non-expert testimony alone being properly excluded; *accord*, 1890, *State v. Tompkins*, 71 id. 617; 1881, *State v. Owen*, 73 id. 441. For a case in which under special circumstances a non-expert was allowed to say whether there had been an erasure, see *Yeates v. Waugh*, 1 Jones L. 423.

TITLE V: QUANTITATIVE (OR, SYNTHETIC) RULES.

CHAPTER LXIX.

§ 2030. General Scope of these Rules.

SUB-TITLE I: NUMBER OF WITNESSES REQUIRED.

§ 2032. History of Rules of Number.
 § 2033. Policy of the Numerical System.
 § 2034. General Principle; One Witness may Suffice; An Uncontradicted Witness need not be Believed.

A. RULES DEPENDING ON THE KIND OF ISSUE.

§ 2036. Treason: (a) History of the Rule.
 § 2037. Same: (b) Policy of the Rule.
 § 2038. Same: (c) Details of the Rule.
 § 2039. Same: (d) Constitutional Sanctions.
 § 2040. Perjury: (a) History of the Rule.
 § 2041. Same: (b) Policy of the Rule.
 § 2042. Same: (c) A Single Witness, if Corroborated, Suffices.
 § 2043. Same: (d) Exception for Contradictory Oaths.
 § 2044. Sundry Crimes, under Statutes.
 § 2045. Civil Cases: Rules derived from the Ecclesiastical Law.
 § 2046. Same: (1) Divorce Charge denied.
 § 2047. Same: (2) Chancery Bill denied by Defendant's Oath.
 § 2048. Same: (3) Wills of Personality, in Ecclesiastical Court; Wills in Pennsylvania.
 § 2049. Same: Wills of Realty at Common Law, and Statutory Attested Wills, distinguished from the preceding.
 § 2050. Same: (4) Nuncupative Wills.
 § 2051. Same: (5) Holographic Wills; (6) Revocations and Alterations; (7) Sundry Testamentary Acts.
 § 2052. Same: (8) Contents of a Test Will.
 § 2053. Usage or Custom.
 § 2054. Local Rules in Miscellaneous Civil Cases (Reaffirming an Instrument, Opponent's Admissions, Contracts, etc.).

B. RULES DEPENDING ON THE KIND OF WITNESS.

§ 2056. Uncorroborated Accomplice: (1) History and Present State of the Law.
 § 2057. Same: (2) Policy of the Rule.
 § 2058. Same: (3) Kind of Crime Affected by the Rule.
 § 2059. Same: (4) Nature of Corroborative Evidence required.
 § 2060. Same: (5) Who is an Accomplice.
 § 2061. Uncorroborated Complainant in Rape, Seduction, Enticement, Bastardy, Breach of Marriage-Promise, and the like.
 § 2062. Same: Nature of Corroborative Evidence.
 § 2063. Parent's Bastardising of Issue, by Testimony to Non-Access: (a) History and Present Scope of the Rule.
 § 2064. Same: (b) Policy of the Rule.
 § 2065. Surviving Claimant's Testimony against Deceased.
 § 2066. Miscellaneous Witnesses requiring Corroboration (Children, Chinese, Divorce Witnesses, Notary's Certificate, etc.).
 § 2067. Uncorroborated Confession of Respondent in Divorce: (a) History of the Rule.
 § 2068. Same: (b) Policy of the Rule.
 § 2069. Same: (c) Scope of the Rule.
 § 2070. Uncorroborated Confession of Accused in Criminal Cases; (1) English Rule.
 § 2071. Same: (2) Rule in the United States.
 § 2072. Same: (3) Definition of *Corpus Delicti*.
 § 2073. Same: (4) Sufficiency and Order of Evidence of *Corpus Delicti*.
 § 2074. Same: (5) Other Rules as to Sufficiency of Admissions and Proof of *Corpus Delicti*, discriminated.

§ 2030. General Scope of Quantitative (or, Synthetic) Rules. Some of the Auxiliary Rules of evidence (*ante*, § 1171) operate by requiring, in specified situations, that a certain quantity of evidential material be provided. This or that piece of evidence, admissible in itself so far as all the foregoing rules are concerned, is declared to be insufficient unless joined sooner or later with other pieces of evidence. It is conditionally admissible; but its admissibility will prove of no avail, because, before the jury is allowed to retire and consider it, all the evidence on that point will be rejected unless the remaining evidential elements have been supplied. Regarded as requiring more than a single piece of admissible evidence, these rules may be termed Quantitative;

regarded as requiring various pieces of evidence to be associated in presentation, in order that any one of them may ultimately be of service, these rules may be termed Synthetic.

(1) These rules thus differ in *operation* essentially from the preceding four groups of Auxiliary Rules. In particular, they differ from the Preferential Rules, in that the latter require that a certain kind of evidence shall be used before any other can be resorted to (*ante*, §§ 1177, 1285), and are thus both more stringent, in obliging the party first to show that the preferred evidence is unavailable, and more lenient, in not making the preferred evidence indispensable.

(2) The *policy* leading to these Quantitative or Synthetic rules differs, therefore, from the policy leading to the other groups of rules, in that here the supposed defect or danger lies in the likelihood of too little evidence being presented, in certain situations, and in the desirability of curing the defect by requiring other evidence to be associated with it in those situations. The propriety of a given rule will thus depend upon the course of our experience, in these special situations, as to the kind of evidence usually offered, as to its usual treatment by juries, and as to the expediency and possibility of annulling the danger by requiring additional evidence to be associated.

(3) In one aspect, this type of rule seems not to be truly one of *Admissibility* (*ante*, §§ 3, 11), but a rule of the Burden of Producing Evidence (*post*, § 2487); because it receives evidence which is concededly admissible as to each piece, and merely declares that it shall not alone be sufficient to entitle the party to go to the jury on that point. The truth is that these rules have two distinct aspects, each a genuine one. As between the opposing parties, the question has constantly to be decided which one is bearing the duty of producing evidence, i. e. which one may be dismissed by the Court, as a matter of law, because he has not fulfilled this duty. The determination of this question as between the parties involves a distinct department of the law of Evidence, answering the question, *By Whom must the Evidence be Produced?* (*post*, Book II, §§ 2483-2489). But, assuming that this duty has been duly determined, and that it is now upon the plaintiff, the question arises whether there are any specific rules by which he is affected in fulfilling that duty. So far as there are any, they become for him rules of *Admissibility*, in a broad but real sense. Their effect is to subject his evidence, not only to the ordinary tests of admissibility for each piece of evidence, but also to a synthetic test for a given mass of evidence; so that, although each piece might ordinarily be admissible absolutely, it is here admissible only conditionally, i. e. subject to being rejected if the whole mass of evidence required by the synthetic rule is not ultimately presented. The effect is that in preparation for trial the rule has to be kept in mind that not only must each piece of evidence be in itself admissible, but it must further be associated with other pieces in order not to be ultimately rejected. For example, if by such a rule two witnesses are required to prove a certain act, then not only must a given witness be qualified in general, but his testimony, unless

further joined with that of another, will still ultimately be held insufficient. Thus the rule, though in one aspect merely a rule as to the party's duty to produce sufficient evidence, for going to the jury (*post*, § 2487), is in another aspect a rule of admissibility, in the sense that evidence declared insufficient by a rule of law is in effect rejected and the party's case is left a blank as far as evidence upon that point is concerned.

(4) The rules may be distinguished (though not for purposes of practical arrangement) as either *negative* or *positive* in form. *Negative* rules are those which declare a given quantity to be insufficient. *Positive* rules are those which declare a given quantity necessary, i. e. declare all other evidence, lacking the specific kind, insufficient. The difference is this: Suppose that evidential elements A, B, C, D, and E are appropriate and admissible for the fact to be proved; a Negative rule declares that A alone or B alone is insufficient; a Positive rule declares that any combination is insufficient unless it contains D. For example, if at cards it should be provided that a hand made up merely of plain cards of spades alone should never win, this would be a negative rule; and if it should be provided that a knave of some suit must be present in any winning hand, this would be a positive rule. Yet though in form the one is negative and the other is positive, both prescribe a quantity of evidence, or, in other words, require one piece of evidence to be synthesized with others in order to suffice. Of the ensuing groups of rules, the first sort (Required Numbers of Witnesses) is negative, i. e. one witness alone is not sufficient; the second sort (Required Eye-Witnesses) is positive, i. e. for certain issues a specific kind of witness must always be present; the third sort (Completeness) is positive, i. e. the whole of a document or an oral utterance must be given; and the fourth sort (Authentication) is in some instances negative and in some instances positive; e. g. a rule declaring that the presence of a purporting private signature on a document is alone insufficient to evidence its genuineness, but that the presence of a purporting official seal is sufficient, is a negative rule; while a rule requiring custody, age, and possession, for a document not otherwise authenticated, is a positive rule.

(5) The various Quantitative or Synthetic rules may best be classified for practical purposes under four heads: the first and second concern testimonial evidence only; the third concerns all kinds of evidence whatsoever, as well as all material forming a part of the issue itself; the fourth concerns circumstantial evidence only.

First, there are rules as to the Number of Witnesses required; the question throughout being whether a single witness is in certain situations sufficient, and if not, what other evidence will suffice therewith (§§ 2086-2074). Secondly, there are rules as to the Kind of Witness required; the question here being whether for certain issues a certain kind of witness must always be present among the general mass of evidence; practically, the only kind of necessary witness recognized in our law is the eye-witness (§§ 2077-2091). Thirdly, there is a rule of Verbal Completeness, i. e. that the whole

of a document or of an oral utterance must be offered, in order that any part of it may be received (§§ 2004-2125). Fourthly, in the Authentication of documents (i. e. proving their genuineness, or due execution), there are rules which declare certain kinds of circumstantial evidence to be insufficient or necessary (§§ 2120-2169).

Sub-title I: NUMBER OF WITNESSES REQUIRED.

§ 2032. *History of Rules of Number.*¹ It is well known that in the civil law of Continental Europe, the great rival of the English common law, its process of proof rested fundamentally on a numerical system. By that system, a single witness to a fact was in general not sufficient; specific numbers of witnesses were in certain cases required; and in some regions, and for some purposes, the weight to be given to each witness' testimony was measured and represented in numerical values, even by counting halves and quarters of a witness; and this system continued in force down to comparatively recent times. In the English common-law institution of jury trial, on the other hand, it was completely otherwise. At common law, there was but a single instance, and that a borrowed and modern one, of almost accidental and of anomalous origin (the rule in perjury), in which a numerical rule existed; what little else there is to-day of that sort has come into our system either by express statutes (all but one dating since 1800), or by the filtration of civil-law rules through the court of chancery, or by local judicial invention. The reason of this contrast, and of our successful resistance to the civil-law rules, and the causes of our freedom from a principle of evidence now generally acknowledged to be unsound and deleterious, form a history worth examining.

(1) It has been doubted whether the Roman law in its prime (that is, before 300 A. D.) proceeded upon a numerical system in its treatment of witnesses.² But it is clear that by the time of the Emperor Constantine, and also in the later codification of the Emperor Justinian, which served as a sufficient foundation for the Continental civil law, the Roman law had adopted the general rule that one witness alone was insufficient upon any material point.³ This rule later came to be adopted in the Continental civil law, founded in part on the Roman law.⁴ But, long before this, it had become a part of the

¹ The ensuing history was originally printed in the *Harvard Law Review*, 1901, XV, 83. An interesting contribution to the subject is found in Mr. John Marshall Gest's article on *The Responsive Answer in Equity*, read before the Pennsylvania Bar Association, June, 1904, and reprinted in the *American Law Register*, LII, 557.

² "The canonists erroneously supposed that the [orthodox] Roman jurists understood the maxim *testis unus testis nullus* in the sense that a single witness did not suffice for proof. It was Constantine who first laid down the arbitrary rule that one witness did not suffice; and the canon law accepted the principle with the more respect because it was sanctioned in Deuter-

onomy" (Glason, *Histoire du droit et des institutions de la France*, VI, 543; 1895).

³ *Digesta*, xxii, 5, 12 (Ulpian; "Ubi numerus testium non adicitur, etiam duosufficiunt; pluralis enim eleatio duorum numero contenta est"); *Codez*, iv, 20, 4 (A. D. 283; "solum testimonium prolatum, nec alia legitimis adiuvantibus causa approbata, nullius esse momenti certum est"); *Id.* 2, § 1 (A. D. 334; "Simili modo sanimus ut unus testimonium nemo iudicium in quocunque causa facile peritur admitti. Et nunc manifeste sancimus, et unus omnino testis responsio non audietur, etiam si preclare curis honore prefulgeat").

⁴ This had no direct influence on our own law, and need not be further noticed. Its his-

canon or ecclesiastical law, which for much of its material was accustomed to draw upon the Roman law. The ecclesiastical law developed the numerical principle freely, and elaborated many specific rules as to the number of witnesses necessary in various situations; against a cardinal, for example, twelve or perhaps forty-four witnesses were required. It is enough to note that its general and fundamental rule was that a single witness was in no case sufficient.⁶ In the Church's system, however, this rule received an additional sanction, over and above the mere precedent of Roman law, from the law of God as revealed in Holy Writ; for passages in the Bible, both in Old and New Testaments, were confidently appealed to as justifying and requiring this rule by Divine command;⁷ and this sanction sufficed to give to the numerical system of the ecclesiastical law an overbearing momentum and a sacred orthodoxy which must be considered in order to appreciate the force against which in due time the common-law judges had to struggle.

The truth was, however, that at this time of the Papal Decretals, and even after the end of the Middle Ages, the rule precisely accorded with the testimonial notions of the time. It was not, in its spirit, an invention of the ecclesiastical lawyers, nor yet a mere continuance of Roman precedent; it was a natural reflection of the fixed popular probative notions of the time, — notions which prevailed as well in the sturdy, self-centred island of England as on the Continent at large. The prevalence and meaning of this underlying notion must now be examined.

(2) Civilization, needless to say, almost began over again with the invasion and settlement of southern and western Europe by the Gothic hordes in the 400s and 500s. Primitive notions prevailed once more, and the slow process of development had to be repeated, — repeated for the law as well as

tory may be found in the following works: 1852, Hamelin, *Histoire de la procédure criminelle en France*, 200, 206; 1900, Partile, *Storia del diritto italiano*, 2d ed., vol. VI, pt. 1, p. 286. Its tenor in the 1700s may be seen in Bonnier, *Traité des Preuves*, 1838, 5th ed., §§ 293, 432; Pothier, ed. 1821, *Procédure Civile*, pt. 1, c. iii; Edinburgh Review, October 1845, p. 328; it persisted in parts of the Continent into the 1800s; but was abolished in France in 1791.

⁶ *Ante* 1400, Corp. Jur. Canon., Decret. Greg. lib. ii, tit. xx, de testibus, c. 22 ("Hoc quodam sint causæ, quæ plures quam duos exigant testes, nulli est tamen causa, quæ unius tantum testimonio, quamvis legitimo, rationabiliter terminetur"); see also ib. c. 28, c. 4 (quoting the Bible); Decret. pars ii, causa iv, qu. ii and iii, c. iv, § 26, reproducing Ulpian; 1552, *Reformatio Legum* [Angliæ] Ecclesiasticarum, tit. de testibus, c. 40 ("Testes singulares nihil probant"); 1713, Gibbon, *Codex Jur. Eccl. Angl.* 1054 ("In the spiritual court, they admit no proof but by two witnesses at least; in the temporal court, one witness, in many cases, is judged sufficient"); 1728, Ayliffe, *Parergon*, 541, 544 ("Though regularly single witnesses make no proof according to the civil and

canon law, nor yet so much as half proof by these laws," yet there are exceptions; in criminal causes, no exception is named except for a confession); 1738, Oughton, *Ordo Judiciorum*, tit. 33, p. 127 ("Jura dicunt, quod regulariter duo testes sufficient").

For the modern ecclesiastical law, as keeping up these rules, see Hinschius (1897), *System d. katholischen Kirchenrechts*, pt. vi, pp. 101, 108, § 264; Bishop Onderdonk's Trial (1845), Appleton's ed., 227, 242, 277; Drusie, *Canonical Procedure*, tr. Meesmer (1857), p. 106.

⁷ Dent. xvii, 6; ["The murderer shall be put to death]; but at the mouth of one witness [only] he shall not be put to death"; ib. xix, 15: "For any iniquity . . . at the mouth of two witnesses, or at the mouth of three witnesses, shall the matter be established"; Numb. xxxv, 30 (like Dent. xvii, 6); Matt. xviii, 16: ["If thy brother trespass against thee, and reject thy complaint,] then take with thee one or two more, that in the mouth of two or three witnesses every word may be established"; II Cor. xiii, 1 (similar); I Tim. v, 19; Hebr. x, 28 (allusions to the foregoing ideas); John viii, 17: "It is also written in your law that the testimony of two men is true."

for other departments of life. Much Roman law remained in the South, and a large body of it was received in a mass in Germany in the 1500s; but this affected chiefly specific rules; the popular and general instinctive legal notions had to grow once more out of primitive into advanced forms. Now one of the universal and marked primitive notions is that of the oath as a formal act, mechanically and *ipso facto* efficacious (like the ordeal and the trial by battle), and quantitative in its nature. This notion is merely one particular phase of the entire system of formalism inherent in the stage of intellectual development at which our Germanic ancestors were in that epoch. It is a matter of the whole spirit of the times, not of a particular or local belief; and since the history with which we are now concerned is that of the growth and change of a radical and epochal conception, not easy to reproduce in our modern imaginations, it may be worth while (for obtaining a starting point) to remind ourselves of its inherent and pervasive nature by the following passage of acute analysis:

1885, Professor *Andreas Hoesler*, *Institutions of Germanic Private Law*, I, 45, 46, 52: 'From the side of spiritual and moral development, the legal life of every civilized people exhibits itself in a movement through three stages; these may be termed the divinational, the formal, and the intellectual stages. . . . The transition from one stage to the other does not occur abruptly and immediately; thus, for example, the judgments of God, in the form known to history, as well as the oath itself, are institutions which, in their deepest sense, belong to the first stage, but have been adopted in the second stage, that of legal formalism. . . . By 'legal formalism' I mean that condition of legal thought in which the sensibly perceivable is accepted as the only or at least the dominant element producing legal effects, and the inward circumstances of a spiritual sort — dispositions, volitions, purposes, and the like — are excluded or forced into the background. In this larger sense the term 'formalism' is ordinarily not taken; we are apt rather by that term to mean merely the notion that transactions which are to have legal significance must have a prescribed form, i. e. a certain mode of utterance or action which is alien to the speech or doing of ordinary life. This external aspect of 'formalism' is, however, only the half of that which I here include by that name; the other half is what may be called the inward formalism, and it consists in this, that the substantial effect, the intrinsic value of the incidents of legal life, is estimated by (as it were) stencils fixed by law. Thus, for example, we contrast the formal and the rational theory of proof, and under the former we class the rule that for full proof a single witness does not suffice, but that two credible witnesses are necessary. Where lies the formalism here? This rule has nothing to do with 'form' in the narrow sense noted above; the real element of formalism in it is that (by reason of long experience with the untrustworthiness of witnesses) a rule of thumb has been made, which denies to the judge his free discretion in the estimation of testimony and lays down a fixed law, not trusting to the often deceptive valuation of each man's credibility, character, and the like, but finding its security in the external mark of numbers. And so, in general, we may properly use the term 'formalism' of the law to express that tendency which excludes from consideration inward qualities, motives, volitions, and the like, and founds legal rules on external phenomena. . . . The formalism of Germanic procedure lays the fullest stress on the parties' acts, and at the same time confines these to prescribed formalities. The summons is given by the one party to the other; the detailed steps of the proceeding, even to the judgment, are brought forth in formal manner by the demands of the parties; the judge.

* This great thinker, to be compared with *Buttigny* to legal history, has since become Chief Professor Brunner, in the value of his contri- Justice of the Swiss Court at Basel.

ment is itself primarily only a determination as to which party has the privilege of making proof, and the proof itself is effectuated either by the oath, the most formal method conceivable, and eventually by the *judicium dei*. One may thus perceive how hateful and obnoxious to the Germanic clansman were the innovations which the procedure of the royal courts introduced and sought also to bring into the popular courts, how unwillingly he suffered the mode of proof by inquisition [jury], and how he chose rather to avoid the royal court and obstinately to suffer the consequences of contumacy than to submit himself to a procedure in which the tribunal's discretion had free play in the valuation of proof."

The same formalistic conception of law in general and of proof in particular has been plainly described, in its present application to the oath, by Professor Brunner, that greatest of Germanists:⁶

"[The domination of formalism and the narrow limits of judicial freedom of judgment were the marked features of Germanic procedure.] It was not to the Court, and with the object of persuading the Court, that proof was furnished, but to the opponent, and with regard to the persuasion or belief of the whole body. The general principle [of formalism] included the proof-procedure; here, too, was the judicial discretion replaced by the compulsion of form. Thus the proof was not submitted to the judge's valuation, but was prescribed once for all by rules which must be fulfilled before the proof tested by them could be regarded as efficacious. These rules consisted of forms, in which the proof-result must manifest itself or (so to speak) crystallize itself, while proof-material available informally or in other forms remains disregarded. . . . The formalism of the party's oath exhibits itself above all in the feature that the oath is 'staffed'; for the opponent of the swearer, holding in his hand a staff, pronounces to the latter the oath-formula, which contains the allegation presented for decision. The swearer is obliged to repeat word for word this 'staffed' formula, while touching the staff and calling upon God. A single error of word defaulted him. . . . [So also for proof by witnesses.] There was no questioning of them. The witnesses had to swear, word for word, to the allegation presented for decision. The probative force of the witnesses' doings lay exclusively in the oath-form of their utterance. Only by an error in this form (it would seem) could the witnesses be ineffective. . . . Apart from peculiarities of special tribal laws, the controversy was decided as soon as the witnesses had sworn their oath according to the necessary formalities. If the opponent of their party was unwilling to let it rest here, he had (by some customs) a single means of overthrowing the witnesses, . . . [namely,] a duel with the impeached witnesses settled the result of the controversy."

The oath, then, in the Germanic epoch is but a single product of the pervading formalistic conception of procedure and of proof. All through the Saxon and Norman times, the oath is a verbal formula, which, if successfully performed without immediate disaster, is conceded to be efficacious *per se*, and irrespective of personal credit. It follows, too, since the performance of this act is in itself efficacious, that the multiple performance of it, if persons can be obtained who will achieve this, must multiply its probative value proportionately. This numerical conception is inherent in the general formalism of it. Thus, again, all through these times, the oath is for greater causes sworn by greater numbers, sometimes six-handed, or twelve-handed, or twenty-four-handed; that is, a degree of greater certainty is thought to be attained, not by analyzing the significance of each oath in itself and relatively

⁶ Die Entstehung der Schwurgerichte, ed. 1872, 42, 53.

to the person, but by increasing the number of the oaths. An oath was one oath; and though as between persons of inferior and superior rank certain differences were sometimes recognized, yet in general and between persons of the same rank one oath was equal to any other oath, with no distinctions based on their testimonial equipment for the case in hand. In short, whatever varieties of probative situations present themselves, the only expedient that suggests itself seems to be some change in the number of oaths.⁹

Little by little, to be sure, a newer idea develops. Numerous oaths may be required to overcome certain strong masses of (what we should now call) presumptive evidence. The classes of cases in which oaths are allowed operative force *per se* are diminished. Most important of all, witnesses may be examined briefly before being allowed to take the oath, and witnesses showing a total lack of knowledge may not be allowed to swear;¹⁰ and of a piece with this comes the separate examination of witnesses swearing on the same side, for a conflict in their stories when separately examined resulted in discrediting their oaths. Even in this latter expedient the feebleness of the new reasoning process is seen, in that the oaths appear (at any rate when taken before the judges and not before a jury) merely to fail as formal acts, and little attempt is made to decide upon the witnesses' relative personal credit.¹¹ Finally, the spread of jury trial must have helped gradually to develop the more rational spirit of investigation of facts and to outlaw the more marked features of primitive formalism. But these steps of progress in popular conceptions of the nature of proof are only slow and gradual, — much more so than one might suppose. The merely superstitious and extreme notion of a witness' oath dies out; but the mechanical, quantitative, formal conception persists for many centuries. Its purely quantitative and ponderative nature may be seen, for example, at a much later period, in the treatment of opposing witnesses' contradictions:

Professor J. B. Thayer, *Preliminary Treatise on Evidence*, 20: "We read [in a case of *cul in vite*, in 1806], that they were at issue *incit certi qui micus prove micus av.* and the tenant proves by sixteen men, etc., and the demandant by twelve; and because the tenant's proof '*fait grandr*' than the demandant's, it was awarded," etc. If we take Fitzherbert's account to be accurate, it might appear that the twelve men on each side cancelled each other and left a total of four to the credit of the tenant, a result which left his proof the better."

It is surprising to us to-day to note how long this conception of the oath (i. e. a single testimonial assertion) persisted.¹² What is material to our

⁹ The rules here summarily referred to may be found in Brunner, *ubi supra*, c. iii; Brunner, *Deutsche Rechtsgeschichte*, II, 337, 397; Thayer, *Preliminary Treatise on Evidence*, 17-34; Lea, *Superstition and Force*, 4th ed., 21-100; Déclaraire, *Les preuves judiciaires dans le droit franc du 5^{me} au 8^{me} siècle* (Nouv. revue hist. de droit fr. et étr., 1899, p. 188); Glanville, *ubi supra*, III, 462, 485, 497.

¹⁰ Yet even here the innovation made little direct change in the formal effectiveness of the oath: Brunner, *Schwurgerichte*, 67, 68, 85, 198.

¹¹ See Thayer, *ubi supra*, 22, 98, 99; and the citations ante, § 1857.

¹² "All our old collections of customary law emulate each other in reminding us that a single witness cannot suffice, but that proof is made as soon as two at least are found to testify to the same effect. Curiously enough, this bizarre system was accepted by our jurists, down to the Revolution, without the least protest" (Glanville, *ubi supra*, 542).

purpose is that as a popular notion and instinctive mental attitude it was still in almost full force in the 1600s, at the time when the conflict of the common law and the ecclesiastical system came upon the stage. The vital force of this quantitative idea of a witness' testimony is seen pressing to the surface in abundant casual instances down into the 1700s;²² and it is only here and there that a protest is raised against its fallacy.²³ It is probable, indeed, that the long delay in abolishing the disqualification of witnesses by interest (*ante*, § 575), and the popularity of those rules till the end of the 1700s, was due to a lurking feeling that an oath-assertion, merely as such, of anybody whatever was (if once admitted) at least good for something, — counted one as testimony.²⁴ Only by a slow and comparatively recent development came the rational notion of analyzing and valuing testimony other than by numbers. Even to-day, among juries in some places, there is no doubt a mere counting of oaths or witnesses.²⁵ Impossible as it may be to note in any precise epoch the parting of the ways, and to put ourselves back fully into the mental condition of the former days, the living force of the old numerical conception as late as the 1600s and 1600s cannot be doubted. It appears plainly enough even on the dead printed pages of the State Trials; and its nature has been very well phrased by Sir James Stephen, in the following passage:

1683, Sir James Stephen, *History of the Criminal Law*, I, 400: "The opinion of the time [before 1700] seems to have been that, if a man came and swore to anything whatever, he ought to be believed, unless he was directly contradicted. . . . The juries seem to have thought (as they very often still think) that a direct unqualified oath by an eye- or ear-witness has, so to speak, a mechanical value, and must be believed unless it is distinctly contradicted. . . . If the Court regarded a man as a 'good' (i. e. a competent) 'witness,' the jury seem to have believed him as a matter of course, unless he was contradicted; though there are a few exceptions. . . . The most remarkable illustration of these remarks is to be found in the trial of the five Jesuits. . . . [Chief Justice Seroggs says:] 'Mr. Fenwick says to all this, "Here is nothing against us but talking and swearing." But, for that, he hath been told (if it were possible for him to learn) that all testimony is but talking and swearing; for all things, all men's lives and fortunes, are determined by an oath, and an oath is by talking, by kissing the Book, and calling God to witness to the truth of what is said.' . . . Seroggs was right as to what it [the practice of juries]

²² 1500, *Thorne v. Rolfe*, Dyer 186 a (in a case where two witnesses of a husband's death were on one side and none on the other side, the old maxim is sanctioned, "*qui melius probat, melius habet*"); 1571, Duke of Norfolk's Trial, in *time's Crim. Tr.* I, 178 (Richard Candlish was sworn and testified to treasonable words of the accused, "when the Duke gave him reproachful words of discredit"; upon which Serjeant Barham interjected, "He is sworn, there needeth no more proving"); 1633, Massinger, in "A New Way to Pay Old Debts," act 5, sc. 1 (Sir Giles Overreach: "Besides, I know thou art a public notary, and such stand in law for a dozen witnesses"); 1683, L. C. J. Pemberton, in Lord Russell's Trial, 9 How. St. Tr. 577, 618 ("If you cannot contradict them by testimony, it will be taken to be a proof"); 1715, Parker, C. J., in *R. v. Manot*, 10 Mod. 192 ("a credible and

probable witness shall turn the scale in favor of either party"); 1736, Lord Hardwicke, C. J., in *R. v. Nunes*, Lee cas. T. Hardwicke, 204 ("One witness is not sufficient to convict a man of perjury, unless there were very strong circumstances; because one man's oath is as good as another's").

²³ See the remarks of Sir John Hawles, Solicitor-General (about 1700), in 8 How. St. Tr. 741.

²⁴ *Ante* 1726, Chief Baron Gilbert, Evidence, 139: "Every plain and honest man affirming the truth of any matter under the sanction and solemnity of an oath is entitled to faith and credit."

²⁵ Compare the measures taken in the French Code d'Instruction Criminelle of 1808 to educate juries out of this attitude: *Kemmler, ubi supra*, 545.

actually was, and to a certain extent still is. It is true that juries do attach extraordinary importance to the dead weight of an oath."

(3) There was, therefore (and this is at once the sum of the foregoing and the key to the ensuing history), in the English common-law courts of the 1500s, nothing at all of repugnance to the numerical system already fully accepted in the ecclesiastical law. The same popular probative notion there prevailed among judges, juries, and counsellors as on the Continent. They were equally prepared and accustomed to weigh testimonies by numbers, and therefore would see nothing fallacious in a rule declaring one witness not enough, and requiring specified numbers of witnesses. And this adoption was in fact frequently demanded of the common-law Courts. It was a time when the conflict between the ecclesiastical and the common-law Courts was at its last and perhaps its crucial stage, — a conflict important in other respects to the rules of evidence.¹⁷ The methods of the ecclesiastical Courts were forming those of the Courts of chancery and of admiralty; the ecclesiastical lawyers were a distinguished and powerful body; their influence was notably felt in politics and in political trials; and there was no way of yet knowing whether their system and not the common-law system might ultimately preponderate in the shaping of English jurisprudence.¹⁸ When their rule declaring one witness insufficient was appealed to, the appeal had behind it the force of presumption due to the prestige of a great system, orthodox on the Continent, and not unequal in its rivalry in England. Add to this, the immense force of the invocation of the law of God, of the Scriptures sanctioning the rule of the Church's law and protecting the innocent against condemnation by single witnesses. Such was the attempt now repeatedly made to fix upon jury trials at common law the fundamental rule of the ecclesiastical law; and it is apparent, from the utterances recorded as late as the early 1600s, that there was no certainty that the attempt would not succeed:

1637, *Bishop of Lincoln's Trial*, 3 How. St. Tr. 780, 788; *Cottingham*, L. C.: "It is not always necessary in this Court to have a truth proved by two or three witnesses; men will be wary in bribery; . . . and *singularis testis* many times shall move and induce me verily to believe an act done, when more proofs are shunned." ¹⁹

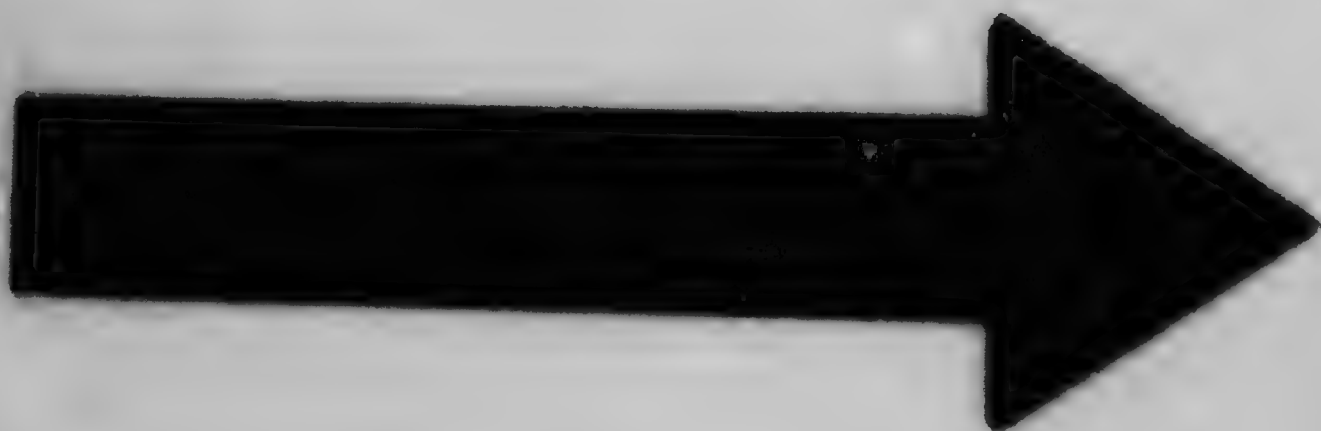
The traditional practice of the common-law Courts, at the time of this attempt, is revealed definitely in the controversy over certain prohibitions issued by them forbidding the ecclesiastical Courts to take cognizance of matters temporal (i. e. not matrimonial nor testamentary). It is not clear that the former specifically acted on the ground of the latter's employing an

¹⁷ Compare the history of the rule against self-crimination, *supra*, § 2250.

¹⁸ See Professor F. W. Maitland's enlightening essay, *English Law and the Renaissance* (1901).

¹⁹ See, also: 1630, *Lord Bacon's Trial*, 2 How. St. Tr. 1067, 1093; 1622, *Adams v. Canon*, Dyer 53 b (quoted *ante*, § 1364); 1623, *R. v. Newton*, ib. 99 b, note; 1623, *Sherfield's Trial*,

3 How. St. Tr. 519, 542, 545; 1640, *Stratford's Trial*, ib. 1427, 1446, 1450; many other scattered instances might be found. The statutory rule for treason was said to have been enacted in direct imitation of the ecclesiastical law: *post*, § 2036. The civil-law rules actually obtained force in Scotland: 1706, *Green's Trial*, 14 How. St. Tr. 1190, 1226.



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improper rule of evidence; they apparently disputed the jurisdiction, not the mode of proof. But it seems to be conceded by the ecclesiastics that the common-law judges in practice asked for no more than one witness. These had as yet probably not had the issue forced upon them in their own courts; but their orthodox practice is clear; they never required a number of witnesses before the jury:

1605, *Bancroft's Articuli Cleri*, and the *Judges' Answers*, 2 Co. Inst. 500, 608; 2 How. St. Tr. 181, 148: "Objection [by the Clergy]: There is a new devised suggestion in the temporall Courts commonly received and allowed, whereby they may at their will and pleasure draw any cause whatsoever from the ecclesiasticall court; for example, many prohibitions have lately come forth upon this suggestion, that the laws ecclesiasticall do require two witnesses, where the common law accepteth of one, and [that] therefore it is *contra legem terræ* for the ecclesiasticall judge to insist upon two witnesses to prove his cause"; Answer [by the Judges]: "If the question be upon payment or setting out of tithes, or upon the proove of a legacy or marriage, or such like incidence [of strictly ecclesiastical jurisdiction], we are to leave it to the tryall of their law, though the party have but one witness; but where the matter is not determinable in the ecclesiastical court, there lyeth a prohibition, either upon or without such a surmise."²⁰

It is about this time that the indications occur (in the passages already above quoted) of a judicial inclination to yield to the ecclesiastical principle, and of a general attempt to carry into the common-law courts the fundamental rule that a single witness was sufficient.²¹

(4) But the attempt failed, — and failed absolutely. After the middle of the 1600s there never was any doubt that the common law of England in jury trials rejected entirely the numerical system of counting witnesses and of requiring specific numbers.²² The only exception to this — the case of

²⁰ The following are instances of prohibitions arising in this controversy: 1607, *Chadron v. Harris*, Noy 12 (plea, payment of legacy; prohibition not granted); 1611, *Roberts' Case*, 12 Co. 65, Oro. Jac. 269 (mere surmise in advance, not sufficient to secure a prohibition); 1629, *Warner v. Barret*, Hetley 87 (plea of *plene administravit*; prohibition apparently granted); 1638, *Richardson v. Disborow*, 1 Vent. 291 (legacy; prohibition issued); 1691, *Shotter v. Friend*, 3 Mod. 283 (payment of legacy; prohibition issuable); 1698, *Breedon v. Gill*, 1 Ld. Raym. 219, 221 (issuable for a legacy, but not for revocation of oral will).

²¹ During the 1500s and 1600s the statutes also exhibit the pervasiveness of the numerical notions: 1558, St. 1 Eliz. c. 1, § 27 ("two sufficient witnesses" required for offences under this act against heresy and foreign church authority); 1597, St. 39 Eliz. c. 20, § 10 ("two sufficient witnesses" required for offences in cloth-making); § 7 (for certain offences, the pillory is provided, "being lawfully convicted by the verdict of twelve men and two sufficient witnesses"); 1627, 13 Car. I, c. 2 (for violations of the Sunday law, "two or more witnesses" or the party's confession, are to suffice before the magistrates); 1688, 1 W. & M. c. 18, §§ 14, 19; 1691, 3 & 4 W. & M. c. 11, § 5. In 1786-87, a statute was

enacted to prevent smuggling (*Cobbett's Parl. Hist.* IX, 1229, *Campbell's Lives of the Chancellors*, VI, 149) penalizing the bearing of arms in companies of three or more when travelling, "on proof by two witnesses that their intention was to assist" in smuggling.

²² There is a foreshadowing of it in the previous century: 1551, *Reniger v. Fogossa*, Plowd. 1, 8, 12 (where the Court's opinion was for the defendant, without reasons given; but the defendant had argued that one witness sufficed in jury trials); Plowden published in 1578, and the case's significance dates from that time. But no positive deliverance seems to come till after the middle of the 1600s: 1662, *Tong's Trial*, 6 How. St. Tr. 226, Kelyng ("at common law, one witness is sufficient to a jury"); then Sir Matthew Hale and L. C. J. Holt, quoted *post*, emphasize this before the end of the century. Thereafter the matter is assumed on all hands: 1806, L. C. Erskine, in *Clifford v. Brooke*, 18 Ves. Jr. 131, 134 (the law of one witness' sufficiency "is uniform in principle and practice, with the single exception of the case of perjury").

In the American colonies the notion is seen surviving somewhat later than in England: 1641, *Mass. Body of Liberties* (Whitmore's ed.) § 47 ("No man shall be put to death without the

perjury — "proves the rule," because it was not established until the early 1700s (*post*, § 2040), when the rejection of the numerical system had been already definitely accomplished.

(5) What, then, was the reason why the common-law Court, in their system of evidence for jury trials, declined to number witnesses like the ecclesiastical Court, and to lay down the rule that a single witness was insufficient? Briefly, the different nature of the tribunal. The situation which would call for such a rule simply did not exist for the common-law judge. The case of having merely one witness could not arise; for the jurymen were already witnesses to themselves, as well as triers. It is unnecessary here to do more than recall that vital circumstance which has in so many ways affected the history of our rules of evidence, namely, that the jury, until at least the early 1700s, were in legal theory entitled to avail themselves of information contributed personally by themselves and obtained independently of the witnesses produced in court; and that during the 1500s and 1600s this joint quality of witnesses and jurors still obtained practically for a more or less considerable part of their evidential material.²² The situation was, therefore, radically different for the common-law judge and the ecclesiastical judge. The former need not and could not measure the witnesses that appeared before him. He could not declare one insufficient and two or more necessary, for this was not all the evidence. There was always, besides the witnesses produced in court, an indefinite and supplementary quantity of evidence existing in the breasts of the jurors. There were (as Fortescue says) twelve other witnesses besides the one produced before the bar; and, as to the extent of the evidential contribution of these others, the judge did not know and had no right to know what it amounted to. It was therefore impossible and preposterous for him to attempt to declare insufficient and to reject the one or more witnesses produced in court. The jury might still go out and find a verdict upon no witnesses (of the ordinary kind) at all. Judicial rules of number would thus be wholly vain and out of place. Such was the logical and necessary answer to any attempt to introduce the numerical system in jury trials. This had been Fortescue's reasoning in the 1400s; and this was the answer of the judges in the late 1600s, when the question was forced upon them:

testimony of two or three witnesses or that which is equivalent thereto"; repeated in Revisions of 1660 and 1672, "Witnesses"; 1660, *Mass. Revised Laws and Liberties*, "Innkeepers," § 13 (offences against the liquor-laws are to be determined by magistrate's view or constable's affirmation "and one sufficient witness, with circumstances concurring, or two witnesses, or confession of the party"; repeated in revision of 1672, "Innkeepers"); 1692, *Proprietor v. Keith*, Pa. Col. Cas. 117, 139, 141 (libel; the defendant's printing was evidenced by the finding of the printing-frame in his house; the jury retired, but came back to ask "whether the law did not require two evidences to find a man

guilty"; c. 36 of the Body of Laws provided that "there shall be two credible witnesses in all cases in order to judgment"; Counsel Lloyd then read a passage "out of a law book, that they were to find it by evidences, or on their own knowledge, or otherwise; now, says D. Lloyd, this 'otherwise' is the frame which you have, which is evidence sufficient"; but the jury disagreed, some of them thinking the evidence insufficient).

²² This fact has been fully noticed *ante*, §§ 1364, 1800; the demonstration has been made in Thayer's *Preliminary Treatise on Evidence*, 137-170.

Circa 1400, Sir John Fortescue, L. C., in his *De Laudibus Legum Angliæ*, c. 33: "Prince: 'But, my good chancellor, though the method [of trial by jury] whereby the laws of England sift out the truth in matters which are at issue highly pleases me; yet there rests one doubt with me, whether it be not repugnant to Scripture. . . . Our Saviour, speaking of offences and forgiving one another, among other things delivers himself thus: "If thy brother will not hear thee, then take with thee one or two more, that in the mouth of two or three witnesses every word may be established." Now if in the mouth of two or three witnesses God will establish every word, why do we look for the truth in dubious cases from the evidence of more than two or three witnesses? No one can lay better or other foundation than our Lord hath laid. This is what in some measure makes me hesitate concerning the proceedings according to the laws of England in matters of proof; wherefore I desire your answer to this objection.' Chancellor: 'The laws of England, sir, do not contradict these passages of Scripture for which you seem to be so concerned; though they pursue a method somewhat different in coming at and discovering the truth. . . . If the testimony of two be true, *a fortiori* the testimony of twelve ought rather to be presumed to be so. The rule of law says "the more always contains in it that which is less."'²⁴ . . . [The law of England] never decides a cause *only* by witnesses, when it can be decided by a jury of twelve men, the best and most effectual method for the trial of the truth, and in which respect no other laws can compare with it.' . . . Prince: 'I am convinced that the laws of England eminently excel, beyond the laws of all other countries, in the case you have been now endeavoring to explain. And yet I have heard that some of my ancestors, kings of England, have been so far from being pleased with those laws that they have been industrious to introduce and make the civil laws a part of the constitution, in prejudice of the common law. This makes me wonder what they could intend or be at by such behaviour.'"

1606, *Vaughan's Trial*, 18 How. St. Tr. 485, 535, treason upon the high seas;²⁵ it was argued that the admiralty trial under the civil law was the proper one; L. C. J. Holt: "There needs not two witnesses to prove him a subject [of the King]; . . . Our trials by juries are of such consideration in our law that we allow their determination to be best and most advantageous to the subject; and therefore less evidence is required than by the civil law. So said Fortescue in his commendation of the laws of England." Dr. Oldish: "Because the jury are witnesses in reality, according to the laws of England, being presumed to be '*ex vicinato*'; but when it is on the high and open seas, they are not then presumed to be '*ex vicinato*,' and so must be instructed according to the rules of the civil law by witnesses."²⁶

That this was the actual and only reason for rejecting the numerical system is further to be seen in the circumstance that wherever the common law had preserved a "trial by witnesses," i. e. a determination by oaths made directly before the Court without the intervention of a jury, there the numerical system was found in force, — not in an elaborate form, but in its fundamental notion that one witness alone was not sufficient. "The laws of England," said Sir John Fortescue, "likewise affirm," with the civil law, "that a less number than two witnesses shall not be admitted as sufficient" in cases where a jury is not used. This was, indeed, the accepted tradition

²⁴ Here he names the instances of "trial" by witnesses without jury, in admiralty, etc.

²⁵ Apparently the statute under which this trial was had, substituting the jury trial for trial by the civil law, was passed chiefly for the very purpose of avoiding the latter's numerical rules; see the preamble to St. 27 H VIII, c. 4 (1535); St. 28 id. c. 15; Hawkins, Pl. Cr., b. 1, c. 37, § 8; c. 31, § 12.

²⁶ See also the arguments of Brook and Atkins, in *Beniger v. Fogoana* (1651), Plowd. 1, 12; Sir Matthew Hale (*ante* 1680), *History of the Common Law*, c. 12.

Burke, with his usual acumen, pointed out this feature of the history in his disquisition on Evidence, in the Report on Warren Hastings' Trial, in 1794 (31 Parl. Hist. 330).

for "trial by witnesses" made directly to the Court in the manner of the civil and ecclesiastical law. There has been some difference of opinion as to the kinds of issue in which this was the proper mode of trial;²⁷ but there seems to be no doubt that whenever it was the proper mode, the witnesses must be at least two in number.²⁸ Moreover, when the classical commentators refer to the rule for this mode of trial, they expressly point out as the reason for the distinction the fact that the jurors are themselves also witnesses.²⁹ This reason, then,—the different nature of the jury as a tribunal,—was the reason for the failure of the numerical system to find a place in our common-law rules of evidence.³⁰

(6) It remains only to ask why this question did not come up for practical settlement earlier than the 1600s? Why was not the contrast between the ecclesiastical system and the common-law system forced to an issue before that comparatively late period in the history of jury trial? The jury had been in general use for at least three hundred years, and the ecclesiastical Courts had had an even longer career in England. Why had not the attempt been earlier made to introduce the witness-rules of the latter into the procedure of the former? The answer is, simply, that there had before then been no witnesses to whom the ecclesiastical rules could be claimed to apply. It is perfectly well established that the extensive and habitual use of witnesses, in the modern sense, does not appear until the 1500s;³¹ and it may be supposed that all through the 1500s the increase of importance in the witnesses' function, and the relative quantity of the information supplied by them as compared with that supplied by the jurors' own knowledge, was but of slow and gradual growth. In the previous history of the jury, and until this period of 1500-1650, there would be no suggestion of an analogy to the situation in the civil-law courts; or, if the suggestion were made (as by Fortescue in the 1400s), it would be answered that there *were* in the jurors themselves more than the needed number of witnesses. But as the function of the jurors became more sensibly and markedly that of mere triers, or judges of fact, proceeding chiefly upon the evidence of witnesses in the modern sense, the analogy of the situation to that of the ordinary civil-law judge would be

²⁷ See Thayer, *Preliminary Treatise on Evidence*, 17-24; Best, *Evidence*, §§ 612-614.

²⁸ *Ante* 1726, Gilbert, *Evidence*, 151 (stating as an exception the case of a bastard's mother charging the father); Best, *ubi supra*; 1807, *Wambaugh v. Schenck*, 1 Penningt. 229, *semble* (lower); trial by witnesses before the Court without jury.

²⁹ 1629, Coke upon Littleton, 6d ("It is to be knowne that when a trial is by witnesses, regularly the affirmative ought to be proved by two or three witnesses, as to prove a summons of the tenant, or the challenge of a juror, and the like. But when the trial is by verdict of twelve men, there the judgment is not given upon witnesses or other kinde of evidence, but upon the verdict, and upon such evidence as is given to the jury they give their verdict"); 1726, Gilbert, *Evidence*, 151 ("for one man's

affirming is but equal to another's denying, and where there is no jury to discern of the credibility of the witnesses, there can be no distinction made; . . . that must be left to the determination of the neighborhood").

³⁰ Remarkable light is thrown on this, the inherent incompatibility of the jury system and the numerical system, by the debates in the French Constitutional Assembly of 1791, on the proposal to introduce trial by jury; the arguments turned on this very point, and in consequence the numerical rules were abolished (Ramein, *Hist. de la procédure criminelle*, 431, 433, 437, 510). In 1804, when trial by jury arose for reconsideration in the Council of State, the same arguments recurred.

³¹ This has been already noted *ante*, § 1864; it is fully expounded by the jury's historian (Thayer, *Preliminary Treatise*, 122-132).

fully perceived, and the propriety of applying the numerical system to the testimony upon which the jury now chiefly depended could fairly be claimed. This situation did not sensibly exist before the 1600s; and it was therefore not until that century that the question came to be pressed for practical solution.

In the matter of time, one more interesting consideration remains to note. If the change of the earlier conditions of jury trial had come about more rapidly, if before the 1500s the jurors had ceased to be also witnesses, and had come to decide chiefly upon the testimony of produced witnesses, the numerical system might after all have been grafted into our body of evidence-rules. The jury would then have been mere judges of fact, obliged to depend upon others' testimony and to weigh accurately its worth, while the popular quantitative conception of testimony would still have been in full force; there would thus have been every reason to expect the enforcement for juries of the general notions of testimony which were still in vogue among the common-law judges and the people at large. This is, to be sure, only one of those contingencies which can easily be reconstructed in imagination;²² but it illustrates at any rate the radical extent to which our common-law rules of evidence have been fundamentally affected by the nature of the jury tribunal and by the condition in which its steps of historical progress happened to place it at a given period.

(7) There did come into our law, however, sooner or later, a few specific rules of the numerical sort, all of them being of the simple type that declares a single witness insufficient and requires additionally either a second witness or corroborating circumstances. Some of these — namely, the Chancery rule requiring two witnesses to overcome a denial on oath, the rule requiring two witnesses to a will of personalty, and the rule requiring two witnesses to a cause for divorce — existed only in the practice of the ecclesiastical courts or that of chancery founded upon it; and wherever they came over into American common-law courts, they were direct borrowings. Others, namely, the

²² That this possibility, however imaginary, is by no means fanciful, may be seen from Professor Brunner's account of the fate that did befall in France, when one of the forms of jury trial — the *enquête par turbes*, consisting of ten men — came, in the course of its history, into competition with the ecclesiastical system: Schwurgerichte, ed. 1872, p. 398: "The *enquête par turbes* occupied a wholly exceptional position in relation to the principles which dominated French proof methods after the 1300s. The contrast between them lay in this, that in other cases [than trial by *enquête*] two witnesses sufficed to prove a fact [to the judge]. These two, however, were examined individually, while the *turbe* gave their verdict with a single utterance. . . . A way was therefore sought to bring this institution, now become alien, into harmony with the prevailing doctrine of proof. The *turbe* was now treated, for purposes of procedure, as a single person, and the verdict of the *turbe* was considered as equivalent

to the assertion of a single witness. But since proof by witnesses, according to the well-known ecclesiastical rule, required at least two concurrent witnesses, it was prescribed, in 1498, by the Ordinance of Blois, art. 13, that for proving a custom [the chief issue for which the *turbe* was used], two agreeing verdicts of *turbes* should be necessary. . . . Whereas formerly the saying ran, 'A *turbe* is equivalent to two witnesses,' henceforward it went, 'A *turbe* is equivalent to but one witness.' Each *turbe* consulted by itself and gave a separate verdict; to effect proof, both *turbes* must agree. . . . After this change, the *enquête par turbes* survived some two centuries, though preserving only slight practical importance. . . . By tit. 13, art. 1, of the Civil Ordinance of 1667, the *enquête par turbes* was abolished; and thus disappeared from French legal life the proof-method in which had been longest preserved the form of French *enquête* nearest related to the jury."

rule requiring an accomplice or a complainant in rape, or the like, to be corroborated, are either express statutory inventions or plain judicial creations; in either case modern innovations, as well as local in the United States, and not a part of the inherited common law. There remain two specific rules — the rule in treason and the rule in perjury — which do come down to us as inheritances; and though these also are in strictness not common-law rules, the one being statutory in origin, and the other an indirect grafting from the ecclesiastical law, yet their roots go some distance back in our law, and their history can be understood only in the light of the general survey just made of the history of the numerical system. The growth of these two rules may better be examined later in treating of their present scope.

§ 2033. *Policy of the Numerical System.* The numerical system of requirements dominated for many ages the law of Continental Europe; and, though its domination may be attributed historically to its harmony with merely primitive notions and to a system lacking in jury trial, still its wide prevalence, even into modern times, entitles it to respectful consideration, and obliges us to ask whether anything can be said in favor of it as a system, or in favor of specific rules resting on its principle. The circumstance, too, that by modern statutes many such rules have been introduced into our own law, and are still in force in many jurisdictions, makes it for us a living question, and not merely a subject of academic or historical interest.

(1) As for the system in gross — a highly developed body of rules in which for varying situations a varying number of witnesses are required and the value of every witness' testimony is reducible to definite numerical units or halves or quarters —, for such a system nobody at the present day finds anything to be said. The probative value of a witness' assertion is utterly incapable of being measured by arithmetic. All the considerations which operate to discredit testimony (*ante*, §§ 875-1144) affect it in such varying ways for different witnesses that the net trustworthiness of each one's testimony is not to be estimated, either in itself or in reference to others' testimony, by any uniform numerical standard. Probative effects are too elusive and intangible for that. The personal element behind the assertion is the vital one, and is too multifarious to be measured by rule. "Testimony," as Boyle well said, "is like the shot of a long-bow, which owes its efficacy to the force of the shooter; argument [*i. e.* circumstantial inference] is like the shot of a cross-bow, equally forcible whether discharged by a giant or a dwarf."¹ The cross-bow notion of testimony — the notion that one shot is as forceful as any other shot — can find no defenders to-day.²

(2) But there may be, here and there, specific numerical rules which may have something to say for themselves; and the question thus arises whether we are to go to the extreme of repudiation, and lay down the proposition that no such rules can be sound, — that there is no virtue in any rule

¹ Quoted in 8 How. St. Tr. 1041.

² For a scathing criticism of the system of "half-proofs," as it continued in some Conti-

ental countries as late as 1850, see Dr. Francis Lieber's *Civil Liberty and Self-Government*, App. III.

based on mere numbers. Practically, for us, this reduces itself to the question whether a rule declaring a single witness insufficient can in any event be a sound one. Nowhere to-day, in our law, is any other rule, based on the numerical principle, contended for; but this specific rule does find wide acceptance in many instances and jurisdictions. Even though in specific situations a rule of that sort may seem useful, still there must first be settled the larger and general question whether such a rule can ever be a wise one. If the numerical principle as a whole is based on a fallacy, a bygone conception of testimony, then can any rule based on mere numbers be justified?

The argument in favor of the utility of such a rule — declaring a single witness insufficient — has nowhere been better put than in the following passage, from a notable trial:

1688, *Algernon Sidney's Apologia*, 9 How. St. Tr. 916, 927 (arguing against the rule then obtaining that the two treason witnesses might testify to different overt acts): "I must ever insist upon the law of God given by the hand of Moses, confirmed by Christ and his Apostles, whereby two witnesses are necessarily required to every word and every matter. . . . The reason of this is not because two or more evil men may not be found —, as appears by the story of Susanna; but because it is hard for two or more so to agree upon all circumstances relating unto a lye as not to thwart one another. And whosoever admits of two testifying several things done or said in several times or places concurring — as is said of late — unto the same ends, destroys the reason of that law, takes away all the defence that the most innocent men can have for their lives, and opens a wide gate for perjury by taking away all possibility of discovering it."

The argument in answer has more than once been set forth by eminent thinkers on the law of evidence. It is in brief this: Conceding the occasional dangers of trusting a single witness, a curative rule requiring two witnesses is not sufficiently efficacious to overcome the new dangers and disadvantages which are thereby introduced:

1827, Mr. *Jeremy Bentham*, *Rationale of Judicial Evidence*, b. IX, pt. VI, c. I, § 1 (Bowring's ed., vol. VII, p. 521): "And after all, what is it worth? In the multitude of counsellors, says the proverb, there is safety; in the multitude of witnesses there may be some sort of safety, but nothing more: it is by weight, full as much as by tale, that witnesses are to be judged. *Pondere, non numero*. From numbers (the particulars of the case out of the question) no just conclusion can be formed. Nothing can be weaker than the best security that can be derived from numbers. In many cases, a single witness, by the simplicity and clearness of his narrative, by the probability and consistency of the incidents he relates, by their agreement with other matters of fact too notorious to stand in need of testimony, — a single witness (especially if situation and character be taken into account) will be enough to stamp conviction on the most reluctant mind. In other instances, a cloud of witnesses, though all were to the same fact, will be found wanting in the balance. There is no man conversant with the business of the bar, whose experience has not presented him with instances of dozens of witnesses opposed to each other in the same cause, line against line, and whose testimony has been of such a nature, that (however it may have been in regard to mendacity) falsehood must have been on one side or the other. . . . I do not mean to insinuate (it would be absurdity to insinuate) that the requisition of a second witness adds nothing to the security against perjury. No doubt but that, the greater the number of witnesses you require, the greater the security against perjury. All I contend for is, that that security (be it greater or less) is not so necessary as that you should pay so great a price for it as you do pay, and must

pay, by the licence you thereby grant to commit the crime in the presence and with the aid of any one. 'Reason,' says Montesquieu, 'requires two witnesses: because a witness who affirms, and a party accused who denies, makes assertion against assertion, and it requires a third to turn the scale.' — this, by way of proof of the proposition immediately preceding: — 'The laws which cause a man to perish upon the deposition of a single witness, are fatal to liberty.' This observation, short as it is, teems with errors. . . . 'Fatal to liberty?' What means *liberty*? What can be concluded from a proposition, one of the terms of which is so vague? What my own meaning is, I know; and I hope the reader knows it too. *Security* is the political blessing I have in view; security as against malefactors, on one hand, security as against the instruments of government, on the other. Security, in both these branches of it, is the benefit, the making due provision for which, in the case in question, is the object of these inquiries. Where two witnesses have been required, the principle of determination is obvious enough: it has been the fear of giving birth to the conviction and punishment of innocent persons, if in each case the testimony of a single witness were held sufficient. Engrossed by the view of this danger, the attention has overlooked the so much greater danger on the other side. . . . The giving security to the innocent, is the object and final cause of this ill-considered scruple. Of what description of the innocent? Of those, and those alone, to whom, by false testimony, it might happen to be subjected to prosecution in a court of justice. On the other hand, those to whom, in consequence of the licence granted by this same rule, it might happen, and (if the rule were universally known) could not but happen, to suffer the same or worse punishment at the hands of malefactors, are altogether overlooked. The innocent who scarcely present themselves by so much as scores or dozens, engross the whole attention, and pass for the whole world. The innocent who ought to have presented themselves by millions, are overlooked, and left out of the account."

1803, Mr. *W. D. Evans*, Notes to Pothier, II, 231 (commenting also on the saying that a law allowing one witness alone is "fatal to liberty"): "It might perhaps be said with greater justice that the absolute and indiscriminate exclusion of a single witness in every capital case would, if not fatal, at least be dangerous to security, — as the opportunity of a solitary situation would enable a miscreant to perpetrate a robbery or a rape with impunity, however respectable the character of the person who suffered the violence, and however assured by previous knowledge of the identity of the defendant. The supposed equality between the denial of the accused and the testimony of the witness is merely fanciful, unless it can be asserted that there is an equal inducement to make a false accusation for the purpose of destroying an individual with whom there is no previous animosity, and to deny the commission of a crime for which a party is justly liable to undergo punishment, — between (as I have seen it observed in a publication of Mr. Christian) a person who by his falsehood has everything to lose and nothing to gain, and one who has everything to gain and nothing to lose."

1849, Mr. *W. M. Best*, Evidence, §§ 507-601: "Those who take the civil-law view contend that it is dangerous to allow a tribunal to act on the testimony of a single witness, since by this means any person, even the most vile, can swear away the liberty, honour, or life of any one else; they insist on the undoubted truth, that the chance of discrepancy between the statements of two false witnesses, when examined apart, is a powerful protection to the party attacked. . . . Now we are by no means prepared to deny that under a system where the decision of all questions of law and fact is intrusted to a single judge, or in a country where the standard of truth among the population is very low, such a rule may be a valuable security against the abuse of power and the risk of perjury; but it is far otherwise where a high standard of truth prevails, and facts are tried by a jury directed and assisted by a judge. Add to this, that the anomaly of acting on the testimony of one person is more apparent than real; for the decision does not proceed solely on the story told by the witness, but on the moral conviction of its truth, based on its intrinsic probability and his manner of giving his evidence. And there are few cases in which the decision rests even on these circumstances alone; they are

usually corroborated by the presumption arising from the absence of counter-proof or explanation, and in criminal cases by the demeanour of the accused while on his trial. . . . Still, however, on the trial of certain accusations, which are peculiarly liable to be made the instruments of persecution, oppression, or fraud, and in certain cases of appointed evidence (where parties about to do a deliberate act may fairly be required to provide themselves with any reasonable number of witnesses, in order to give facility to proof of that act), the law may with advantage relax its general rule, and exact a higher degree of assurance than could be derived from the testimony of a single witness. Cases, too, must now and then, though extremely seldom, occur, in which the grossest injustice is done by giving credence to the story of a single witness. . . . On the other hand, however, as the requiring a plurality of witnesses clearly imposes an obstacle to the administration of justice, especially where the act to be proved is of a casual nature, — above all, where, being in violation of law, as much clandestinity as possible would be observed, — it ought not to be required without strong and just reason. Its evils are these: 1. It offers a premium to crime and dishonesty: by telling the murderer and felon that they may exercise their trade, and the knave that he may practise his fraud, with impunity, in the presence of any one person; and the unprincipled man that he may safely violate any engagement, however solemn, contracted under similar circumstances. 2. Artificial rules of this kind hold out a temptation to the subornation of perjury, in order to obtain the means of complying with them. 3. They produce a mischievous effect on the tribunal, — their natural tendency to react on the human mind; and they thus create a system of mechanical decision, dependent on the number of proofs, and regardless of their weight. . . . On the whole, we trust our readers will agree with us in thinking that any attempt to lay down a *universal* rule on this subject which shall be applicable to all countries, ages, and causes, is ridiculous; and that, although so far as this country is concerned, the general rule of the common law — that judicial decisions should proceed on the intelligence and credit, and not on the number of the witnesses examined or documents produced in evidence — is a just one, there are cases where, from motives of public policy, it has been wisely ordained otherwise.”³

What we must conclude, then, is that our whole presumption should be against any specific rule requiring a number of witnesses; that such arbitrary measurements are likely to be of little real efficacy and to introduce disadvantages greater than those which they purport to avoid; and that therefore any such rule, when advanced for a specific issue — for example, treason or perjury — or for a specific witness — for example, an accomplice or a rape-complainant — must justify itself by experience as overwhelmingly useful and efficacious.

§ 2034. **General Principle; One Witness may Suffice; An Uncontradicted Witness need not be Believed.** The common law, then, in repudiating the numerical system, lays down three general principles:

³ When Napoleon abolished for the Rhine provinces the number-rules of the civil law, he stigmatized their weakness in this epigram: “Thus, one honorable man by his testimony could not prove a single rascal guilty; though two rascals by their testimony could prove an honorable man guilty” (Bonnier, *Traité des Preuves*, ed. 1888, § 293). “The Turkish Law rigidly holds every person to prove all the facts of his case by two Turkish witnesses, which makes the dealing (with a view of dispute) extremely difficult. . . . Nay, a merchant [of

England] there will directly hire a Turk to swear the fact of which he knows nothing; which the Turk doth out of faith he hath in the merchant’s veracity; and the merchant is very safe in it for, without two Turks to testify, he cannot be accused of the subornation. This is not, as he [in England], accounted [by the English merchants] a villanous subornation, but an easy under an oppression, and a lawful means of coming into a just right” (Roger North’s *Life of Sir Dudley North*, 1744, p. 46).

(1) In general, the testimony of a single witness, no matter what the issue or who the person, may legally suffice as evidence upon which the jury may found a verdict.¹

(2) Conversely, the mere assertion of any witness does not of itself need to be believed, even though he is unimpeached in any manner; because to require such belief would be to give a quantitative and impersonal measure to testimony:

1869, *Beck, J.*, in *Callanan v. Shaw*, 34 Ia. 441, 444 (disapproving an instruction "that no important fact can be proved without at least the testimony of one credible and unimpeached witness"): "It is impossible, from the nature of things, for the law to provide rules which shall determine the quantity or amount of evidence necessary to establish a fact in judicial proceedings. There can be devised no standard—no unit of measurement, whereby we may determine just what measure of evidence shall be required to prove a fact in issue. To say that one credible witness is necessary, is a very unsatisfactory and indefinite rule indeed. As a matter of fact, evidence can usually be brought before a jury only through the medium of human testimony; there must, of necessity, be a witness, or one standing in that position, through whom the fact can be brought to the mind of a court or jury. . . . There must be, then, in most cases, to establish a fact, a witness, whether that fact be important or unimportant. But this rule gives no measure for the quantity of evidence, for knowledge, intelligence, qualities of memory, and all other attributes that make up ability, together with those moral qualities which constitute credibility, are most unequally united in men, so that one possessing all the attributes of ability and credibility in the highest degree, and so known to the tribunal before whom he testifies, would, in his evidence, outweigh an indefinite number of witnesses who possess the same attributes in the lowest degree. It is also true, that a witness, in order to prove a fact by his evidence, must be credible—he must be such a witness as will be entitled to receive the belief, the faith of others. But here again, from the very nature of the case, there are indefinite degrees in this character we call credibility. One may possess it in the highest degree, another in the lowest. It follows, therefore, that when evidence is weighed, to determine whether a fact has been proven thereby, all the qualities going to make up what is termed ability and credibility to a witness must be fully considered in order to arrive at a truth. And who should so weigh and consider these qualities? Most evidently the jury. The Court cannot discharge this duty for them, because the very opinion which they may form upon these questions of ability and credibility in truth determines their finding. . . . If the witness, from want of intelligence, or from any other cause, is incompetent under the rules of law, the Court will not permit him to testify; but when the evidence of the witness is before the jury, all questions of credibility are for them, and for them alone."

¹ The English authorities have already been given in § 2032, ante; that the principle is rarely mentioned does not affect its actual acceptance: Cal. C. C. P. 1872, § 1844 ("The direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact except perjury and treason"); 1889, *Fengar v. Brown*, 57 Conn. 60, 17 Atl. 321 ("If the jury believe the statement of a witness, there is no rule of law forbidding them to found their verdict upon it, though the witness stands alone and his testimony is opposed to that of others"); 1868, *Callanan v. Shaw*, 34 Ia. 440, 444 (quoted *supra*); Mont. C. C. P. 1895, § 3120 (like Cal. C. C. P. § 1844); Or. C. C. P. 1892, § 681 (like Cal. C. C. P. § 1844); 1866, *Gould v. Safford*, 39 Vt. 490, 505.

Occasionally we find a statement that one witness suffices if not contradicted; for example, 1897, *Southwest Va. M. L. Co. v. Chase*, 9 Va. 50, 37 S. E. 826; but this is merely a piece of careless heterodoxy.

The following codes state the general principle in broader form; Alaska C. C. P. 1900, § 673 (like Or. C. C. P. § 845); Cal. C. C. P. 1872, § 2061, par. 2 (the Court is to instruct the jury "that they are not bound to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a less number or against a presumption or other evidence satisfying their minds"); Or. 1892, § 845 (like Cal. C. C. P. § 2061).

1901, *Marshall, J.*, in *Bourde v. Jones*, 110 Wis. 82, 85 N. W. 671: "It is not infrequently supposed that a sworn statement is necessarily proof, and that, if uncontradicted, it establishes the fact involved. Such is by no means the law. Testimony, regardless of the amount of it, which is contrary to all reasonable probabilities or conceded facts — testimony which no sensible man can believe — goes for nothing; while the evidence of a single witness to a fact, there being nothing to throw discredit thereon, cannot be disregarded."²

(3) As a corollary of the first proposition, *all rules requiring two witnesses, or a corroboration of one witness, are exceptions to the general principle.*

To these exceptions we now come. In classifying them, the main distinction seems to depend upon whether the rule applies to a certain charge or issue (*i. e.* to any and every witness produced to prove that issue), or to a certain *kind of witness* (*i. e.* to that kind of witness only, and to no others, irrespective of the issue, or to no others upon the same issue). Accordingly, under one group (A) fall the rules affecting the charge or issue of *treason, perjury, sundry crimes, chancery causes, wills, and sundry civil causes* (*post*, §§ 2036–2054); and under another group (B) fall the rules affecting an *accomplice, a complainant in rape, bastardy, seduction, and the like, a defendant in divorce, and sundry other kinds of witnesses* (*post*, §§ 2056–2074).

A. RULES OF NUMBER DEPENDING ON THE KIND OF ISSUE.

§ 2036. *Treason; (a) History of the Rule.* It is clear enough that the rule requiring two witnesses to prove a charge of treason was not a common-law rule, but had its beginning in the statutes of the 1500s.¹ Sir Edward Coke at one time ventured to advance the contrary assertion,² but his pretended authorities do not bear him out, and his utterances on this point appear by the circumstances to be of not the slightest weight.³ There was no instance, before the 1600s, of a rule that the testimony of a single witness called before a jury at common law should be insufficient, — as the history already examined (§ 2032) amply indicates.

¹ 1899, *Lee Sing Far v. U. S.*, 35 C. C. A. 327, 94 Fed. 834, 839 (collecting authorities). For a further notice of the fallacy that an uncontradicted witness must be believed, see *ante*, § 1012, *post*, § 2498.

² 1585, *Bishop Flabber's Trial*, 1 How. St. Tr. 205, 401; 1762, *Foster, Crown Law*, 223 ("It hath been generally agreed, and I think upon just grounds (though Lord Coke hath advanced a contrary doctrine), that at common law one witness was sufficient in the case of treason as well as in every other capital case").

³ 1629, *Coke*, 2 Inst. 26 ("It seemeth by the ancient common law one accuser or witness was not sufficient to convict any person of high treason; . . . and that two witnesses be required appeareth by our books, and I remember no authority in our books to the contrary").

⁴ Coke's vacillation in legal tenets, when the interests of partisanship pressed, has often been observed upon other points (an instance is noted *post*, § 2550), and the present is merely one more instance of his untrustworthiness. In 1603, in

Raleigh's Trial (2 How. St. Tr. 15, 16; quoted *ante*, § 1944), Coke as the King's Attorney-General, and on his way to be Chief Justice, had maintained that two witnesses in treason were unnecessary; his violent insistence upon Cobham's testimony, during his colloquy with Raleigh, supplied a notorious instance of unbridled forensic brutality and coarseness. But some years later, in 1629, when Coke had fallen from the favor of his royal master and was in opposition, as a champion of popular liberties, he printed his Third Institute, and inserted in it a directly contrary assertion (above quoted); making no allusion to his own former doctrine nor to the repeated judicial decisions since 1555, and citing palpably irrelevant passages in support of his novel proposition. "I have great respect," said Lord Redesdale (*Barbary Peerage Case*, 1810, App. to LeMarchant's *Gardner Peerage Case*, 437), "for the memory of Lord Coke, but he was too fond . . . of telling untruths to support his own opinions."

The rule begins, then, with the statutes of the 1500s; and the chief interest of its history lies in the controversy over the supposed repeal of the first statute, and in the true apportionment between the political parties of the blame of maintaining this repeal.

(1) The first statutory provision was that of Edward VI (1547 and 1552), by which two witnesses were declared necessary.⁴ The immediate circumstances leading to this step were probably the extreme methods used in some of the political trials with which the reign of Henry VIII had just closed.⁵ The law of treason had been by this monarch, as never before, wrested to his own personal and despotic ends; and (as Sir James Stephen has acutely remarked in another connection⁶) the dominant legislator class, who might not have cared how many a humble subject was unfairly convicted of petty thievery, were well alive to the possibilities of treason law, if the rapid turn of the political wheel should chance to bring them underneath; and they probably were moved by the thought of self-protection against the future.⁷ As an expedient for this purpose, it was natural that they should seek aid in a rule of numbers. The numerical conception of testimony was then still an instinctive one among all; the ecclesiastical rules of that sort lay plainly in sight, in the spiritual practice; and a rule of numbers was perhaps not only the natural, but to them the only conceivable expedient for providing this protection. That this was in fact the source of the rule was at any rate the tradition as handed down a century later:

1680, *Lord Stafford's Case*, T. Raym. 409: "Upon this occasion my lord Chancellor in the Lords' House was pleased to communicate a notion concerning the reason of two witnesses in treason, which [reason] he said was not very familiar, he believed, and it was this: Anciently, all or most of the judges were churchmen or ecclesiastical persons, and by the canon law now and then in use all over the Christian world, none can be condemned of heresy but by two lawful and credible witnesses, . . . and anciently heresy was treason; and from thence the parliament thought fit to appoint that two witnesses ought to be for proof of high treason."

(2) But the reactionary times of Mary's reign arrived shortly; and the following statute, the foundation of two hundred years' controversy, was immediately passed:

⁴ 1547, St. 1 Edw. VI, c. 12, § 22 (no person is to be indicted or arraigned for treason, petty treason, or misprision, "unless the same offender or offenders be accused by two sufficient and lawful witnesses, or shall willingly without violence confess the same"); 1552, St. 5 & 6 Edw. VI, c. 11, § 12 (no person is to be indicted or arraigned for treason, "unless the same offender or offenders be thereof accused by two lawful accusers, which . . . accusers at the time of the arraignment of the party so accused, if they be then living, shall be brought in person before the party so accused and avow and maintain what they have to say against the said party . . . unless the said party arraigned shall willingly without violence confess the same").

⁵ P. Professor Willis-Bond (*State Trials New Treason*, 1879, vol. I, Introd. xxxix) thinks that this statute "was probably the result of such cases as the Marquis of Exeter's and the Earl of Surrey's." For another explanation, not essentially different, see Eastel's Statutes, 102, as quoted in 1 How. St. Tr. 520, and Bishop Burnet, arguing in the House of Lords, in 13 How. St. Tr. 537, 752 (quoted *ante*, § 1864).

⁶ History of the Criminal Law, I, 226 (quoted *ante*, § 1846).

⁷ Notice that they did not extend the provision to Ireland, where these considerations did not apply: 1795, Jackson's Trial, 25 How. St. Tr. 783, 861, 872; 1798, Sheare's Trial, 26 id. 255, 377.

1554, St. 1 & 2 P. & M. c. 10, § 7; all trials for treason hereafter had "shall be had and used only according to the due order and course of the common laws of this realm and not otherwise."

What was the effect of this statute? It did not expressly repeal the statutes of Edward; but if the due order and course of trials included the modes of proof at a trial, then the new rule of proof introduced by the former statute now fell away, and the common-law practice, which made no requirement of number, was restored. Such was the judicial construction now put upon the new act. Whether it was the correct one need not here be considered in detail. Arguments of various sorts have been advanced;⁸ the most significant one to the contrary, perhaps, is that the very next statute, Chapter 11, in the same session,⁹ expressly restored the old evidence-rule (of one witness) for petty treason committed by forging the coin of the realm, and that the Legislature would have used similar express words in Chapter 10, had they intended the same thing.

On the whole, it may be supposed that the Legislature did intend in Chapter 10 to strike hard at treason, and to annul the recent innovation by which two witnesses were required. But the important thing is that this was the judicial construction of the statute of Mary from the very first,—beginning within a year after its enactment, and continuing for a century.¹⁰ This was afterwards forgotten, during the political ascendancy of the Whigs, after the Revolution of 1688 and during the early 1700s, when every reminiscence of the Stuarts was a dark one and all the doings of their times were anathematized. The trials of Sir Walter Raleigh in 1603, and of other noted victims of that time, were after the Revolution regarded by many as instances of unfair and corrupt political oppression by the Stuart judges. But time has vindicated the judges from such charges.¹¹ Whatever they were or did, they were not in this respect either unscrupulous or corrupt, and they did not distort the law for the pleasure of James or Charles. They merely applied, as

⁸ The arguments may be found in the following places; 1716, Hawkins, Pl. Cr. II, c. 46, § 2; 1762, Foster, Crown Law, 237 (arguing forcibly for the view that there was no repeal); 1803, East, Pleas of the Crown, I, 128.

⁹ 1554, St. 1 & 2 P. & M. c. 11, § 3 (all trials for offences connected with the coin of the realm may be tried "by such like evidence and in such manner and form as has been used and accustomed within the realm at any time before the first year of Edward the Sixth"); c. 10, § 12 (similar); 1697, St. 8 & 9 W. III, c. 26, § 7 (similar); these were applied, as needing only one witness, in the following cases: 1725, R. v. Anstruther, T. Jones 233 (impairing the coin); 1748, R. v. Gahagan, 1 Leach Cr. L., 4th ed. 42 (similar).

¹⁰ 1555, Anon., Dyer, 132 a, 134 a ("The intent of the Statute 1 & 2 P. & M. c. 10, was to remove the two accusers and two witnesses"; approved by the judges; perhaps the same case as the following): 1556, Anon., Brooke's Abridgment, "Corone," 219 (at a conference of all the justices, it was agreed that "for no trea-

son under St. 25 Edw. III, was there need of accusers at the trial, because it is enacted by the statute of 2 M. c. 10, that all trials for treason shall be held according to the common law only and not otherwise, and the common trial of the common law is by jury and by witnesses and by no accusers"; otherwise for treason charged under the same act of 2 M., "according to an article contained in the said statute at the end thereof"); 1586, Abington's Trial, 1 How. St. Tr. 1141, 1148; 1651, Love's Trial, 5 id. 43. Some additional cases reaching the same result, but bearing only on the history of the Hearsay rule, have been cited *ante*, § 1364; the same statute of Edward had provided for confronting the accused with the two witnesses, and thus its repeal came into question also in that connection. So also in the history of confession law (*ante*, § 816) the same construction is found.

¹¹ Professor Willis-Bund, in his *State Trials for Treason*, cited *supra*, has demonstrated this for procedure in general and the substantive law of treason.

in duty bound, the traditional and long-established construction of the statute of Mary, — a construction plainly laid down by the entire body of justices from the earliest moment after its enactment. Moreover, this construction was not even a mark of the Tudor and Stuart régimes as a whole. It continued under the Commonwealth, in the very heat of the passion of overthrow and reform. In the meanwhile, a single statute requiring two witnesses for a specific kind of treason had been passed, under a Tudor monarch;¹³ but during the whole of the century, from 1554 to 1659, under Tudor, Stuart, and Cromwell alike, the construction of the statute of Mary was uniform. The hostile judgment of the dominant party of the Revolution was merely a political dogma.

(3) Before the end of the first half of the 1600s, however, had come Coke's Third Institute, in which he now advanced the view that the statute of Mary had not repealed the statutes of Edward.¹⁴ His reasoning is apparently that the word "trial" in the statute meant merely the mode of decision, i. e. by a jury, as contrasted with a decision by judges hearing witnesses without a jury. To be sure, the word "trial" bore then that distinction;¹⁵ but it is a forced meaning to put upon it in the statute, since nobody had ever thought of "trying" treason by witnesses to a judge without a jury (which is what the "otherwise" of the statute would mean, according to Coke). Moreover, Coke's *dictum* on this particular point was valueless, for the reasons already noticed.¹⁶ Nevertheless, his utterance in the Third Institute, like every other printed utterance of that man of prodigious learning, counted for a great deal. Professional opinion began to change, at any rate, not long after this time.

The change must have been matured before the Restoration of Charles II in 1660; for immediately upon the Restoration, and in the very first year of it, in spite of all the power of the restorers and of their bitter and dominating purpose to punish the death of Charles I, and in spite of the large grist of traitors upon whom to sate their appetite for revenge, the whole aspect of affairs changes. Foremost comes the statute of 1661, the first treason act passed after the Restoration, in which the rule of two witnesses is deliberately established for all treasons defined by that act.¹⁷ Next, but equally significant, came the judicial overthrow of the century-long construction of the statute of Mary. It was now affirmed by the Courts, and assumed and practised when not expressly affirmed, that the statute of Mary had not repealed

¹³ 1558, St. 1 Eliz. c. 1, § 37 (no person to be arraigned for treason under this act, "unless there be two sufficient witnesses" produced if living and in the realm). The St. 13 Eliz. c. 1, has sometimes been said to make a similar provision; but this is a misunderstanding of it.

¹⁴ 1629, Coke, 3 Inst. 26 ("for that act of 1 & 2 P. & M. extends only to trials by the verdict of twelve men *de vicinis* . . . and the evidence of witnesses to the jury is no part of the trial, for by law the trial in that case is not by witnesses, but by the verdict of twelve men, and so a manifest diversity between the evidence to a jury and a tryall by jury").

¹⁵ *Ante*, § 2032; Thayer, Preliminary Treatise, 17-24.

¹⁶ *Supra*, note 3.

¹⁷ 1661, St. 13 Car. II, c. 1, § 1 (for treasons under this section, persons must be "legally convicted thereof upon the oaths of two lawful and credible witnesses, upon trial, or otherwise convicted or attainted by due course of law"); § 5 (no persons shall be convicted of the treasons in this act unless accused "by the testimony and deposition of two lawful and credible witnesses upon oath," produced face to face, etc., as in St. 5 & 6 Edw. VI, *supra*).

the statute of Edward; so that two witnesses were now to be required for treasons at large. The remarkable thing is that this decision was reached, for the first instance, in the very year of Charles' restoration, and in the trial of the regicides themselves, against whom the greatest license of judicial harshness might have been expected;¹⁷ and it was repeated and maintained on all other occasions during the remaining years which fate had allotted to the Stuart family under Charles II and James II.¹⁸ Here again is laid bare the fallacy of the Whig dogma of the 1700s, that all the evil judicial practices occurred under the Stuarts, while all the reforms came in with the Revolution.¹⁹ The reform in this instance came with the very first moment of the Stuart Restoration. Dangerous and unwholesome as was undoubtedly the reinstatement of this worthless family, the judges of the time must be redeemed from the reproach of an unscrupulous and tyrannous application of the law. On the contrary, it was through them that the change began. It is merely another instance out of several, in which we are to date the improvements of trial procedure from the Restoration, and not from the Revolution.²⁰ Policy, no doubt, as well as a real growth of sentiment, and a sagacious perception of the wisdom of maintaining the restored power by abandoning the excesses of the earlier Stuarts, furnished in part the motives. But the fact remains, and deserves to be recorded.

(4) The ensuing legislation of William III, after the Revolution,²¹ estab-

¹⁷ May, 1660, *Regicides' Case*, Kel. 9 (it was assumed that the law for two witnesses was in force).

¹⁸ Dec. 1662, *Tong's Case*, Kel. 22 (though some of the judges believed that there had been a repeal, yet "they all agreed that if the law for two witnesses be in force," it was to be interpreted in a certain way; but at page 49, Kelyng expresses his own opinion in favor of the repeal; this was not later than 1671, the year of his death); 1679, *Whitebread's Trial*, 7 How. St. Tr. 405; 1680, *Lord Castlemaine's Trial*, ib. 1111; 1680, *Lord Stafford's Trial*, T. Raym. 407, 7 How. St. Tr. 1298, 1527. The same result on this point is seen in the interpretation of the statute (already noticed) against treason by false coining: 1673, *R. v. Acklandby*, 3 Keb. 68 (clipping the coin; two judges apparently differed in opinion); 1684, *Anon.*, T. Jones 233 (clipping the coin; at a conference of the judges it was resolved that by the statute of 1 & 2 M. "one witness is sufficient, for that restores the trial at common law for such case, which was altered generally for all cases of treason by 1 Edw. VI and 5 & 6 Edw. VI, which required two witnesses where one was sufficient by the common law"). Lord Hale, writing some time before 1690, utters inconsistent views: Hale, Pl. Cr. I, 300 (after examining the *pro* and *con*, he ends: "thus the reasons stand on both sides, and though these [for repeal] seem to be stronger than the former," yet it is safest to err on the side of mercy); II, 286 (the early statute "is not altered by the statute of 1 & 2 P. & M."; citing Coke).

¹⁹ One example, from many, may suffice:

"The truth is that up to the period of the Revolution of 1688, our criminal trials are a disgrace to the national annals" (Forsyth, *Hortensius the Advocate*, 3d ed., 331).

²⁰ It is indeed fairly presumable that the direct foundation of the reforms which ensued at the Restoration was laid by the destructive work of the Commonwealth lawyers in tearing away the traditions of the earlier régime. Mr. Robinson's learned account (*Juridical Society Papers*, III, 567; 1869) of "Anticipations under the Commonwealth of Changes in the Law" exhibits the materials for this conclusion. "The goodness," he says, "of the laws of Charles II, as contrasted with the badness of his government, has drawn a compliment from Blackstone, epigrams from Burke and Fox, and a paradox from Buckle. An enquiry into the source of these laws may show that the paradox is unreal, the epigrams unfounded, the compliment due to the Republicans; that they, in redressing grievances which from the time of James I and Bacon had been fostering rebellion, forestalled the law-reformers, not of the Restoration only, but of our own age." Compare the history of the registration system (*ante*, § 1650), of the allowance of witnesses to an accused (*ante*, § 575), and of the self-accrimination privilege (*post*, § 2550).

²¹ 1694, St. 7 W. III, c. 3, § 2 (no person shall be indicted or tried for high treason working corruption of blood, or misprision, "but by and upon the oath and testimony of two lawful witnesses, either both of them to the same overt act, or one of them to the one and the other of them to another overt act of the same treason,"

lished the law, by continuing in a general statute that which the Restoration had instituted, partly by statute and partly by judicial action, a generation before. From the beginning of the 1700s there has never been any doubt or vacillation upon the rule that two witnesses at least are required upon a charge of treason.²⁰

§ 2037. *Same: (b) Policy of the Rule.* The object of the rule requiring two witnesses in treason is plain enough. It is, as Sir William Blackstone said, to "secure the subject from being sacrificed to fictitious conspiracies, which have been the engines of profligate and crafty politicians in all ages."¹ But is the rule fitted to accomplish this concededly desirable purpose? On this point Mr. Best's suggestions seem to present the correct view:

1849, Mr. W. M. Best, *Evidence*, §§ 616-619: "The reason for requiring two witnesses in high treason and misprision of treason — unquestionably that which influenced the framers of the modern statutes on the subject, whatever may have been the motive of those of the earlier ones — is the peculiar nature of these offences, and the facility with which prosecutions for them may be converted into engines of abuse and oppression. For although treason, when clearly proved, is a crime of the deepest dye, and deservedly visited with the severest punishment, yet it is one so difficult to define — the line between treasonable conduct and justifiable resistance to the encroachments of power, or even the abuse of constitutional liberty, is often so indistinct; the position of the accused is so perilous, struggling against the whole power and formidable prerogatives of the Crown — that it is the imperative duty of every free State to guard, with the most scrupulous jealousy, against the possibility of such prosecutions being made the means of ruining political opponents. . . . The principle of 7 & 8 Will. III, c. 3, requiring two witnesses in treason, has, however, been severely attacked. Bishop Burnet, speaking of that statute shortly after it was passed, said the design of it seemed to be to make men as safe in all treasonable conspiracies and practices as possible. . . . [Bentham observes] that after the passing of this statute, 'a minister might correspond (as so many ministers were then actually corresponding) with the exiled king by single emissaries, and be safe.' . . . All this reasoning, however, is more specious than sound. It seems based, in some degree at least, on the false principle that has been examined in the Introduction to this work, and which is to be found more or less in every part of Bentham's *Treatise on Judicial Evidence*, viz., that the indiscreet passiveness of the law is as great an evil as its corrupt or misdirected action; and consequently that the erroneous conviction and punishment of an innocent, a violent, or even a seditious man, for the offence of treason, works the same amount of mischief as the escape of a traitor from justice, and no more. . . . By the law as it stands, persons sometimes escape with a conviction for felony or sedition whose conduct, considered with technical accuracy, amounts to treason. But, on the other hand, those who are innocent of that terrible crime lie under no dread of being

unless the accused "shall willingly, without violence, in open court confess the same, or stand mute or refuse to plead"; c. 7 (the foregoing provision is not to extend to counterfeiting the coin).

²⁰ There has, however, been some change as to the scope of the treason to which the rule applied: 1800, St. 40 Geo. III, c. 93 (in trials for treason by killing or doing bodily harm to the King, the trial may be "upon the like evidence as if such person or persons stood charged with murder"); 1821, St. 1 & 2 Geo. IV, c. 24 (extends the St. 7 W. III to Ireland, compare note 7, *ante*); 1842, St. 5 & 6 Vict. c. 51 (similar to St. 40 Geo. III); 1843, St. 11 & 12

Vict. c. 12, § 4 (in trials for compassing death or bodily harm to the King, etc., no conviction is to be had for this so far as expressed by "open or advised speaking," unless "upon his own confession in open court, or unless the words so spoken shall be proved by two credible witnesses"). Compare, also, the statutes *ante*, note 9, as to treason by false coining.

A special form obtains in *Canada*: *Crim. Code* 1892, § 684 (no person shall be convicted "upon the evidence of one witness, unless such witness is corroborated in some material particular by evidence implicating the accused").

¹ *Commentaries*, III, 353.

falsely accused of it; and when a conviction for treason does take place, it is on such unquestionable proof that the blow descends on the disaffected portion of society with a moral weight, increased a hundred-fold by the moderation of the Executive in less aggravated cases."

The true solution seems to depend on the relative proportion, in experience, of two elements, namely, the likelihood of false accusations, as compared with the harm of a guilty person's escape. When the former (relatively to the specific crime) is large, and the latter (relatively to the specific crime) is small, then the two-witness rule may be justified as being often effective, and seldom harmful when not effective. Now for treason this relation does seem to exist. In times of bitter political division, the dominant political party has the strongest motive and the amplest means of securing false testimony, to rid itself of its opponents; while the harm of a real traitor escaping judicial punishment is relatively small, because treason, when it is confined to a few individuals, can never really endanger the State, and, when it represents a widespread opinion in the community, the judicial punishment of a few representatives can rarely put an end to it. The rule of two witnesses, then, seems to rest on justifiable grounds of policy.

§ 2038. *Same: (c) Detail of the Rule.* (1) The requirement of an overt act is one of substantive law, and is therefore beyond the present purview. But a question arises as to the scope of the rule of evidence, with reference to the tenor of the required witnesses' testimony. Is it enough if there is one witness to one overt act and another to a different overt act, or must both witnesses speak to the same overt act? The former view was established as orthodox, in applying the original statute of Edward;¹ and it was expressly confirmed in the enactment of 1696.² But, having regard to the virtue and operation of the rule, as maintained by Sidney,³ this seems an erroneous view; for the opportunity of detecting the falsity of the testimony, by sequestering the two witnesses⁴ and exposing their variance in details, is wholly destroyed by permitting them to speak to different acts. It is true that the difficulty of obtaining testimony to genuine treason would be thereby greatly increased; but, as already noted (*ante*, § 2037) the very object of the rule is to protect those who are innocent of treason; therefore, if the rule is to be maintained at all, regard should chiefly be had to the interests of those for whose protection it is established. Accordingly, the constitutional provisions adopting the rule for this country have everywhere and properly required that the two witnesses shall testify to the same overt act.⁵

¹ 1649, Lilburne's Trial, 4 How. St. Tr. 1269, 1401; 1660, Regicides' Case, Kel. 9 ("If two witnesses prove two several acts tending to the compassing the King's death, the treason is proved by two witnesses as the law in case of treason requireth"); 1680, Earl of Stafford's Trial, 7 How. St. Tr. 1293, 1537; 1681, Colledge's Trial, 8 id. 549, 620; 1696, Sir John Friend's Trial, 13 id. 1, 131; 1696, Vaughan's Trial, ib. 485, 535.

² St. 7 Wm. III, c. 3, § 2 (quoted *ante*, § 2036, note 21); § 4 ("If two or more dis-

tinct treasons of diverse heads or kind shall be alleged in one bill of indictment, one witness produced to prove one of the said treasons and another witness produced to prove another of the said treasons shall not be deemed or taken to be two witnesses to the same treason within the meaning of this act"); 1867, R. v. McCafferty, 10 Cox Cr. 608 (statute applied).

³ *Ante*, § 2036.

⁴ *Ante*, § 1838.

⁵ These are given in the next section; the Federal clause was applied in the following

(2) The two witnesses are not necessary for any fact to be proved *other than the overt act*.⁶ In particular, two witnesses are not necessary for an *extrajudicial confession* offered as part of the evidence.⁷ The *infra-judicial confession* ("in open court") is virtually a plea of guilty;⁸ and for this no witnesses are needed, not only by the statute's express terms, but because an act done in court, before the judge, in the nature of a pleading, never needs witnesses.

(3) The rule of two witnesses means, by reason of the general principle (*ante*, § 2030, par. 3), that they must be effective witnesses, i. e. they must *both be believed by the jury*.⁹ A rule requiring a certain quantity of evidence is binding upon the jurors as well as upon the judge; they are not to convict unless in their judgment the required amount exists. If the testimony of one is rejected by the jury upon consideration, there remains but one witness, — less than the rule requires.

(4) It was once ruled, before the Hearsay rule had been established (*ante*, § 1364), that one witness directly to an act and another witness to the *hearsay statement* of the first, were sufficient; but this was soon repudiated,¹⁰ and would of course never again be proposed.

(5) The order of evidence is in general left to the determination of the trial Court (*ante*, §§ 1867, 1870). No specific regulation exists for the order of the evidence required by the treason-rule, and the *overt act* need therefore not be evidenced *before the other evidence* is offered.¹¹

cases: 1795, *U. S. v. Mitchell*, Wharton's State Trials, 170, 183; 1799, *Charge of Iredell, J.*, to Grand Jury, *ib.* 490 (the rule in England "has always appeared to be contrary to the true intention of the law which made two witnesses necessary"); 1799, *U. S. v. Fries*, *ib.* 482, 585, 594; 1807, *U. S. v. Burr*, 4 Cr. 473, 525.

⁶ 1762, *Foster*, Crown Law, 240; 1808, *Fest, Pleas of the Crown*, I, 130.

⁷ 1781, *Respublica v. M'Carty*, 2 Dall. 86 (undecided); 1799, *U. S. v. Fries*, Whart. St. Tr. 482, 586, 594 (Peters, J., does not require this; but Iredell, J., does). The above conclusion seems unquestionable. Under the English practice, an extrajudicial confession might serve as one of the overt acts (*ante*, § 818); but then, by the English rule (*supra*), a single witness sufficed. In the United States, if an extrajudicial confession had to have two witnesses, it could only be because it was an overt act, but then no other overt act would be needed, which is inconsistent with the United States doctrine that such a confession cannot serve as an overt act. If by the substantive law, the overt act must be independent of such a confession, then by the Constitution the two witnesses are required only for the overt act.

For the sufficiency of an extrajudicial confession, see *post*, § 2071.

⁸ It can hardly be doubted that, apart from the express words of the statute, the *confession* which is to dispense with the two-witness rule must be practically a *plea of guilty*; the English

cases and the history of the phrase "in open court" have been given *ante*, § 818; the American authority is scanty: 1781, *Respublica v. M'Carty*, 2 Dall. 86 (apparently not decided; the words "in open court" not being in the Pennsylvania statute; yet here the confession was in fact so made); 1787, Madison's Journal of the Constitutional Convention, Scott's ed. II, 563 ("Mr. L. Martin moved to insert after 'conviction, etc.' 'or on confession in open court'; and on the question, the negative States thinking the words superfluous, it was agreed to," by a vote of 7 to 3); 1799, *U. S. v. Fries*, Whart. St. Tr. 482, 586, 594 (confession before a committing magistrate is not sufficient).

⁹ 1680, Lord Castlemaine's Trial, 7 How. St. Tr. 1067 (L. C. J. Scroggs: "If two witnesses are produced both speaking materially to the thing, the one is believed and the other not, whether upon these two witnesses the jury can find a person guilty, or no? I am of opinion it is but one witness"; Mr. J. Raymond: "I never heard any man question it. If the law says there must be two witnesses produced, it says they must both be believed").

¹⁰ 1572, Lord Lumley's Case, cited Coke, 3 Inst. 25 (repudiating Thomas' Case, 1553); 1680, Hale, Pl. Cr. II, 280; 1716, Hawkins, Pl. Cr. II, c. 25, § 189.

¹¹ 1807, *Burr's Trial*, Robertson's Rep. I, 460, 469 (the overt acts need not first be proved, before evidence of intent, etc., is offered; lucid opinion by Marshall, C. J.).

Distinguish the question whether *other overt*

§ 2039. *Same: (d) Constitutional Sanctions.* The rule of two witnesses in treason appealed to the founders of our government as one of the few doctrines of evidence entitled to be guaranteed against legislative change.¹ A provision of this sort is found in the Federal Constitution and in three-fourths of our State Constitutions.² This does not mean, however, that the rule is in itself one of the most important, or that its principle is fundamental in our system. It signifies merely that, since treason involves an opposition to the dominant political influences, a rule which could be changed or abolished at pleasure by the dominant political party in the Legislature would be virtually no rule at all for such cases. It has, however, been placed also in the statutes of certain Territories; yet here, presumably, the Federal Constitution would in any case extend its protection.

§ 2040. *Perjury: (a) History of the Rule.* By the end of the 1600s it was decisively settled (*ante*, § 2032) that the ecclesiastical rules about numbers of witnesses were not to be adopted into the common law. It was after that

acts than those named in the indictment may be received as evidence of intent; this is entirely proper under the general principle of circumstantial evidence (*ante*, § 367).

¹ 1787, Madison's Journal of the Federal Convention, Scott's ed., II, 564, 566 ("It was then moved to insert, after 'two witnesses' the words 'to the same overt act.' Dr. Franklin wished this amendment to take place. Prosecutions for treason were generally virulent, and perjury too easily made use of against innocence. Mr. Wilson: 'Much may be said on both sides. Treason may sometimes be practiced in such a manner as to render proof extremely difficult,—as in a traitorous correspondence with an enemy.' On the question," the vote was 5 to 3 for the amendment).

² The following provisions are substantially identical, except where otherwise noted; the date and clauses are those of the Constitution, unless otherwise noted: U. S. Const. Art. III, § 3 ("No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court"); St. 1902, c. 140, § 9, March 3, 32 Stat. 55 (rule applied to trials in the Philippine Islands by any tribunal); Ala. 1876, I, 19; Ariz. P. O. 1887, § 1652; Ark. 1874, II, 14; Cal. 1879, I, 20; C. C. P. 1872, § 1968 ("two witnesses to the same overt act" are required); omitted by the Commissioners of 1901 (for the Commission's validity, see *ante*, § 438); P. C. § 1103 (no conviction "unless upon the testimony of two witnesses to the same overt act, or upon confession in open court"); Colo. 1876, II, 9; Conn. 1875, IX, 4; Fla. 1887, Decl. of Rights, 23; Rev. St. 1892, § 2909 (like the Constitution, but requires "two lawful witnesses"); Ga. 1877, I, I, par. 2; Code 1895, § 5156 (two witnesses or one and corroborating circumstances); Cr. C. § 991 (two witnesses); Haw. Penal Laws, 1897, § 31; Ida. 1899, I, 5; Rev. St. 1887, § 6005 (like Cal. C. C. P. § 1968); Ill. Rev. St. 1874, c. 23, § 264 ("by two or more witnesses, or voluntary confession in open court");

Ind. 1851, I, 29; Rev. St. 1897, § 1901; Ia. 1857, I, 16; Code 1897, § 4726; Kan. 1859, Bill of R. 13; Ky. 1891, 229; La. 1879, 151; 1898, 162 (inadvertently omitting "or"); Me. 1819, I, 13; Pub. St. 1882, c. 117, §§ 1, 2 (treason must be proved by two witnesses to the same overt act, or confession in open court; misprision of treason, in the same way, but one witness may prove one act, and another another one of the same treason); Mass. Pub. St. 1882, c. 201, § 4, Rev. L. 1902, c. 206, § 4 (requires two "lawful witnesses to the same overt act of treason," unless on confession in open court); Mich. 1850, VI, 30; Minn. 1857, I, 9; Miss. 1890, III, 10; Mo. 1875, II, 13; Rev. St. 1899, § 2630; Mont. 1889, III, 9; P. C. 1895, § 2079; C. C. P. 1895, § 2371 (like Cal. C. C. P. § 1968); Nebr. 1875, I, 14; Comp. St. 1899, § 7203 (same; furthermore, for offences of surrendering military posts, etc., or setting on foot a military expedition against any of the U. S., etc., "two credible witnesses," or confession in open court, are necessary) Nev. 1864, I, 19; N. J. 1844, I, 14; N. D. 1889, I, 19; Rev. C. 1895, § 8193; Ok. Rev. St. 1898, § 7298 (treason provable only by confession in open court or by "the testimony of two credible witnesses to the same overt act laid in the indictment"; "two credible witnesses" also necessary for misprision of treason or unauthorized military expedition); Or. 1859, I, 24; C. C. P. 1892, § 778 (like Cal. C. C. P. § 1968); R. I. Gen. L. 1896, c. 275, § 3 (no conviction for treason, except by "testimony of two lawful witnesses to the same overt act for which he shall then be on trial, unless he shall in open court confess the same"); S. C. 1895, I, 23; S. D. 1889, VI, 108; Tex. 1876, I, 22; C. Cr. P. 1895, § 783; Utah 1895, I, 19 (omitting the confession clause); Rev. St. 1898, § 1854; Va. Code 1887, § 3653 (punishable if proved by "two witnesses to the same overt act or by confession in court"); Wash. 1889, I, 27; W. Va. 1872, II, 6; Wis. 1843, I, 10; Wyo. 1889, I, 28.

time that there arose the single common-law exception to the doctrine that one witness alone may suffice in every case, namely, the rule that one witness, without corroborating circumstances, does not suffice on a charge of perjury. Yet even this rule was an indirect borrowing from the civil law.

First of all, it is fairly clear that there was no such rule of common law until towards the first half of the 1700s.¹ That the quantitative conception of an oath still prevailed at that time has been already noticed (*ante*, § 3032), and in this respect the acceptance of the rule is not strange. But why should an exceptional step have been taken at that epoch for perjury trials, which was not taken, either before or after, for any other kind of common-law trials? The causes that answer this question are scarcely to be mistaken, and they were two; one may be called a mechanical, the other a moral cause.

(1) The first of these lay in the important circumstance that in 1640, towards the end of Charles the First's reign, the Court of Star Chamber had been abolished² and its jurisdiction transferred³ to the King's Bench. Now the proceedings of the Star Chamber Court, being presided over by the Lord Chancellor, had always been conducted according to the ecclesiastical or civil law, by following or adopting its methods, much as did the Court of Chancery; and, in particular, the ecclesiastical rule of two witnesses obtained therein.⁴ Furthermore, the crime of perjury, though also cognizable as a statutory crime in the ordinary criminal courts, was practically dealt with almost exclusively in the Star Chamber.⁴ Hence, on the one hand, there was little or no occasion for any question to arise before 1640 as to proof of perjury in a common-law court; while, on the other hand, after the transfer of jurisdiction at that date, the canon-law notions of proof peculiar to perjury were likely to pass over and be adopted as a whole in the subsequent common-law practice. There was, therefore, by this change of mechanism, a tradition prepared, by the middle of the 1600s, for an exceptional doctrine to be established for proof of perjury; and by the end of the 1600s

¹ The following seem to be the earliest cases: 1693, *R. v. Fauchaw, Skinn.* 327 ("There being but the oath of the prosecutor, and so oath against oath, the defendant was acquitted"); 1714, *Parker, C. J.*, in *R. v. Muscot*, 10 Mod. 192 ("There is this difference between a prosecution for perjury and a bare contest about property, that in the latter case the matter stands indifferent, and therefore a credible and probable witness shall turn the scale in favor of either party. But in the former, presumption is ever to be made in favor of innocence, and the oath of the party will have a regard paid to it until disproved. Therefore, to convict a man of perjury, a probable, a credible witness is not enough; but it must be a strong and clear evidence, and more numerous than the evidence given for the defendant; for else there is only oath against oath"; this was said in charging a jury, and no precedent was cited); 1736, *R. v. Nunes, Lee cas. t. Hardw.* 265 (*Lord Hardwicke, C. J.* ["One witness is not sufficient], unless there were very strong circumstances; because one

man's oath is as good as another's"); 1745, *R. v. Broughton*, 2 Str. 1229.

² St. 16 Car. I, c. 10.

³ *Ante* 1635, Hudson, *Treatise of the Star Chamber*, 223, in Hargrave's *Collectanea Juridica*, vol. II ("they always require indifferent witnesses' clear proof, not by relation, and double testimony, or that which amounteth to double testimony").

⁴ 1596, *Dampart v. Sympeon*, Ore. El. 520 ("Until the statute of 3 H. VII, c. 1, which gives power to examine and punish perjuries in the Star Chamber, there was not any punishment for any false oath of any witness at the common law"); 1883, Sir J. Stephen, *History of the Criminal Law*, III, 245 ("The present law upon the subject . . . originated entirely, as far as I can judge, in decisions by the Court of Star Chamber"); 1903, *Leadam's Select Cases in the Star Chamber*, *Seld. Soc. Pub.*, vol. XVI, p. cxxxiv, p. 102, note 17. Hudson, *supra*, p. 71, says that perjury was "usually punished" there.

(as exhibited in the cases above cited) such a doctrine was making its appearance.

(2) But why did not the corrective consideration, already noted (*ante*, § 2032) which applied to prevent such a numerical rule in other common-law trials, apply here also, namely, the consideration that the jurors were themselves twelve witnesses, as being capable of and entitled to contribute information of their own? In the first place, the living strength of this consideration had by the beginning of the 1700s substantially disappeared,⁵ and in this must probably be sought the real explanation why the perjury rule was able to obtain a firm footing. In other words, the quantitative notion of an oath was still popular enough, while the corrective notion — that of the jury as witnesses — had practically disappeared, and thus the way was open. Furthermore, a charge of perjury was the one case where a plausible inducement for such a rule was presented; because in all other criminal cases the accused could not testify, and thus one oath for the prosecution was in any case something as against nothing; but on a charge of perjury the accused's oath was always in effect in evidence, and thus, if but one witness was offered, there would be merely (as Chief Justice Parker said) oath against oath. Thus, in a perjury case, the quantitative theory of testimony would present itself with the greatest force. Such seems to be the course of thought which made possible the tardy introduction of this rule.

It found a permanent place, however, in the common law; for, in spite of a perception of its incongruity with modern ideas, and of an occasional hesitation, the rule, persisting through the 1700s, was fully confirmed in England in the 1800s.⁶

§ 2041. *Same: (b) Policy of the Rule.* The rule is in its nature now utterly incongruous in our system. The quantitative theory of testimony, if consistently applied, should enforce a similar rule for every criminal charge, now that the accused is competent to testify. "Oath against oath," as a reason for the rule, is quite indefensible.

But there may be reasons of policy, founded on experience (*ante*, § 2033, par. 2) sufficient to justify its maintenance:

1840, Mr. W. M. Best, *Evidence*, §§ 605-606: "The reason usually assigned in our books for requiring two witnesses in perjury — viz., that the evidence of the accused having been given on oath, when nothing beyond the testimony of a single witness is produced to falsify it, there is nothing but oath against oath — is by no means satisfactory. All oaths are not of equal value; for the credibility of the statement of a witness depends quite as much on his deportment when giving it, and the probability of his story, as on the fact of its being deposed to on oath; and, as is justly remarked by Sir W. D. Evans, the motives for falsehood in the original testimony or deposition may be much stronger with reference to the event on the one side than the motives for a false accusation of per-

⁵ *Ante*, § 10; Thayer, *Preliminary Treatise*, 174.

⁶ 1831, R. v. Mudie, 1 Moo. & Rob. 126 (perjury in swearing to an insolvent schedule by omitting certain debtors; the debtors testified each to the existence of his own debt; Lord Tenterden thought it "difficult to give

any other evidence," and said that on conviction a new trial might be moved; but there was an acquittal); 1839, R. v. Gardiner, 8 C. & P. 757 (rule applied); 1840, R. v. Virrier, 13 A. & E. 317, 524 (rule applied); 1842, R. v. Parker, Car. & M. 689, 646, Tindal, C. J. (similar to R. v. Mudie; rule applied).

jury on the other. . . . The foundations of this rule, we apprehend, lie much deeper. The legislator dealing with the offence of perjury has to determine the relative weight of conflicting duties. Measured merely by its religious or moral enormity, perjury, always a grievous, would in many cases be the greatest of crimes, and as such be deserving of the severest punishment which the law could inflict. But when we consider the very peculiar nature of this offence, and that every person who appears as a witness in a court of justice is liable to be accused of it by those against whom his evidence tells, who are frequently the basest and most unprincipled of mankind; and when we remember how powerless are the best rules of municipal law without the coöperation of society to enforce them, — we shall see that the obligation of protecting witnesses from oppression, or annoyance, by charges, or threats of charges of having borne false testimony, is far paramount to that of giving even perjury its deserts. To repress that crime, prevention is better than cure; and the law of England relies, for this purpose, on the means provided for detecting and exposing the crime at the moment of commission, — such as publicity, cross-examination, the aid of a jury, etc.; and on the infliction of a severe, though not excessive punishment, wherever the commission of the crime has been clearly proved. But in order to carry out the great objects above mentioned, our law gives witnesses the privilege of refusing to answer questions which tend to criminate, or to expose them to penalty or forfeiture; it allows no action to be brought against a witness, for words written or spoken in the course of his evidence; and it throws every fence round a person accused of perjury. Besides, great precision is required in the indictment; the strictest proof is exacted of what the accused swore; and, lastly, the testimony of at least two witnesses must be forthcoming to prove its falsity. The result accordingly is that in England little difficulty, comparatively speaking, is found in obtaining voluntary evidence for the purposes of justice; and although many persons may escape the punishment awarded by law to perjury, instances of erroneous convictions for it are unknown, and the threat of an indictment for perjury is treated by honest and upright witnesses as a *brutum fulmen*.¹

This result, if tested by the canon already laid down for the rule in treason (*ante*, § 2037), may be correct; though in the end all depends upon local experience. If there is a relatively greater likelihood of false accusation of perjury (on the part of defeated litigants seeking to revenge themselves), and if there is, relatively to the interests of litigants in general, less harm in the escape of a guilty perjurer than in that of other criminals, then the rule justifies its existence.

§ 2042. *Same: (c) A Single Witness, if Corroborated, Suffices.* A feature of the rule is now to be noticed which vitally distinguishes this and most of the following rules from the treason-rule, namely, the feature that a *single witness suffices, if corroborated*. The other and corroborating evidence will of course usually be furnished in some shape through another witness, and thus there come to be two witnesses. But the corroborating evidence might conceivably come without another witness, for example, through the inspection of the accused's person (*ante*, § 1150). But the corroboration is asked merely to confirm the single witness' testimony and to induce the belief of it; so that when the corroboration has been furnished and the witness is believed, the verdict ultimately is founded upon the single witness' assertion.

¹ The rule was forcefully opposed in the following debate: 1828, Feb. 29, Mr. G. Lamb, Speech on the Courts of Common Law, Hans. Parl. Deb., 2d ser., XVIII, 567 ("The difficulty of convicting in cases of perjury is one of the great blot in the law, both civil and criminal," etc.).

Or, put in another way, the treason rule requires two witnesses to the same fact; the perjury rule requires only one witness to the fact, and merely provides a means of reaching a belief in his testimony. This rule, then, while requiring a specific quantity of evidence, does not by any means rest exclusively on the antiquated numerical or quantitative conception of testimony. It proceeds in part on the modern rational theory that an oath-assertion varies infinitely in its quality and significance, and that a single person's assertion, if made under specified conditions of credibility, may suffice to produce complete persuasion.

(1) This aspect of the rule — as requiring merely a *single witness*, if duly corroborated — has been fully recognized in modern times. It is said¹ that Lord Tenterden maintained two witnesses to the same fact to be necessary, and such an understanding perhaps prevailed with other judges at one time.² But it has been since repudiated in England;³ and it is now everywhere conceded in this country that a single witness, somehow corroborated, suffices.⁴

(2) As to the *nature of the corroboration*, no detailed rule seems to have been laid down, nor ought to be laid down.⁵ The jury should be instructed

¹ 1836, Coleridge, J., in *R. v. Champney*, 2 Law. Cr. C. 259; 1841, Lord Brougham, in *Jordan v. Money*, 5 H. L. C. 185, 232.

² 1827, *State v. Howard*, 4 McC. 159 (no authority cited).

³ 1854, Lord Brougham, *id. supra*; 1859, *R. v. Braithwaite*, 8 Cox Cr. 354, 444, 1 F. & F. 638, 646 ("that rule is now exploded"); 1860, *R. v. Towey*, 8 Cox Cr. 323; Can. Crim. Code 1892, § 694 (like the treason rule, quoted *ante*, § 2030).

⁴ Besides the following, the cases cited *post* assume the same principle: Ariz. P. C. 1887, § 1652 (perjury must be proved by "two witnesses, or one witness and corroborating circumstances"); Cal. C. C. P. 1872, § 1968 (perjury and treason must be proved "by more than one witness; treason, by the testimony of two witnesses to the same overt act; and perjury, by the testimony of two witnesses, or one witness and corroborating circumstances"); omitted by the Commissioners of 1901 (for the validity of their amendments, see *ante*, § 468); Ga. Code 1895, § 5156 (two witnesses, or one and corroborating circumstances); Ida. Rev. St. 1887, § 6005 (like Cal. C. C. P. § 1968); 1885, *Mackin v. People*, 115 Ill. 312, 329, 3 N. E. 322; 1892, *State v. Bliss*, 111 Mo. 464, 469, 20 S. W. 210; Mont. C. C. P. 1895, § 3271 (like Cal. C. C. P. § 1968); 1898, *Terr. v. Williams*, 9 N. M. 400, 54 Pac. 232; Or. C. C. P. 1892, § 778 (like Cal. C. C. P. § 1968); Tex. C. Cr. P. 1895, § 786 (no conviction "except upon the testimony of two credible witnesses, or of one credible witness corroborated strongly by other evidence as to the falsity of the defendant's statement under oath, or upon his own confession in open court"); 1893, *Meeks v. State*, 32 Tex. Cr. 420, 422, 24 S. W. 98; Utah Rev. St. 1898, § 4748 ("Perjury must be proved by the testimony of two witnesses, or one witness and corroborating circumstances").

⁵ *England*: 1834, *R. v. Mayhew*, 6 C. & P. 315 ("even a letter [not on oath] . . . would be sufficient to make it unnecessary to have a second witness"); 1841, *R. v. Yates*, Car. & M. 132, 139 ("evidence confirmatory of that one witness in some slight particulars only," not sufficient); 1842, *R. v. Parker*, *id.* 639, 646 (there must be "some documentary evidence or some admission or some circumstances to supply the place of a second witness"); 1852, *R. v. Boulter*, 2 Den. Cr. C. 396, 5 Cox Cr. 542, 16 Jur. 185 (no general rule laid down; "there must be something in the case to induce the jury to believe one rather than the other"; here, entries made at the time by the single witness, held insufficient); 1859, *R. v. Webster*, 1 F. & F. 515 (memorandum made at the time by the single witness, held sufficient); 1859, *R. v. Braithwaite*, *ib.* 638, 8 Cox Cr. 354, 444 (no corroboration, on the facts); 1860, *R. v. Towey*, 8 Cox Cr. 323 (oral admissions, held sufficient corroboration); 1865, *R. v. Shaw*, 10 *id.* 66, 72 (Erie, C. J.: "What degree of corroborative evidence is requisite must be a matter for the opinion of the tribunal that tries the case, which must see that it deserves the title of corroborative evidence; any attempt to define the degree of corroborative evidence necessary would be illusory"); *United States*: 1900, *People v. Rodley*, 131 Cal. 240, 63 Pac. 351 (instructions held correct); 1903, *People v. Parent*, 129 *id.* 400, 73 Pac. 423 (statute applied); 1902, *State v. Fahey*, — Del. —, 54 Atl. 690 (rule applied); 1876, *Ransom v. Christian*, 56 Ga. 351, 356 (need not amount to the testimony of a second witness); 1902, *Hereford v. People*, 197 Ill. 222, 64 N. E. 310 (rule applied); 1866, *Hendricks v. State*, 26 Ind. 493 (need not be "equivalent to the positive testimony of one witness"); 1866, *State v. Raymond*, 20 La. 532, 537 ("it must be at least

not to convict unless the testimony of the principal witness has been so corroborated that they believe it to be true beyond a reasonable doubt.

(3) The rule of course applies only to the proof of the *fact alleged as falsely sworn*, and therefore a corroboration as to the act of swearing and the words sworn is not called for.⁶ Moreover, the corroboration is required for the perjured fact as a whole, and not to every detail or constituent part of it.⁷ But as to each separate assignment of fact in the indictment (whether or not in the same count) the rule applies independently.⁸

(4) The rule has usually been held to apply even in *civil causes* where the proof of perjury becomes necessary.⁹

§ 2043. *Same: (d) Exception for Contradictory Oaths.* Suppose that the accused has sworn contraries on two different occasions; does the rule still require a corroborated witness, when as against the oath charged in the indictment is produced the other oath to the contrary? It may be that the two contraries are reconcilable, or it may be that the accused's knowledge of the falsity on the one occasion does not of itself appear from the contrary oath. But it is not a question whether additional corroborative evidence may be needed. The question is whether it is invariably needed, as a rule, even when the nature of the fact sworn to makes it perfectly clear that the falsity must have been stated knowingly. Furthermore, the difficulty of framing an indictment (arising from the uncertainty whether the one or the other assertion should be alleged false) has nothing to do with the

strongly corroborative" and "must be by independent circumstances"; 1902, *Williams v. Com.*, — Ky. —, 68 S. W. 371 (rule applied); 1848, *Com. v. Parker*, 2 Osh. 312, 233 (there must "be established, by independent evidence, strong corroborating circumstances, of such a character as clearly to turn the scale"); 1901, *Whittle v. State*, 79 Min. 327, 30 So. 722 (rule applied); 1874, *State v. Heed*, 57 Mo. 253, 284 (it must be "at least strongly corroborative"); 1903, *State v. Faulkner*, — Id. —, 75 N. W. 116 (rule applied); 1827, *State v. Moller*, 1 Dev. L. 263, 265 ("some other independent evidence is necessary"); 1826, *Woodbeck v. Keller*, 6 Cow. 119, 121 (it need not be "tantamount to another witness," but it must be "strongly corroborative" of the single witness); 1859, *Crusen v. State*, 10 Oh. St. 258, 269 (need not be "of sufficient force to equal the positive testimony of another witness"); 1879, *Williams v. Com.*, 91 Pa. 493, 501 (if "any material circumstance be proved" in confirmation, it suffices); 1819, *State v. Hayward*, 1 Nott & McC. 546, 548 ("some other independent evidence" is necessary); 1875, *State v. Bale*, 43 Tex. 532, 535 (corroboration, under the Code, must be of the material facts).

• 1903, *Stone v. State*, — Ga. —, 45 S. E. 630 (the perjurer testifying to the fact of subornation, on a charge of subornation, need not be corroborated, but the rule of corroboration applies to the perjury itself); 1864, *State v. Wood*, 17 Ia. 18; 1847, *Com. v. Pollard*, 12 Meta. 225, 237; 1901, *State v. Henswick*, 85

Minn. 19, 28 N. W. 23 (subornation; the corroboration of the actual perjury need not extend to the fact of the defendant's inducement); 1819, *State v. Hayward*, 1 Nott & McC. 546, 548. *Contra*: 1827, *State v. Howard*, 4 McC. 159 (to prove "the facts sworn to").

• 1843, *Patteson, J.*, in *R. v. Roberts*, 3 C. & K. 607, 614 ("There need not be two witnesses to prove every fact necessary to make out an assignment of perjury. If the false swearing be that two persons were together at a certain time, and the assignment of perjury that they were not together at that time, evidence by one witness that at the time named the one was at London, and by another witness that the other was at York, would be sufficient proof"); 1902, *State v. Courtright*, 66 Oh. 35, 63 N. E. 590 (the subject of the corroborated witness' testimony must be the main fact forming the subject of the perjury).

• 1890, *Marvin v. State*, 53 Ark. 395, 398, 14 S. W. 87; 1879, *Williams v. Com.*, 91 Pa. 493, 501.

• 1849, *Spruill v. Cooper*, 16 Ala. 791 (slander for charging with perjury); 1851, *Laughran v. Kelly*, 8 Cush. 199, 202 (action on the case for garnishor's false statement under oath); 1826, *Woodbeck v. Keller*, 6 Cow. 119 (slander for charging with perjury); 1828, *Coulter v. Stewart*, 2 Yerg. 225 (slander by charging perjury). *Contra*: 1876, *Rice v. Coolidge*, 121 Mass. 393, 397 (action for subornation of perjury; the perjury rule is "applicable only to criminal proceedings"; *Laughran v. Kelly* not cited).

rule of evidence; for it may be impossible to allege which of the two is false, while it may still be an incontrovertible fact that the accused has in either the one or the other assertions spoken with knowing falsity. Is it then not proper, without more, to allow the jury, merely by comparing the assertions, to determine that one of them was perjured? The question is practically the same even where the second assertion was not under oath; for the nature of the fact asserted remains the same, and the comparison may equally suffice to convince the jury. It seems clear that the rule here suffers an exception, and that by mere comparison the jury may determine the falsity. The purpose of the rule is to protect the accused from the false testimony of a single witness swearing against him; here no attempt is made to condemn him upon the credit of another person; the rule's protection is not needed; and the rule should fall with its reason:

1840, *Wayne, J.*, in *U. S. v. Wood*, 14 Pet. 430, 437, 440: "If it be true, then (and it is so) that the rule of a single witness being insufficient to prove perjury rests upon the law of a presumptive equality of credit between persons, or upon what Starkie terms the apprehension that it would be unsafe to convict in a case where there is merely the oath of one man to be weighed against that of another, [it follows that we may] satisfy the equal claim to belief, or remove the apprehension, by concurring written proofs which existed and are proved to have been in the knowledge of the person charged with the perjury, when it was committed, especially if the written proofs came from himself and are facts which he must have known because they were his own acts,—and the reason for the rule ceases. . . . In what cases, then, will the rule not apply? or, in what cases may a living witness to the *corpus delicti* of a defendant be dispensed with and documentary or written testimony be relied upon to convict? We answer, to all such where a person is charged with a perjury directly disproved by documentary or written testimony springing from himself, with circumstances showing the corrupt intent; in cases where the perjury charged is contradicted by a public record, proved to have been well known to the defendant when he took the oath, the oath only being proved to have been taken; in cases where a party is charged with taking an oath contrary to what he must necessarily have known to be the truth, and the false swearing can be proved by his own letters relating to the fact sworn to, or by other written testimony existing and being found in the possession of a defendant and which has been treated by him as containing the evidence of the fact recited in it."¹

This conclusion has been usually accepted, and may be regarded as the orthodox one, presumably for the case of a contradictory statement not under oath,² and certainly for that of a contradictory oath.³

¹ So also a good statement in the *Reporters' notes* to 5 B. & Ald. 939 (1832).

² 1840, *U. S. v. Wood*, 14 Pet. 430, 437, 441 (false oath to cost of imported goods; the invoice-book and letters of the defendant, held sufficient to prove the perjury; *Thompson, J.*, diss.; quoted *supra*); *Contra,semble*: 1854, *Dodge v. State*, 24 N. J. L. 455, 461 (cited *infra*).

³ 1764, *Anon.*, cited 5 B. & Ald. 931, 939 (per Lord Mansfield, C. J., Wilmut, Aston, and Yates, JJ.); 1774, *R. v. Dane*, cited ib. 937, *semble* (per Chambre, J.); 1823, *R. v. Knill*, cited ib. 939 ("the jury might infer the motive

from the circumstances"); 1823, *R. v. Harris*, ib. 924, 932 (counsel for defendant conceded that the contradiction of oaths "might have been sufficient alone for the jury to have convicted the defendant of perjury"); 1823, *R. v. Jackson*, 1 Lew. Cr. C. 270, *semble* (if the jury believe one of the oaths false); 1840, *U. S. v. Wood*, 14 Pet. 430, 437 (quoted *supra*). *Contra*: 1833, *R. v. Wheatland*, 3 C. & P. 238, Gurney, B. (contradiction of oaths, alone not sufficient, and confirmatory evidence required; but here the difficulty turned on the indictment); 1839, *R. v. Gaynor*, 1 Cr. & D. 142, 147 (Ireland; *Torrans, J.*, thought this sufficient; but the judges

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§ 2030-2074] CORROBORATION; PERJURY, SUNDRY CRIMES. § 2044

§ 2044. *Sundry Crimes, under Statutes.* In a few jurisdictions, a require-
 ment of number has been introduced by statute for certain additional crimes.¹
 The propriety of such rules will depend somewhat on local conditions, and
 may perhaps be adequately tested by the canon already stated (*ante*, § 2037).
 Most of these statutes have probably been based upon some single local
 instance of hardship, and not upon any general survey of experience in the
 class of crimes dealt with. They may contain suggestions worth considering,
 but on the whole they are likely to be of little service. A capable judiciary,

afterwards unanimously decided to the contrary);
 1844, R. v. Hughes, 1 C. & K. 519, 527, per
 Tindal, C. J. (merely to "prove the two con-
 tradictory statements and leave it there" is not
 enough); 1864, Dodge v. State, 34 W. J. L.
 465, 461 (such evidence "in connection with
 the testimony of one other witness" suffices).

The following peculiar cases also is sound:
 1908, People v. Duddy, 173 N. Y. 165, 64 N. E.
 807 (perjury in falsely testifying that he did not
 remember certain criminal acts; no direct testi-
 mony from witnesses as to the accused's memory
 being possible, the rule was held not applicable,
 and proof by comparison with his repeated prior
 testimony asserting and admitting the acts was
 held sufficient); compare Pigott's perjury in the
 Perrell case (quoted *ante*, § 1200).
 § 1845, St. 48 & 49 Vict. c. 69, § 2
 (procuring for prostitution or seduction; no
 conviction to be had on the evidence "of one
 witness, unless such witness be corroborated in
 some material particular by evidence implicating
 the accused"); § 3 (as also for procuring defile-
 ment by fraud, etc.); Can. Crim. Code 1892,
 § 684 (the treason rule, quoted *ante*, § 2036,
 applied to forgery, fraudulent marriage, seduc-
 tion, and kindred offenses specified); Ariz. P. C.
 1887, § 1659 (false pretences; if the pretence
 is not in writing by defendant, it must be proved
 "by the testimony of two witnesses, or that of
 one witness and corroborating circumstances," ex-
 cept on a charge of marrying or obtaining money
 or property by personation); Cal. P. C. 1872,
 § 1110 (certain kinds of cheating by false pre-
 tences; if the alleged pretence was merely "in
 language unaccompanied by a false token or
 writing," then there must be either a written
 memorandum signed by defendant, or two wit-
 nesses, or "one witness and corroborating cir-
 cumstances"); Conn. Gen. St. 1857, § 1622
 (no person is to be convicted of any capital
 crime "without the testimony of at least two
 witnesses, or that which is equivalent thereto");
 1881, State v. Smith, 49 Conn. 376, 384 (the
 two witnesses are not required for every impor-
 tant fact; what is the "equivalent" of the
 witnesses is entirely for the jury); Ida. Rev.
 St. 1857, § 7670 (false pretences; unless there
 be a writing in defendant's hand, there can be
 no conviction "unless the pretence be proven
 by the testimony of two witnesses, or that of
 one witness, and corroborating circumstances";
 not applicable to personation to obtain mar-
 riage or receive money or property); Ind. Rev.
 St. 1897, § 1892 ("Three witnesses at least

shall be required to prove the fact of genui-
 ness" of a note, bill, etc., or "other instrument
 of writing"; but "the single evidence of the
 cashier of the bank purporting to have issued
 the same" suffices); Kan. Gen. St. 1897, c. 102,
 § 236 (persons of skill may testify to the genu-
 ineness of a bill or other writing; "but three
 witnesses at least shall be required to prove the
 fact, except (that) in case of a larceny thereof
 the single evidence of the president, cashier,
 or teller of the bank purporting to have issued
 the same, or the maker thereof, may be received
 as sufficient"); 1883, State v. Foster, 30 Kan.
 345, 367, 2 Pac. 628 (statutory requirement for
 number applies only when expert witnesses are
 used; not, as here, to a cashier testifying to a
 draft of his own bank); Ky. Stats. 1899, § 1594
 (no one is to be convicted of offenses under the
 election-law "upon the testimony of a single
 witness, unless sustained by strong corroborat-
 ing circumstances"); 1896, Com. v. Hart, 99
 Ky. 7, 32 S. W. 128 (applying the statute);
 Mass. St. 1896, c. 329, Rev. L. 1902, c. 212, § 7
 (enticing for prostitution, tormented, etc.; one
 witness alone is not sufficient, unless "corrob-
 orated in some material particular"); Minn.
 Gen. St. 1894, § 2525 (there can be no commit-
 ment by a justice to a reform school for incor-
 rigibility, "unless each charge is proved by at
 least two disinterested witnesses"); N. J.: 1608,
 State v. Kenilworth, — N. J. L. —, 54 Atl.
 244 (construing St. 1889, p. 249, requiring the
 oath of one or more "credible" witnesses to
 convict of perjury); N. D. Rev. C. 1896,
 § 8196 (like Cal. P. C. § 1110); Cal. Stats.
 1893, § 2157 (a threat, not in writing, to publish
 a libel, and the "character of libellous matter,"
 must be proved "by at least two witnesses,
 or by one witness and corroborating circum-
 stances"); § 5210 (like Cal. P. C. § 1110); S. C.
 St. 1897, c. 22, p. 457 (breach of a verbal con-
 tract for labor is punishable by fine or imprison-
 ment, "provided, the verbal contract herein
 referred to shall be witnessed by at least two
 disinterested witnesses"); 1901, State v. East-
 erlin, 61 S. C. 74, 20 S. E. 260 (brother of a
 party, held disinterested, under the statute);
 S. D. Stats. 1899, § 2654 (like Cal. P. C. § 1110);
 Utah Rev. St. 1898, § 4861 (like Cal. P. C.
 § 1110).

For other statutes requiring corroboration
 of a specific kind of witness (rape-complain-
 ant, children, Chinese, etc.), see *post*, §§ 2056-
 2066.

and an effective jury system (both depending upon a conscientious citizenship and a sound condition of politics), are in the end the only real safeguards of an innocent man.

§ 2045. *Civil Cases: Rules derived from the Ecclesiastical Law.* The rule of the later Roman law, and of its successors, the Continental civil law and the canon law, required at least two witnesses to prove any fact (*ante*, § 2032). Whatever detailed additional rules of number existed on the Continent, and in the earlier English canon law as administered in the spiritual Courts, the later ecclesiastical law in England seems to have been satisfied in general with the simple rule of two witnesses for all classes of cases.¹ In the final form, as it appears when the rulings of those Courts begin to be published (that is, by the end of the 1700s), the rule is still further attenuated, and requires only one witness with corroborating circumstances.² The further definition of the notion of corroboration seems seldom to have been formulated into rules,³ and was carried out in each case according to the discretion of the judge.

But in the meantime this rule of the ecclesiastical law had been exercising an influence, direct and indirect, upon English law outside of the narrow jurisdiction of the ecclesiastical Courts. In the first place, its methods of procedure and proof had been adopted by the Chancellors, who, being originally ecclesiastics, were trained in the civil and canon law, and made its practice the basis of that of the Court of Chancery.⁴ These rules, there enforced, became an integral part of the common law as distinguished from the canon law. In the next place, the jurisdiction of the ecclesiastical Courts was exclusive over some subjects—matrimonial and testamentary—and thus certain rules became associated with certain classes of litigation. Thus, the ecclesiastical rule in some subjects came later to be incorporated into the ordinary (or "common") system of law in one of two ways; namely, either a statute imitated or adopted the ecclesiastical rule, or, when the ecclesiastical Courts were abolished and their jurisdiction transferred to the ordinary Courts, their rule of proof was followed as well as their rules of substantive law. Of the former mode—statutory adoption—at least one instance (that of nuncupative wills) occurred during the existence of the ecclesiastical Courts; but the remainder were created by the very statutes transferring the ecclesiastical jurisdiction, for it was natural in one and the same enactment to deal with both the jurisdiction and the rules of law to be transferred. Of the latter mode—judicial adoption of precedent—it would seem that there ought to have been no instances at all; because the legislative transfer of

¹ The authorities have been noted *ante*, § 2032, par. 1.

² 1790, *Crompton v. Butler*, 1 Hagg. Cons. 460, 463 (rule applied to an action for defamation; one witness each to separate utterances, held sufficient); 1792, *Hutchins v. Deniloe*, ib. 181, 182 ("the ordinary rule of the ecclesiastical law" requires two witnesses, or one with corroborating circumstances; here applied to a prosecution for quarrelling in church).

³ 1847, Dr. Lushington, in *Simmons v. Simmons*, 1 Rob. Ecol. 566, 575 ("evidence to mere probability, not applying to the act, cannot be received as corroborative"; treating the fact of A's intercourse with M, before A's marriage to B, as evidence making probable his adulterous intercourse with her after marriage, but not as corroboration to the act itself).

⁴ Langdell, *Summary of Equity Pleading*, § 44.

jurisdiction, with a confirmation of established substantive rules, would still leave a common-law Court free (in the absence of express legislation) to follow in its newly acquired matters of jurisdiction all its traditional rules of proof, in particular the rule requiring no more than one witness. This was indeed the result wherever the question was expressly forced upon the attention of those Courts.⁵ Yet in one or two subjects — for example, the rule about a respondent's confession in divorce (*post*, § 2067) — there was a general assumption that the rule of evidence came over with the jurisdiction and the rules of substantive law.

Thus, in several instances (now to be examined), a rule of number originating in the ecclesiastical Court and not indigenous to the common law, has become a part of our law, either by filtration through the Court of chancery or the Court of probate, or by express statutory confirmation or imitation. On the other hand, it remains true that except in these ways no rule of number pure and simple — *i. e.* no rule declaring insufficient a single witness, irrespective of kind — has found a footing in the common law for civil cases.

§ 2046. *Same: Divorce Charge denied.* The ecclesiastical rule (*post*, § 2067) requiring corroboration for the confession of a divorce-respondent, applied solely to the confessing testimony of the respondent, and had no application to that of the complainant, nor to the number of witnesses produced by the complainant. Nevertheless, the general rule of the ecclesiastical Courts, that *one witness alone was insufficient* for any claim, was there equally applicable to a *petition for divorce*, and was so construed.¹ The two rules, it will thus be perceived, were entirely independent of each other, — the present rule for the complainant resting on the general principle of canon law everywhere accepted, and the other rule, for confessions (*post*, § 2067), having its origin in local English ecclesiastical law. The former, therefore, would disappear entirely, in the common-law Courts, with the entire ecclesiastical principle (*ante*, § 2045) about numbers of witnesses. The latter would also, it is true, disappear as a matter of principle; but a special policy (*post*, § 2068) sufficed to preserve it.

Accordingly, it seems clear that, so far as the testimony for the complainant in divorce is concerned, no common-law principle requires that a second witness or corroborating circumstances be brought, either to support ordinary testimony or to support the complainant's own testimony;² and statute rarely sanctions it.³

⁵ *Could v. Safford*, 39 Vt. 498, *post*, § 2060 (nuncupative will); *Robinson v. Robinson*, 1 Sw. & Tr. 362, *post*, § 2067 (divorce confession).

¹ These cases deal with adultery only; but the rule seems to have applied to all causes for divorce: 1795, *Donellan v. Donellan*, 2 Hagg. Eccl. (Suppl.) 144; 1832, *Kenrick v. Kenrick*, 1 Hagg. Cona. 114, 136; 1844, *Evans v. Evans*, 1 Rob. Eccl. 165, 175 (one witness alone is insufficient, as a general principle of canon law); 1847, *Simmons v. Simmons*, ib. 563, 569, 577.

² 1868, *Robbins v. Robbins*, 100 Mass. 150

("the rule . . . is merely a general rule of practice, and not an inflexible rule of law; . . . there is no law to prevent the finding of a fact upon the testimony of a party whose credibility and good faith are satisfactorily established"); 1878, *Flattery v. Flattery*, 88 Pa. 27 ("the law has made the libellant a competent witness; whether credible, was a question for the jury and not for the Court"); 1892, *Lee v. Lee*, 3 Wash. 234, 237, 28 Pac. 355.

³ Ky. Stat. 1890, § 2119 (quoted *post*, § 2067); 1901, *Barnett v. Barnett*, — Ky. —, 64 S. W. 844 (statute applied).

One or two Courts, however, have judicially introduced a rule, not prescribing (like the ecclesiastical rule) that any one witness is insufficient, but merely that the testimony of the *complainant* alone,⁴ or of a *particeps criminis* alone,⁵ without corroboration, is insufficient; and in several other jurisdictions a similar provision has been made by statute.⁶

§ 2047. *Same*: (2) *Chancery Bill denied by Defendant's Oath*. The Court of Chancery, in all classes of cases, followed directly the ecclesiastical rule that two witnesses were required to prove any material fact as the foundation of a decree. This rule seems not to appear in the reports until the end of the 1600s,¹ nearly two centuries after the Chancery system had begun to be an organized competitor of the common law. But it is not to be doubted that the rule was followed from the beginning. Probably the direct and simple form of the ecclesiastical rule was in the beginning unchanged; but in later development there came alterations both in the scope of the rule and in the reasons given for it.

(1) The scope of the rule, as it comes into the modern law, is confined to cases where the defendant by his sworn answer has *directly denied on oath* the allegation of the bill. In other words, the rule does not apply in all cases other than where the allegation is admitted to be true. In Chancery, a mere failure to deny did not (as at common law) amount to a judicial

⁴ *N. H.*: 1842, *Kimball v. Kimball*, 13 N. H. 222, 225 ("or, if no other persons have knowledge respecting the facts in the case, there must be evidence that the libellant sustains a good general character"; compare the rule for corroboration of witnesses, *ante*, § 1104); *N. J.*: 1870, *Woodworth v. Woodworth*, 21 N. J. Eq. 251 (the plaintiff's testimony alone is insufficient); *Reid v. Reid*, *ib.* 331, 333; 1871, *Palmer v. Palmer*, 22 id. 83, 90; 1889, *McShane v. McShane*, 45 id. 341, 19 Atl. 465; 1890, *Costill v. Costill*, 47 id. 346, 350, 21 Atl. 35; 1901, *Moak v. Moak*, — id. —, 48 Atl. 394; 1901, *Garcin v. Garcin*, 62 id. 189, 50 Atl. 71; 1902, *Grover v. Grover*, 63 id. 771, 50 Atl. 1051 (for all causes of divorce).

⁵ 1823, *Best v. Best*, unreported, quoted in *Poynter, Marr. & Div.* 198; 1845, *Emmons v. Emmons*, *Walker Ch. (Mich.)* 532, 534; 1855, *Simons v. Simons*, 18 Tex. 468, 474, *semble*.

Such rules are therefore in theory really of the sort examined *post*, § 2066.

⁶ Md. Pub. Gen. L. 1888, Art. 35, § 3 (in proceedings for divorce no decree shall be rendered "upon the testimony of the plaintiff alone; but in all such cases testimony in corroboration of that of the plaintiff shall be necessary"); Wis. Supreme Court Rules (Stats. 1898, § 2348, note).

Other statutes provide generally that the testimony of "the parties" alone shall not suffice; these, being aimed chiefly at the use of respondents' confessions, are placed *post*, § 2067; but they are usually construed as including the testimony of the complainant: 1871, *Evans v. Evans*, 41 Cal. 103 ("It would be impossible to lay down any general rule as to the degree of

corroboration which will be requisite"); 1874, *Matthai v. Matthai*, 49 id. 90, 94; 1891, *Cooper v. Cooper*, 88 id. 45, 48, 25 Pac. 1062; 1892, *Venzke v. Venzke*, 94 id. 225, 29 Pac. 499; 1894, *Wolff v. Wolff*, 102 id. 433, 437, 36 Pac. 767, 1037; 1897, *Smith v. Smith*, 119 id. 183, 48 Pac. 730; 1890, *LeBrun v. LeBrun*, 55 Md. 496, 503 ("mere declarations of either of the parties" not sufficient); 1900, *Westphal v. Westphal*, 81 Minn. 242, 68 N. W. 988 (statute applied); 1883, *Hansel v. Hansel*, *Wright* 213 (under statute). *Contra*: 1901, *Rosecrance v. Rosecrance*, 127 Mich. 332, 86 N. W. 800 (under Comp. St. § 8652, a divorce may be decreed on the testimony of complainant alone, the statute referring only to confessional declarations).

Whether under such statutes a respondent's confession, which would of itself be insufficient under § 2069, *post*, may serve as sufficient corroboration for the present purpose, is a petty quibble upon which different views have been expressed, — affirmatively, in *Smith v. Smith*, Cal., negatively, in *Scarborough v. Scarborough*, Ark., cited *post*, § 2069.

For the requirement of corroboration for defences, prostitutes, and persons of loose character in divorce cases, see *post*, § 2066.

¹ The following are early cases: 1679, *Wakelin v. Walthal*, 2 Ch. Cas. 8; 1682, *Hobbs v. Norton*, 1 Vern. 136; 1683, *Alam v. Jourdan*, *ib.* 161; 1692, *Christ College v. Widdrington*, 2 Vern. 283; 1693, *Bath and Mountague's Case*, 3 Ch. Cas. 63, 123 (per Lord Keeper Somers).

On all of the ensuing points, compare the learned article of Mr. Goss, "The Responsive Answer in Equity," cited *ante*, § 2032, note 1.

admission; unless a defendant expressly admitted the allegation, or unless he was in contempt for refusing to answer at all and the bill was ordered to be taken *pro confesso*, the plaintiff must still prove his allegation.² Accordingly, it would seem that in the intermediate case, i. e. where the defendant answered, and yet neither expressly admitted nor expressly denied the allegation under oath, and also even where he denied but in an answer not under oath, the allegation must be proved, and yet needed not two witnesses:

1778, *Thurston, L. C.*, in *Pember v. Mathers*, 1 Bro. Ch. C. 59: "I take the rule to be that, where the defendant in express terms negatives the allegations of the bill, and the evidence is only one person affirming what has been so negatived, there the Court will neither make a decree nor send it to a trial at law. Where the Court does not send it to a trial at law, it orders the answer to be read in evidence, and sends it to the Court of law only to find the consequences. Because the Court of equity has such a rule, therefore it refers to a court of law what a court of equity should do; this was done by the House of Lords in Lord Milton's case.³ The original rule stands on great authorities; so does the manner of liquidating it; I do not see great reason in either."

(2) This rule, like the general rule of the ecclesiastical Courts (*ante*, § 2045), thinned out, in the course of modern development, into a rule requiring merely *one witness with corroborating circumstances*:

1837, Mr. R. N. Gressley, *Evidence in Equity*, 4: "Some corroboration is required, — the testimony of a second witness, or any circumstances which may give a turn to the balance; the corroboration, however, has sometimes been so extremely slight that . . . there can be little doubt that this circumstance [of the defendant being interested] has a considerable weight."⁴

(3) The *theory of the rule* was originally no other than that of the ecclesiastical Courts, namely, that two witnesses are required to prove any fact. But in later times the rule was explained, though still in the quantitative conception of testimony (*ante*, § 2032), on the theory that the answer of the defendant on oath was *equivalent to one witness* in his favor, and that therefore this offset the single witness for the plaintiff and made another necessary:

² Langdell, *Summary of Equity Pleading*, §§ 84, 137.

³ Brown's P. C., V, 312, 8vo ed.

⁴ The further details and precedents, as involving a chancery rule, are without the present purview (*ante*, § 4); see Gressley, *Evidence in Equity*, pp. 4, 156; Greenleaf, *Evidence*, I, § 300, III, § 289; Note to first American edition of Brown's Chancery Cases, I, 53, *Pember v. Mathers*; Daniell, *Pleading and Practice in Chancery*, I, 843 ff.; Gould's sixth American edition; Story, *Equity Jurisdiction*, II, § 1528. The rule has been applied in the following cases: *Cam.*: 1853, *Boulton v. Robinson*, 4 Grant U. C. 109, 123; 1878, *Powell v. Lea*, 20 id. 621; 1879, *Moberly v. Brooks*, 27 id. 270, 278; *Ala.*: 1847, *Moyler v. Moyler*, 11 Ala. 620, 628; *Fla.*: 1903, *Pinney v. Pinney*, — Fla. —, 35 So. 86; *Pa.*: 1847, *Brawdy v. Brawdy*, 7 Pa. St.

157, 159; 1883, *Juniata Bldg. Ass'n v. Hetzel*, 108 Pa. 507, 514; 1884, *Phillips v. Meily*, 106 id. 536, 544; 1887, *Sylvius v. Kosak*, 117 id. 67, 78, 11 Atl. 392; *Tenn.*: 1791, *Humphreys v. Blevins*, 1 Overt. 177, 179; 1901, *Bennett v. Ins. Co.*, 107 Tenn. 371, 64 S. W. 758 (rule not applied to a bill to annul an insurance policy on the ground of fraud); *U. S.*: 1812, *Russell v. Clark*, 7 Cr. 63, 92; 1815, *Clark v. Van Riemdyk*, 9 id. 152, 160. The rule has been repudiated in the following cases: 1902, *Rush v. Landers*, 107 La. 542, 33 So. 95; 1875, *Cornet v. Bertelsmann*, 61 Mo. 118, 125; and cases cited in Mr. Gest's article *supra*, note 1.

For its application to a *corporation-defendant*, see the following case: 1901, *Kane v. Ins. Co.*, 199 Pa. 198, 205, 48 Atl. 989.

For the rule that the *whole of a responsive answer* must be read, see *post*, § 2123.

1837, Mr. R. N. Greasley, *Evidence in Equity*, 4: "Where a material fact was directly put in issue by the answer, the Courts of equity followed the maxim of the civil law, *responsio unius non emine audiatur*, and required the evidence of two witnesses as the foundation for a decree. But of late years the rule has been referred more closely to the equitable principle on which it is grounded, namely, the equal right to credit which a defendant may claim when his oath, 'positively, clearly, and precisely given,' and consequently subjecting him to the penalties of perjury, is opposed to the oath of a single witness."⁵

Such an explanation could have occurred as a natural one only after the rule had come to be restricted to the case of an answer on oath. But it was in any event inconsistent with the fundamental theory of an answer in chancery. The answer, so far as it is capable of being treated as evidence, is merely an admission extracted from the defendant on compulsion, and hence is available for the plaintiff only, if he cares to use it. Since the rule of parties' disqualification (*ante*, § 575) applied equally in chancery, the answer, on principle, is not testimony in the defendant's own favor.⁶ The modern explanation of the rule, therefore, needlessly obscures its origin and rests upon a false theory of chancery pleading. This has been long ago pointed out:

1838, Lord Brougham, in *Attwood v. Small*, 6 Cl. & F. 232, 297: "It is said that you must have recourse to the answer . . . [because of a rule that if the defendant denies on oath] you must have more than one witness, or some circumstances more than one witness, in order to rebut that denial. But I take it that the denial is not read as evidence in the cause, and the Court does not use it as evidence; it is rather considered as a general denial in the nature of a plea of not guilty, — a sort of general issue which puts the plaintiff to the proof in a particular way."

(4) The policy of the rule has perhaps something to be said for it, because of the practice of the Chancery court to act without sight of the witnesses and (practically) without cross-examination, — in short, without the usual accompaniments of a jury trial.⁷ But the question may be pressed more closely, why *should* the Chancery court deprive itself of these aids, and thus be obliged to rely on a rule of thumb for the determination of a rational investigation? Mr. Bentham's irony has forever pilloried the delinquencies in this respect of the traditional methods of the Court of Chancery:

1827, Mr. Jeremy Bentham, *Rationale of Judicial Evidence*, b. IX, pt. VI, c. I, § 1 (Bowring's ed., Vol. VII, p. 580): "Where the defendant contradicts the witness, it [i. e. equity] counts testimonies, without weighing them. . . . The ground on which this arrangement is placed by the account given of it in the books, is curious enough: 'Here is oath against oath; therefore nothing is to be done.' The judge who should allege this contrariety as a reason for doing nothing, would recognise himself unfit for his office. *Injured suitor*: 'To weigh testimony against testimony in a jury-box is the business, the everyday's business, of the same sort of man whose business it is, when behind a counter, to weigh lead or brass against bread or candles. What then? Is the task too hard for you? Do you sink under it? Such imbecility, is it the fruit of all your science? Sue, then, for a place in the jury-box; and learn your business from bakers and tallow-

⁵ This theory is found as early as Gilbert (*ante* 1726). *Evidence*, 182. It was early made popular in the United States by Marshall and Story.

⁶ Langdell, *ubi supra*, §§ 68, 78, 83, 128.

⁷ For a good examination of its policy, see Evans, *Notes to Pothier*, II, 235 (1806).

chandlers.' *Lord Chancellor*: 'It is not but that, if I were at liberty, I could weigh testimony against testimony as well as any tallow-chandler; but the mode of inquiry which I am bound and content to conform to, does not allow me to weigh evidence. Where truth is at all doubtful, equity is altogether unfit for the discovery of it. This we are all sensible of; accordingly, as often as evidence is worth weighing, we send it to the tallow-chandlers; they have a method of their own, which it does not suit the purpose of equity to follow. . . . Equity receives evidence in a scientific way — a way which was designed, not for the discovery of truth, but for better purposes.'

§ 2048. Same: (3) *Wills of Personality, in the Ecclesiastical Court; Wills in Pennsylvania.* (a) The secular jurisdiction of the ecclesiastical Courts was settled (after the first early struggles) to include (mainly) matters matrimonial and testamentary.¹ But the common-law Courts would not concede that this jurisdiction extended to the determination of land-titles. The practical result was that a judgment of the ecclesiastical Court could not validate a title depending on a will of land, and virtually their testamentary jurisdiction was confined to *wills of personality*. Within this jurisdiction they applied of course the ecclesiastical rule requiring at least two witnesses:

1640, *Swinburne, J.*, *Wills*, pt. I, § 9: "[By the Roman law] it must be proved forthwith by seven witnesses. Wherefore with good reason was this excess reformed first by the ecclesiastical law, which did reduce the number of seven witnesses to three (the parochial minister being one) and in some cases two; and then by the general [ecclesiastical] custom of this realm,² which distinctly requireth no more witnesses than two, so they be free from any just cause of exception. . . . So we are no further tyed than to the observation of those requisites that be necessary *jure gentium*, which requireth but two witnesses. . . . [A man,] if he will, he may procure the witnesses to subscribe their names to the testament; . . . but no man is tyed to the observation of these cautele."³

Thus, down to the time of the abolition of the ecclesiastical prerogative Courts (in England, in 1857,⁴ and in this country, at earlier dates), a will of personality must be proved by two witnesses.⁵ As it happened, however, this rule, ever since 1678, had been in two important respects less stringent than the rule for proving wills in the common-law courts, namely, the witnesses need not have subscribed the will's execution (*ante*, § 1290) and the number required to be called was less than the number required to have attested a will of realty (*post*, §§ 2426, 2456). Postponing for a moment the consideration of the difference for wills of realty, it is enough to note that,

¹ Makower, *Constitutional History of the Church of England* (Sonnenschein's ed.) 1896, pp. 417, 451.

² This author deals with the ecclesiastical law, and his "custom of the realm" means the English ecclesiastical custom.

³ So also *ib.* pt. IV, § 21.

⁴ St. 20 & 21 Vict. c. 77, c. 85.

⁵ 1696, *Twaites v. Smith*, 1 P. Wms. 10 (will of personality; two of the witnesses, children of the residuary legatee, being incompetent by the canon law, "the common-law judges agreed with the civilians that these two children were not to be allowed as witnesses [by the canon law, which applied to such wills]; there-

fore the will failed for want of proof, one witness being by the civil law as no witness"); 1826, *Brett v. Brett*, 3 Add. 510, 524 (the requirement is merely of an affidavit to the signature "by two persons"; or if there is one attesting witness, then the affidavit of one other person); 1832, *Theakston v. Marson*, 1 Hagg. Cons. 290, 313 ("evidence of one witness, unsupported by any circumstances," does not make "legal proof of a testamentary act"; this because "by the general law of these Courts one witness does not make full proof"; here applied to a will's execution); 1842, *Mackenzie v. Yeo*, 3 Curt. Eccl. 125, 133, 145, 150 (rule applied to a will's execution).

with the statutory assimilation of the attesting-witness requirement for personality and realty alike (*ante*, §§ 1290, 1310), and the abolition of the ecclesiastical Courts, their rule disappeared,⁶ apparently everywhere except in one of our own State jurisdictions.

(b) In *Pennsylvania*, an early statute perpetuated the rule of the ecclesiastical Courts, and extended it to both kinds of wills.⁷ In the application of this statute, the modern doctrine of the English ecclesiastical law (*supra*, par. a, and *ante*, § 2405), that corroborating circumstances might supply the place of a second witness directly to the act of execution, was here also carried out.⁸ It is enough to note that the practical difference between this rule and that now obtaining in the other jurisdictions for attesting witnesses (*ante*, §§ 1290, 1302) is that by the present one the entire elements of a valid execution must be proved twofold, i. e. either by two witnesses each testifying to all the elements, or by one witness to all and by circumstances sufficient alone to evidence all, while by the other rule the specified number of

⁶ In South Carolina, Tennessee, and Virginia, a similar rule once existed, either by statute or by judicial adoption of the ecclesiastical rule in probate Courts (*supra*, note 8); but the modern statutes seem to have assimilated all will-proof under the common-law rule.

⁷ Pa. St. 1833, Pub. L. 249, § 6, P. & L. Dig., Decedents' Estates 53 (Act of 1705; a will "shall be proved by the oaths or affirmations of two or more competent witnesses").

⁸ The detailed questions need not be here further noticed; with the Pennsylvania rulings are here placed the early rulings in the other States "so having a similar practice": Pa.: 1788, *Lewis v. Maria*, 1 Dall. 278 (under the act of 1705; "two or more credible witnesses"); 1791, *Walmsley v. Read*, 1 Yeates 87 (same); 1803, *Eyster v. Young*, 3 id. 511, 514 ("circumstances may supply the want of one witness, where they go directly to the immediate act of disposition"); 1820, *Hook v. Hook*, 6 B. & R. 47 ("each must make proof complete in itself," where they testify to circumstantial evidence, and not to the fact of execution); 1820, *Miller v. Carothers*, ib. 215, 223 (one attesting witness deceased after taking oath before the register, and one witness to handwriting, sufficient); 1827, *Reynolds v. Reynolds*, 16 id. 21, 26 (discussing the question, Who is a "complete" witness?); 1836, *Mullen v. McKelvy*, 5 Watts 399 (when there are but two witnesses, the testimony of each must be such as would be sufficient to submit to the jury were only one required); 1844, *Jones v. Murphy*, 8 W. & S. 275, 295 (circumstances may supply the place of one witness); 1851, *Shinkle v. Crook*, 16 Pa. St. 159 (competency of witness to mark); 1868, *Carmen's Appeal*, 59 id. 493, 498 (one complete witness, and another whose testimony is completed by circumstances, sufficient; here the element thus supplied was the identity of the document); 1874, *Derr v. Greenwalt*, 76 id. 239, 253 (approving *Hook v. Hook*, and applying it); S. C.: 1821, *Sampson v. White*, 1 McC. 74 (the

rule is satisfied by proof of the handwriting of subscribing witnesses, if they cannot be had in person); 1821, *White v. Helmes*, ib. 430, 437 (wills must be proved by two witnesses, but not necessarily to the direct fact of execution; here one testified to that, and others to handwriting, etc.); Tenn.: 1834, *Suggett v. Kitchell*, 6 Yerg. 425, 428 (will of personality, usually by two witnesses; one witness to execution, and another to a plan to make a will, here held insufficient); 1850, *Moore v. Steele*, 10 Humph. 562 (two witnesses required for a will of personality; preceding case approved); 1850, *Jones v. Arterburn*, 11 id. 97, 101 (preceding cases approved); "facts and circumstances" may be equivalent to the testimony of one witness; handwriting of one subscribing witness alone, not sufficient; if witnesses' handwriting is unavailable, two witnesses to testator's are required); 1860, *Johnson v. Fry*, 1 Coldw. 101, 102 (will of personality; testimony by one to execution and by another to handwriting only, insufficient; unless, *semble*, the will were holographic or evidence of his acknowledgment of it were added); 1872, *Morris v. Swancy*, 7 Heisk. 591, 596 (will of lands; "one fact may be proven by one witness, and other facts and corroborating circumstances may be proven by other witnesses"; this is loose and unsound); Va.: 1828, *Bedford v. Peggr*, 6 Rand. 316, 326, 339, 344, 347 (wills of personality must be proved by two witnesses; except, per Green and Cabell, J.J., an olograph will, for which by analogy of the statute for wills of realty one witness suffices); 1834, *Worsham v. Worsham*, 5 Leigh 589, 596 (preceding case overruled; one witness sufficient for will of personality; the decision proceeds upon local practice). Where one witness recollects nothing, or becomes incompetent, but has attested, his attestation should be equivalent to one witness; as to this, and as to the facts imported by an attestation, the authorities have already been examined *ante*, §§ 1315, 1316, 1511.

attesters need merely be called, whether or not they prove anything by their testimony.

§ 2049. *Same: Wills of Realty at Common Law, and Statutory Attested Wills, distinguished from the Preceding.* The establishment of wills of realty, falling as it did within the jurisdiction of the common-law Courts, was regulated by their rules of evidence. Hence, at common law, a will of realty, even after the statute of Henry VIII requiring it to be in writing, could be sufficiently proved by a single witness; the common law having no rule requiring two witnesses (*ante*, § 2032, *post*, § 2426). But in 1678, the Statute of Frauds added for such wills the requirement of attestation by at least three witnesses.¹ The question therefore arises whether any requirement of quantity or number was thereby introduced into the rules of evidence. The result reached by the Courts was perfectly plain and settled; but, to appreciate it, three sorts of legal requirements must be distinguished:

(1) In the first place, the *validity of the will*, as to its formalities of execution, was affected. The act of execution, after the Statute, must include the act of signing by three witnesses; without their coöperation, the will is void. Here is no matter of evidence, but of substantive law (*post*, § 2456).

(2) Among the kinds of witnesses who might be qualified to speak to the execution, the *attesting witnesses* were (after the Statute) to be *preferred before all others*. This came, not by express direction of the Statute, but by the general principle of the common law that an attesting witness must be called (or shown unavailable) before any other can be resorted to (*ante*, § 1290). The Statute merely provided the attesting witness for wills; the common-law principle of evidence, thus applying, required him to be used.² Here is now a rule of evidence; but it is merely a rule of preference between kinds of witnesses; it is not a rule of numbers.

But, furthermore, this rule of preference may also provide *how many* of these preferred witnesses shall be called. Such a further rule will of itself say nothing as to the proof supplied by these witnesses; for example, it might require that each and all be called, but not that each and all should prove respectively the entire elements of due execution. Now the common-law Courts never required that more than one be even called. It is true that the chancery Court (probably under the influence of its ecclesiastical rule) did at some periods require all to be called; and that some modern statutes have made similar provisions. But at common law not even this much of a rule of number existed (*ante*, § 1304). Thus, by whichever practice judged (common law, chancery, or statute), the effect of the attesting-witness rule is limited to requiring that he be called, and involves nothing as to the proof he shall make (*ante*, § 1302).

(3) The third question, then, remains: Was any rule of number, for the purposes of establishment of belief, or *proof*, introduced by implication of

¹ St. 29 Car. II. c. 3, § 5 (devises of lands or tenements "shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses, or else they shall be

utterly void and of none effect"); the history is examined *post*, § 2426.

² Compare the exposition of L. O. J. Pratt, quoted *infra*, par. 3.

the Statute? Suppose that all three witnesses are called, and thus the attesting-witness rule in its extremest form is satisfied; but suppose further that two of them are unable to recollect, or deny seeing the execution, or otherwise fail to furnish any evidence of execution; in other words, there remains but one witness actually contributing evidence of execution; is he sufficient? It is clear that by the common-law rule for attesting witnesses, he is (*ante*, § 1302); but that by the ecclesiastical rule for wills of personality (*ante*, § 2048), he is not. The question is thus whether, for wills of realty under the Statute, there is, besides the attesting-witness rule of preference, a rule of number requiring that more than one witness shall give credited testimony to the elements of due execution. The judicial answer to this was plain and inevitable, namely, that the common law possessed no rules of number, that the Statute merely introduced a new rule of substantive law as well as invoked the existing general rule for attesting witnesses, and that no more was intended by the Statute, and therefore the common-law rule of one witness remained in full application. This was established at the very outset of the judicial consideration of the Statute, and was continuously maintained:

1683, *Hudson's Case*, Skinner 79; two of the attesting witnesses swearing against the due execution, other evidence of it was received and acted on; "to which the counsel of the other side urged that if the witnesses were not to be believed, then there would not be three witnesses to the will, and so no will within the statute of frauds and perjuries; to which Pemberton, C. J., answered that if there were three witnesses to a will, whereof one was to his own knowledge a thief or person not credible, yet the words of the statute being satisfied, and he having collateral proof to fortify the will, he would direct a jury to find it a good will."

1765, L. C. J. Pratt (Lord Camden), in *Hindson v. Kersey*, 1 Day 41, 49: "Here I must premise one observation, that there is a great difference between the method of proving a fact in a court of justice, and the attestation of that fact at the time it happens. These two things, I suspect, have been confounded; whereas it ought always to be remembered that the great inquiry upon this question is, how the will ought to be attested, and not how it ought to be proved. The new thing introduced by the Statute [of Frauds] is the attestation; the method of proving this attestation stands as it did upon common-law principles. Thus, for instance, one witness is sufficient to prove what all three have attested; and though that witness must be a subscriber, yet that is owing to the general common-law rule that where a witness hath subscribed an instrument, he must always be produced because it is the best evidence. This we see in common experience, for after the first witness has been examined, the will is always read."

This much is of course necessarily implied in all the judicial decisions (*ante*, § 1304) declaring that one attesting witness only need be called; for if one only need be called, and if he can speak to all the elements of execution, no further witness or proof is needed; the settlement of the one point settles the other also. But the question may arise as a separate one in those jurisdictions in which (following the Chancery or a statutory rule) all the attesting witnesses must be called (*ante*, § 1304); for it may then be asked further whether from the mouth of each of them must be obtained separate proof of execution, i. e. whether more than one testimony to execution must be given. The question is usually settled, by implication, as above noted;

but it has also sometimes been expressly dealt with as a distinct question, and has been almost universally decided in accordance with the original and orthodox view taken by the English Court (quoted *supra*), namely, that testimony to all the elements constituting due execution, by a single witness, suffices.⁸ A contrary result can properly be reached only under a statute expressly requiring that the will be attested "and proved" by more than one witness.⁴

It is plain, therefore, that a rule of preference requiring attesting witnesses to be called is distinct from a rule of number requiring credited testimony to execution to be given by two or more witnesses; that either may exist without the other; that the latter exists without the former in a single jurisdiction (*ante*, § 2048); that the former exists without the latter, at common law and under the Statute of Frauds, in almost every other jurisdiction; and that in perhaps a few jurisdictions, by express modern statute, both coexist.

§ 2050. *Same*: (4) *Nuncupative Wills*. A nuncupative (or oral) will of personalty would have required two witnesses in the ecclesiastical Courts, but of realty, in the common law Courts (so far as valid at all after the statute of Henry VIII), only one witness. But by the Statute of Frauds a nuncupative will was subjected to a rule of number more stringent even than that of the ecclesiastical Courts; for three were required.¹ The Statute of Frauds was probably inspired directly by the ecclesiastical rules, for the latter had at one period required at least three;² and a canonist's hand had apparently been concerned in the drafting of the Statute.³ The rule of the Statute

¹ 1855, *Walker v. Hunter*, 17 Ga. 364, 407; 1862, *Tarrant v. Ware*, 25 N. Y. 425, note; 1863, *Auburn Seminary v. Calhoun*, ib. 422, 425.

In *Florida* the earlier decisions took the opposite view: 1832, *Barwell v. Corbin*, 1 Rand. 131, 141 ("Every important requisite of the statute must be attested and proved by each witness"); 1837, *Smith v. Jones*, 6 id. 33, 37, *semble* (two witnesses necessary for will of realty); 1832, *Dudleys v. Dudleys*, 3 Leigh 434, 449, *semble* (two witnesses necessary; here, a will of both realty and personalty); but the later ones took the orthodox view: 1839, *Clarke v. Dunnivant*, 10 Leigh 18, 23 (*Brooke, J., diss.*); 1846, *Pollock v. Glasell*, 11 Gratt. 439, 461; 1849, *Jesse v. Parker*, 5 id. 57, 61, 64 (under a statute requiring attestation by two witnesses, it is not necessary that by two such witnesses or by any two witnesses every statutory element shall be proved); 1877, *Lambert v. Cooper*, 29 id. 61, 67 (same); 1878, *Chenham v. Hatcher*, 30 id. 56, 58 (same).

² The statutes on the point have been already collected, in dealing with the attesting-witness rule, *ante*, § 1904. The following case seems to justify itself on that ground: 1876, *Crowley v. Crowley*, 80 Ill. 469 (two witnesses necessary).

³ 1678, St. 29 Car. II, c. 3, § 11 (no nuncupative will of an estate exceeding 200 is to be valid "that is not proved by the oaths of three witnesses at the least, that were present at the making thereof; nor unless it be proved that

the testator at the time of pronouncing the same did bid the persons present or some of them bear witness that such was his will, or to that effect"); § 20 ("after six months passed after speaking of the pretended testamentary words, no testimony shall be received . . . except the said testimony, or the substance thereof, were committed to writing within six months after the making of the said will"). The provisions as to a *rogatio* (or calling to bear witness), and as to the reduction of execution, are matters affecting the validity of execution; and, as the interpretation of the statute on this point is scarcely to be separated from its interpretation as a rule of evidence, no attempt is here made to collect the rulings; they may be found in the following works: *Jarman on Wills*, 6th Amer. ed. (Bigelow), I, 79; *Schouler on Wills*, 3d ed., § 373; see also the following cases: 1875, *Morgan v. Stevens*, 78 Ill. 287 (statute applied); 1849, *Parkinson v. Parkinson*, 12 Sm. & M. 672, 677 (testator need not call upon the two witnesses also, but only upon "some person present"); 1854, *Burch v. Stovall*, 27 Miss. 725, 729 (the person called upon may be one of the two witnesses; no form of words for "calling" are necessary, if such is the import); 1879, *Broach v. Sing*, 57 id. 115 (no "calling" proved on the facts); 1837, *Tully v. Butterworth*, 10 Yerg. 501 (useful opinion as to whether the two witnesses may speak to different utterances).

⁴ *Swinburne*, quoted *ante*, § 2048.

⁵ Chief Baron Gilbert, writing before 1736

may therefore be reckoned as one of those which we owe to the ecclesiastical law.

Apart from such a statute in our own jurisdictions, it would seem that no more than one witness is to be required.⁴ But in most jurisdictions there exist by statute provisions similar to those of the Statute of Frauds, specifying more than one witness as necessary.⁵ Such statutes, it will be ob-

(Reports, 201) makes this statement; and, though the identity of the draftsman has been a mooted point, the influence of the ecclesiastical model at that period, in view of what has been said above in § 2082, seems clear enough; compare § 2426, *post*.

⁴ *See* *Donald v. Bedford*, 89 Vt. 498, 505 ("the rule of the civil law was merely a rule of proof, and did not relate to the essence of the act"; in a court of common law, the rules of proof of the latter system control).

⁵ *Ariz. Rev. St.* 1887, § 3238 (a nuncupative will of an estate exceeding \$50 is not valid "unless it be proved by three credible witnesses" that the testator called on "some person" to take notice, etc.); *Ark. Stats.* 1894, § 7404 (a nuncupative will must be "proved by at least two witnesses, who were present at the making thereof"); *Cal. Civ. C.* 1872, § 1280 (a nuncupative will must be proved by "two witnesses who were present at the making thereof, one of whom was asked by the testator at the time to bear witness"); § 1290 (words or substance must have been reduced to writing within 30 days after speaking); *Colo. Annot. Stats.* 1891, § 4671 (for nuncupative wills, the testator's utterance must be proved "by the testimony of at least two credible disinterested witnesses"; and the subsequent reduction to writing must be "proved by two disinterested witnesses, other than those hereinbefore mentioned"); *D. C. Comp. St.* 1894, c. 70, § 80 (a nuncupative will of an estate exceeding 30 pounds is to be "proved by the oaths of three witnesses at the least, that were present at the making thereof"); § 81 (after six months from the utterance of a nuncupative will, no testimony shall be received . . . except the said testimony, or the substance thereof, were committed to writing within six days after the making of the said will"); *Fla. Rev. St.* 1893, § 1799 (a nuncupative will must be "proved by the oaths of three witnesses present at the making thereof"); *Ill. Rev. St.* 1874, c. 148, § 15 (a nuncupative will is valid if "proven before the county Court by two or more credible disinterested witnesses" who were present and will testify to last illness, etc., "and it being also proven by two disinterested witnesses, other than those hereinbefore mentioned, that the said will was committed to writing," etc.); *Mo. Pub. St.* 1893, c. 74, §§ 18, 19 (a nuncupative will of more than \$100 must be proved by three persons present at the time and requested to bear witness; nuncupative will not provable after six months, unless the substance was reduced to writing within six days); *Miss. Gen. St.* 1894, § 4445 (a nuncupative will is to be probated only "upon the evidence of at least

two credible and disinterested witnesses"); *Miss. Annot. Code* 1892, § 4492 (nuncupative will of an estate exceeding \$100; it must "be proved by two witnesses that the testator or testatrix called on some person present" to bear testimony); *Mo. Rev. St.* 1899, § 4696 (must be "proved by two witnesses, who were present at the making thereof"); *Nebr. Comp. St.* 1899, § 3643 (a nuncupative will of an estate of more than \$150 must be "proved by the oath of three witnesses at least that were present at the making thereof"); *Nev. Gen. St.* 1895, § 3004 (must be "proved by two witnesses who were present at the making thereof"); *N. J. Gen. St.* 1896, Wills, §§ 11, 12, 16 (must be proved by three witnesses present at the making; not provable after six months, unless the testimony or its substance was "committed to writing" within six days after the will made; except for soldiers' and sailors' wills); *N. M. Comp. L.* 1897, § 1950 (a verbal will is to be attested by the "same number of witnesses"—two—required for written one, "and besides, two witnesses, there being no more, possessing the same qualifications as required for the written will, to testify that the testator, male or female, was in possession of a sound mind and entire judgment"); *N. C. Code* 1883, § 2148 (a nuncupative will must be proved by "two credible witnesses present at the making" called on to bear witness; and cannot be proved after six months, unless put in writing within ten days); *N. D. Rev. C.* 1895, § 3644 ("must be proved by two witnesses who were present at the making thereof," one of whom was asked to be a witness); *Okla. Stats.* 1893, § 6170 (a nuncupative will "must be proved by two witnesses who were present at the making thereof," one of whom was asked to bear witness); *Pu. St.* 1892, Pub. L. 135, § 11, P. & L. Dig.: Decedents' Estates, § 62 (no testimony is to be received after six months from the alleged speaking, nor unless the testimony or its substance was committed to writing within six days); *S. D. Stats.* 1899, § 4499 (like N. D. Rev. C. § 3644); *Tenn. St.* 1784, Code 1896, § 3899 (by two witnesses, for estates of over \$250); § 3900 (revocation of a nuncupative will, by two witnesses); *Tex. Rev. Civ. Stats.* 1895, § 5339 (no nuncupative will shall be probated, "unless it be proved by three credible witnesses that the testator called on some person" to bear witness); § 1903 (same; "and if the testimony of such witnesses differs materially as to the testamentary words spoken, or as to the testator's calling upon some one to witness the same," probate shall be refused); *Utah Rev. St.* 1896, § 2747 (like Cal. Civ. C. § 1289); *Wash. C. & Stats.* 1897, § 4905 (none to be good "unless

served, combine in effect an attesting-witness rule with a rule of number (ante, § 2049, par. 3).

§ 2051. Same: (5) Holographic Wills; (6) Revocations and Alterations; (7) Sundry Testamentary Acts. (5) When a *holographic* will, being entirely in the testator's handwriting, is by law allowed to be valid, a single witness to its authenticity would upon the common-law principle (ante, § 2034) be sufficient.¹ But the few statutes authorizing such wills have usually required more than one witness to its authenticity.²

(6) The *revocation* or *alteration* of a will to be effective, has generally been treated, in the statutes dealing with wills, on the same footing as any act of testamentary disposition, and the usual formalities of attestation have been equally prescribed for it.³ Apart from such statutory provisions, one witness would at common law suffice for any matter affecting revocation or alteration and not covered by the statutory terms.⁴ But in several jurisdictions express provision is made by statute for a specified number of witnesses to prove certain acts in the nature of revocation or alteration.⁵ Some of these, in their restriction to personality, suggest a connection with the ecclesiastical rule.

(7) There occur also a few *miscellaneous* provisions, affecting testamentary acts, for which by statute a specified number of witnesses are required.⁶

the same be proved by two witnesses who were present at the making thereof, and it be proven that the testator . . . did bid some person to bear witness, etc."); *N. H. Stat.* 1894, § 2292 (for estates exceeding \$150, no will is to be good "that is not proved by the oath of three witnesses, at least, that were present at the making thereof."). As to the interpreting rulings under these statutes, see note 1, *supra*.

¹ 1894, *Baker v. Dobyns*, 4 Dana 220, 231.

² *Ark. Stat.* 1894, § 7393 (for holographic wills, even without attesting witnesses, there must be "the unimpeachable evidence of at least three disinterested witnesses to the handwriting of each testator"); *N. C. Code* 1888, §§ 2136, 2176 (holographic will not attested, or holographic revocation, must be proved as to the testator's handwriting by "three credible witnesses"); *Tenn. St.* 1784, Code 1896, § 3896 (holographic will must be proved by three credible witnesses); *Tax. Rev. Civ. Stat.* 1895, § 1900 (for wills in general, proof of handwriting of the testator and subscribing witnesses must be by two witnesses; for an olographic will, "two witnesses of his handwriting" are necessary).

³ That is, where the revocation is attempted by writing, and not by burning, tearing, canceling, or obliterating.

⁴ 1886, *Williams v. Williams*, 142 Mass. 515, 517, 8 N. E. 424 (intent to revive former will by revocation of a later one); 1813, *Burns v. Burns*, 4 S. & R. 295 (similar).

⁵ *Ala. Code* 1897, § 4265 (when a will is revoked by burning, etc., by another than the testator, the testator's "direction and consent thereto, and the fact of such burning, canceling, tearing, or obliterating, must be proved by at least two witnesses"); *Ark. Stat.* 1894, § 167 (revocation by injury or destruction

"shall be proved by at least two witnesses"); *Ark. Stat.* 1894, § 7394 (the destruction of a will by another than testator, and the testator's direction and consent, "shall be proved by at least two witnesses"); *Cal. Civ. C.* 1872, § 1293 (the cancellation or destruction of will by any other than testator, and his direction, must be proved by two witnesses); *D. C. Comp. St.* 1894, c. 70, § 28 (no change of a will of personality is valid, unless in writing and read to the testator and allowed by him, "and proved to be so done by three witnesses at least"); *Fla. Rev. St.* 1892, § 1798 (revocation or alteration of a will of personality; the writing, the reading of the writing to the testator, and his allowance of it, must be "proved to have been done by three disinterested and credible witnesses"); *Md. Pub. Gen. L.* 1888, art. 93, § 312 (a repeal or alteration of a will of personality must be proved to have been executed by three witnesses); *N. Y. Rev. St.* II, 64, § 42 (two witnesses are required to prove the cancellation, etc., of a will by another person for the testator); *N. D. Rev. C.* 1895, § 3660 ("the direction of the testator and the fact of such injury or destruction must be proved by two witnesses," where another than the testator does it); *Okla. Stat.* 1893, § 6185 (cancellation or destruction by any person other than the testator, and the testator's direction, "must be proved by two witnesses"); *Or. C. C.* P. 1892, § 780 (revocation by an agent; "the direction and consent of the testator, and the fact of such injury or destruction, shall be proved by at least two witnesses"); *S. D. Stat.* 1899, § 4514 (like N. L. Rev. C. § 3660); *Utah Rev. St.* 1895, § 2750 (like Cal. Civ. C. § 1293).

⁶ *Ark. Rev. St.* 1897, § 3248 (where a be-

§ 2052. Same: (8) Contents of a Lost Will. At common law, by the general principle (*ante*, § 2034), no more than one witness was required to prove the contents of a will alleged to have been lost or destroyed. There was an established rule as to the fulness of detail with which the contents must be made to appear (*post*, § 2106), and the clearness or preponderance of proof (*post*, § 2498); and there was authority for the view that testimonial, not merely circumstantial, evidence must be furnished (*post*, § 2000), and perhaps a copy (*ante*, §§ 1267, 1278). But there was no rule requiring more than one witness to furnish testimony to the contents;¹ and the execution was to be proved as for wills produced in specie.²

Yet by statute, in several jurisdictions, a rule of number has been introduced,—not apparently upon any suggestion of the ecclesiastical law, but merely upon a supposition of the wisdom of such a safeguard.³ It is diffi-

cult to find a subscribing witness would otherwise be void, it shall not be if the will is proved "by the evidence of the subscribing witnesses, corroborated by the testimony of one or more disinterested and credible persons, to the effect that the testimony of such subscribing witnesses, necessary to sustain the will, is substantially true"; *N. H. Pub. St.* 1891, c. 184, § 18 (*a donatio mortis causa*; "actual delivery" must be "proved by two indifferent witnesses"); 1902, *Blazo v. Cochran*, 71 N. H. 585, 59 Atl. 1026 (statute applied); *Tex. Rev. Civ. Stats.* 1896, § 1900 (cited *supra*, par. 5, note 2. The following rulings upon a now obsolete statute may be placed here: 1810, *Donaldson v. Jude*, 2 Bibb 57, 59 (manumission required by statute to be proved by two witnesses); 1815, *Clark v. Bartlett*, 4 id. 201 (same).

¹ *Eng.*: 1876, *Sugden v. St. Leonardo*, L. R. 1 P. D. 184, 231, 323, 244; *Ons.*: 1858, *Haye's Will*, 2 *Morris Newt.* 227; 1859, *Calahan's Will*, 1b 278; *U. S.*: 1884, *Jaques v. Horton*, 78 Ala. 228, 245; 1886, *Shoggs v. Horton*, 83 id. 358, 364, 2 S. 110; 1874, *Johnson's Will*, 40 Conn. 587, 589; 1843, *Kearns v. Kearns*, 4 *Harringt.* 33, 35; *Ga. Code* 1895, § 3299 ("If a will be lost or destroyed subsequent to the death, or without the consent of the testator, a copy of the same, clearly proved to be such by the subscribing witnesses and other evidence, may be admitted to probate"); 1869, *Kitchens v. Kitchens*, 39 Ga. 168, 172 (under this statute, the execution must be proved by the three attesting witnesses, on the rule of § 1804, *ante*; but not the contents, which may be proved by any "other evidence"); 1883, *Mowley v. Carr*, 70 id. 333, 336 (preceding case approved; but the opinion is inconsistent); 1884, *Burge v. Hamilton*, 73 id. 568, 614 (one witness suffices); 1901, *Scott v. Maddox*, 113 id. 795, 39 S. E. 500 (approving *Kitchens v. Kitchens*); 1886, *Re Page*, 118 Ill. 576, 578, 8 N. E. 352; 1836, *Baker v. Dobyns*, 4 Dana 220, 221; 1837, *Graham v. O'Fallon*, 4 Mo. 601, 608; 1839, *Dickey v. Malochi*, 6 id. 177, 184; 1863, *Wyckoff v. Wyckoff*, 16 N. J. E. 401, 405.

² 1863, *Harris v. Harris*, 36 N. Y. 433 (distinguishing proceedings under 2 Rev. St. 152,

§ 5); 1870, *Krice v. Nesson*, 66 Pa. 253, 259 (*Shawwood, J.*: "If one witness deposes positively to the handwriting of a party, whether to a lost or an existing paper, it satisfies the rule; the paper or copy is admissible, it matters not how many other witnesses may deny it, or what circumstances may be proved to cast doubt upon it. The question of sufficiency remains for the jury").

Aris. Rev. St. 1867, § 997 ("its provisions" must be "clearly and distinctly proved by at least two credible witnesses"); *Cal. C. C. P.* 1872, § 1359 ("no will shall be proved as a lost or destroyed will, . . . unless its provisions are clearly and distinctly proved by at least two credible witnesses"); 1901, *Camp's Estate*, 134 Cal. 283, 66 Pac. 237 (statute applied); *Colo. Annot. Stats.* 1891, § 4673 ("the contents thereof," in addition to regular proof of execution, must be "likewise shown by the testimony of two or more witnesses"); *Ida. Rev. St.* 1887, § 5326 (like *Cal. C. C. P.* § 1359); *Ind. Rev. St.* 1897, § 2890 (the will's "provisions shall be clearly proven by two witnesses, or by a correct copy and the testimony of one witness"); 1884, *Fairbank v. Webster*, 99 Ind. 583, 591 (statute applied); 1894, *Jones v. Casler*, 139 id. 382, 38 N. E. 312 (statute applied); *Minn. Gen. St.* 1894, § 4443 (not to be established "unless its provisions are clearly and distinctly proved by at least two credible witnesses"); *Mont. C. C. P.* 1895, § 2371 (like *Cal. C. C. P.* § 1339); *Nev. Gen. St.* 1885, § 2705, c. 19, § 38 (not to be probated, unless "its provisions are clearly and distinctly proved by at least two credible witnesses"); repeated in *St.* 1897, c. 106, § 25; *N. Y. C. C. P.* 1877, § 1865 (provisions must be "clearly and distinctly proved by at least two credible witnesses, a correct copy or draft being equivalent to one witness"); *N. D. Rev. C.* 1895, § 6226 (not to be probated "unless the tenor of its provisions is clearly established by the testimony of at least two credible witnesses"); *Okla. Stats.* 1893, § 1208 (no will is to be proved as lost or destroyed, "unless its provisions are clearly and distinctly proved by at least two credible witnesses"); *Tex. Rev. Civ. Stats.* 1896, §§ 1901, 1905 (written will not

cult to see why such a rule is more needed for lost wills than for lost deeds or bonds; and it would seem that it unnecessarily introduces an anomaly and a hampering restriction into our customary modes of proof.

§ 2082. *Usage or Custom.* The view has been occasionally advanced that a single witness is insufficient to prove the existence of a custom or usage,¹ — probably from the notion that, since a custom must usually be notorious in order to effect a contract, many persons must know it, and some concurrence of testimony should therefore be shown. One answer to the suggestion is that the common law knows no rule requiring more than one witness in any civil case (note, § 2082). Another is that, if such a possibility of contradiction is to be feared, it is amply provided for in the liberty of the opponent to produce dissentient witnesses and the fair certainty that he will be prepared to do so. The rule would thus operate as a merely unnecessary burden in cases where no real dispute exists:

1851, *Foot, J., in Vail v. Rice*, 1 N. Y. 155, 156: "There does not appear to be anything in the character of the fact that a usage in a given branch of trade exists, which renders it important that such fact should be established by more than one competent witness; and many cases may arise in which the administration of justice would be needlessly delayed and burdened by requiring two or more witnesses. . . . When only one witness is called to establish such a fact, the duty of a Court and jury will always lead to an inquiry and examination into the circumstances: and if his single testimony is not sufficient, it will not form a basis of judicial action. The question whether the testimony of one witness to such a fact is sufficient may be safely left in every case to the Court and jury."

The rule would probably not to-day be recognized in any court,² except under express statute.³

produced may be proved by "the same amount and character of testimony . . . as is required to prove a written will produced in court"; but "the cause of its non-production must be proved, and such cause must be sufficient to satisfy the Court that it cannot by any reasonable diligence be produced, and the contents of such will must be substantially proved by the testimony of a credible witness who has read the same or who has heard it read"; *Utah Rev. St.* 1898, § 3810 (like Cal. C. C. P. § 1839); *Wash. C. & State* 1897, § 6117 (like Cal. C. C. P. § 1839); *Wyo. St.* 1891, c. 70, ch. iv, § 2 ("clearly and distinctly proved by at least two credible witnesses").

¹ 1817, *Thomas v. Graves*, 1 Mill Const. 308 ("It will rarely happen that one witness will sufficiently establish a usage"; no authority cited); 1843, *Halverson v. Cole*, 1 Spears L. 391, 393 ("I do not think the evidence of a single individual is enough to establish a usage of trade for Charleston different from the general rule"); and the two overruled cases cited in the next note.

² 1856, *Partridge v. Porynth*, 29 Ala. 300, 303 (one witness suffices); 1830, *Parrott v. Tacher*, 9 Pick. 425, 431 (one witness held not sufficient under the circumstances; "usage is a thing which must be public and notorious, at least known to all masters of packets in this

trade"); 1866, *Boardman v. Spooner*, 13 All. 353, 356 ("It has been considered to be a rule of law that the testimony of a single witness is insufficient to establish a usage of trade"); 1880, *Jones v. Hoey*, 128 Mass. 585 ("Notwithstanding the dictum in *Boardman v. Spooner*, there can be no doubt at the present day that the circumstance that but one witness testifies to a usage is important only as bearing upon the credibility and satisfactoriness of his testimony in point of fact"); 1829, *Wood v. Hickok*, 2 Wend. 501, 504 (testimony of one witness "does not amount to proof of the usage of a particular trade"; no authority cited); 1851, *Vail v. Rice*, 1 N. Y. 155, 156 (preceding case held to establish no rule; one witness sufficient; see quotation *supra*); 1871, *Robinson v. U. S.*, 13 Wall. 363, 366 (one witness suffices); 1897, *Southwest Va. M. L. Co. v. Chase*, 95 Va. 50, 27 S. E. 826.

³ Or. C. C. P. 1892 § 778 ("usage, by the testimony of at least two witnesses"); 1901, *Aldrich v. H. Co.*, 30 Or. 263, 64 Pac. 455 (designating the method of enforcing the statutory rule).

Distinguish the question whether the witness must state specific instances (note, § 1954), and whether one instance suffices (note, § 379).

§ 2054. *Local Rules in Miscellaneous Civil Cases (Reforming an Instrument, Opponent's Admissions, Contracts, etc.).* In a few jurisdictions, anomalous rules exist, either by judicial decision or under express statute, requiring more than one witness.

(1) In *Pennsylvania*, a rule exists requiring two witnesses (or one corroborated by circumstances) to impeach a *written instrument*,¹ and another, requiring the same amount to reform a written instrument;² both probably being applications of the Chancery or ecclesiastical rule of two witnesses (*ante*, §§ 2045, 2047).

(2) In *Texas*, professedly on the foundation of a Chancery ruling in England (approved by Chancellor Kent, but in reality a mere casual utterance of caution for the case in hand³), a rule has been laid down that a verbal declaration or *admission of a trust* annexed to a deed of sale must be proved by two witnesses or by one with corroboration.⁴

(3) In other jurisdictions, statutes have introduced a few miscellaneous rules, of only local significance, requiring more than one witness in certain civil cases.⁵

¹ 1847, *Brawdy v. Brawdy*, 7 Pa. 157, *semble*; 1886, *Thomas v. Loose*, 114 id. 35, 45, 6 Atl. 326; 1895, *Pyroloem Appliance Co. v. W. H. & S. Co.*, 169 id. 440, 83 Atl. 458 (ruling that two partners were two witnesses); 1898, *Key-stone Axle Co. v. Layda*, 188 Pa. 322, 41 Atl. 477. Compare the peculiar *parol-evidence* rule in this State (*post*, § 2481).

² 1898, *Cooper v. R. V. Mills*, 185 Pa. 115, 39 Atl. 824; 1902, *Butch's Estate*, 201 id. 305, 50 Atl. 943. Compare the rule for measure of proof by preponderance of evidence (*post*, § 2498).

³ 1805, *Lench v. Lench*, 10 Ves. Jr. 517, 519 (issue as to a lien upon an estate purchased by a husband with money from the wife's trustees; as to the husband's declarations, Sir W. Grant, M. R., said that "upon this evidence I should have been disposed to allow the claim or to direct an inquiry; but if evidence of this sort could be proceeded upon, standing unsupported, and in some degree contradicted by the circumstances, it ought to stand wholly uncontradicted by other evidence"); 1815, *Boyd v. M'Lean*, 1 John. Ch. 582, 580 (Kent, C., referred to *Lench v. Lench* with approval, but did not lay down any absolute rule; "Sir W. Grant did not deem the unassisted oath of a single witness to the mere naked declaration of the trustee admitting the trust, as sufficient; . . . it would be easy to multiply instances of the like caution and discretion"). Compare the rule for giving notice of such admissions (*ante*, § 1856).

⁴ 1849, *Neill v. Keese*, 5 Tex. 23, 28 (reporting to follow *Boyd v. M'Lean*); 1852, *Mead v. Randolph*, 8 id. 191 (not clear); 1853, *Miller v. Thatcher*, 9 id. 432, 435 (rule approved and established); 1858, *Cuney v. Dupree*, 21 id. 211, 219 (rule applied); 1882, *Grace v. Hanks*, 57 id. 14, 15 (*same*).

In *Wisconsin*, it has been suggested (perhaps without intending to make a rule) that a single

witness will not suffice to prove matters *notoriously* and highly improbable: 1897, *Badger v. Mills*, 95 Wis. 599, 70 N. W. 687 ("contrary to conceded fact or matters of common knowledge or to all reasonable probabilities"; here the cause of the breaking of a ladder).

In *Alabama*, it seems to be the rule that two witnesses, or one with corroboration, are required for a *plea of truth* in defamation: 1849, *Spruill v. Cooper*, 16 Ala. 791; 1900, *Hereford v. Combs*, 126 id. 369, 28 So. 582 (approving *Spruill v. Cooper*).

⁵ *Colo. St.* 1893, p. 239, § 6 (residence in Colorado of an applicant for divorce must be proved by "at least one credible witness other than the plaintiff," except for divorce for adultery or cruelty done within the State); *Fla. Rev. St.* 1892, § 1962 (in proceedings for relinquishment of dower of insane married women, "such witnesses shall consist of not less than two practicing physicians and three other credible witnesses who shall be personally acquainted with said woman"); *La. Rev. Civ. C.* 1888, § 2277 ("All agreements relative to movable property, and all contracts for the payment of money where the value does not exceed \$500," if not reduced to writing, are provable by any evidence; but "such contracts or agreements, above \$500 in value, must be proved by at least one credible witness and other corroborating circumstances"); applied in the following cases: 1818, *Ferry v. Legras*, 5 Mart. 393; 1834, *Lopez v. Bergel*, 7 La. 178, 181; 1835, *Stanley v. Addison*, 8 id. 207, 210; 1843, *Lewis v. Debuys*, 4 Rob. 257; 1847, *Palmer v. Dinn*, 2 La. An. 536; 1853, *O'Brien v. Flynn*, 8 id. 307; 1855, *Harrison v. McCawley*, 10 id. 370; 1867, *Stribling v. Stewart*, 19 La. An. 71; 1868, *Goldsmith v. Friedlander*, 20 id. 119; 1868, *Field v. Harrison*, ib. 411; *Helm v. Ducayot*, ib. 417; 1869, *Mille v. Dupuy*, 21 id. 53, 54; 1871, *Betzler v. Coleman*, 23 id. 785; 1872, *Webster v. Burke*, 24

Topic II: RULES DEPENDING ON THE KIND OF WITNESS.

§ 2056. **Uncorroborated Accomplice; (1) History and Present State of the Law.** May a jury lawfully convict of a crime on the sole testimony of an accomplice in the alleged crime? Or must his single testimony be corroborated by other evidence? This question did not become a mooted one until the end of the 1700s. Long before then, a struggle had centered round the testimony of accomplices, for in the political trials ever since the time of Henry VIII (when the frequent reports begin) they appear as the chief dependence of the Crown in its prosecutions. But the original controversy was over their admissibility. Through the 1600s and the 1700s it had to be ruled again and again that they were to be received as witnesses.¹ But for a long time no question was made as to the sufficiency of their testimony when admitted. The quantitative conception of an oath (*ante*, § 2032) tended to keep this question in the background. An oath, in the notions of the time, had a certain dead-weight of its own; one oath was as good as another oath. Should a witness once get in, the harm (they thought) was done; for there would be little weighing of the comparative quality of different persons' oaths. The struggle therefore was made at the threshold.

As time went on, and the modern conception of testimony developed, the possibility of admitting a witness and yet discriminating as to the qualitative sufficiency of his testimony became more apparent; and the way was open for the consideration of this question. In a few instances, as the 1700s wore on, and even before then, judicial suggestions are found as to the feasibility of such a discrimination.² But not until the end of that century does any Court seem to have acted upon such a suggestion in its directions to the jury. About that time there comes into acceptance a general practice to discourage a conviction founded solely upon the testimony of an accomplice uncorroborated.³

id. 137; 1876, *Rossignol v. Tricha*, 28 *id.* 144; 1898, *Berges v. Daverde*, — *id.* —, 23 *So.* 391; 1902, *Clark v. Hedden*, 109 *La.* 147, 33 *So.* 116; *S. D. Stats.* 1899, § 3567 (on committal to insane asylum, "the oath of two reputable physicians" is necessary); statutes similar in substance to the preceding occur in many jurisdictions, but they provide rules of procedure rather than rules of evidence; *Tenn. St.* 1801, c. 18, Code 1896, § 3518 (service of surety's notice to creditor to sue the principal must be proved by two witnesses); applied in the following cases: 1827, *Waterford v. Hensley*, *Mart. & Y.* 275; 1837, *Thompson v. Watson*, 10 *Yerg.* 362, 368; 1841, *Miller v. Childress*, 2 *Humph.* 320; 1873, *Simpson v. State*, 6 *Bart.* 440; 1882, *Jackson v. Huey*, 10 *Lea* 184, 189.

For statutes equally applicable to civil cases, requiring a certain number of *expert witnesses* in handwriting, see *ante*, § 2044.

¹ *Ante*, §§ 526, 527.

² 1680, *Hale, Pleas of the Crown*, I, 305 ("The credibility of his testimony is to be left to the jury; and truly it would be hard to take

away the life of any person upon such a witness that swears to save his own and yet confesseth himself guilty of so great a crime, unless there be very considerable circumstances which may give the greater credit to what he swears"); 1775, *R. v. Rudd*, 1 *Cowp.* 331, 336 (*Mansfield, L. C. J.*, after referring to the competency of accomplices as "approvers": "Though under this practice they are clearly competent witnesses, their single testimony alone is seldom of sufficient weight to convict the offenders"); 1863, *Plunkett, Evidence of Accomplices*, 2 ("As to the origin of this practice of requiring confirmation at all, it cannot be very clearly traced. . . . It was not laid down or acted on in the time of Lord Holt, that is, up to the year 1710; . . . it was after this decision in *Rudd's* case [1775] that the practice must have been introduced").

³ 1784, *R. v. Smith and Davis*, 1 *Leach Cr. L.*, 4th ed., 479, note ("The Court, though it was admitted as an established rule of law that the uncorroborated testimony of an accomplice is legal evidence, thought it too dangerous to

(1) But was this practice founded on a *rule of law*? Never, in England. It was recognized constantly that the judge's instruction upon this point was a mere exercise of his common-law function of advising the jury upon the weight of the evidence, and was not a statement of a rule of law binding upon the jury:

1788, *Buller, J.*, in *R. v. Atwood and Robbins*, 1 Leach Cr. L., 4th ed., 464: "I thought it proper to refer your case to the consideration of the twelve Judges. My doubt was whether the evidence of an accomplice, unconfirmed by any other evidence that could materially affect the case, was sufficient to warrant a conviction. And the judges are unanimously of opinion that an accomplice alone is a competent witness, and that if the jury, weighing the probability of his testimony, think him worthy of belief, a conviction supported by such testimony alone is perfectly legal. The distinction between the competency and credit of a witness has long been settled. If a question be made respecting his competency, the decision of that question is the exclusive province of the judge: but if the ground of objection go to his credit only, his testimony must be received and left to the jury, under such directions and observations from the Court as the circumstances of the case may require, to say whether they think it sufficiently credible to guide their decision in the case."

1848, *Maule, J.*, in *R. v. Mullins*, 7 State Tr. n. s. 1110, 3 Cox Cr. 526: "The truth of the matter is, there is no rule of law at all that an accomplice cannot be believed unless he is confirmed. . . . It is an observation addressed, not to the Court to exclude the evidence, but addressed to the jury who have to weigh the evidence, and it is for them to say whether the confirmation will satisfy them or whether they will be satisfied without any. If they are satisfied without any, they may be, and their verdict may be an honest and just and true one. . . . The directions of judges given to juries in that respect are not directions in point of law which juries are bound to adopt, but observations respecting facts, which judges are very properly in the habit of giving, because, with respect to matters of fact, the judge as well as the counsel upon both sides endeavor to assist the jury."⁴

In the United States the same discrimination was early accepted:

1837, *Ruffin, C. J.*, in *State v. Hardin*, 2 Dev. & B. 407, 411: "The evidence of an accomplice is undoubtedly competent, and may be acted on by the jury as a warrant to convict, though entirely unsupported. It is, however, dangerous to act exclusively on such evidence; and therefore the Court may properly caution the jury and point out the grounds for requiring evidence confirmatory of some substantial part of it. But the

suffer a conviction to take place under such unsupported testimony"; 1788, *R. v. Atwood and Robbins*, 1 Leach Cr. L., 4th ed., 464 (quoted *infra*); 1788, *R. v. Durham and Crowder*, ib. 478 (foregoing case followed; this case is clearly the later, though the date is misprinted as 1787 in the report).

⁴ *Accord*: 1803, *R. v. Despard*, 28 How. St. Tr. 346, 487; 1809, *Ellenborough, L. C. J.*, in *R. v. Jones*, 2 Camp. 182 ("Strange notions upon this subject have lately got abroad; and I thought it necessary to say so much for the purpose of correcting them"); 1821, *R. v. Dawber*, 3 Stark. 84; 1826, *R. v. Sheehan, Jebb* 54 (by all the Irish judges); 1835, *R. v. Hastings*, 7 C. & P. 152 ("It is altogether for the jury"); 1836, *R. v. Wilken*, ib. 372; 1837, *R. v. Casey, Jebb* 233 (by all the Irish judges);

1847, *Simmons v. Simmons*, 1 Rob. Eccl. 566, 575; 1848, *R. v. Mullins*, 7 State Tr. n. s. 1110, 3 Cox Cr. 526; 1852, *R. v. Dunne, Ir.*, 5 Cox Cr. 507; 1855, *R. v. Stubbs*, 1 Dears. 555, 7 Cox Cr. 48 ("It is not a rule of law that an accomplice must be confirmed"); 1860, *M'Clory v. Wright*, 10 Ir. C. L. 514, 520; 1860, *Magee v. Magee*, 11 id. 449, 462; 1868, *R. v. Boyce*, 1 B. & S. 311, 320; 1894, *Re Meunier*, 3 Q. B. 415, 418 (the warning to the jury is customary; but there is no right to withdraw the case for want of corroboration); *Canada*: 1860, *R. v. Tower*, 20 N. Br. 168, 207 (there is no positive rule of law requiring direct corroboration); 1894, *R. v. Andrews*, 12 Ont. 184, 191 (the practice of instruction is proper, but it is not a rule of law reviewable on appeal).

Court can do nothing more; and if the jury really yield faith to it, it is not only legal, but obligatory on their consciences, to found their verdict upon it."

As a matter of common law, then, the doctrine was universally understood (except by one or two Courts⁵) as amounting to no rule of evidence, but merely to a counsel of caution given by the judge to the jury.⁶ It followed

⁵ 1860, *People v. Eckert*, 16 Cal. 110 (misunderstanding some of the English cases); 1848, *Ray v. State*, 1 G. Greene, Ia. 316 (with sentimental reflections upon the lack of harmony between the English rule and our supposed superior methods of justice); 1844, *Kinchelov v. State*, 5 Humph. 9, *semble*; 1854, *Jones v. State*, 13 Tex. 168, 177, *semble*.
⁶ Ark.: 1867, *Flanagin v. State*, 25 Ark. 92; Colo.: 1878, *Solander v. People*, 2 Colo. 48, 66; 1888, *Wisdom v. People*, 11 id. 174, 17 Pac. 519; Conn.: 1851, *State v. Wolcott*, 21 Conn. 272, 281; 1875, *State v. Williamson*, 42 id. 261, 263; Fla.: 1867, *Sumpter v. State*, 11 Fla. 247, 252 (R. v. Jones *supra*, quoted with approval); 1886, *Bacon v. State*, 22 id. 51, 78; 1890, *Tuberson v. State*, 26 id. 472, 474, 7 So. 858; 1900, *Brown v. State*, — id. —, 27 So. 869; *Hawc.*: 1869, R. v. Brown, 3 Haw. 114, 115; 1889, R. v. Wo Sow, 7 id. 734, 737; 1898, *Republic v. Edwards*, 11 id. 571, 573 (adomny; but the jury should be advised not to convict, and the Court may in discretion instruct them not to do so); Ill.: 1861, *Gray v. People*, 26 Ill. 344, 347; 1868, *Cross v. People*, 47 id. 152, 160 ("It is a matter of discretion with the Court to advise, rather than a rule of law"); 1874, *Earl v. People*, 73 id. 329, 334; 1881, *Collins v. People*, 93 id. 584, 588 (careful opinion); 1882, *Friedberg v. People*, 102 id. 160, 164; 1892, *Hoyt v. People*, 140 id. 588, 595, 30 N. E. 315; 1895, *Campbell v. People*, 159 id. 9, 43 N. E. 123; 1897, *Honselman v. People*, 168 id. 173, 46 N. E. 304; Ind.: 1851, *Johnson v. State*, 3 Ind. 652; 1853, *Dawley v. State*, 4 id. 128; 1855, *Stocking v. State*, 7 id. 326, 330; 1859, *Ulmer v. State*, 14 id. 52, 57; 1879, *Johnson v. State*, 65 id. 269, 271; Kan.: 1866, *Craft v. State*, 3 Kan. 460, 479; 1878, *State v. Kellerman*, 14 id. 135, 137, *semble*; 1878, *State v. Adams*, 20 id. 311, 327; 1893, *State v. Patterson*, 52 id. 335, 354, 34 Pac. 784, *semble* (but *contra*, 1896, *State v. McDonald*, 57 id. 537, 46 Pac. 967, *semble*); La.: 1871, *State v. Bayonne*, 23 La. An. 78; 1878, *State v. Prudhomme*, 25 id. 522, 525 ("rather a rule of practice than a rule of law"); 1881, *State v. Russell*, 33 id. 135, 138 ("the authorities . . . justify conviction by the jury on such testimony although it may not be corroborated by other"); 1886, *State v. Mason*, 38 id. 476; 1888, *State v. Banks*, 40 id. 736, 739, 5 So. 18; 1900, *State v. Vicknair*, 52 id. 1921, 22 So. 373 (foregoing cases approved; here a requested charge that the accomplice's testimony should not be even considered unless corroborated was held properly refused); 1903, *State v. De Hart*, 109 La. 570, 83 So. 605 (the necessity of corroboration is "rather a rule of practice than a rule of law"); Me.: 1850, *State v. Cunningham*, 31 Me. 355;

1870, *State v. Litchfield*, 58 id. 267, 270; Mass.: 1839, *Com. v. Bosworth*, 22 Pick. 397; 1852, *Com. v. Savory*, 10 Cush. 535, 538; 1857, *Com. v. Brooks*, 9 Gray 299, 303; 1858, *Com. v. Price*, 10 id. 472, 475; 1868, *Com. v. Larrabee*, 99 Mass. 413, 415; 1872, *Com. v. Elliot*, 110 id. 104, 106; 1877, *Com. v. Scott*, 123 id. 232, 237; 1890, *Com. v. Wilson*, 152 id. 12, 14, 25 N. E. 16 (where the judge refused to instruct on the subject, and was sustained); 1894, *Com. v. Clune*, 162 id. 206, 214, 38 N. E. 485; Mich.: 1858, *People v. Jenness*, 5 Mich. 305, 330; 1874, *Hamilton v. People*, 29 id. 173, 188; Miss.: 1848, *Keithler v. State*, 10 Sm. & M. 192, 228 (the jury "may believe him, if they choose, without corroboration"); 1856, *Dick v. State*, 30 Miss. 593, 599, *semble*; 1860, *George v. State*, 39 id. 570, 592, *semble*; 1875, *Fitzcox v. State*, 52 id. 923, 926; 1876, *White v. State*, 1b 216, 227; Mo.: 1861, *State v. Watson*, 31 Mo. 361, 364 (good opinion); 1877, *State v. Jones*, 64 id. 391, 395; 1880, *State v. Reavis*, 71 id. 419; 1887, *State v. Chyo Chiang*, 92 id. 395, 413, 417, 4 S. W. 704 (but intimating that it should be a rule of law); 1888, *State v. Walker*, 98 id. 95, 109, 11 S. W. 1133; 1890, *State v. Harkins*, 100 id. 666, 672, 13 S. W. 830 (repudiating in effect the suggestion in *State v. Chyo Chiang*); 1891, *State v. Jackson*, 106 id. 174, 179, 17 S. W. 301; 1893, *State v. Minor*, 117 id. 302, 306, 22 S. W. 1085; *State v. Crab*, 121 id. 554, 565, 26 S. W. 548; 1894, *State v. Dawson*, 124 id. 418, 422, 27 S. W. 1104; *State v. Marks*, 140 id. 656, 41 S. W. 973; 1895, *State v. Donnelly*, 130 id. 642, 32 S. W. 1124; 1897, *State v. Tobie*, 141 id. 547, 42 S. W. 1078 (it is reprehensible in a Court to consider an appeal against a doctrine so long established as this); 1898, *State v. Black*, 143 id. 166, 44 S. W. 340 (was the Bar entitled to a ruling on this point every twelve months?); 1899, *State v. Sprague*, 149 id. 400, 425, 50 S. W. 901; 1902, *State v. Koplan*, 167 id. 298, 66 S. W. 967; Nebr.: 1894, *Lamb v. State*, 40 Nebr. 312, 319, 58 N. W. 968; N. J.: 1877, *State v. Hyer*, 39 N. J. L. 598, 603; 1902, *State v. Rachman*, 68 id. 120, 53 Atl. 1046; N. Y.: 1823, *People v. Reeder*, 1 Wheel. Cr. C. 418, 420; 1839, *People v. Davis*, 21 Wend. 308, 314; 1845, *People v. Costello*, 1 Den. 83, 87; 1860, *People v. Dyle*, 21 N. Y. 578; 1864, *Dunn v. People*, 29 id. 523, 528; 1875, *Linsday v. People*, 63 id. 145, 154; at this point the law was changed by St. 1882, c. 360, quoted *infra*, note 10; the following ruling had been made meantime: 1869, *People v. Evans*, 40 N. Y. 1, 6 (an exception exists for the case of subornation of perjury; the perjurer must be corroborated in the charge against the suborner; this ruling stands alone; but compare the application of the statutory

that the jury might or might not regard the caution by acquitting upon an uncorroborated accomplice's testimony;⁷ that they alone were to determine whether corroboration existed and was sufficient;⁸ and that the trial judge's omission of the caution was of itself not a ground for a new trial, being a matter solely for the trial judge's discretion.⁹

But in nearly half of the jurisdictions in our own country a statute has expressly turned this cautionary practice into a rule of law.¹⁰ The judge

rule to perjury, *post*, § 2059, and the rule for perjury in general, *ante*, § 2042); *N. C.*: 1837, *State v. Haney*, 2 Dev. & R. 390, 397; 1837, *State v. Hardin*, 407, 411; 1880, *State v. Holland*, 83 N. J. 624; *Oh.*: 1859, *Allen v. State*, 10 Oh. P. 237, 305; *Pa.*: 1879, *Kilrow v. Com.*, 89 Pa. 481, 488; 1889, *Cox v. Com.*, 125 id. 94, 101; *S. C.*: 1849, *State v. Brown*, 3 Strobb. 508, 517, *semble*; 1867, *State v. Wingo*, 11 S. C. 275, *semble*; 1897, *State v. Green*, 48 id. 136, 26 S. E. 234; *U. S.*: 1829 (?) *Steinham v. U. S.*, 2 Paine 168, 180; 1829, *U. S. v. Kessler*, *Baldw.* 15, 23; 1843, *U. S. v. Troax*, 3 McL. 224; 1876, *U. S. v. Babcock*, 3 Dill. 571, 619; *Fl.*: 1869, *State v. Potter*, 42 Vt. 495, 506 ("only a rule of practice, and not a rule of law"); *Va.*: 1859, *Brown v. Com.*, 2 Leigh 769, 777, *semble*; *Wash.*: 1891, *Edwards v. State*, 2 Wash. 201, 306, 26 Pac. 258, *semble*; 1891, *Rose v. State*, *ib.* 310, 320, 26 Pac. 264, *semble*; 1900, *State v. Contee*, 23 id. 601, 61 Pac. 726; 1901, *State v. Concannon*, 25 id. 327, 65 Pac. 534 (corroboration usually to be required); *W. Va.*: 1877, *State v. Bettsall*, 11 W. Va. 703, 740; 1900, *State v. Hill*, 48 id. 132, 35 S. E. 831; *Wis.*: 1854, *Mercer v. Wright*, 3 Wis. 645 ("A jury ought not to convict upon the testimony of an accomplice uncorroborated, but all now agree that they may do so"); 1879, *Ingalls v. State*, 48 id. 647, 652, 4 N. W. 785; 1884, *Black v. State*, 59 id. 471, 13 N. W. 457; 1895, *Porath v. State*, 90 id. 527, 537, 63 N. W. 1061; *Wyo.*: 1894, *McNealley v. State*, 5 Wyo. 69, 36 Pac. 324 (undecided); 1902, *Smith v. State*, 10 id. 157, 67 Pac. 977 (accomplice's uncorroborated testimony may suffice; but the opinion is inconsistent).

⁷ This is stated or implied in all the above cases.

⁸ This was the practical consequence; nevertheless, the judges, merely as a part of the caution, did define certain elements of corroboration; these are treated *post*, § 2058.

⁹ 1892, *Hoyt v. People*, 140 Ill. 538, 596, 30 N. E. 315; 1890, *Com. v. Wilson*, 152 Mass. 12, 14, 25 N. E. 16; 1896, *Com. v. Bishop*, 165 id. 148, 42 N. E. 500; 1877, *State v. Jones*, 64 Mo. 391, 395; 1892, *State v. Woodard*, 111 id. 248, 256, 30 S. W. 27. *Contra*: 1887, *U. S. Express Co. v. Donohoe*, 14 Ont. 323, 337; 1873, *Solander v. People*, 2 Colo. 48, 66, *semble* (but only where there is in fact no corroboration); 1861, *State v. Stabbins*, 29 Conn. 463, 473 ("To omit it is now held a clear omission of judicial duty, and becomes a ground, perhaps, for granting a new trial"); 1875, *State v. Williamson*, 48 id. 361, 264 (apparently approving the above passage); 1902, *Anthony v. State*,

Fla. —, 32 So. 318; 1858, *People v. Jennings*, 5 Mich. 305, 330, *semble*; 1861, *State v. Watson*, 31 Mo. 361, 365, *semble*; 1877, *State v. Hyer*, 39 N. J. L. 598, 605; 1854, *Jones v. State*, 13 Tex. 163, 177 (provided the facts make it applicable); 1869, *State v. Potter*, 42 Vt. 495, 506. *Undecided*: 1886, *State v. Mason*, 38 La. An. 476.

¹⁰ *Ala. Code*, 1897, § 5300 ("A conviction of a felony cannot be had on the testimony of an accomplice, unless corroborated by other evidence tending to connect the defendant with the commission of the offense; and such corroborative evidence, if it merely shows the commission of the offense, or the circumstances thereof, is not sufficient"); *Alaska C. Cr. P.* 1900, § 153 (like *Or. C. Cr. P.* 1892, § 1370); *C. C. P.* § 678 (like *Or. C. C. P.* § 845); *Ariz.* *C. C. P.* 1887, § 1660 (like *Cal. P. C.* § 1111); *Ark. Stats.* 1894, § 2230 (in felony, not sufficient, "unless corroborated by other evidence tending to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows that the offense was committed, and the circumstances thereof"); *Cal. P. C.* 1872, § 1111 (an accomplice's testimony is not sufficient, "unless he is corroborated by other evidence which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof"); § 1112, as amended by the Commissioners of 1901 (same provision for an accessory after the fact as for an accomplice; as to the validity of this amendment, see *ante*, § 488); *C. C. P.* § 2061, par. 4 (the judge is to instruct, "on all proper occasions," that "the testimony of an accomplice ought to be viewed with distrust"); *Ga. Code* 1895, § 5156, *Cr. C.* § 991 ("The testimony of a single witness is generally sufficient to establish a fact"; except "in any case of felony where the only witness is as an accomplice"; but "corroborating circumstances may dispense with another witness"); *Ida. Rev. St.* 1887, § 7871 (like *Cal. P. C.* § 1111); *Ida. Code* 1897, § 5489 (insufficient, "unless corroborated by other evidence which shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely show the commission of the offense or the circumstances thereof"); *Ky. C. Cr. P.* 1898, § 241 (like *Ark. Stats.* § 2230); *Miss. Gen. St.* 1894, § 5767 ("A conviction cannot be had upon the testimony of an accomplice, unless he is corroborated by such other evidence as tends to convict the defendant of

must therefore under these statutes instruct the jury in the rule of law, and the jury must follow it; moreover, the judge administers the rule of law (so far as this is practicable) by defining for the jury the precise conditions of its application. The binding rule of evidence thus created differs little from the terms of the common-law practice; the statute merely makes a rule of law out of a practice which before had no standing except in actual usage. To refuse the instruction when asked is, under the statute, of course unlawful.¹¹ Moreover, the existence of corroborating circumstances becomes a question of law,¹² upon which a verdict of guilty may be set aside; and the definition of corroboration becomes a task for the judge, which might properly be left, but usually is not, to the trial Court.

The manner in which this change came about is not difficult to perceive. At common law the judge was entitled and bound to assist the jury, before their retirement, with an expression of his opinion (in no way binding them to follow it) upon the weight of the evidence. This utterance was made the medium of many useful general suggestions based on experience. The benefit of this experience was thus obtained for them, without any attempt to fetter their judgment by inflexible dogmas unfitted for invariable application as rules of law. One of these general hints was that about accomplices' testimony. But in this country the orthodox function of the judge to assist the jury on matters of fact was in a misguided moment (except in a few jurisdictions) eradicated from our system (*post*, § 2551). The judge was forbidden to contribute to the jury's aid any expression of opinion upon the weight of evidence in a given case. Unless there was a rule of the law of evidence upon the subject of an accomplice's testimony, he could not in a given case advise them to refuse to convict upon the uncorroborated testimony of an accomplice. The makers of this innovation upon established trial-methods were thus obliged to turn into a rule of law the old practice as to accomplices, if they wished to retain its benefit at all. This they therefore did. Whether or not they had attempted the impracticable and the undesirable, — whether it is either wise or feasible to construct a fixed rule of law for all cases, is a question which may now be considered.

the commission of the offence; and the corroboration is not sufficient if it merely shows the commission of the offence or the circumstances thereof"; *Mont. P. C.* 1895, § 2089 (like *Cal. P. C.* § 1111); *Nev. Gen. St.* 1885, § 4245 (like *Ia. Code* § 5489); *N. H. Pub. St.* 1891, c. 272, § 4 (fornication; "no person shall be convicted solely upon the testimony of a partner in guilt"); *N. Y. C. Cr. P.* 1891, § 399 (not sufficient, "unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime"); *N. D. Rev. C.* 1895, § 8195 (like *Ia. Code* § 5489); *Okla. Stats.* 1893, § 5209 (like *Ia. Code* § 5489); § 1850 (in bribery, "no conviction shall be had on the uncorroborated testimony of one such witness," i. e. an informing participant granted immunity); *Or. C. C. P.* § 845 (like *Cal. C. C. P.* § 2041); *O. Cr. P.* § 1376 (like *Ia. Code* § 5489);

Pa. St. 1860, Pub. L. 332, § 49, P. & L. Dig. Crimes, § 62 (in bribery, an accomplice's testimony is not sufficient, unless "corroborated by other evidence or the circumstances of the case"); *S. D. Stats.* 1899, § 8653 (like *Ia. Code* § 5489); *Tex. C. Cr. P.* 1895, § 781 (like *Ia. Code* § 5489); § 891 (for gaming offences, "a conviction may be had upon the unsupported evidence of an accomplice or participant"); *Utah Rev. St.* 1898, § 4862 (like *Cal. P. C.* § 1111); *Wyo. Rev. St.* 1887, § 3297 (in trials for perjury or subornation thereof, "no conviction shall be had on the evidence of the person attempted to be influenced, unsupported by other testimony").

¹¹ 1879, *State v. Odell*, 8 Or. 30, 33; 1877, *Davis v. State*, 2 Tex. App. 588, 606; 1877, *Carroll v. State*, 3 id. 117. All the cases assume this.

¹² *Post*, § 2056.

§ 2057. *Same*: (2) *Policy of the Rule*. The reasons which have led to this distrust of an accomplice's testimony are not far to seek. He may expect to save himself from punishment by procuring the conviction of others. It is true that he is also charging himself, and in that respect he has burned his ships. But he can escape the consequences of this acknowledgment, if the prosecuting authorities choose to release him provided he secures the conviction of his partner in crime:

1837, Lord Abinger, C. B., in *R. v. Farler*, 8 C. & P. 100: "It is a practice which deserves all the reverence of law, that judges have uniformly told juries that they ought not to pay any respect to the testimony of an accomplice unless the accomplice is corroborated in some material particular. . . . The danger is that when a man is fixed, and knows that his own guilt is detected, he purchases immunity by falsely accusing others."

It is true that this promise of immunity is usually denied, and may not exist; but its existence is always suspected. The essential element, however, it must be remembered, is this supposed promise or expectation of conditional immunity. If that is lacking, the whole basis of distrust fails. We have passed beyond the stage of thought in which his commission of crime, self-confessed, is deemed to render him radically a liar (*ante*, § 526). The extreme case of the wretch who fabricates merely for the malicious desire to drag others down in his own ruin can be no foundation for a general rule.

The promise of immunity, then, being the essential element of distrust, but not being invariably made, no invariable rule should be fixed as though it had been made. Moreover, if made, its influence must vary infinitely with the nature of the charge and the personality of the accomplice. Finally, credibility is a matter of elusive variety, and it is impossible and anachronistic to determine in advance that, with or without promise, a given man's story must be incapable of being believed:

1844, Chief Baron Joy, *Evidence of Accomplices*, 4: "How the practice which at present prevails could ever have grown into a general regulation must be matter of surprise to every person who considers its nature, or inquires into the foundation on which it rests. Why the case of an accomplice should require a particular rule for itself; why it should not, like that of every other witness of whose credit there is an impeachment, be left to the unfettered discretion of the judge, to deal with it as the circumstances of each particular case may require, it seems difficult to explain. Why a fixed, unvarying rule should be applied to a subject which admits of such endless variety as the credit of witnesses, seems hardly reconcilable to the principles of reason. But, that a judge should come prepared to reject altogether the testimony of a competent witness as unworthy of credit, before he had ever seen that witness; before he had observed his look, his manner, his demeanour; before he had had an opportunity of considering the consistency and probability of his story; before he had known the nature of the crime of which he was to accuse himself, or the temptation which led to it, or the contrition with which it was followed;—that a judge, I say, should come prepared beforehand, to advise the jury to reject without consideration such evidence, even though judge and jury should be perfectly convinced of its truth, seems to be a violation of the principles of common sense, the dictates of morality, and the sanctity of a juror's oath. . . . Nor, if we inquire into the foundation of the rule, shall we find in it anything certain or fixed, such as ought to be the basis of an uniform and never varying rule. We shall be told

by one that it is the moral guilt of the witness which produces this, as it were, practical incompetency; whilst another ascribes it to the desire which he has to purchase impunity for his own transgression. If it be the moral guilt of the witness that affects his credit, the degree to which his credit is affected must depend upon and vary with the magnitude of the crime of which each witness confesses himself to be guilty. Crimes are of every different shade, from the most venial petit larceny to the most atrocious murder. Yet to all the rule equally applies. The witness who on cross-examination confesses that he has been engaged in many murders, appears more stained with guilt than he who comes forward as an accomplice in the petit larceny then under trial; yet the former is without the scope of the rule, whilst the latter comes entirely within the sphere of its application. The testimony of the same witness may in one trial be absolutely rejected under the operation of the rule, and in the very next trial, in the course of the same day, it may be permitted to go the jury; yet his moral character has undergone no change in the interval. Moral guilt, then, can never afford any rational foundation for a rule which applies indiscriminately to the highest and to the lowest degrees of that guilt. But an accomplice, we are told, comes forward to save himself, and his credit is affected by the temptation which this holds out to forswear himself. But who is it that establishes his guilt? He himself—he is his own accuser; and the proof, and often the only proof which can be had, of his guilt, comes from his own lips. He is generally admitted as a witness from the necessity of the thing, and from the impossibility without him of bringing any of the offenders to justice. If this be the foundation of the rule, it rests on a shifting sand. The temptation to commit perjury which influences his credit must be proportioned to the punishment annexed to the crime of which the witness confesses himself guilty. But the rule applies with equal force to the accomplice who may apprehend but a month's imprisonment for the most trifling petit larceny, and to him who may reasonably dread death for an atrocious murder. Universal and indiscriminating, the rule levels all distinctions. Where then is the necessity for, or good sense in, such a rule? Why not leave the credit of the accomplice to be dealt with by the jury, subject to such observations upon it from the judge as each particular case may suggest? . . . That persons whom the interest of the community require, and the principles of sound policy invite to come forward, should not be marked by a rule which has not been deemed necessary in the case of more atrocious offenders not appearing in the character of accomplices, seems to me to be what is required by reason and good sense."

1877, Mr. J. Knapp, arguing in *State v. Hyer*, 80 N. J. L. 508, 602: "To deny to a conviction under such circumstances [of actual credit] legal support would be to take from the jury the right of judgment upon the weight of testimony of legally competent witnesses—a right within their province—and to compel them to find against their convictions of its truth. The wise practice of Courts to admonish jurors against too great reliance on the evidence of *particeps criminis* found much support in the circumstance that the mouth of the accused was closed against the accusations of his criminality, while the self-convicted criminal was allowed to speak. The admission of persons accused of crime as witnesses in their own behalf has removed this one ground for disfavoring their testimony."

It may be noted, also, that the legislative creation of a rule of law, by introducing detailed refinements of definition to be applied by the jurors, has merely tended to confuse them with sounds of words, and to place in the hands of counsel a set of juggling formulas with which to practice upon the chance of obtaining a new trial.

¹ Compare also the following good opinions: case of need set aside the verdict); 1870, C. J. 1877, Johnson, J., in *State v. Bettsell*, 11 W. Va. Appleton, in *State v. Litchfield*, 58 Me. 287, 703, 749 (pointing out that the judge could in 270.

§ 2058. *Same*: (3) *Kind of Crime affected by the Rule*. In the common-law practice, the caution was given without distinction as to the kind or the grade of the crime. But under some of the statutory provisions both distinctions are found; the rule being limited, for example, to felonies,¹ or to bribery.² If the rule is a just one at all, it is worth using for all charges of crime. It is also applicable to accomplices in *civil actions* for a penalty,³ but not to civil cases generally.⁴

§ 2059. *Same*: (4) *Nature of Corroborative Evidence required*. In examining the nature of the corroborative evidence to be required, the common-law rulings may be drawn upon, for it was by them that the terms of the caution were developed, and the statutory rule of law usually follows closely the judicial custom.

(a) It is clear, as to the *testimonial source* of the corroboration, that it must be independent of the accomplice himself; it must rest on other than his credit.¹ It is usually said that the testimony of *another accomplice* is not sufficient;² yet the circumstances may sometimes render it sufficiently trustworthy.³ So also the testimony of an *accomplice's wife*, though sometimes held insufficient,⁴ may properly be treated, in a given case, as amply confirmative.⁵ The corroboration may of course come from the *accused himself*, for example, from a confession,⁶ or from his failure to produce available testimony, or the like.⁷

¹ Statutes cited *supra*, § 2056, note 10; the following rulings under them declare the rule not applicable below felonies: 1877, *Moses v. State*, 58 Ala. 117; 1871, *Parsons v. State*, 42 Ga. 197; 1874, *Orison v. State*, 51 Id. 507; 1885, *Asken v. State*, 75 Id. 356; 1896, *Porter v. State*, 76 Id. 658.

² Statutes cited *supra*, § 2056, note 10.

³ *Contra*: 1860, *McClary v. Wright*, 10 Ir. C. L. 514, 521; 1860, *Magee v. Mark*, 11 Id. 449, 462. It was held not applicable on a bastardy charge: 1882, *State v. Nichols*, 29 Minn. 357, 359, 13 N. W. 153.

⁴ 1887, *United States Expr. Co. v. Donohoe*, 14 Ont. 333, 337, *semble*; 1898, *Graham v. British C. L. & I. Co.*, 12 Man. 244, 262, 269 (the practice in criminal cases does not apply to civil cases).

⁵ This is assumed in all the cases; it is also expressly and superfluously stated in some of the statutes, cited *ante*, § 2056 ("other evidence, in itself and without the aid of the testimony of the accomplice"); it is also expressly noted in the following rulings: 1870, *Lopes v. State*, 34 Tex. 133; 1880, *Hannahan v. State*, 7 Tex. App. 664.

⁶ 1832, *R. v. Noakes*, 5 C. & P. 326; 1898, *People v. Creagan*, 121 Cal. 554, 58 Pac. 1082; 1853, *Johnson v. State*, 4 G. Greene 65; 1876, *Blackburn v. Com.*, 12 Bush 181, 188; 1901, *Porter v. Com.*, — Ky. —, 61 S. W. 10; 1899, *State v. Yellow Hair*, 32 Mont. 23, 55 Pac. 1026; 1903, *People v. O'Farrell*, 175 N. Y. 323, 67 N. E. 568 (that two accomplices testify does not exempt the case from the rule; the sufficiency of the corroboration is for the jury, *semble*).

but its existence is a question of law for the Court); 1875, *Roberts v. State*, 44 Tex. 119, 123; 1879, *Heath v. State*, 7 Tex. App. 464, 466.

⁷ 1839, *R. v. Aylmer*, 1 Cr. & D. 116 (insufficient unless they have been separately confined); 1875, *State v. Williamson*, 42 Conn. 261, 265 (insufficient unless they had "had no opportunity of being together to prepare a uniform story"); 1903, *Stone v. State*, — Ga. —, 45 S. E. 630 (good opinion by Lamar, J.).

⁸ 1835, *R. v. Neal*, 7 C. & P. 168.

⁹ 1884, *Woods v. State*, 76 Ala. 35, 39; 1868, *State v. Moore*, 25 Ia. 128, 133; 1874, *Blackburn v. Com.*, 12 Bush 181, 188 ("So far as this hope [of escaping prosecution] may be supposed to influence his statements, it may be expected that his wife will be equally affected by it. But the wife, who has none of the moral taint which affects the husband because of his participation in crime, ought not to be discredited alone on the ground that her husband is a felon; such a rule is neither just to her nor safe to society"); 1876, *Dill v. State*, 1 Tex. App. 278, 286; 1862, *U. S. v. Horn*, 5 Blatchf. 102 (with qualifications; general rule not laid down). Not decided: 1867, *Haskins v. People*, 16 N. Y. 344, 351.

¹⁰ 1883, *Snoddy v. State*, 75 Ala. 23; 1893, *Schaefer v. State*, 95 Ga. 177, 18 S. E. 552 (confession, plus *corpus delicti*, suffices).

¹¹ 1896, *People v. Sternberg*, 111 Cal. 3, 43 Pac. 198; 1860, *People v. Dyle*, 21 N. Y. 578, 580; 1884, *People v. Ryland*, 97 Id. 126, 132, *semble*. *Contra*: 1868, *State v. Hull*, 26 Ia. 292, 295.

(b) As to the *tenor* of the confirmative evidence, the question was raised at an early date whether it should be required to refer to specific kinds of facts, or whether the definition should be left untrammelled by further details. The suggestion came to be advanced that the corroborative evidence must at least confirm the accomplice as to the *accused's actual participation* in the crime (or, "connection with the offence"), or (thus it is sometimes put) as to the *accused's identity* with the participators; and for the following

1897, Lord Abinger, C. B., in *R. v. Farler*, 8 C. & P. 106: "A man who has been guilty of a crime himself will always be able to relate the facts of the case, and if the confirmation be only on the truth of that history, without identifying the person, that is really no corroboration at all."

1826, Bush, C. J., and others, in *R. v. Steehan*, Jebb 54, 57, thought "that *ex concessio* an accomplice was concerned in the crime and knew all the facts; that it was his interest to relate the facts only, because otherwise he would run the risk of differing from the account given by some person present at the commission of the crime; therefore that his uttering truth with regard to the facts did not lead to the inference that he also told truth with respect to the persons concerned, unless he had reason to suppose that there was some unimpeached person who could also prove that the persons charged by him were the persons concerned; and inasmuch as in the case supposed no such person appeared on the trial, he might well suppose that their persons were unknown and could not be identified, so that he might safely charge whom he pleased."

But the fallacy of this reasoning has been well expounded by Chief Baron Joy. Briefly, it lies in this: We are assuming that the accomplice is not to be trusted in the case in hand; his credit is an entire thing, not a separable one; therefore, whatever restores our trust in him personally restores it as a whole; if we find that he is desiring and intending to tell a true story, we shall believe one part of his story as well as another; whenever, then, by any means, that trust is restored, our object is accomplished, and it cannot matter whether the efficient circumstance related to the accused's identity or to any other matter. The important thing is, not *how* our trust is restored, but whether it is restored at all:

1844, Chief Baron Joy, *Evidence of Accomplices*, 8: "[There are] different opinions entertained upon the subject — First, some hold that the corroboration required must go to the criminality or identification of every prisoner on trial accused by the accomplice — . . . Lastly, others are of opinion that the points of corroboration are not necessarily confined to the criminality or identification of any of the prisoners, but that it is enough if the testimony of the accomplice is confirmed in such and so many material parts of it as may reasonably induce the jury to credit him as to the entire of his narrative, and among other parts, as to the guilt of the prisoners. The first opinion appears plausible, and the arguments in support of it are specious, . . . and are apt to captivate those who do not attentively consider the subject. . . . This opinion originates in a misconception as to the nature of the defect in the evidence which is to be supplied. The defect in the evidence is not in its *quantity*, but in its *quality*. The witness swearing directly to the prisoner's guilt, that guilt is established if the witness be credible. What, therefore, is required is to throw something, no matter of what nature, into the opposite scale, which will serve as a counterpoise to the impeachment of the witness' credit arising from the

* So also: 1835, Morton, J., in *Com. v. Bosworth*, 22 Pick. 307, 309.

character in which he appears; something that will improve the quality of the proof which has been given by the accomplice; and *that* something may be anything which induces a rational belief in the mind of the jury that the narrative of the accomplice is in all respects a correct one. Now, if we try the question by what passes in our own minds, we shall find that there may be many things which may contribute to inspire us with a rational confidence in the testimony of an accomplice as well as some corroboration as to that part of the evidence which goes to affect the prisoner. . . . The correct and accurate manner in which an accomplice details the circumstances of the transaction shows that he was cool and collected, that he possessed observation, that his recollection is fresh, that he was an observer, not an inventor of facts and incidents; and if we find that in every point in which the evidence of other witnesses can be brought into contact with his, they fit into one another and correspond exactly, it is good ground for presuming that his entire narrative is correct. . . . The accomplice, who must be supposed to know the whole details, is expected to relate them, and is thus exposed to detection in a variety of ways. There is, therefore, less necessity for breaking the general uniformity and destroying the harmony of the rules of law, in this case, than in the other."

An ideal instruction upon the theory of Chief Baron Joy is found in the following passage:

1820, *Garrow, B.*, in *Tidd's Trial*, 33 How. St. Tr. 1488 (charging the jury): "It may not be unfit to observe to you here that the confirmation to be derived to an accomplice is not a repetition by others of the whole story of the accomplice and a confirmation of every part of it; that would be either impossible or unnecessary and absurd; . . . and therefore you are to look to the circumstances to see whether there are such a number of important facts confirmed as to give you reason to be persuaded that the main body of the story is correct. . . . You are, each of you, to ask yourselves this question: Now that I have heard the accomplice and have heard other circumstances which are said to confirm the story he has told, does he appear to me to be so confirmed by unimpeachable evidence, as to some of the persons affected by his story or with respect to some of the facts stated by him, as to afford me good ground to believe that he also speaks the truth with regard to other prisoners or other facts, with regard to which there may be no confirmation? Do I, upon the whole, feel convinced in my conscience that his evidence is true and such as I may safely act upon?"

In *England*, this view obtained at first, that no specific corroboration need be furnished as to the accused's identity.¹⁰ But the opposite opinion began to be taken at Nisi Prius, some twenty years later, and finally prevailed.¹¹ In the *United States*, it also obtained general acceptance as applied to the common-law caution;¹² and when by statute the cautionary practice was in many

¹⁰ So also: 1803, *R. v. Despard*, 26 How. St. Tr. 346, 487.

¹¹ 1803, *R. v. Despard*, *supra*; 1813, *R. v. Birkett and Brady*, R. & R. 252, at a meeting of the judges; 1820, *Tidd's Trial*, quoted *supra*.

¹² 1826, *R. v. Shoshan*, Jebb 54 (of the Irish judges, six favored the new view; five believed that any corroboration sufficed); 1834, *R. v. Addis*, 6 C. & P. 383, Paterson, J.; *R. v. Webb*, ib. 595, Williams, J.; 1836, *R. v. Wilkes*, 7 C. & P. 272, 273, Alderson, B.; 1837, *R. v. Farler*, 8 id. 104, Lord Abinger, C. B.; 1838, *R. v. Kelsey*, 2 Lew Cr. O. 45; 1838, *R. v. Dyke*, 3 C. & P. 261, Gurney, B.; 1839, *R. v. Birkett*, ib. 782, Paterson, J.; 1854, *R. v. Stubbs*, 7

Cox Cr. 48, 1 Dears. 555, by three judges; 1860, *M'Clory v. Wright*, 10 Ir. C. L. 514, 521.

It followed that, where there were several defendants, the corroboration must affect each one in order to make the accomplice's testimony sufficient as against him: 1826, *R. v. Moore*, 7 C. & P. 370; 1829, *R. v. Wells, M. & M. 326*, Littledale, J.; 1845, *R. v. Jenkins*, 1 Cox Cr. 177, Alderson, B.; 1855, *R. v. Stubbs*, 7 id. 48, Dears. 555, by three judges; 1876, *Dill v. State*, 1 Tex. App. 278, 287; 1869, *State v. Potter*, 43 Vt. 495, 506.

¹³ *Ala.*: 1856, *Martin v. State*, 28 Ala. 71 (before the statute); *Cal.*: 1866, *People v. Garrett*, 29 Cal. 622, 625 (before the statute); *Ga.*:

jurisdictions created into a rule of law, this definition of the scope of the corroborative evidence was expressly retained.²³ This element of the requirement, however, would not be essential when the accomplice's testimony did not directly relate to the accused's participation;²⁴ yet it would be sufficient, i. e. corroboration as to the accused's participation would suffice although the subject of it was not a part of the accomplice's testimony.²⁵

1874, *Childers v. State*, 52 Ga. 106, 110 (Warner, C. J., diss.); *Hammack v. State*, ib. 397, 403; *Middleton v. State*, ib. 527, 530; 1875, *Roberts v. State*, 55 id. 320; 1876, *Bailey v. State*, 56 id. 314, *errata*; 1886, *Evans v. State*, 78 id. 351 (slight evidence suffices); 1893, *Johnson v. State*, 92 id. 577, 20 S. E. 8; *Ill.*: 1861, *Gray v. People*, 26 Ill. 346, 347; *Id.*: 1848, *Ray v. State*, 1 G. Gr. 316, 323; *La.*: 1895, *State v. Callahan*, 47 La. An. 444, 452, 17 So. 50; *Mass.*: 1839, *Com. v. Bosworth*, 25 Pick. 397, 399; 1840, *Com. v. O'Brien*, 12 All. 183; 1848, *Com. v. Larrabee*, 99 Mass. 418, 419; 1873, *Com. v. Elliot*, 110 id. 104, 107; 1878, *Com. v. Snow*, 111 id. 411, 417; 1877, *Com. v. Scott*, 123 id. 222, 228 (repudiated to an extent by *Com. v. Holmes*, *infra*; see note 17, *infra*); 1878, *Com. v. Drake*, 124 id. 21, 25; 1879, *Com. v. Holmes*, 127 id. 424, 428 ("upon a point material to the issue, in the sense that it tends to prove the guilt of the defendant"); 1883, *Com. v. Hayes*, 140 id. 366, 369, 5 N. E. 264; *Mo.*: 1887, *State v. Chyo Chiangk*, 92 Mo. 395, 417, 4 S. W. 704; 1888, *State v. Walker*, 96 id. 95, 100, 9 S. W. 446, 11 S. W. 1133; 1890, *State v. Harkins*, 100 id. 666, 672, 13 S. W. 830; 1891, *State v. Jackson*, 106 id. 174, 179, 17 S. W. 301; *S. C.*: 1849, *State v. Brown*, 3 Strobb. 508, 517; *N.Y.*: 1894, *McNealley v. State*, 5 Wyo. 66, 36 Pac. 834.

²³ The statutes are given *ante*, § 2056; they are applied in the following cases, but, as each ruling depends upon the evidence in the case in hand, its details are useless for the purpose of a precedent: *Ala.*: 1867, *Montgomery v. State*, 40 Ala. 684, 686; 1877, *Smith v. State*, 59 id. 104; 1880, *Marler v. State*, 67 id. 55, 66; *Lumpkin v. State*, 68 id. 56; *Marler v. State*, ib. 580, 585 (good opinion by Somerville, J.); 1888, *Burney v. State*, 87 id. 80, 6 So. 391; *Ark.*: 1894, *Vaughan v. State*, 58 Ark. 353, 365, 24 S. W. 885; *Cal.*: 1870, *People v. Ames*, 39 Cal. 408; 1870, *People v. Melvane*, ib. 614; 1875, *People v. Cleveland*, 49 id. 577, 580; 1875, *People v. Cloonan*, 50 id. 449; 1876, *People v. Thompson*, ib. 480 (the evidence must do more than merely "raise a suspicion"); 1882, *People v. Rolfe*, 61 id. 541, 544; 1887, *People v. Kunz*, 73 id. 313, 14 Pac. 836; 1888, *People v. Grundell*, 75 id. 301, 305, 17 Pac. 314; 1890, *People v. McLean*, 84 id. 480, 483, 24 Pac. 32; 1890, *People v. Hong Tong*, 85 id. 171, 173, 24 Pac. 726; 1903, *People v. Morton*, 139 id. 719, 73 Pac. 609; *Ga.*: 1860, *Chapman v. State*, 113 Ga. 56, 37 S. E. 102; *Id.*: 1867, *State v. Upton*, 5 La. 445 (concealing stolen goods); 1859, *State v. Willis*, 9 id. 582 (burglary); 1860, *State v. Pepper*, 11 id. 347 (counterfeit money); 1864, *State v. Tulley*, 18 id. 83 (seduction); 1866,

State v. Thornton, 26 id. 79, 83 (larceny); 1872, *State v. Moran*, 34 id. 453 (burglary); 1874, *State v. Clemens*, 38 id. 257 (obstructing track); 1877, *State v. Graff*, 47 id. 384 (burglary); 1878, *State v. Stanley*, 48 id. 221 (larceny); 1879, *State v. Wart*, 51 id. 587, 2 N. W. 405 (arson); 1880, *State v. Hennessy*, 55 id. 299, 360, 7 N. W. 641 (arson); 1881, *State v. Allen*, 57 id. 431, 435, 10 N. W. 808 (murder); 1883, *State v. Reader*, 60 id. 527, 15 N. W. 423 (arson); 1885, *State v. Dietz*, 67 id. 320, 25 N. W. 141 (murder); 1888, *State v. Mikenell*, 70 id. 176, 30 N. W. 474 (robbery); 1890, *State v. Van Winkle*, 80 id. 15, 22, 45 N. W. 388 (larceny); 1893, *State v. Thompson*, 87 id. 670, 673, 54 N. W. 1077 (this long list of cases illustrates the abuse to which the rule lends itself in requiring a decision by the Supreme Court upon matters properly for the trial judge alone); *Ky.*: 1879, *Miller v. Com.*, 78 Ky. 15, 21 ("must extend to every fact necessary to establish the fact that the offense charged was committed and that the prisoner was the perpetrator"); 1881, *Bowling v. Com.*, 79 id. 604; 1893, *Stevens v. Com.*, — id. —, 45 S. W. 76 (apparently approving *Miller v. Com.*; here, rape); 1901, *Howard v. Com.*, 110 id. 356, 61 S. W. 756; *Miss.*: 1881, *State v. Lawlor*, 28 Minn. 216, 224, 9 N. W. 698 (it must "tend in some degree to establish the guilt of the accused, but need not be sufficiently weighty or full as standing alone to justify a conviction"); 1883, *State v. Bria*, 30 id. 522, 525, 16 N. W. 406; 1901, *State v. Clements*, 82 id. 434, 35 N. W. 229; *N. Y.*: 1884, *People v. Hooghkerk*, 96 N. Y. 149, 162; 1884, *People v. Ryland*, 97 id. 126, 131; 1887, *People v. Everhardt*, 104 id. 591, 594, 11 N. E. 62; 1887, *People v. Elliott*, 106 id. 288, 292, 12 N. E. 602; 1888, *People v. O'Neil*, 109 id. 251, 267, 16 N. E. 68; *Or.*: 1879, *State v. Odell*, 8 Or. 30, 33; 1890, *State v. Townsmd*, 19 id. 213, 23 Pac. 968; *S. D.*: 1894, *State v. Hicks*, 6 S. D. 325 (used only "tend" to connect the defendant); *Tex.*: 1858, *Bruton v. State*, 21 Tex. 337, 347; 1876, *Wright v. State*, 43 id. 170, 174; 1876, *Thomas v. State*, ib. 658, 661; 1876, *Coleman v. State*, 44 id. 109, 111; *Roberts v. State*, ib. 119, 123; 1877, *Nourse v. State*, 2 Tex. App. 304, 317; *Gillian v. State*, 3 id. 132, 137 (mere suspicion is not enough); 1878, *Jones v. State*, ib. 575, 578; *Hoyle v. State*, ib. 239, 245; 1880, *Myers v. State*, 7 id. 640, 656; *Utah*: 1888, *U. S. v. Kershaw*, 5 Utah 618, 19 Pac. 194; 1897, *State v. Spencer*, 15 id. 149, 49 Pac. 302; 1899, *State v. Collett*, 20 id. 290, 58 Pac. 634 (Spencer case followed).

²⁴ 1889, *Cox v. Com.*, 126 Pa. 94, 102, 17 Atl. 377.

²⁵ 1889, *Malachi v. State*, 80 Ala. 184, 141,

(c) In a few jurisdictions it is occasionally said that the corroboration must affect some material fact in the accomplice's testimony.¹² But this phrase seems not to mean more, in any case, than that the corroboration must have the effect of persuading to trust the testimony. To-day the place of this phrase is taken by the foregoing requirement as to corroborating the accused's participation or identity;¹³ and that indeed seems to have been the meaning of the original proposers.

(d) The requirement of corroboration leads to many rulings as to sufficiency, based wholly upon the evidence in each case; from these no additional development of principle can profitably be gathered.¹⁴ As recorded

8 Am. 104; 1874, *Hammack v. State*, 53 Ga. 397, 403; 1898, *Blais v. State*, 92 Id. 544, 50 A. E. 12 (proof of corpus delicti does not suffice); 1897, *McCrory v. State*, 101 Id. 779, 28 S. E. 921; 1852, *Com. v. Savory*, 10 Cush. 535, 539; 1879, *Com. v. Holmes*, 127 Mass. 424, 441; 1888, *Com. v. Chase*, 147 Id. 597, 599, 18 N. E. 565; 1860, *People v. Dyle*, 21 N. Y. 578, 580, *semble*.

A peculiar doctrine in *Massachusetts* is that it may be erroneous to admit corroborating evidence which does not satisfy the above requirement, although in that State the jury may lawfully convict without corroboration: 1839, *Com. v. Bosworth*, 32 Pick. 397; 1852, *Com. v. Savory*, 10 Cush. 535, 539, *semble*; 1868, *Com. v. Larabee*, 99 Mass. 413, 415; 1879, *Com. v. Holmes*, 127 Id. 434, 441, 445 ("The decision in *Com. v. Bosworth* has for forty years been treated as settling that if evidence is admitted for the purpose of so far corroborating the testimony of an accomplice as to make it safe for the jury to convict, which is not legally to be considered as corroborating that sense, the error may be revised by... exceptions"; *Morton, J., diss.*). The effect is that if no evidence at all is offered in corroboration, the jury may convict, but if evidence is offered and admitted, a rule of sufficiency may apply which will render a verdict of conviction illegal; in other words, $a = a$, but $a + 0 \neq a$. As a consequence, trial judges there would do better to exclude all corroboration whatever, or at least to omit all caution on the subject; and this seems to be the practice begun in *Com. v. Wilson* (1890), 152 Mass. 12, 14, 35 N. E. 16. The *Massachusetts* doctrine is of course unsound, and has been repudiated in *Bruton v. State*, 21 Tex. 337, 315.

Under the statutory rule, the sufficiency of the evidence as satisfying the definition of the rule of law is of course for the judge, while its effect as actually making the accomplice's testimony trustworthy is for the jury: 1879, *Lockett v. State*, 63 Ala. 5, 11; 1882, *Craft v. Com.*, 50 Ky. 349; 1903, *People v. O'Farrell*, N. Y. (cited *supra*, note 2). Compare § 2550, *post*.

¹² This is said in some of the English cases quoted *supra*, and is laid down in the following rulings: 1865, *State v. Schlagel*, 19 Ia. 169; 1880, *State v. Henneman*, 55 Id. 299, 7 N. W. 641; 1881, *State v. Allen*, 57 Id. 431, 495, 10 N. W. 805; 1901, *State v. Jones*, 115 Id. 113,

88 N. W. 196; 1879, *Kilrow v. Com.*, 89 Pa. 461, 488; 1880, *Cox v. Com.*, 125 Id. 91, 102, 17 Atl. 237; 1884, *Bruton v. State*, 21 Tex. 337, 345; 1889, *State v. Howard*, 32 Vt. 380, 400.

¹³ *Mum.*: 1899, *Com. v. Bosworth*, 22 Pick. 397, 399, *semble*; 1879, *Com. v. Holmes*, 127 Mass. 424, 435, 443 (Gray, C. J., referring to the opinion in the preceding case, which first in this State advanced the distinction: "Taking the whole paragraph together, it is manifest that the phrase 'material to the issue' is used as equivalent to 'involving the guilt of the party on trial' or 'having necessary connection with the guilt of the defendant'"; thus practically repudiating the intimation in *Com. v. Scott*, 123 Id. 232, 251, 258, that a "material" fact might be sufficient though falling short of a fact "tending to connect the defendant with the crime"); 1888, *Com. v. Chase*, 147 Id. 597, 18 N. E. 565 (approving the foregoing remark); *Mo.*: 1887, *State v. Chyo Chiagh*, 92 Mo. 395, 417, 48 W. 704, *semble*; 1890, *State v. Harkins*, 100 Id. 666, 672, 18 S. W. 830; 1900, *State v. McLain*, 159 Id. 340, 60 S. W. 736 (following *State v. Chyo Chiagh*); *Tex.*: 1875, *Wright v. State*, 48 Tex. 170, 174, *semble*; 1878, *Hoyle v. State*, 4 Tex. App. 239, 244 ("It would serve no good purpose, nor tend to enlighten the jury, to tell them that the accomplice must be corroborated in his statements in any 'material matter'").

¹⁴ *Ark.*: 1861, *Cassidy v. State*, 37 Ark. 67, 84; 1889, *Fort v. State*, 53 Id. 180, 187, 11 S. W. 959; 1896, *Scott v. State*, 63 Id. 310, 35 S. W. 538; 1897, *Kent v. State*, 64 Id. 247, 41 S. W. 849; *Cal.*: 1896, *People v. Barker*, 114 Cal. 617, 46 P. 601; *People v. Armstrong*, ib. 570, 48 Pac. 611; *People v. Main*, ib. 639, 46 Pac. 612; 1899, *People v. Compton*, 123 Id. 403, 56 Pac. 44; 1899, *People v. Solomon*, 125 Id. 19, 58 Pac. 58; 1903, *People v. Hoagland*, 138 Id. 335, 71 Pac. 259; *Ga.*: 1899, *Chapman v. State*, 169 Ga. 157, 34 S. E. 269 (slight evidence may suffice); 1900, *Taylor v. State*, 110 Id. 150, 35 S. E. 161; 1902, *Dixon v. State*, 116 Id. 166, 42 S. E. 357; *Id.*: 1894, *State v. Russell*, 90 Ia. 493, 494, 58 N. W. 890; 1895, *State v. Feuerhaken*, 96 Id. 299, 65 N. W. 299 (instruction, on a charge of receiving stolen goods, not requiring corroboration as to defendant's knowledge of the stolen character, held proper); 1898, *State v. Smith*, 106 Id. 701, 77 N. W. 499; 1900, *State*

precedents of Supreme Courts, they are mere useless chaff, ground out by the vain labor of able minds mistaking the true material for their energies.

§ 2060. Same: (5) *Who is an Accomplice.* In the application of the rule requiring corroboration, the definition of an accomplice, as made by the substantive law, usually suffices and is followed.¹ Nevertheless, certain questions peculiar to this rule of evidence arise for settlement.

(a) In sexual crimes, the other person — usually the woman — may or may not be an accomplice, according as she is, by the nature of the crime, a victim of it or a voluntary partner in it. Thus, in adultery, the other party may well be deemed an accomplice;² and so also, perhaps, in incest;³ but

v. Chauvet, 111 id. 687, 83 N. W. 717; *Mont.*: 1899, *State v. Gidden*, 22 Mont. 66, 55 Pac. 919; 1900, *State v. Calder*, 23 id. 504, 59 Pac. 906; 1902, *State v. Stevenson*, 26 id. 332, 67 Pac. 1001; *Nev.*: 1871, *State v. Chapman*, 6 Nev. 230, 324; *N. Y.*: 1894, *People v. Mayhew*, 150 N. Y. 346, 44 N. E. 971; *N. D.*: 1897, *State v. Condott*, 7 N. D. 109, 73 N. W. 918; *Or.*: 1895, *State v. Scott*, 28 Or. 331, 42 Pac. 1 (evidence of mere opportunity to commit adultery, not amounting to design or inclination, held insufficient); 1900, *State v. Savage*, 36 id. 191, 60 Pac. 610; *S. D.*: 1894, *State v. Phelps*, 5 S. D. 480, 488, 59 N. W. 471; 1899, *State v. Levers*, 13 id. 265, 41 N. W. 294; *Wash.*: 1901, *State v. Harris*, 25 Wash. 411, 65 Pac. 774.

¹ In the following *cum gratia* crimes the rule was applied according to the tests of the substantive law: 1831, *R. v. Hargrave*, 5 C. & P. 170 (man-slaughter; spectators at prize-fight); 1859, *Davidson v. State*, 33 Ala. 350, 352 (illegal card-game); 1860, *English v. State*, 35 id. 423 (same); 1860, *Bird v. State*, 26 id. 279 (same); 1861, *Base v. State*, 37 id. 469 (betting at illegal game); 1866, *Ash v. State*, 81 id. 76 (aiding an escape from jail); 1884, *Milton v. State*, 43 Ark. 367, 371 (murder); 1885, *Carroll v. State*, 45 id. 539, 545 (murder); 1898, *Hillman v. State*, 50 id. 523, 526, 8 S. W. 334 (rescue of prisoner).

In *bribery or subornation*, the other participant is not an accomplice: 1889, *State v. Quinlan*, 40 Minn. 55, 57, 41 N. W. 299 (taking money to withhold evidence; the payor not an accomplice); 1898, *State v. Durnan*, 73 id. 150, 75 N. W. 1127 (demanding a bribe; the person paying it not an accomplice); 1895, *State v. Carr*, 28 Or. 359, 42 Pac. 215 (bribery); *contra*, *semble*: Statutes cited *ante*, § 2056, for Okl., Pa., Wyo.

So also for *subornation of perjury*: 1902, *Storie v. State*, — Ga. —, 45 S. E. 630; *Contra*: 1869, *People v. Evans*, 40 N. Y. 1, 6 (perjured person is an accomplice).

In *knowing receipt of stolen goods*, the thief is not an accomplice: 1896, *Springer v. State*, 102 Ga. 447, 30 S. E. 971; 1896, *State v. Kuhlman*, 152 Mo. 100, 53 S. W.

A *joint principal* is of course an accomplice for the present rule: 1875, *Barran v. State*, 42 Tex. 260, 263; *Williams v. State*, ib. 392, 395; 1879, *Irvine v. State*, 1 Tex. App. 301, 303;

1877, *Davis v. State*, 2 id. 539, 605; 1878, *Roach v. State*, 4 id. 48, 49; 1880, *Myers v. State*, 7 id. 640, 688.

The mere prior existence of an indictment for the same offence does not of itself make the person an accomplice: 1875, *Barran v. State*, 42 Tex. 260, 263 (the mere fact of the dismissal of an indictment does not show the witness an accomplice; but its dismissal upon an understanding that he will testify and be exempted from prosecution is an admission by the State that he is an accomplice, though his testimony may not criminate him); 1875, *Roberts v. State*, 44 id. 119, 123, *semble* (same); and conversely, prior acquittal on the same charge does not show him not an accomplice: 1898, *People v. Croegan*, 121 Cal. 554, 55 Pac. 1062.

Compare the rulings cited *ante*, §§ 249, 267 (impeachment of an accomplice). Compare also the rules denying the disqualification of an accomplice merely by reason of his self-confessed turpitude (*ante*, § 526) or by reason of his being indicted for the same offence (*ante*, § 580, notes 3-4); by those rules, however, inasmuch as they declared an accomplice admissible, it seldom became necessary to define the term.

² 1891, *State v. Henderson*, 34 Ia. 161, 165, 50 N. W. 758 (if voluntary); 1894, *State v. Ean*, 90 id. 534, 536, 53 N. W. 898; 1898, *U. S. v. Kershaw*, 5 Utah 618, 19 Pac. 194, *semble*. *Contra*: 1878, *State v. Colby*, 51 Vt. 292, 295 (adultery; testimony of the participant is to be weighed as in any other crime; repudiating *State v. Annice*, N. Chipm. 9). For *fornication*, see the New Hampshire statute cited *ante*, § 2056.

³ 1882, *Raiford v. State*, 68 Ga. 672, *semble*; 1901, *Solomon v. State*, 113 id. 192, 33 S. E. 332 (for one who "knowingly and wilfully consents"); 1899, *State v. Kellar*, 8 N. D. 563, 80 N. W. 476 (if not acting under force or fraud); 1890, *State v. Jarvis*, 18 Or. 360, 364, 30 id. 437, 23 Pac. 251, 26 Pac. 302; 1895, *Porath v. State*, 90 Wis. 527, 538, 63 N. W. 1061 (unless she "was the victim of force, fraud, or undue influence"). *Contra*: 1894, *People v. Patterson*, 102 Cal. 239, 244, 34 Pac. 436, *semble*; 1897, *State v. Kouhns*, 101 Ia. 720, 73 N. W. 333; 1894, *Whittaker v. Com.*, 95 Ky. 632, 27 S. W. 62; 1902, *Schwartz v. State*, — Nebr. —, 51 N. W. 191.

the woman is not an accomplice in rape,⁴ rape under age,⁵ seduction,⁶ or abortion;⁷ nor the participant in sodomy.⁸

(b) The case of a *pretended confederate*, who as detective, spy, or decoy, associates with the wrongdoers in order to obtain evidence, is distinct from that of an accomplice, although the distinction may sometimes be difficult of application:

1843, *Mauls, J.*, in *R. v. Mullins*, 7 State Tr. n. s. 1110, 3 Cox Cr. 756: "An accomplice is a person who has concurred in the commission of an offence. . . . [But such are different from] spies, that is, persons who take measures to be able to give to the authorities information so as to prevent those who are disposed to break out from effecting their purpose. . . . In the case of an accomplice, he acknowledges himself to be a criminal; in the case of these men, they do not acknowledge anything of the kind."

The line should perhaps be drawn in this way: When the witness has made himself an agent for the prosecution before associating with the wrongdoers or before the actual perpetration of the offence, he is not an accomplice; but he may be, if he extends no aid to the prosecution until after the offence is committed. A mere detective or decoy is therefore not an accomplice;⁹ nor an original confederate who betrays before the crime's committal;¹⁰ yet an accessory after the fact would be,¹¹ if he had before betrayal rendered himself liable as such.

(c) The burden of *proving* the witness to be an accomplice is of course upon the party alleging it for the purpose of invoking the rule, namely, upon the defendant. Whether the witness is in truth an accomplice is left to the jury to determine, and if they conclude him to be such, then and then only

* 1903, *Trimble v. Terr.*, — Ariz. —, 71 Pac. 292.

* 1898, *Republic v. Parsons*, 10 Haw. 601, 606; 1903, *State v. Perea*, 27 Mont. 259, 71 Pac. 162; 1900, *State v. Hilberg*, 22 Utah 27, 61 Pac. 215; 1903, *State v. Roller*, 30 Wash. 692, 71 Pac. 713.

* 1898, *Keller v. State*, 102 Ga. 503, 31 S. E. 92; 1903, *Gatzmeyer v. Peterson*, — Nebr. —, 34 N. W. 974 (bastardy).

But, by the *statutes* cited in the next section, corroboration is required in these two cases as an independent rule, irrespective of the theory of accomplices.

* 1898, *State v. Smith*, 90 Ia. 26, 68 N. W. 428; 1888, *Peoples v. Com.*, 87 Ky. 487, 489, 9 S. W. 509, 510; 1888, *Com. v. Wood*, 11 Gray 85, 93; 1874, *Com. v. Boynton*, 116 Mass. 343; 1878, *Com. v. Drake*, 124 Id. 21, 24; 1875, *State v. Owens*, 22 Minn. 328, 244; 1877, *State v. Hyer*, 29 N. J. L. 596, 601; 1864, *Dunn v. People*, 29 N. Y. 523, 527; 1885, *People v. Vedder*, 98 Id. 630.

* 1833, *R. v. Jellyman*, 3 C. & P. 604; 1901, *Kelly v. People*, 192 Ill. 119, 61 N. E. 423 (crime against nature; corroboration of the boy-victim held not necessary).

* 1803, *R. v. Despard*, 38 How. St. Tr. 248, 489; 1843, *R. v. Dowling*, 3 Cox Cr. 509, 515 ("If he only lent himself to the scheme for the purpose of convicting the guilty," he was not an

accomplice); 1868, *People v. Farrell*, 30 Cal. 316 (counterfeiting); 1874, *People v. Barric*, 49 Id. 342, 344 (larceny); 1873, *State v. McKean*, 26 Ia. 248 (private detective; *R. v. Despard* followed); 1892, *State v. Brownlee*, 84 Ia. 473, 476, 51 N. W. 25 (malicious threat to kill); 1855, *Com. v. Downing*, 4 Gray 29 (one purchasing of liquor to obtain evidence); 1887, *State v. Baden*, 37 Minn. 212, 34 N. W. 24 (similar); 1901, *State v. Douglas*, 26 Nev. 196, 65 Pac. 802 (deputy-sheriff, held not an accomplice on the facts); 1877, *Campbell v. Com.*, 84 Pa. 187, 197 (detective becoming a confederate in the Molly Maguire confederacy of crime).

Compare the cases cited *post*, § 2066 (detectives in divorce cases).

* 1893, *Com. v. Hollister*, 157 Pa. 13, 16, 27 Atl. 386 (confederate betraying his companions and going on with the crime, not an accomplice).

* 1876, *State v. Hayden*, 45 Ia. 11, 14, *semble*; 1878, *Müller v. Com.*, 73 Ky. 15, 22 (undecided); 1879, *State v. Odell*, 8 Or. 30, 33. *Contra*: 1898, *McFalls v. State*, 66 Ark. 16, 48 S. W. 492 (one who merely conceals the crime out of fear, not an accomplice); 1884, *Lowry v. State*, 72 Ga. 649; 1885, *Allen v. State*, 74 Id. 769, 771; 1898, *State v. Umbie*, 115 Mo. 452, 461, 23 S. W. 378. The rule does not apply to an accomplice in *another crime*; 1896, *People v. Sternberg*, 111 Cal. 3, 43 Pac. 199.

are they to apply the rule requiring corroboration.¹³ If they are in doubt, and unable to decide, the rule is not to be applied;¹⁴ but they need only believe by the preponderance of evidence.¹⁵

§ 2061. *Uncorroborated Complainant in Rape, Seduction, Enticement, Bastardy, Breach of Marriage-Promise, and the like.* At common law, the testimony of the prosecutrix or injured person, in the trial of offences against the chastity of women, was alone sufficient evidence to support a conviction; neither a second witness nor corroborating circumstances were necessary:¹

1680, *Hale*, L. C. J., *Pleas of the Crown*, I, 638, 636: "The party ravished may give evidence upon oath and is in law a competent witness; but the credibility of her testimony, and how far forth she is to be believed, must be left to the jury, and is more or less credible according to the circumstances of fact that concur in that testimony. . . . It is one thing whether a witness be admissible to be heard; another thing, whether they are to be believed when heard. It is true, rape is a most detestable crime, and therefore ought severely and impartially to be punished with death; but it must be remembered that it is an accusation easily to be made and hard to be proved; and harder to be defended by the party accused, tho never so innocent."

1876, *Brichell*, C. J., in *Boddie v. State*, 52 Ala. 305, 306: "No principle of law forbids

¹³ 1880, *Polk v. State*, 26 Ark. 117, 126; 1879, *People v. Curlee*, 53 Cal. 604, 607 (provided "there is any evidence, however slight, tending to prove his complicity"); 1886, *Bernhard v. State*, 76 Ga. 613, 617; 1864, *State v. McKinzie*, 18 Ia. 573; 1865, *State v. Schlagel*, 19 id. 169; 1872, *Com. v. Elliot*, 110 Mass. 104, 107; 1881, *State v. Lawlor*, 28 Minn. 216, 223, 9 N. W. 698; 1884, *People v. Hooghkerk*, 86 N. Y. 149, 163; 1880, *Butler v. State*, 7 Tex. App. 635, 639. *Contra*: 1895, *State v. Callahan*, 47 La. An. 455, 17 So. 50, *sybil* (the Court decides whether he is an accomplice; here the opinions differed, and the effect of the decision is not clear); 1896, *State v. Carr*, 28 Or. 239, 42 Pac. 215 (the question is for the Court, when no corroboration is offered and the evidence of complicity is undisputed). Of course the prosecution may have conceded the witness to be an accomplice: 1855, *Com. v. Desmond*, 5 Gray 80; 1872, *Com. v. Elliot*, 110 Mass. 104, 106 (but a mere hypothetical argument is not an admission). Compare § 2550, *post* (judge and jury).

¹⁴ 1883, *Ross v. State*, 74 Ala. 533, 536; 1893, *Childress v. State*, 66 id. 77, 83, 5 So. 775.

¹⁵ 1897, *State v. Smith*, 102 Ia. 656, 72 N. W. 279.

¹ *Accord*: (1) *Rape*: 1875, *Boddie v. State*, Ala., quoted *supra*; 1887, *Barnett v. State*, 83 id. 40, 45, 3 So. 612; 1895, *Curby v. Terr.*, — Ariz. —, 42 Pac. 963; 1892, *People v. Fleming*, 94 Cal. 308, 810, 29 Pac. 447; 1897, *Doyle v. State*, 39 Fla. 155, 22 So. 372; 1894, *State v. Connelly*, 57 Minn. 482, 483, 59 N. W. 479; 1893, *Moore v. State*, 71 Miss. 196, 198, 13 So. 884; 1892, *State v. Dusenberry*, 112 Mo. 277, 292, 20 S. W. 461; 1897, *State v. Marks*, 140 id. 656, 41 S. W. 973 (repudiating the *obiter dictum* in *State v. Patrick*, *infra*; *Sherwood*, J., *diss.*); 1894, *Gonzales v. State*, 22 Tex. Cr. 611, 620, 25 S. W. 781; 1894, *Thompson v. State*, 33 id.

472, 475, 26 S. W. 987; 1900, *Keith v. State*, — id. —, 56 S. W. 628; 1899, *Wilcox v. State*, 102 Wis. 650, 78 N. W. 763; 1902, *Lanphere v. State*, 114 id. 193, 89 N. W. 123; 1897, *Tway v. State*, 7 Wyo. 74, 50 Pac. 188. (2) *Seduction*: 1897, *Ferguson v. Moore*, 98 Tenn. 242, 39 S. W. 241 (even where she consents to an abortion); 1900, *State v. Seiler*, 106 Wis. 346, 82 N. W. 167 (fornication with a female of previous chaste character). (3) *Bastardy*: 1882, *State v. Nichols*, 29 Minn. 357, 359, 13 N. W. 153; 1891, *Olson v. Peterson*, 33 Nebr. 358, 360, 50 N. W. 155; 1894, *Robb v. Hewitt*, 39 id. 217, 220, 58 N. W. 53; 1901, *State v. Mearns*, 60 S. C. 527, 39 S. E. 245.

Contra: (1) *Rape*: 1890, *State v. Anderson*, 6 Lia. 706, 59 Pac. 180 (conviction may be "upon the uncorroborated testimony of the prosecutrix," but only when her character is unimpeached and where the circumstances "are clearly corroborative of the statements of the prosecutrix," — whatever this *delphic* utterance may mean); 1891, *State v. Patrick*, 107 Mo. 147, 168, 173, 17 S. W. 666 (adopting the Nebraska rule; but repudiated *ubi supra*); 1886, *Mathews v. State*, 19 Nebr. 330, 337, 27 N. W. 234 (where the defendant's testimony "expressly denies that of the prosecutrix, she must be corroborated to authorize a conviction"); 1897, *Fager v. State*, 22 id. 332, 333, 35 N. W. 195 (these two rulings overturn the following, in which originally it had been held that corroboration was not essential: 1877, *Garrison v. People*, 6 id. 274, 283; 1881, *Olson v. State*, 11 id. 376, 277, 9 N. W. 38); 1894, *Hammond v. State*, 39 Nebr. 252, 257, 58 N. W. 92 (not required necessarily as to the criminal act directly); 1899, *Dunn v. State*, 58 id. 807, 79 N. W. 719; 1897, *Sowers v. Terr.*, 6 Okl. 486, 50 Pac. 257; 1893, *O'Boyle v. State*, 100 Wis. 296, 76 N. W. 989 (necessary where her testimony seems unreliable).

a conviction on her uncorroborated testimony, though she is wanting in chastity, if the jury are satisfied of its truth. Her testimony should be cautiously scrutinized, and Court and jury should diligently guard themselves from the undue influence of the sympathy in her behalf which the accusation is apt to excite. If she did not conceal but immediately discovered the offence, and the offender is known to her; if the place of its commission was such that if she made outcry it would not probably be heard and bring her assistance and defence, — these and other circumstances should be considered by the jury. The manner in which she testifies, the consistency of her testimony, should also be carefully considered. If, viewed fairly and carefully, the jury are satisfied of the truth of her evidence, it needs no corroboration from other witnesses to support a conviction."

Upon principle, this result was merely an instance of the general absence in our law of rules requiring a specified number of witnesses. As to policy, it seems to be sufficiently justified. In the first place, applying the canon already suggested in dealing with the treason-rule (*ante*, § 2037), the first condition justifying a rule of number does perhaps exist, namely, the frequency of false accusations of the class in question; but the second does not exist, namely, the relatively small disadvantage that would ensue in case a guilty man escaped through the lack of the required number of witnesses, for in none of these offences can such a view be taken of the consequences of letting such offences go unpunished. Furthermore, a rule of law requiring corroboration has probably little actual influence upon the juror's minds over and above that ordinary caution and suspicion which would naturally suggest itself for such charges; and the rule thus tends to become in practice merely a means of securing from the trial judge the utterance of a form of words which may chance to be erroneous and to lay the foundation for a new trial. Finally, the purpose of the rule is already completely attained by the judge's power to set aside a verdict upon insufficient evidence, and under this power verdicts are constantly set aside, in jurisdictions having no statutory rule, upon the same evidence which in other jurisdictions would be insufficient under the statutory rule requiring corroboration.

Nevertheless, in many jurisdictions, a statute, based on a plausible but questionable purpose of protecting against false accusations, has introduced a rule requiring corroboration. This rule is made applicable, in some jurisdictions, to rape only; in others, to seduction under promise of marriage; in others, to bastardy; in others, to abortion; and in others, to two or more such offences having in common the feature that an alleged injured woman is likely to be the principal witness.²

² With the statutes are placed, in this note, the rulings which merely apply the statutory rule to the facts of a given case, or define the scope of the statute; rulings defining or applying some general canon of corroboration (except for the English statutes) are placed in the next section; for statutes applicable merely to children (in all crimes), see *post*, § 2066.

ENGLAND: (1) *Rape under age*: 1885, St. 48 & 49 Vict. c. 69, §§ 2-4 (on a charge of carnally knowing a girl under the age of consent, the testimony of the girl or "any other child of tender years" being made admissible without

oath, on certain conditions, nevertheless no conviction can be had on such testimony unless it is "corroborated by some other material evidence in support thereof implicating the accused"); (3) *Bastardy*: 1834, St. 4 & 5 W. IV. c. 76, § 72 (no order of filiation shall be made "unless the evidence of the mother of such bastard child shall be corroborated in some material particular by other testimony"); 1839, R. v. Read, 9 A. & E. 619 (statute applied); 1844, St. 7 & 8 Vict. c. 101, § 3 (similar requirement); 1860, *Hodges v. Bennett*, 5 H. & N. 625 (statute applied); 1872, St. 35 & 36 Vict. c. 65, § 4 (a

§ 2062. *Same: Nature of Corroborative Evidence.* The further definition of the term "corroboration," by detailed rules of law, is unwise and unprac-

man may be adjudged the putative father of a bastard, "if the evidence of the mother be corroborated in some material particular by other evidence to the satisfaction of the said justices"; 1872, *R. v. Armitage*, L. R. 7 Q. B. 773 (under the statute the mother's testimony is indispensable; her death does not alter the rule); (3) *Breach of marriage-promise*: 1869, St. 32 & 33 Vict. c. 68, § 3 (no plaintiff, in an action for breach of marriage-promise, is to recover, unless his or her testimony "shall be corroborated by some other material evidence in support of such promise"); 1872, *Hickey v. Campion*, 6 Ir. Rep. O. L. 587 (corroboration held sufficient); 1872, *Willcox v. Gottfrey*, 26 L. T. S. 328 (*Bramwell, B.*: "The promise itself must be confirmed, and not merely the fact that the parties were keeping company; defendant's failure to testify, held sufficient corroboration"); 1877, *Bessala v. Stern*, L. R. 3 C. P. D. 265, 271 ("the corroboration need not go the length of establishing the contract; if the evidence supports the promise, it is enough; defendant's failure to deny the promise, when charged in conversation, held sufficient"); 1891, *Wiedemann v. Walpole*, 2 Q. B. 524 (statute applied); (4) *Cruelty*: 1889, St. 52 & 53 Vict. c. 44, § 3 (similar to St. 1884, for offences of cruelty to children).

CANADA: *Dem.*: St. 1890, c. 37, § 13 (like Eng. St. 1885); *Crim. Code* 1892, § 685 (rape under age, and indecent assault, like Eng. St. 1885); *B. C.* St. 1900, c. 9, § 3 (in breach of promise of marriage, the plaintiff's testimony must be "corroborated by some other material evidence in support of such promise"); *Man.*: 1888, *Waters v. Bellamy*, 5 Man. 246 (breach of promise statute applied); *Newf. Consul. St.* 1892, c. 57, § 4 (like Ont. Rev. St. 1897, c. 73, § 6); *N. W. Terr.*: 1895, *R. v. Wyne*, 2 N. W. Terr. 103 (Dominion statute applied); *Ont. Rev. St.* 1897, c. 73, § 6 (in breach of promise of marriage, the parties are competent; but no plaintiff shall recover unless "his or her testimony is corroborated by some other material evidence in support of the promise"); *P. E. I. St.* 1889, c. 3, § 7 (like Eng. St. 1869).

UNITED STATES: *Ala. Code* 1897, § 5508 (no conviction for seduction is to be had "on the uncorroborated testimony of the woman"); *Alaska C. C. P.* 1900, § 155 (like Or. Annot. C. 1892, § 1378); *Cal. P. C.* 1872, § 1108 (prosecutions for abortion or for enticement of chaste female for purpose of prostitution; the woman's testimony not sufficient "unless she is corroborated by other evidence"); 1897, *People v. Wade*, 118 Cal. 672, 80 Pac. 841 (prosecutrix in seduction under Pen. C. §§ 268, 1106; corroboration not required); *Colo. Annot. Stat.* 1891, § 1325 (no conviction for seduction is to be had "on the testimony of the female seduced unsupported by other evidence"); *Ida. Rev. St.* 1897, § 7869 (abortion and enticing for prostitution; no conviction is to be had "upon the testimony of the woman upon whom or with

whom the offence was committed, unless she be corroborated by other evidence"); *Ill. Rev. St.* 1874, c. 36, § 525 (St. 1899, April 19) (no conviction is to be had for seduction "upon the testimony of the female unsupported by other evidence"); *Ind. Rev. St.* 1897, § 1898 (in prosecutions for seduction, and for enticing a female for prostitution, the female's evidence "must be corroborated to the extent required as to the principal witness in cases of perjury"); *Ia. Code* 1897, § 5486 (in prosecutions for rape or assault with intent, or for enticing for prostitution, or for seduction, the testimony of the "injured person" is insufficient, "unless she be corroborated by other evidence tending to connect the defendant with the commission of the offence"); § 4757 (compulsory marriage or defilement; no conviction is to be had "unless the evidence of the prosecuting witness be corroborated by other evidence tending to connect the defendant with the commission of the crime"); 1884, *State v. Miller*, 65 Ia. 60, 63, 21 N. W. 181 (statute assumed applicable to incest); 1891, *State v. Moore*, 81 Id. 578, 47 N. W. 772 (same); 1897, *State v. Kohns*, 103 Id. 720, 73 N. W. 353 (no corroboration needed, where the crime though charged as incest was also rape); *Kan. Gen. St.* 1897, c. 100, § 36 (seduction under promise of marriage; "the testimony of the woman alone shall not be sufficient evidence of a promise of marriage"); *Md. Pub. Gen. L.* 1888, art. 35, § 3 (in proceedings founded on adultery or for breach of marriage-promise, no recovery can be had on the "testimony of the plaintiff alone," but "testimony in corroboration of that of the plaintiff shall be necessary"); *Miss. Annot. C.* 1892, § 1298 (seduction; "the testimony of the female seduced, alone, shall not be sufficient to warrant a conviction"); *Mo. Rev. St.* 1899, § 2631 (in trials for seduction under marriage-promise, "the evidence of the woman as to such promise must be corroborated to the same extent required of the principal witness in perjury"); 1886, *State v. Hill*, 91 Id. 423, 425, 4 S. W. 121 (by statute, the corroboration need touch only the promise to marry); 1891, *State v. Wheeler*, 105 Id. 658, 665, 16 S. W. 924; 1897, *State v. Marshall*, 137 Id. 462, 39 S. W. 63; 1897, *State v. Davis*, 141 Id. 522, 42 S. W. 1033; *Mont. P. C.* 1895, § 2035 (like Cal. P. C. § 1108); *Nebr. Comp. St.* 1899, § 7201 (on a trial for taking a woman with intent to marry forcibly or to defile, "and for seduction, for the purpose of prostitution," the female's evidence, "unsupported by other evidence," is insufficient); *Neu. Gen. St.* 1895, § 599 (the paternity of an illegitimate child "shall be established by mutual agreement of the mother and any person whose relations have been sufficiently intimate with her to warrant the conclusion. It may also be established by the confession or admission of the father, when not denied by the mother;" and otherwise, according to the trial Court's discretion); *N. J. Gen. St.* 1896, *Crimes*, § 204 (intercourse and

tical. Whether there exists such corroborative evidence ought to be a question for the determination of the trial judge upon the circumstances of each case; and a few Courts occasionally incline to such a doctrine.¹ So far as further definitions have been attempted, they are of two general types similar to those already noted for the accomplice-rule (*ante*, § 2059). By some Courts it is said that the corroboration must be upon some or all material facts.² By others, and sometimes by express statutory definition, the corroboration is required to consist of facts *tending to connect the defendant with*

pregnancy on false representation of singleness or under promise of marriage; "the evidence of the female must be corroborated to the extent required in case of indictment for perjury"; 1881, *Zabrickie v. State*, 48 N. J. L. 640, 647 (corroboration defined and illustrated); 1900, *State v. Brown*, 64 id. 414, 45 Atl. 800 (statute applied); N. Y. P. C. 1891, §§ 283, 286 (complainant's testimony in rape, defilement, abduction, or compulsory marriage, is insufficient if "unsupported by other evidence"); 1900, *People v. Page*, 162 N. Y. 372, 56 N. E. 750 (rape; corroboration held not sufficient); N. D. Rev. C. 1895, § 8197 (like Okl. Stat. § 5211, applying it to abortion also, but omitting from "tending to connect" to the end); Okl. Rev. St. 1893, § 7296 (in prosecutions for seduction under marriage-promise and fornication by a teacher with a pupil, the sole testimony of the victim is to be insufficient if "unsupported by other evidence to the extent required" in perjury); Okl. Stat. 1893, § 5211 (on a trial for enticing for prostitution or for seduction, no conviction is to be had "upon testimony of the person injured, unless she is corroborated by other evidence tending to connect the defendant with the commission of the offense"); Or. C. Cr. P. 1892, § 1873 (on a trial for enticing to prostitution or for seduction, the female's testimony is not sufficient, "unless she is corroborated by some other evidence tending to connect the defendant with the commission of the crime"); this is not applied to a charge of rape under age; 1901, *State v. Knighten*, 39 Or. 63, 64 Pac. 666; Pa. St. 1860, Pub. L. 322, § 41, P. & L. Dig., Crimes § 599 (seduction; "the promise of marriage shall not be deemed established unless the testimony of the female seduced is corroborated by other evidence, either circumstantial or positive"); 1882, *Rice v. Com.*, 100 Pa. 28 (statute applied; defendant's competency to testify does not affect the rule); St. 1895, June 26, Pub. L. 267, § 1 (quoted *ante*, § 1493; dying declarations in abortion); R. I. Gen. L. 1898, c. 281, § 5 (criminal seduction, or dragging to obtain intercourse, etc.; no conviction is to be had upon the testimony of one witness only, unless "corroborated by other evidence"); S. D. Stat. 1899, § 8655 (like Okl. Stat. § 5211); Tex. C. Cr. P. 1895, § 769 (seduction; "no conviction shall be had upon the testimony of the said female, unless the same is corroborated by other evidence tending to connect the defendant with the offense charged"); U. S. Rev. St. 1878,

§ 5351 (seduction of female passenger by officer or crew; "no conviction shall be had on the testimony of the female seduced, without other evidence"); Utah Rev. St. 1898, § 4853 (like Cal. P. C. § 1108); Va. Code 1896, § 3679 (no conviction shall be had for seduction or for abduction for defilement or marriage, "on the testimony of the female seduced, abducted, or detained, unsupported by other evidence"); 1889, *Hausenfluck v. Com.*, 85 Va. 702, 8 S. E. 633 (statute applied); Wyo. Stat. 1898, § 4581 (no conviction is to be had for seduction "on the testimony of the female seduced, unsupported by other evidence"); Wyo. Rev. St. 1897, § 3296 (in trials for seduction and for taking with intent to force marriage or defilement, "no conviction shall be had on the evidence of the female offended against, unsupported by other evidence").

For the doctrine about *consistency of accusation in travel* by the complainant in bastardy, see *ante*, § 1141.

¹ 1882, *Cunningham v. State*, 73 Ala. 51, 55 ("Whenever there is any evidence, no matter how slight, in support of any material subject of inquiry, its sufficiency can never become a question for the Court"); 1896, *Mills v. Com.*, 93 Va. 815, 22 S. E. 863 ("It is sufficient here to say that it must be evidence which does not emanate from the mouth of the seduced female; that it must not rest wholly upon her credibility, but must be such evidence as adds to, strengthens, confirms, and corroborates her testimony"). Of course, if it is legally sufficient, the jury have still to say whether it convinces them: 1878, *State v. Bell*, 49 Ia. 440, 443.

² 1882, *Cunningham v. State*, 73 Ala. 51, 56 (must be merely "of some matter material to the guilt of the accused," and its effect must be to convince the jury of the witness' truth); 1883, *Wilson v. State*, 1b. 527, 534 (*Cunningham* case approved; *Brickell, C. J.*, *diss.*, holding that the evidence should "extend to every material fact," and should "tend to connect the defendant with the commission of the offense"); 1888, *Cagle v. State*, 37 id. 98, 97, 6 So. 300 (*Cunningham* case followed); 1890, *Cooper v. State*, 90 id. 641, 3 So. 321 (same); 1898, *Suther v. State*, 118 id. 68, 24 So. 43; 1900, *State v. Timmens*, 4 Minn. 328, 323 ("upon every material point necessary to the perfection of the offense"); 1893, *State v. Brassfield*, 81 Mo. 151, 159; 1895, *State v. Patterson*, 66 id. 88, 92, 90; 1901, *Harvey v. Terr.*, 11 Okl. 186, 65 Pac. 637 (*State v. Timmens*, *Miss.*, followed).

the commission.³ Most of the rulings were a waste of the State's time by the Supreme Courts.

§ 2063. *Parent's Bastardizing of Issue, by Testimony to Non-Access;* (a) *History and Present Scope of the Rule.* The story of the rule that parents may not "bastardize their issue" is a singular one; though it has had some parallels in other parts of our law. First, a settled rule; then, a chance judicial expression, in apparent contradiction; then, a series of rulings based on a misunderstanding of this expression and an ignoring of the settled rule; then, an entirely new rule, and new and wondrous reasons contrived and put forward to defend the novelty, as if it had from the beginning been based on the experience and wisdom of generations.

(1) In the first place, then, there clearly was in the beginning no rule at all against using the testimony of a husband or a wife, to prove the non-access of the husband as evidence of the child's bastardy (i. e. the parentage of another man than the husband). The only objection that was brought

³ *Rape: Ia.*: 1876, *State v. McLaughlin*, 44 Ia. 82, 85; 1877, *State v. Comstock*, 46 id. 265, 268; 1883, *State v. Stowell*, 60 id. 535, 538, 15 N. W. 418; 1885, *State v. Mitchell*, 68 id. 116, 121, 26 N. W. 44; 1890, *State v. Watson*, 81 id. 380, 387, 46 N. W. 369; 1892, *State v. Cassidy*, 85 id. 145, 52 N. W. 1; 1893, *State v. Chapman*, 88 id. 254, 55 N. W. 499; 1894, *State v. Cook*, 92 id. 483, 487, 61 N. W. 185; 1895, *State v. Hutchison*, 95 id. 506, 64 N. W. 610; 1895, *State v. French*, 96 id. 255, 65 N. W. 156; 1897, *State v. Bailor*, 104 id. 1, 73 N. W. 344; 1898, *State v. Baker*, 106 id. 99, 76 N. W. 509; 1899, *State v. Fountain*, 110 id. 15, 81 N. W. 162.

SEDUCTION: Ark.: 1883, *Polk v. State*, 40 Ark. 482, 484 (must "tend to connect the defendant with the commission of the offense"); *Ind.*: 1901, *Hinkle v. State*, 157 Ind. 237, 61 N. E. 196 (an example of the absurdity of the rule in practice); *Ia.*: 1864, *State v. Tully*, 13 Ia. 88; 1871, *State v. Sheen*, 33 id. 83, 90; 1874, *State v. Kingsley*, 39 id. 439; 1878, *State v. Danforth*, 48 id. 43, 47; *State v. Wells*, ib. 671; 1879, *State v. Curran*, 51 id. 112, 119, 49 N. W. 1006; 1880, *State v. Smith*, 54 id. 749, 7 N. W. 402; 1882, *State v. Heatherton*, 60 id. 175, 177, 14 N. W. 230; 1884, *State v. Fitzgerald*, 63 id. 263, 272, 19 N. W. 209; 1887, *State v. Richards*, 72 id. 17, 21, 33 N. W. 342; *State v. McClintic*, 73 id. 663, 665, 35 N. W. 606; 1893, *State v. Standley*, 76 id. 215, 219, 40 N. W. 815; 1899, *State v. Bell*, 79 id. 117, 119, 44 N. W. 244; 1891, *State v. Gunagy*, 84 id. 177, 180, 50 N. W. 832; 1892, *State v. Smith*, ib. 523, 51 N. W. 24; *State v. Enke*, 85 id. 25, 51 N. W. 1146; 1892, *State v. Brown*, 86 id. 121, 126, 53 N. W. 92; 1893, *State v. Baldner*, 88 id. 55, 61, 55 N. W. 97; *State v. Lenihan*, ib. 670, 56 N. W. 292; 1894, *State v. Knutson*, 91 id. 549, 552, 60 N. W. 129; 1895, *State v. Bauerkemper*, 95 id. 502, 64 N. W. 609; 1898, *State v. Hayes*, 105 id. 83, 74 N. W. 767; 1898, *State v. Hughes*, 106 id. 125, 76 N. W. 520; 1899, *State v. Reinheimer*, 109 id. 624, 80 N. W. 669; 1899, *State v. McGinn*, 109 id. 641, 80 N. W. 1068; 1900, *State v. Burns*, 110 id. 745, 82 N. W. 325; 1900, *State v. Kinsock*, 111 id. 690, 83 N. W. 724; 1901, *State v. Mulholland*, 115 id. 170, 88 N. W. 325; *Miss.*: 1894, *Ferguson v. State*, 71 Miss. 805, 815, 15 So. 66 ("as with the accomplice, so here, corroboration to the extent of fairly tending to connect the accused with the commission of the offence should be held sufficient"); *N. Y.*: *Kenyon v. People*, 26 Y. 203, 208 (corroboration need go only to "those facts which tend to prove the offence charged"); 1873, *Boyd v. People*, 55 id. 644 (nature of corroboration indefinitely defined); 1877, *Armstrong v. People*, 70 id. 33, 43 (corroboration is necessary as to the promise and the intercourse; nature of corroboration defined); *Okla.*: 1901, *Harvey v. Terr.*, 11 Okl. 156, 65 Pac. 837 (corroboration must cover the promise and the intercourse). — It is in some rulings further held that the corroboration need not relate directly to the fact of intercourse; *Ia.*: 1857, *State v. Andre*, 5 Ia. 289 (evidence need not refer to "the fact of illicit intercourse," but may concern "intimacy, opportunity, and inducement"); 1874, *State v. Kingsley*, 39 id. 439 (Andre case approved); 1879, *State v. Painter*, 50 id. 317, 319 ("intimacy" and "opportunity" further defined); 1880, *State v. Araah*, 55 id. 258, 7 N. W. 601 (same); 1892, *State v. Smith*, 84 id. 522, 51 N. W. 24 (same); and other cases *supra*: *S. D.*: 1897, *State v. King*, 9 S. D. 623, 70 N. W. 1046, *semble*.

ABORTION: 1870, *People v. Jomelyn*, 39 Cal. 393 (the evidence must corroborate her in some part of the testimony which "imputes to the defendant the commission of the crime alleged," though not necessarily as to the particular method stated by her).

ABDUCTION: 1885, *People v. Plath*, 100 N. Y. 590, 592, 3 N. E. 790 (abduction for purpose of prostitution, under P. C. § 583; corroboration must extend to "the material facts necessary to establish the commission of a crime and the identity of the person committing it").

forward was that of the *disqualification of wife or husband* (*ante*, § 600, *post*, § 2227) to testify for or against the other. This was usually held not applicable on the facts of the case; and, in any event, it had nothing to do with the fact of non-access, as such; it applied, if at all, to whatever facts might be in issue involving bastardy. All this is perfectly plain and unquestionable in the precedents of the 1700s.¹

(2) But about the middle of the 1700s there arose a rule peculiar to *filiation cases* (i. e. proceedings to charge a bastard's father with its support), that the order of support should not be made against the defendant on the *sole* and uncorroborated *testimony* of the *mother*, if a married woman:

1784, *R. v. Reading*, *Lee temp. Hardwicke* 79 (order of filiation of a child born of a married woman; objected, "that the wife is the only evidence, and that she is not a competent witness in law to exonerate her husband of the charge and burthen of this child"); *Hardwicke*, L. C. J.: "[The wife] may be a competent witness to prove the criminal conversation between the defendant and herself, by reason of the nature of the fact, which is usually carried on with such secrecy that it will admit of no other evidence; . . . but then in the present case it is gone further, for the wife is [here] the only evidence to prove the absence and want of access of her husband, whereas this might be made to appear by other witnesses. . . . It must be a very dangerous consequence to lay it down in general that a wife should be a sufficient sole evidence to bastardise her child and to discharge her husband of the burthen of his maintenance; but the opinion the Court is of at present will not be a precedent to determine any other case wherein there are other sufficient witnesses as to the want of access; but the foundation that is now gone upon is the wife's being a sole witness."

This rule was simple enough, and went on being steadily enforced, without departure, for three quarters of a century.² Two or three things about

¹ 1717, *St. Andrews v. St. Brides*, Sessions Cas. K. B. 35 (order of filiation for a married woman's children, wife testifying to non-access; objected "that the wife was not good evidence, it being against her husband"; "but not allowed, for the parishes are only concerned"); 1717, *Clerk v. Wright*, 1 Bott Poor Law, 4th ed., pl. 558, 6th ed., pl. 496 (Chancery issue to try legitimacy; mother's declarations "that the child was not her husband's," excluded, but "if she had been here herself, she might have been examined as to this fact"); 1783, *Pendrell v. Pendrell*, 2 Stra. 925 (inheritance-issue; defendant offered "strong evidence of no access" of the claimant's parents, and the mother was allowed to be called and cross-examined by defendant and her contradictory declarations put in); 1785, *R. v. St. Peter*, 1 Barr. Sett. Cas. 45, Bull. N. P. 112 (father allowed to testify to no marriage, in a pauper-settlement case, because he was not testifying in his own discharge, being liable in either event); 1763, *Buller, Nisi Prius*, 113 (comments on *R. v. Reading*, *infra*, that, after the husband's death and the cessation of his liability, the mother could without question testify to non-access; so also 287).

² 1737, *R. v. Bedel*, *Lee temp. Hardw.* 379 (order of filiation, granted below upon proof of non-access by "the examination of the said E. the wife and other proof upon oath"; order con-

firmed: Page, J.: "Though 'tis said to be on the examination of the wife, 'tis also upon other good proof upon oath"); 1752, *R. v. Rook*, 1 Wils. 240 (order of filiation; the mother, being married, swore that her husband was in jail and had had no access; it was objected that "a wife cannot be admitted to prove that her husband had no access to her"; and the whole Court agreed, upon the ruling of Lord Hardwicke in *R. v. Reading*, that "an order of bastardy could not therefore be made upon her oath alone"; distinguishing *R. v. Bedel*, "for there were [other] witnesses to prove the husband had no access"; and concluding that "as the justices have determined solely upon the evidence of a wife, the order must be quashed"); 1807, *R. v. Luffe*, 8 East 193 (order of filiation for a married woman's bastard, granted below "upon the oath of the said M. T., as otherwise," proving non-access; *Ellenborough*, L. C. J.: "[The objection is] that the wife was examined generally and alone to the fact of non-access, and that the order is founded on her evidence only, whereas it is laid down in the cases that an order of this sort cannot be made on the evidence of the wife alone, but that there must be other proof of non-access"; but he pointed out that the words "as otherwise" in the order must imply other sufficient testimony upon oath; *Lawrence*, J.: "[The order is sustainable] be-

it are plain. In the first place, it was limited strictly to filiation proceedings; it had no status as a rule of general application, for its reason had no such bearings. In the next place, the ground of the objection was that of interest, i. e. the wife was testifying to discharge the husband of the child's support; yet the objection did not in strictness apply (since the husband was not a party), and furthermore the exception of necessity (*ante*, § 612) would in any event allow her testimony to intercourse with the other man. Her testimony to non-access, however, being only technically admissible within the rule of disqualification by interest, some additional corroboration was thought essential in order to found an order; hence the doctrine of *R. v. Reading* forbade such an order, in Lord Hardwicke's language, where the wife was "a sole witness."

The important feature of this rule is thus the bearing of the wife's disqualification by interest; and, when the question first comes up in the United States, the same objection is the one that occupies judicial attention,³ — a principle which, of course, to-day in most of our jurisdictions is outlawed (partly or entirely) by statute (*ante*, § 619). That the testimony is to the fact of non-access is therefore of no importance at all in this rule of *R. v. Reading*, except so far as the necessity-exception to the rule of disqualification by interest might not apply to that fact while it might apply to others. That the fact of non-access, of itself, was a thing not proper to be testified to, either on moral or on sentimental grounds, or that parents could not testify to illegitimacy, never for a moment occurred to these judicial expounders of the common law; and this is seen clearly enough in rulings throughout the 1700's, in other kinds of litigation, where the objection based on disqualification by interest did not arise as it did for the case of filiation-proceedings.⁴

(3) But, in the meantime, while these rulings were being made, came Lord Mansfield's sonorous utterance, in another part of the juristic field, that "the law of England," as well as "decency, morality, and policy," forbade a parent's testimony to non-access:

cause it was made upon other evidence besides that of the wife; . . . we may presume that if there had been no other evidence of non-access than that of the wife, the sessions would not have confirmed the order"; *Groce and LeBlanc, JJ.*, spoke similarly).

³ *N. H.*: 1844, *Parker v. Way*, 15 N. H. 45 (filiation proceeding, by married woman; said *obiter*, citing *Com. v. Shepherd*, Pa., that the mother is "not a witness to prove non-access"); Pa.: 1801, *Com. v. Stricker*, 1 Browne Appendix 47 (indictment for bastardy; "the parent is not a witness to prove non-access," because "it may be proved by other testimony"); 1814, *Com. v. Shepherd*, 6 Binn. 233 (prosecution for begetting a bastard on a married woman; the woman allowed to testify to connection, but not to non-access, "because everything else is capable of proof by other persons, and nothing but necessity will warrant the dispensing with the rule that a woman shall not be a witness in a matter wherein her husband is concerned"; *Yeates, J.*, diss., on

the authority of *R. v. McClean*, "a case of great notoriety some years before the American revolution"; "many instances have occurred wherein that precedent has been followed; such also is the practice in England, under orders of filiation of the bastard children of married women"; circa 1825, *Com. v. Wentz*, 1 Ashm. 269 (indictment for fornication and bastardy; the statute of 1705 making the unmarried mother competent to prove the intercourse, held not to exclude a married mother; the opinions in *Com. v. Shepherd* followed and approved as to the early practice).

⁴ Cases cited *supra*, n. 1; the following utterance is plain: 1795, *Kenyon, L. C. J.*, in *R. v. Bramley*, 6 T. R. 330: "Parents may be called as witnesses with respect to the legitimacy of their issue; and if they may be called to prove that they are legitimate children, there is no reason why they should be considered as incompetent when called to prove that the children are illegitimate."

1777, *Goodright v. Moss*, Cowp. 881 (ejection; issue of the claimant's legitimacy as born after marriage of F. and M.; argued for the claimant that "though the testimony of parents in their lifetime or their declarations after their decease might be admissible in cases where proof of the marriage was presumptive only, as by cohabitation or general reputation, yet neither their declarations nor their personal testimony [of birth before marriage] could be admitted to bastardize their issue, where as in this case the fact of the marriage was actually proved [by the register-entry]"; *Mansfield*, L. C. J.: "All the cases cited are cases relative to children born in wedlock; and the law of England is clear that the declarations [or testimony on the stand] of a father or mother cannot be admitted to bastardize the issue born after marriage. . . . As to the time of the birth, the father and mother are the most proper witnesses to prove it. But it is a rule founded in decency, morality, and policy, that they shall not be permitted to say after marriage that they have had no connection, and therefore that the offspring is spurious; more especially the mother, who is the offending party."

It is possible to imagine more than one explanation of the aberration which prompted this utterance. But what Lord Mansfield said was plain. It might be argued that he spoke *obiter*; yet Lord Mansfield's *obiter dicta* were as effective as other men's positive decisions; and at any rate it was his opinion. What must be conceded and emphasized, however, is that he had no authority whatever for his utterance. If there is any such law of England, or was for any period, it was invented by him and dates from his utterance.⁵ Before long it began to be repeated with approval,⁶ and the way was paved for substituting his new law for the existing law.⁷

(4) But what had become, in the meantime, of *R. v. Reading*? Was not its authority, and that of its successors, as firm and unmistakable as ever? Could Lord Mansfield's single utterance overthrow a long line of clear precedents? It could and did, but first through misconstruing them. Whom the gods wish to destroy, they first make mad; which, for legal precedents, means that they must first be misunderstood. In 1809, in *R. v. Kea*, within two years after *R. v. Luffe*⁸ (the last lineal successor of *R. v. Reading*), the settled rule in filiation-orders was held to mean that the married mother was incompetent to testify, and not merely that she could testify but must be corroborated.⁹ This, of course, was in positive contradiction of those

⁵ Compare his inventions of the rule against *allegans suam turpitudinem* (*ante*, § 526) and of the rule against jurors impeaching their verdicts (*post*, § 2352).

⁶ 1792, Sir W. Wynne, in *Smyth v. Chamberlayne*, quoted in Nicolas, *Adulterine Bastardy*, 147, from *Gardner Peerage Case*, Appendix: 1813, *Banbury Peerage Case*, reported in Nicolas, *Adulterine Bastardy*, 470 (Lord Redesdale refers with doubt to a mother's declarations); 1814, *Phillips*, *Evidence*, I, 241.

⁷ The wide contrast between the then existing law, and the law that was about to be, may be easily seen. Lord Mansfield's rule, in the first place, applied to *all issues* of litigation whatever; the rule of *R. v. Reading* applied to *filiation proceedings only*. Lord Mansfield's rule applied to *both parents equally*; the rule of *R. v. Reading* applied *only to the mother*. Again, the one was based on a broad and *fixed ground*

of policy; while the other was *flexible* according to the rule of disqualification by interest. Finally, and most important, the former was a rule *excluding absolutely* the testimony; while the latter *admitted* the testimony and merely required corroboration before an order could be founded on it. This last feature of Lord Mansfield's rule was its most ill-advised one, and has constantly remained a stubborn puzzle and a source of fantastic speculation in judicial opinion.

⁸ Quoted *supra*, note I.

⁹ 1809, *R. v. Kea*, 12 East 132 (order of filiation of married woman's child, granted "as well on the testimony of the said other witnesses as to the non-access of M. P., as on the evidence so given by M. D. [the wife] as aforesaid, and not exclusively on either"; order quashed, because "to hold this evidence receivable would be in direct contradiction to *R. v. Reading* and

cases, though it purported to follow them. The way was now open. *R. v. Kee* excluded the married mother's testimony to non-access in filiation cases; Lord Mansfield had declared for a broader exclusion of either parent's testimony to that fact in all cases. The two rules were now harmonious; one was merely broader than the other. The broader now began to be followed, and for fifty years in England was accepted without question.¹⁰ By that time, the statutory abolition of married persons' incompetency (*ante*, § 620) led to a reconsideration of the question; and, for a time at least, the original and orthodox rule of *R. v. Reading* (but not limited to filiation cases) was revived.¹¹ To what extent the law of England will pare down Lord Mansfield's innovation cannot be surely known from the modern rulings.¹²

In the United States, the original practice, so far as there is any report of it, was entirely in harmony with the orthodox rule of *R. v. Reading*, & c. it knew merely a rule of corroboration for married mothers in filiation or similar proceedings.¹³ But the circulation of Lord Mansfield's dogmatic pronouncement, in the treatises of the early 1800s, soon brought the new rule to the attention of our Courts; and they seem usually to have accepted it with unquestioned faith.¹⁴ It may have become, in some jurisdictions, too

other cases," the wife being examinable "only to those facts which she might legally prove, and not to the non-access of the husband".

¹⁰ 1833, *Cope v. Cope*, 1 Moo. & R. 269, Alderson, J. (issue to try legitimacy; wife's declarations as to the father, excluded, because "she is not allowed herself to prove the illegitimacy of the child, as by showing non-access"); 1836, *R. v. Bourton*, 5 A. & E. 180, K. B. (pauper settlement; husband's testimony not receivable to prove non-access, on the authority of *Goodright v. Moss*, though the true doctrine of *R. v. Reading* was called to the Court's attention by counsel; the first bench decision positively adopting the new rule); 1841, *R. v. Mansfield*, 1 Q. B. 444 (pauper settlement; the wife was sole witness to non-access, but this was not treated as improper, the Court holding merely that non-access was not fully proved); 1850, *Wright v. Holdgate*, 5 C. & K. 152, Crosswell, J. (issue to try legitimacy; husband not admitted to prove access, on the principle of *R. v. Bourton*); 1855, *Anon. v. Anon.*, 23 Beav. 401, 23 id. 278 (legitimacy; rule held to forbid wife's testimony to non-access before marriage, the child being then conceived); 1856, *Leggo v. Edmonds*, 28 L. J. Ch. 125, 135 (title depending on legitimacy; wife's testimony to facts regarding non-access—here, by reason of incompetency—held not receivable, by Wood, V. C., who pointed out the correct early rule, and said of the modern rule "that it appears to me to be very far from satisfactory").

¹¹ 1870, *Rideout's Trusts*, L. R. 10 Eq. 41 (title depending on legitimacy; James, V. C., having in view the statutory abolition of husband's and wife's incompetency, took the fact of non-access to be proved upon the husband's testimony with other corroborating evidence; having refused to rest on the husband's testi-

mony alone); 1877, *Yearwood's Trusts*, L. R. 5 Ch. D. 545 (title depending on legitimacy; Hall, V. C., followed the preceding case, similar in its facts, as involving the principle that the evidence was "admissible, but not to be acted upon unless corroborated by other evidence").

¹² Compare the citations *infra*, note 15, at the end.

¹³ 1801, *Yeates, J.*, in *Com. v. Shepherd*, Pa.; quoted *supra*, note 2.

¹⁴ *Cal. C. C. P.* 1872, § 1830, subd. 4, inserted by the Commission of 1901 ("In a case where the legitimacy of a child born in lawful wedlock is in issue, neither the husband nor the wife can, during the marriage or afterward, be examined or testify as to any fact or circumstance tending to show the illegitimacy of such child"; for the validity of the Commission's amendments, see *ante*, § 488); 1902, *Mills' Estate*, 137 Cal. 298, 70 Pac. 91 (rule applied to A's wife's testimony to non-access with A, in favor of her children claiming as illegitimate heirs of B; but the opinion seems to confuse this rule and the presumption of legitimacy, *post*, § 2527); *La.*: 1829, *Tate v. Penno*, 7 Mart. N. s. 548, 555 (title depending on legitimacy; declarations of the mother, a party, held inadmissible under the French law); *Mass.*: 1814, *Canton v. Bentley*, 11 Mass. 441 (pauper settlement; husband's testimony to his absence from the wife during the appropriate period, to prove the son illegitimate, held probably inadmissible; question expressly not decided, and no cases cited); 1861, *Hammaway v. Towner*, 1 All. 209 (illegitimacy; father's declarations not admitted, but on the ground of the presumption of legitimacy); 1862, *Haddock v. R. Co.*, 3 id. 656 (ejectment; parent's declarations as to offspring being spurious, inadmissible); 1870, *Abington v. Duxbury*, 105 Mass. 287, 290 (pauper settle-

deeply planted to be uprooted; but the example of the modern English judges in allowing the question to be reconsidered justifies us in inquiring whether there is any sound policy which to-day can be invoked in its maintenance.

§ 2064. *Sense: (b) Policy of the Rule.* In considering the possible grounds upon which the rule may be supported, the rule of disqualification by interest

ment; wife's testimony to non-access, excluded); *Mich.*: 1880, *Egbert v. Greenwalt*, 44 *Mich.* 245, 248, 6 N. W. 654 (crime, non.); wife's and husband's testimony to their non-intercourse during cohabitation, so as to fix defendant as author of her pregnancy, held inadmissible); 1897, *Eabeke v. Reer*, 115 *Ill.* 328, 78 N. W. 242 (marriage with B. in February, and a child in September; wife's testimony to non-intercourse with B. before marriage, excluded, in an action against B. for seduction in the previous October; but to intercourse with B. in October, allowed); *N. Y.*: 1832, *Cross v. Cross*, 3 *Paige Ch.* 139, 141 (wife's admissions, not receivable to establish non-access, in a bill for divorce and declaration of illegitimacy); 1841, *Ratoliff v. Wales*, 1 *Hill* 63, 65 (older statement similar to the next ruling); 1853, *People v. Overmire*, 15 *Barb.* 286, 292 (allegation of married woman's bastard; mother inadmissible to prove non-access); 1861, *Chamberlain v. People*, 23 *N. Y.* 85, 86 (perjury by husband in trial of divorce for adultery, by testifying to non-access to the wife; declared to be improper testimony); *N. C.*: 1823, *State v. Pettaway*, 3 *Hawks* 623, 625 (allegation of married woman's bastard; mother not allowed to speak to non-access); 1849, *State v. Wilson*, 10 *Ired.* 181 (bastardy; opinion obscure, but apparently assumes that the wife was not competent as to non-access); 1874, *Boykin v. Boykin*, 70 *N. C.* 262 (neither husband nor wife may prove access or non-access); *Okla.*: *State*, 1892, § 5547 (presumption of legitimacy can be disputed by husband or wife only, etc.; "illegitimacy, in such case, may be proved like any other fact"); 1899, *Bell v. Terr.*, 8 *Okla.* 75, 56 *Pac.* 853 (bastardy; mother may not testify to the husband's non-access); *Pu.*: the early cases are cited *supra*, note 3; 1857, *Dennison v. Page*, 29 *Pa.* 420, 423 (legitimacy; neither parent may prove non-access); 1874, *Tioga v. South Creek*, 75 *Id.* 433, 436 (pauper settlement; same ruling); *S. C.*: 1853, *Johnson v. Chapman*, *Busbee* 318 (title depending on legitimacy of a posthumous child; father's admissions as to non-access, held inadmissible); 1863, *Moseley v. Eakin*, 15 *Rich.* 324, 340 (wife admitted to testify that a marriage was consummated by intercourse, but not the contrary to prove a child spurious); *Tex.*: 1892, *Simon v. State*, 31 *Tex. Cr.* 186, 196, 199 (incest; declarations of defendant's parents as to his illegitimacy, excluded); *U. S.*: 1825, *Stegall v. Stegall's Adm'r*, 3 *Brockenb.* 256, 262 (title depending on legitimacy; whether mother's testimony to non-access was admissible, left undecided; *Marshall, C. J.*); *Pa.*: 1811, *Bowles v. Bingham*, 2 *Mansf.* 443 (title depending on legitimacy; the

answer of the husband, an opponent, denied legitimacy on the ground of non-access; point not decided); *Wia.*: 1864, *Mink v. State*, 60 *Wia.* 583, 585, 19 *N. W.* 445 (prosecution by a married woman for filiation of a bastard; wife's testimony to non-access, held inadmissible); 1885, *Watts v. Owens*, 62 *Id.* 512, 519, 23 *N. W.* 720 (same ruling, on an issue of legitimacy); 1892, *Shuman v. Shuman*, 33 *Id.* 250, 58 *N. W.* 455 (title depending on legitimacy; parents' statements of non-access, excluded).

It has also been held that the abolition of disqualification by interest does not abolish this rule: 1880, *Egbert v. Greenwalt*, 44 *Mich.* 245, 248, 6 *N. W.* 654; 1861, *Chamberlain v. People*, 23 *N. Y.* 85, 86; 1874, *Tioga v. South Creek*, 75 *Pa.* 433, 437.

But it is agreed on all hands that the prohibited testimony concerns solely the specific fact of non-access, i. e. testimony to any other fact constituting illegitimacy, or to illegitimacy in general, is admissible: *Eng.*: 1860, *Darey's Infants*, 11 *Ir. C. L. R.* 296 (legitimacy under a will; mother's affidavits to an illegal Roman Catholic ceremony, admitted); 1875, *Murray v. Milner*, *L. R.* 13 *Ch. D.* 845, 849 (deceased father's statements in a will, as to "my reputed son," admitted); 1885, *Aylesford Peerage Case*, *L. R.* 11 *App. Cas.* 1 (a letter of the mother, held admissible, not as an assertion regarding legitimacy, but as an "act of an important nature done by the mother with reference to the care, custody, and bringing up of her child"); 1908, *Poulett Peerage*, *App. Cas.* 266 (legitimacy of a peerage claimant, born less than six months after the marriage; the father's testimony of non-access before marriage and of separation shortly after marriage upon the wife's confession of pregnancy by another man before marriage, admitted; the general principle held not to include such a case); *Can.*: 1892, *Mulligan v. Thompson*, 23 *Ont.* 54 (loss of service; rule not applicable to illegitimate birth as evidence of seduction; commenting on *Evans v. Watt*, 2 *Id.* 166, and *Ryan v. Miller*, 21 *U. C. Q. B.* 202, 22 *Id.* 87); *U. S.*: 1862, *Niles v. Syracuse*, 13 *La.* 198, 207 (declarations denying marriage, admitted on the facts); 1861, *Com. v. Stricker*, 1 *Browne Appendix* 47 (bastardy; mother, a married woman, may prove anything but non-access); 1819, *Allen v. Hall*, 2 *Kott & McC.* 114 (partition; parent admissible to disprove marriage).

Distinguish the question as to using hearsay statements under the pedigree-exception (*note*, §§ 1494, 1500), and the question as to the force of the presumption of legitimacy (*note*, § 2027).

may be dismissed as irrelevant. That rule was advanced as the foundation of the original rule of corroboration,¹ and it did have a bearing in the specific and original case of filiation-proceedings (although even there it was technically satisfied), but not on the fact of non-access, merely or always.

The rule, then, as an independent one, standing by itself, must be based upon some extrinsic ground of "decency, morality, and policy," in Lord Mansfield's phrase. But why is such a person's testimony to such a fact indecent, immoral, or impolitic? Among several judicial efforts to supply an answer to this question, the following may be taken as typical:

1874, *Gordon, J.*, in *Tiegs v. South Creek*, 75 Pa. 433, 437: "Many reasons have been given for this rule. Prominent among them is the idea that the admission of such testimony would be unseemly and scandalous; and this, not so much from the fact that it reveals immoral conduct upon the part of the parents, as because of the effect it may have upon the child, who is in no fault, but who must nevertheless be the chief sufferer thereby. That the parents should be permitted to bastardize the child is a proposition which shocks our sense of right and decency."

We learn, then, that the indecency or unseemliness lies in allowing a person to testify to an illicit connection, and that the immorality consists in allowing a parent to give testimony which will ruin his own child's legal status. The utterly artificial and false nature of the rule could not more forcibly appear than in the inconsistency of these *ex post facto* reasons. (1) There is an indecency, we are told. And yet, in nine cases out of ten, the sole question that the wife is asked is (for example) whether her husband was in Seattle from 1849 to 1853 during the time that she was in Atlanta. Is this indecent? Moreover, the very next question may be whether during that time she lived with the alleged adulterer; and this (by general concession) is indubitably allowable. In every sort of action whatever, a wife may testify to adultery or a single woman to illicit intercourse; yet the one fact singled out as "indecent" is the fact of non-access on the part of a husband. Such an inconsistency is obviously untenable.² (2) There is an immorality and a scandal, we are told, in allowing married parents to bastardize their children. And yet they may lawfully commit this same immorality by any sort of testimony whatever, except to the fact of non-access. They may testify that there was no marriage-ceremony, or that the child was born before marriage, or that the one party was already married to a third person, or their hearsay declarations (after death) to illegitimacy in general may be used. In all these other ways they may lawfully do the mean act of helping to bastardize their own children born after marriage. Where is the consistency here? Of what value is this conjuring phrase about "bastardizing the issue," if it will not do the trick more than once in a dozen times? Moreover, what shall be said of a system of law which, while thus rebuking

¹ Cases cited *ante*, § 2063, note 2.

² 1801, *Rush, P.*, in *Com. v. Stricker*, 1 Browne Appendix 47: "To admit a married woman, upon an inquiry into the legitimacy of a child born in the absence of her husband, to

swear she has lived in adultery, . . . and at the same time to say that she shall not give evidence that her husband had no access to her, because the evidence would be indecent, seems rather mysterious and incomprehensible."

parents who come to prove their children bastards, at the same time by its own inhuman prohibition (unique among civilized peoples) has refused absolutely to allow those parents, by any means whatever, to remove afterwards (by legitimation) the consequences of their original error and to give to their innocent children the sanction of lawful birth,—a refusal which is still maintained in most of our jurisdictions! That the same law which harshly fixes the stain of bastardy as perpetually indelible should censure parents for the abomination of testifying to that bastardy is preposterous.

The truth is that these high-sounding "decencies" and "moralities" are mere pharisaical afterthoughts, invented to explain an otherwise incomprehensible rule, and having no support in the established facts and policies of our law. There never was any true precedent for the rule; and there is just as little reason of policy to maintain it.

§ 2065. *Surviving Claimant's Testimony against Deceased.* Beginning with a modern Chancery ruling in England, an effort was there made to declare, by an inflexible rule, that the testimony of a claimant on his own behalf, in support of a claim against a deceased person, could never of itself suffice, but must be corroborated by other evidence:

1886, *Chatterton, V. C.*, in *Re Harnett*, 17 L. R. Ir. 543, 547: "Look at the result of acting on such evidence alone. A claimant, who cannot by possibility be contradicted, and who may be too clever and unscrupulous to break down under cross-examination, could put forward a claim founded solely on his own oath, which the judge can detect no reason for disregarding, and which in the absence of such a rule he would be bound to act upon, the only person who could contradict it being dead. It is not a rule which depends on the character of the witness, but on the manifest danger which requires the establishment of a general rule applicable to all alike from the great difficulty or impossibility of detecting falsehood."

The danger against which this rule attempts to guard is the same which has led, in most States, to the absolute exclusion of such testimony. The obnoxious character of that rule has been already noticed (*ante*, § 578), and it remains only to observe that the present rule, though decidedly an improvement over the rule of exclusion, and though lacking the peculiar vices of the latter, is nevertheless a misguided one. In the first place, it favors the dead above the living, for it would rather see an honest survivor unjustly lose his claim than an honest decedent be made unjustly to pay; yet, the equities being equal, the living person should rather be favored. In the next place, it is based on a mere contingency,—the contingency that the claim will be dishonest and that there will be no means of exposing its dishonesty; and so, for the sake of defeating the dishonest man who may arise, the rule is willing to defeat the much more numerous honest men who are sure to possess just claims. Again, the rule in England was utterly inconsistent (until recently) with the practice in criminal cases. The mouth of the accused was closed by law, as in civil cases that of the opponent was closed by death; yet no judge on the account was found to advance a rule that the person injured by the crime must be corroborated in order that a conviction might

be supported. Finally, there is always an abstract impropriety and injustice in any rule which interposes a technicality to prevent judicial action upon testimony which is in fact completely believed and trusted:

1866, *Bray, M. R.*, in *Re Garnett*, L. R. 21 Ch. D. 1, 2: "There is no such law. Are we to be told that a person whom everybody on earth would believe, who is produced as a witness before the judge, who gives his evidence in such a way that anybody would be perfectly sensible who did not believe him, whose evidence the judge in fact believes to be absolutely true, is according to a doctrine of the Courts of Equity not to be believed by the judge because he is not corroborated? The proposition seems unreasonable the moment it is stated. . . . The evidence ought to be thoroughly sifted, and the mind of any judge who hears it ought to be first of all in a state of suspicion. But if in the end the truthfulness of the witnesses is made perfectly clear and apparent, and the tribunal which has to act on their evidence believes them, the suggested doctrine becomes absurd. And what is ridiculous and absurd never is, to my mind, to be adopted either in law or in equity."

Nor did this rule ever obtain a final place in English law. It was, after some time, completely repudiated in England¹ and in some Courts of Canada;² although it has been preserved by the Courts of Ireland,³ and has been legislated into Canadian law.⁴ In the United States, it has been introduced in

¹ 1865, *Grant v. Grant*, 24 Beav. 628, 627 (parol gift to a wife, claimed by her against the executor; Sir J. Romilly, M. R.: "There is a rule constantly acted on in chambers in equity, that the unsupported testimony of any person on his own behalf cannot be safely acted on"; here corroboration was found); 1865, *Dowd v. Ellis*, 35 id. 578, 581 (similar ruling by same judge); 1873, *Hill v. Wilson*, L. R. 8 Ch. App. 888, 899 (gift to the plaintiff by the deceased of money covered by a note from the plaintiff; one judge said that the plaintiff's testimony, "unless corroborated, should be wholly disregarded"); 1875, *Fowkes v. Pascoe*, L. R. 10 Ch. 343, 349 (gift claimed against a deceased's estate; James, L. J.: "Although this Court has more than once said that it is too dangerous to rely on the mere evidence of a party interested as to conversations with a deceased person, yet it is legally admissible, and is not to be disregarded"); 1882, *Re Finch*, L. R. 23 Ch. D. 267 (similar facts; Jessel, M. R.: "It is the first time I have ever heard of such a doctrine as this. . . . It is a rule of prudence that, sitting as a jury, we do not give credence to the unsupported testimony of the claimant; with a view, no doubt, of preventing perjury and with a view of protecting a dead man's estate from unfounded claims. It is not a rule of law, but it is a question to be decided by a jury"; Baggallay, L. J., speaks of it as "the general rule," Lindley, L. J., as "the ordinary practice . . . to be very reluctant" in such cases); 1883, *Maddison v. Alderson*, L. R. 9 App. Cas. 467, 487 (Lord Blackburn denied the existence of such a rule); 1885, *Re Richardson*, L. R. 20 Ch. D. 400 (circumstances held to furnish corroboration); 1885, *Re Garnett*, L. R. 21 Ch. D. 1, 8 (quoted *supra*); 1885, *Re Hodgson*, ib. 177 (Sir J. Hannen: "We are of opinion that there is

no rule of English law laying down such a proposition").

² *Man.*: 1865, *Rankin v. McKensie*, 3 Man. 222 (creditor's claim against an estate; Hill v. Wilson, Eng., followed); *N. Br.*: 1874, *Re parte Simpson*, 15 N. Br. 142, 144 (the uncorroborated evidence of an interested person, fixing an estate with liability, ought to be "very clear and free from suspicion"); 1880, *Powell v. Wark*, 20 id. 15, 24 (there is no rule requiring such corroboration; but "it would be well if it were enacted").

³ 1869, *Hartford v. Power*, Ir. R. 3 Eq. 602, 607 (claim of loan against deceased woman's separate estate; Chatterton, V. C., refused to allow "any claim merely upon the unsupported evidence of the claimant"; following Lord Romilly's rule); 1879, *Re Roak*, L. R. Ir. 3 Ch. D. 222 (similar); 7 id. 322, 327 (ruling affirmed on appeal); 1886, *Re Harnett*, 17 L. R. Ir. 543, 547 (rule continued, in spite of the English rulings).

⁴ *D. C. St.* 1900, c. 9, § 4, adding to R. S. 1897, c. 71, two sections: § 50 (like Ont. Rev. St. 1897, c. 73, § 11, as unamended); § 51 (like ib. § 10); *Newf. Consol. St.* 1892, c. 57, § 26 (like Ont. Rev. St. 1897, c. 73, § 10); ib. § 27 (like ib. § 11, as unamended); *N. Sc. Rev. St.* 1900, c. 163, § 25 (quoted *ante*, § 488); construed in the following cases: 1877, *Chesley v. Murdock*, 2 Can. Sup. 48; 1879, *Confederation L. Ass'n v. O'Donnell*, 2 Russ. & C. 570, Can. Sup. Cases' Dig. 1893, p. 370; *Ont. Rev. St.* 1897, c. 73, § 10 (in an action "by or against the heirs, executors, administrators, or assigns of a deceased person, an opposite or interested party to the action shall not obtain a verdict, judgment, or decision therein, on his own evidence, in respect of any matter occurring before the death of the deceased person, unless such

a few jurisdictions by statute,⁶ — not as a reproduction of a supposed English rule, but rather as a half-way measure intended to answer the same purpose as the statutes which in other jurisdictions (*ante*, §§ 488, 578) absolutely prohibit such testimony.

§ 2056. *Miscellaneous Witnesses requiring Corroboration (Children, Chinese, Divorces, Witnesses, Notary's Certificate, etc.* (1) In a few jurisdictions, a statute requires the testimony of a *child* to be corroborated.¹ (2) A Federal statute has required the testimony of *Chinese*, in establishing a right of alien re-immigration, to be corroborated by white witnesses;² but this cannot be extended to one of Chinese parentage making proof of citizenship by birth.³ The policy of such race-discriminations has elsewhere been criticized (*ante*, §§ 516, 936). If an experience of notorious untruthfulness is

evidence is corroborated by some other material evidence"); § 11 (in an action "by or against a person found by inquisition to be of unsound mind, or being an inmate of a lunatic asylum, an opposite or interested party shall not obtain a verdict, judgment, or decision therein, on his own evidence, unless," etc., as above); St. 1900, c. 17, § 13 (amends R. S. c. 73, § 11, by inserting after "lunatic asylum" the words "or who in the opinion of the Court or a judge is from unsoundness of intellect incapable of giving evidence"); some of the cases applying the statute are as follows: 1876, *Birdsell v. Johnson*, 24 Grant 302; 1878, *McDonald v. McKinnon*, 26 id. 12; 1881, *Halloran v. Moon*, 28 id. 319; 1886, *Tucker v. McMahon*, 11 Ont. 718; 1891, *Radford v. Macdonald*, 18 Ont. App. 167 (leading case); 1896, *Green v. McLeod*, 23 id. 676; *P. E. I. St.* 1899, c. 9, § 11 (like Ont. Rev. St. 1897, c. 78, § 10); § 12 (like *ib.* § 11, as unamended).

• *Ill. Rev. St.* 1874, c. 2, § 60 (if objection is made to a claim against a decedent's estate, "the same shall not be allowed without other sufficient evidence" than the claimant's oath to his claim in writing); *N. M. Comp. L.* 1897, § 3201 (in a suit by or against the heirs, etc., of a deceased person, "an opposite or interested party to the suit shall not obtain a verdict, judgment, or decision therein, on his own evidence, in respect to any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence"); 1898, *Byrta v. Robinson*, — *N. M.* —, 54 Pac. 932 (statute applied).

The following ruling was not based on statute: 1896, *Cochrane v. McKates*, — *N. J. Eq.* —, 51 Atl. 379 (uncorroborated testimony of a daughter, as to a promise by her deceased parents to make her a bequest, held insufficient "under the usual rule of a court of equity"; citing only *Jacob's Fisher's Digest*, p. 1804).

¹ *Eng.*: 1888, St. 48 & 49 Vict. c. 69, § 4 (quoted *ante*, § 2061); *Can.*: Dom. St. 1893, c. 31, § 25 ("in any legal proceeding" the rule of Eng. St. 1888, is adopted, requiring corroboration "by some other material evidence"); *B. C. Rev. St.* 1897, c. 71, § 25 (like Dom. St. 1893, c. 31, § 25); St. 1901, c. 9, § 25 (like Eng.

St. 1885); *Man. Rev. St.* 1902, c. 57, § 39 (like Dom. St. 1893); *U. S.*: *N. Y. C. Cr. P.* 1891, § 392 (the unsupported testimony in a criminal prosecution of a child under twelve, allowed to testify without an oath, is insufficient).

² *U. S. St.* 1892, May 5 (27 Stat. L. 25), c. 60, § 6 (deportation of Chinese laborers, unlawfully without certificate in the U. S.; the judge is to order deportation "unless he shall establish clearly . . . to the satisfaction of said United States judge, and by at least one credible witness other than Chinese," that he was a resident of the U. S. on Mar. 1, 1892); St. 1893, Nov. 3 (23 Stat. L. 7), c. 1, § 2 (a Chinese applying for re-admission as a merchant formerly here "shall establish by the testimony of two credible witnesses other than Chinese" the fact of having conducted such business and of not having been a manual laborer); Departmental Mailings S. 17555, 21099 (statute construed as to the tenor of the required testimony); 1900, *Li Sing v. U. S.*, 180 U. S. 486, 21 Sup. 449 (statute of 1893 applied); 1902, *Quong Sue v. U. S.*, 54 C. C. A. 452, 116 Fed. 316 (statute of 1893 applied).

³ 1900, *U. S. v. Lee Saick*, 40 C. C. A. 448, 100 Fed. 386 (statutory requirement of two witnesses does not apply to proof of U. S. birth; Chinese testimony to U. S. birth of Chinese, sufficient); 1901, *Woey Ho v. U. S.*, 48 C. C. A. 705, 109 Fed. 368 (in passing on a claim of citizenship by one of Chinese parentage, the Court said: "A Court is not at liberty to arbitrarily and without reason reject or discredit the testimony of a witness upon the ground that he is a Chinaman, an Indian, a negro, or a white man. All people, without regard to their race, color, creed, or country, whether rich or poor, stand equal before the law").

The following ruling is therefore presumably discredited: 1899, *Re Louis You*, 97 Fed. 580 (one of Chinese race claiming to have been born in the U. S. and to have been absent sixteen years, three Chinese witnesses testifying to the petitioner's identity with the person proved to have been born here; held, nevertheless, that the identity must be corroborated by "some white witness, or some fact not depending on Chinese testimony").

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their basis, then the experience in naturalization proceedings⁴ demands their extension to white persons of all nationalities. (3) In *divorces*, the testimony of detectives, or persons of loose moral character, has been said to require corroboration;⁵ but this ought merely to be a caution of common sense which would occur to any juror. (4) A few statutes and decisions create local rules of corroboration applicable to sundry kinds of witnesses.⁶

§ 2067. *Uncorroborated Confession of Respondent in Divorce; (a) History of the Rule.* The ecclesiastical Courts in England administered the canon or church law as emanating from the continental authorities of the Catholic church; additionally to this, there were in local force certain constitutions of the legates sent to England, as well as other ecclesiastical rules provided by the English church authorities. Now in the general canon law, as contained in the *Corpus Juris Canonici*, consisting of papal decrees and decretals, and dating prior to 1400, there appears to have been no general and established rule declaring a confession by the respondent in divorce insufficient to support a judgment.¹ Nor does there appear to have existed, in the

⁴ See an example in *Re Lipshitz*, 97 Fed. 564 (1899); but this is notorious.

⁵ *Eng.*: 1859, *Sopwith v. Sopwith*, 4 Sw. & Tr. 248, 245 (comments on the untrustworthiness of hired detectives' testimony, without stating any rule); 1865, *Ginger v. Ginger*, L. R. 1 P. & D. 37 (Lord Penzance: "It is a serious responsibility to undertake to separate man and wife on the unsupported testimony of one witness [to adultery], and that a woman, by her own admission, of loose character"; *Can.*: 1899, *Bell v. Bell*, 94 N. H. 615, 622 (not clear); 1891, *Aldrich v. Aldrich*, 31 Ont. 447, 449 (one witness of loose character, uncorroborated, held insufficient); *U. S.*: *Ky. State*, 1899, § 2119 (quoted post, § 2067); 1899, *Banta v. Banta*, 3 Edw. Ch. 295 (McConn, N. C.: "The only witness to prove the adultery is a common prostitute," and the decree was on this and other circumstances, refused); 1844, *Turney v. Turney*, 4 id. 566 (testimony to adultery from two women of loose character "may do when corroborated by facts or circumstances from other witnesses," but here it did not suffice); 1889, *Moller v. Moller*, 115 N. Y. 463, 465, 22 N. E. 160 ("The Courts have come to regard the uncorroborated evidence of such witnesses [prostitutes and private detectives] as insufficient to break the bonds of matrimony"; citing the above cases).

⁶ With the following, compare the statutes cited ante, §§ 2044, 2054 (corroboration according to the kind of issue involved): *Can. Rev. St.* 1894, c. 187, §§ 20, 31 (for certain coinage offences, a credible witness other than the plaintiff or informer is required); *Ill.*: 1874, *Russell v. Baptist Theol. Union*, 73 Ill. 337, 341 ("the mere evidence of the party purporting to have made the acknowledgment" is not sufficient to overthrow the notary's certificate); 1892, *Olliphant v. Liveredge*, 122 id. 100, 109, 30 N. E. 384 (same); 1898, *Davis v. Howard*, 172 id. 340, 50 N. E. 258 (same); 1899, *Rosenberg v. Husman*, 163 id. 341, 349, 55 N. E. 346 (same); 1903,

Gritten v. Dickerson, 202 id. 372, 66 N. E. 1090 ("the uncorroborated testimony of the grantor, or party executing a deed, is not sufficient to overcome the evidence afforded by the officer's certificate of acknowledgment"); *Mich.*: *Comp. L.* 1897, § 10189 (in an action for baggage lost or retained, no judgment exceeding \$150 shall be given on the testimony of the owner alone as to value).

The following statutory rules are, in principle, really rules declaring what shall be sufficient to overcome a presumption (post, § 2493); *Eng. St.* 31 Jac. I, c. 27 (if a bastard's mother conceal its death so that it may not appear whether or not it is born alive, this is to be murder, unless she prove, by one witness at least, that it was born dead); repealed by St. 43 Geo. III, c. 55, § 3; commented on in *Hawk. Pl. Cr. II*, c. 46, § 43, *Blackstone, Comm. IV*, 196; 1791, *Pennsylvania v. M'Kee*, *Addis. I*, 5 (statute commented on); *Or. Cr. C.* 1892, § 1924 (the frequenting of an opium den is *prima facie* evidence of the purpose of smoking; defendant's evidence "unsupported by other evidence" is not to rebut this).

² It does not clearly appear, from the rescript given in Decretal. IV, 19, 5, *de divoritiis* (dated 1187-1191), that there was then any rule as to the insufficiency of a confession in a petition for divorce in general; it appears, however, that the wife was "diligentius admonita" whether she had confessed adultery for ulterior motives; in 1091 (Decret. Pars II, causa 35, qu. VI, can. IV, *et duo viri*) a canon had been made, providing for dissolution on the ground of consanguinity if two or three witnesses prove it "vel ipsi forte confessi fuerint." But in 1188-1191 (Decretal. IV, 18, 5, *de cognatione legit.*; attributed to Pope Celestine III) it was ordered that a petition for separation on the ground of prior consanguinity should not be granted "upon their confession alone nor upon repute of the neighborhood, since some persons sometimes would wish to collude between them-

local English ecclesiastical decrees or constitutions before 1600, anything to that effect.³ The rule, then, as we find it later obtaining, must be regarded as founded on an ecclesiastical law of specifically English origin; for after the time of Henry VIII no papal or continental pronouncement was of any validity in English ecclesiastical Courts.⁴

In 1603 and 1605, at convocations in Canterbury and York, certain constitutions and canons were passed by the assembled Church of England, and were ratified by the King, though never by Parliament. These canons, thus imperfectly sanctioned, were held⁵ not to bind the laity *proprio vigore* as to their new matter; though they did bind the clergy, and therefore presumably the ecclesiastical Courts within their proper jurisdiction. It is upon one of these canons of 1603, and upon that only, that the modern rule in question rests (for it cannot be doubted that the common-law courts knew nothing of any such rule).⁶ This canon is as follows:

1603, Canon 106, at the Convocation of Canterbury: "Forasmuch as matrimonial causes have been always reckoned and reputed amongst the weightiest, and therefore require the greater caution when they come to be handled and debated in judgment, especially in causes wherein matrimony having been in the church duly solemnized is required upon any suggestion or pretext whatsoever to be dissolved or annulled, We do strictly charge and enjoin that, in all proceedings to divorce and nullities of matrimony, good circumspection and advice be used, and that the truth may (as far as it is possible)

selves against their marriage and would incline easily to a confession of incest"; and in 1816-1227, ib. IV, 15, 7, *de frigiditate*, a judge is directed to grant a divorce for impotence after causing an inspection, "ne id confiterentur in fraudem."

Lindwood's Provinciale discloses nothing of the sort. The work *Reformatio Legum Ecclesiasticarum* [Anglicanarum], which was a report of a committee of revision, acting under St. 25 H. VIII (1534) and St. 5 Edw. VI (1551), and was promulgated in 1552 (consulted in the edition of 1640), contains no trace of a divorce rule; of this book Sir Wm. Scott said, in *Hutchins v. Deuall*, *infra*, that it was "of great authority" in showing the practice. Gibson, in his *Codex Juris Ecclesiastici Anglicani* (ed. 1713, tit. 12, c. 17, p. 534), commenting on Canon 106 of 1603 (*supra* in the text) says that the church rule rested on the Decretal of Calixtus III, cited as *Extirp.*, tit. 12, c. 5 (cited *supra*, note 1), and adds: "This prohibition had been expressly renewed in the canons of 1597," without citation. The editor of Walcott's *Constitutions and Canons Ecclesiastical of the Church of England* (1874; at p. 145) in a note *mensura*, without citing the source, a constitution of 1597, reading: "Nec partium confessioni, que in his causis neque fallax est, temere confidatur"; which falls short of the canon of 1603.

³ By St. 25 H. VIII, c. 16, St. 35 H. VIII, c. 16, and St. 1 Eliz. c. 1, the existing papal decrees and decretals, with the English provincial and legatine constitutions, were confirmed, so far as not repugnant to the common law and so far as they "be yet accustomed and used here in the Church of England." In the time of Edward VI, the proposed *Reformatio* (cited

supra), of 1552, had failed to receive the royal assent. The history is most amply given in Makower's *Constitutional History of the Church of England* (Sonnenstein's ed.), 1895, pp. 161, 206.

⁴ Lord Hardwicke, in *Middleton v. Croft*, 2 Stra. 1056 (1737).

⁵ Because they had no jurisdiction of divorce causes, and because no ecclesiastical rule had been made binding upon the lay Courts. The following case, sometimes cited as authority, involves a different point and throws no light on either the common law or the ecclesiastical rule: 1682, *Anon.*, 2 Mod. 314 (in a libel for annulment of marriage on account of the husband's former marriage, "they both appear and confess the matter, upon which a sentence of divorce was to pass"; whereon a prohibition was asked by the children in the King's Bench, because it was "a contrivance between him and his wife . . . to defeat their children of an estate settled upon them in marriage with remainder over"; and "the reason why a prohibition was prayed was . . . for that the inheritance and freehold of land were concerned in this case"; and since the spiritual Court had no jurisdiction in such causes, the prohibition was intimated to be grantable; evidently on the general principle of *Hicks v. Harris*, 12 Mod. 35, that "if they encroach on the common law, though they have original cognisance, we will prohibit"; compare § 2250, *post*).

⁶ Walcott's *Constitutions and Canons*, p. 145; the text is also to be found in Poynter (1894), *Marriage and Divorce*, p. 196 and App. II. In Ireland, Canon 52, in 1634 (quoted in Milw. 537), followed the English canon of 1603.

be sifted out by deposition of witnesses and other lawful proofs and evictions, and that credit be not given to the sole confession of the parties themselves, howsoever taken upon oath either within or without the court."

This canon seems thenceforth to have been regarded as a valid rule of law in the ecclesiastical Courts, and received repeated application.⁷

But in 1857 the ecclesiastical (prerogative) Courts were reorganized by statute in England, and their secular jurisdiction was transferred to the common-law Courts; and the question naturally then arose whether the rules of evidence (including this one) of the ecclesiastical law were transplanted into the common-law Courts along with their new jurisdiction; and, if not, whether there was any common-law rule requiring corroboration for a respondent's confession in divorce. Both these questions were immediately answered in the negative:

1858, *Cockburn, C. J.*, in *Robinson v. Robinson*, 1 Sw. & Tr. 302, 365, 393 (divorce for adultery; Court for Divorce and Matrimonial Causes, superseding the Ecclesiastical Court, and including all the common law judges, the chancellor, and the probate judge, any two of them with the probate judge forming a full Court): "As this Court is not a Court of ecclesiastical jurisdiction, nor bound in cases of divorce *a vinculo* by rules of merely ecclesiastical authority, it is at liberty to act and bound to act on any evidence, legally admissible, by which the fact of adultery is established; and if therefore there is evidence, not open to exception, of admissions of adultery by the principal respondent, it would be the duty of the Court to act on such admissions, although there might be a total absence of all other evidence to support them. No doubt the admissions of a wife unsupported by corroborative proof should be received with the utmost circumspection and caution. . . . Nevertheless, if after looking at the evidence . . . the Court should come to the conclusion, first, that the evidence is trustworthy, secondly, that it amounts to a clear, distinct, and unequivocal admission of adultery, we have no hesitation in saying that the Court ought to act upon such evidence and afford to the injured party the redress sought for."⁸

In the United States, in the few instances in which no express statute existed, the opposite conclusion was reached,—not by deliberate decision, but apparently upon the tacit assumption that the statutory transference of

⁷ These reports before the 1800s are scanty: 1792, *Timnings v. Timnings*, 3 Hagg. Eccl. 76, 77 (separation only); 1794, *Williams v. Williams*, 1 Hagg. Cons. 290, 304 (Lord Stowell: "Confession [here extrajudicial] is a species of evidence which, though not inadmissible, is to be regarded with great distrust; . . . [it] is received in conjunction with other circumstances, yet it is on all occasions to be most accurately weighed"); 1800, *Crowe v. Crowe*, 8 Hagg. Eccl. 122, 131; 1816, *Searle v. Price*, 2 Hagg. Cons. 187, 189; 1817, *Burgess v. Burgess*, ib. 223; 1820, *Mortimer v. Mortimer*, ib. 310, 315; 1831, *Owen v. Owen*, 4 Hagg. Eccl. 261; 1841, *Cobbe v. Garston*, Milw. 529, 537 (Ireland; a confession, plus a single uncorroborated witness, insufficient; here, in annulment on the ground of previous marriage); 1842, *Harrison v. Harrison*, 4 Moore P. C. 84, 103 (divorce for impotence; on appeal from the Consistory Court, the Privy Council refused to declare

that inspection of the person was essential as corroboration, and held that the party's refusal to allow inspection was sufficient, the absence of collusion being clear); 1845, *Shuldham's Divorce*, 12 Cl. & F. 363, *semble*; 1846, *Noverre v. Noverre*, 1 Rob. Eccl. 423, 440 ("There must be other evidence, then; though I am not aware of any case in which the *quantum* or description, as auxiliary to a confession, has been the subject of discussion"); 1847, *Tucker v. Tucker*, 11 Jur. 893 ("I accede not only to the rule of the canon, but to the principle on which it is founded").

⁸ *Accord*: 1858, *Robinson v. Robinson*, 1 Sw. & Tr. 362, 365, 393, 29 L. J. P. M. 176, 191 (quoted *supra*); 1865, *Williams v. Williams*, L. R. 1 P. & D. 29 (preceding case approved; "in each case the question will be whether all reasonable ground for suspicion is removed").

the former jurisdiction of the ecclesiastical Courts, included by implication this rule of evidence.⁹ In most jurisdictions, however, the same statute had in fact expressly enacted the ecclesiastical rule of evidence; and thus the rule was placed beyond the necessity of judicial adoption.¹⁰ Whether it does

⁹ Cases *infra*, note 10, in Massachusetts, Minnesota, and elsewhere.

¹⁰ *Ala.* Code 1896, § 1491 ("no decree can be rendered on the confession of the parties or either of them"); 1856, *King v. King*, 28 *Ala.* 315, 319 (Code held to adopt in effect the rule of Canon 106); 1858, *Cornelius v. Cornelius*, 31 *id.* 479, 481; *Alaska C. C. P.* 1900, § 684 (like *Or. Annot. C.* 1892, § 857); *Ariz.* Rev. St. 1887, § 2113 ("no divorce shall be granted on the testimony of a party, unless the same be corroborated by other evidence"); *Ark.* Stats. 1894, § 2511 (statements of complainant are not to be taken as true because of defendant's "failure to answer, or his or her admission of their truth"); 1853, *Vicer v. Bertrand*, 14 *Ark.* 267, 273, 283 (confessions, in the answer or otherwise, not sufficient for any charge); 1855, *Welch v. Welch*, 16 *id.* 527, 528; 1857, *Jacob v. Boh*, 18 *id.* 292, 410; 1879, *Rie v. Rie*, 34 *id.* 87, 88; 1881, *Kurtz v. Kurtz*, 38 *id.* 119, 123; 1881, *Brown v. Brown*, *ib.* 324, 327; 1890, *Scarborough v. Scarborough*, 54 *id.* 30; *Cal. C. C. P.* 1872, § 2073 (in divorce for adultery, "a confession of adultery, whether in or out of the pleadings, is not of itself sufficient to justify a judgment of divorce"); *Civ. C.* § 130 (the "uncorroborated statement, admission, or testimony of the parties," in divorce, is not sufficient); 1859, *Conant v. Conant*, 10 *Cal.* 249, 254; 1859, *Baker v. Baker*, 13 *id.* 87, 96 ("The question . . . is this, 'Would the entire testimony, confessions, and circumstances lead the guarded discretion of a reasonable and just man to the conclusion?'"); 1898, *Andrews v. Andrews*, 120 *id.* 184, 53 *Pac.* 236 (corroboration found, on the facts); *D. C. Comp. St.* 1894, c. 30, § 33 ("nor shall any admissions contained in the answer of the defendant be taken as proof of the facts charged as the ground of the application, but the same shall in all cases be proved by other evidences"); *Del. Rev. St.* 1893, c. 75, § 6 ("The confession of neither party shall be received in evidence, unless such confession shall be corroborated by the testimony of three or more competent witnesses or by strongly corroborative circumstances"); *Ga.* Code 1895, § 2430 (confessions of adultery or cruelty are insufficient "if unsupported by corroborating circumstances and made with a view to be evidences in the cause"); 1858, *Backholts v. Backholts*, 24 *Ga.* 233, 244 ("When the evidence consists exclusively in such confessions, a total divorce will not be granted"); 1875, *Woolfolk v. Woolfolk*, 53 *id.* 651 (Code applied); *Haw. Civil Laws* 1897, § 1929 ("no sentence of nullity of marriage shall be pronounced solely on the declarations or confessions of the parties, but the Court shall in all cases require other satisfactory evidence of the facts on which the allegation of nullity is founded"); § 1934 (in divorce, "the Court shall require

exact legal proof upon every point, notwithstanding the consent of parties; and the admission of the respondent shall not be competent evidence, except to prove the original marriage"); *Ida.* Rev. St. 1887, § 2471 (divorce not to be granted "upon the uncorroborated statement, admission, or testimony of the parties"); *Ill.* Rev. St. 1874, c. 40, § 3 ("If the bill is taken as confessed, the Court shall proceed to hear the cause by examination of witnesses in open court," and the Court shall in no case grant divorce unless satisfied "that the cause of divorce has been fully proven by reliable witnesses"); § 9 ("No confession of the defendant shall be taken as evidence unless the court or jury shall be satisfied that such confession was made in sincerity and without fraud or collusion to enable the complainant to obtain a divorce"); 1852, *Shillinger v. Shillinger*, 14 *Ill.* 147, 150 ("It would be erroneous to grant the decree, on taking the bill for confessed, without any evidence"); 1859, *Bergen v. Bergen*, 22 *id.* 187, 189, *semble* (admissions, if free from fraud or collusion, may suffice); *Ind.* Rev. St. 1897, § 1069 ("no decree shall be rendered on default without proof"); 1846, *McCalloch v. McCulloch*, 3 *Blackf.* 60 (other evidence is necessary, under the early statute, even if the confession is believed); 1841, *Scott v. Scott*, 17 *Ind.* 309, *semble* (default or confession alone not sufficient, even under "a statute declaring marriage a civil contract"); *Kan.* Gen. St. 1897, c. 96, § 59 (a divorce is not to be granted "upon the uncorroborated testimony of either husband or wife or both of them"); § 60 (admissions not obtained "by connivance, fraud, coercion or other improper means," are receivable); *St.* 1903, c. 337 (in divorce proceedings, no divorce shall be granted "upon the uncorroborated testimony of either husband or wife, or of both of them"); c. 333 (same, but ending, "either husband or wife by the other"); *Ky.* Stats. 1899, § 2119 (no divorce petition "shall be taken for confessed, or be sustained by the admission of the defendant alone, but must be supported by other proof. Two witnesses, or one and strong corroborating circumstances, shall be necessary to sustain the charge of adultery or lewdness. The credibility or good character of such witnesses must be personally known to the judge, or to the officer taking the deposition, who shall so certify, or it must be proved"); 1893, *McCampbell v. McCampbell*, 103 *Ky.* 745, 46 *S. W.* 18 (the statute is satisfied by testimony to the witness' good character presented to the judge); *La.* Stats. 1840, *Herman v. McLeland*, 16 *La.* 26 ("mere acknowledgment," insufficient); 1864, *Weigel's Succession*, 18 *La. An.* 49, 53 (preceding case approved); 1857, *Mack v. Handy*, 30 *id.* 491, 493, 2 *Sa.* 181 (mere confession is "insufficient of itself"); *Me.* Stats. 1830, *Cayford's Case*, 7 *Greenl.* 57, 61 (the mere confession of a party

exist as a part of the common law, where no such statute obtains and no prior rulings have assumed its existence, seems therefore to be an arguable question.

charged with adultery is not sufficient, "to prevent collusive arrangements between husband and wife to obtain a divorce"; 1834, *Bentley v. Bentley*, 11 Me. 367 (cruelty; record of conviction, on a plea of guilty, for assault and battery on the wife, admitted; nothing said as to sufficiency); *Mass.*: 1806, *Holland v. Holland*, 2 Mass. 184 (confession, "unsupported by other evidence," insufficient); 1831, *Billings v. Billings*, 11 Pick. 461 ("the circumstances here proved by other evidence than the confessions showed there could be no collusion," and this sufficed; the reporter's headnote to this case is misleading); *Mich. Comp. L.* 1897, § 8652 ("No decree of divorce shall be made solely on the declarations, confessions, or admissions of the parties, but the Court shall require other evidence of the facts"); 1842, *Sawyer v. Sawyer*, Walker Ch. 48, 51 ("other proof is required in corroboration"; but on a charge other than adultery corroboration "need not be of so decisive a character," where there is less danger of collusion); 1845, *Emmons v. Emmons*, ib. 532 (a rule of Court requires proof to be taken on a confession by default or answer); 1867, *Robinson v. Robinson*, 16 Mich. 79 (decree cannot be entered by consent); 1869, *Dawson v. Dawson*, 18 id. 335 (statute applied); *Mass. Gen. St.* 1894, § 5769 ("Divorces shall not be granted on the sole confessions, admissions, or testimony of the parties, either in or out of court"); 1861, *True v. True*, 6 Mass. 453, 463 (confession alone, insufficient, even though no statute expressly adopts the ecclesiastical rule); *Mass.*: 1839, *Tewksbury v. Tewksbury*, 4 How. 109, 112 (confessions here held sufficient with other evidence); 1856, *Armstrong v. Armstrong*, 32 Mass. 279, 283, *semble* (confessions alone, insufficient); *Mo.*: 1856, *Twyman v. Twyman*, 27 Mo. 383 (admissions alone, insufficient); *Mont. C. C. P.* 1895, § 3415 (like Cal. C. C. P. § 2079); *Neb. Comp. St.* 1899, § 2893, (no decree of divorce and nullity "shall be made solely on the declarations, confessions, or admissions of the parties"; but "other satisfactory evidence" shall be required); *N. H.*: 1830, *Washburn v. Washburn*, 5 N. H. 195 (confessions "alone are clearly insufficient"); 1863, *White v. White*, 45 id. 121 (same; limited here to adultery); 1867, *Burgess v. Burgess*, 47 id. 395 (plea of guilty to indictment in another State for adultery, sufficient if corroborated); *N. J.*: 1831, *Clutch v. Clutch*, 1 N. J. Eq. 474 (confessions "are never held sufficient without strong corroborating circumstances"); 1838, *Miller v. Miller*, 2 id. 139, 142; 1866, *Jones v. Jones*, 17 id. 351; 1870, *Derby v. Derby*, 21 id. 23, 47 ("it is not usual" to rely upon them alone); 1875, *Tate v. Tate*, 26 id. 55 ("it is a settled rule" not to rely upon them alone); 1883, *Summerbell v. Summerbell*, 37 id. 603, 610 ("I take the rule to be that if the proofs in a cause irrespective of the confession of the incriminated party well nigh demonstrate the fact of the adultery charged but do

not entirely satisfy the conscience of the Court, the confession may then (if free from suspicion of collusion or duress or improper influence or of having been prepared to furnish evidence) be permitted to decide the otherwise doubtful judgment of the Court"); 1900, *Perkins v. Perkins*, 59 id. 515, 46 Atl. 173 (applied to a defence of adultery set up to the wife's application for alimony); 1900, *Weigel v. Weigel*, 60 id. 322, 47 Atl. 183; 1901, *Kloman v. Kloman*, 61 id. 153, 49 Atl. 310 (confession alone, not sufficient without corroboration as to the act charged); *N. Y. C. C. P.* 1877, § 1763 (the confession of a party is alone insufficient; "other satisfactory evidence of the facts must be produced"); 1799, *Doe v. Roe*, 1 John. Cas. 25 (confessions, "with other proof," held sufficient, by a majority); 1814, *Betta v. Betta*, 1 John. Ch. 197 (an early statute at this time required proof to be taken, upon admission by default or answer; a master's report based "almost wholly on proof by confession," held insufficient for a decree of divorce for adultery); 1824, *Barry v. Barry*, 1 Hopk. Ch. 113 (decree of separation, not to be found on a default alone); 1836, *Devenbagh v. Devenbagh*, 5 Paige 584 (statute applied, prohibiting a decree solely upon confessions); 1861, *Lyon v. Lyon*, 62 Barb. 133, 142; *N. C. Code* 1883, § 1288 (in divorce for adultery, neither party's admissions shall be received); 1849, *Hansley v. Hansley*, 10 Ired. 506, 511; 1893, *Toole v. Toole*, 112 N. C. 152, 16 S. E. 912, (effect of extrajudicial admissions, considered); *N. D. Rev. C.* 1895, § 2767 ("No divorce can be granted . . . upon the uncorroborated statement, admission, or testimony of the parties"); *Ok. Rev. St.* § 5697 (in divorce or alimony proceedings, admissions obtained by "fraud, connivance, coercion, or other improper means," not to be received; a decree is not to be granted "upon the testimony or admissions of a party unsupported by other testimony"); 1833, *Brainard v. Brainard*, Wright 354 (applying the statute); 1834, *Bascom v. Bascom*, ib. 632; *Ok. Stats.* 1893, § 4556 (in divorce or alimony proceedings, "the Court may admit proof of the admissions of the parties, . . . carefully excluding such as shall appear to have been obtained by connivance, fraud, coercion, or other improper means. . . . But no divorce shall be granted without proof"); *Or. C. C. P.* 1892, § 857 (like Cal. C. C. P. § 2079); *Pa.*: 1847, *Matchin v. Matchin*, 6 Pa. St. 332, 337, ("confession alone," insufficient); 1863, *Wood v. Wood*, 2 Brewst. 447 (preceding case followed); *S. D. Stats.* 1899, § 3491 (like N. D. Rev. C. § 2767); *Tex. Rev. Civ. Stats.* 1895, § 2979 ("the decree of the Court shall be rendered upon full and satisfactory evidence, independent of the confession or admission of either party"); *St.* 1897, c. 49 ("No divorce shall be granted upon the evidence of either husband or wife, if there be any collusion between them"; amending *Rev. Civ. Stats.* 1895, § 2979, by striking out "independ-

§ 2068. *Same: (b) Policy of the Rule.* The rule is founded on the rooted propensity (apparently nothing novel in our own generation) to resort to a false confession of guilt in order to secure freedom from the marriage tie in cases where no legally recognized cause for its dissolution really exists:

1788, Mr. *Thomas Oughton*, *Ordo Judiciorum*, tit. 218, p. 816: "Since in our days (by the Devil's persuasion) a great many divorces are sought on the ground of adultery, in order by that pretext that the divorced parties may be able to proceed to another marriage, and since (in order thus the more easily to obtain a divorce) the wife is used to confess the adultery of which she is by collusion charged, though in truth none has been committed; and sometimes also the husband (that he may take a new wife) induces the wife by threats, blows, blandishments, or some other unlawful mode, to confess the adultery, though she had committed none. Therefore, to avoid and obviate this craft and fraud, the judge, in this class of cases, is accustomed to search out the woman's mind in private (all other persons, especially the husband, being withdrawn), and to examine her carefully as to the truth and as to the motive for such a confession, and by every lawful means and mode to elicit the truth; and if he finds craft and fraud of this sort, or even some probable suspicion of it, he is accustomed to refuse a judgment of divorce, unless the petitioner for the divorce shall have proved the alleged adultery by witnesses, or at least by vehement presumptive circumstances and public repute, or otherwise informed the judge's conscience (because the alleged crime may be true), from which the judge may believe that the woman's confession of the adultery has not proceeded from craft or fraud."

1850, *Field, J.*, in *Baker v. Baker*, 18 Cal. 87, 94: "The object of the rule is to prevent collusion between the parties. Without some limitation of this kind it would be in the power of the parties to obtain a divorce in all cases. The public is interested in the marriage relation and the maintenance of its integrity, as it is the foundation of the social system; and the law wisely requires proof of the facts alleged as the ground for its dissolution. The agreement of the parties will not answer, as then the marriage relation would be one only of temporary convenience. The default in the action will not answer, as this would only be another form for carrying out their previous agreement. Confessions will not answer, because they may be the result of collusion, and be untrue in fact. But the public can have no interest in suppressing the truth; and, as a means of its ascertainment, the confessions of parties against their interests have always been regarded as evidence of the most important character."

That such a frequency of false confession prevails is indubitable. That prudence would require a judge always to seek such corroboration is equally indubitable. But it does not follow that a fixed rule of law ought to exist. Its behest is generally superfluous, since ordinary prudence and knowledge of human nature point the same warning. All the arguments generally applicable against fixed rules of number or quantity (*ante*, § 2033) are here also applicable. The present rule probably does less harm than any other of

dent of the confession or admission of either party," and by adding the above clause); 1848, *Sheffield v. Sheffield*, 3 Tex. 79, 88 (statute applied); 1865, *Simmons v. Simmons*, 18 id. 468, 473 (same); 1874, *Mathews v. Mathews*, 41 id. 331, 333 (same); 1884, *Endick v. Endick*, 61 id. 559, 561 (same; conviction of assault and battery on a wife, upon plea of guilty, insufficient); *Pt. St.* 1894, § 2672 (no marriage is to be declared null "solely on the declarations or

confessions of the parties"); 1827, *Gould v. Gould*, 2 Aik. 180 (confession alone, not sufficient on a charge of adultery); 1877, *Richardson v. Richardson*, 50 Vt. 119, 122 (statute applied); *Wyo. Rev. St.* 1887, § 1597, (no decree "shall be made solely on the declarations, confessions, or admissions of the parties, but the Court shall in all cases require other evidence in its nature corroborative of such declarations," etc.).

the sort; but it belongs to a class of rules not broadly wise in principle nor essentially useful in practice.

§ 2069. *Same: (c) Scope of the Rule.* (1) The language and the policy of the Canon applies to the proof of *all causes of divorce*; and, although the comments of Oughton are limited to the cause of adultery, the ecclesiastical practice seems to have followed no such limitation, nor have the statutes or decisions in this country (with rare exceptions) accepted it.¹

(2) The application of the rule to a petition for separation (divorce *a mensu et thoro*), and not merely to divorce in the narrower sense (*a vinculo matrimonii*) has sometimes been doubted; but the policy of the rule seems to apply alike to both.²

(3) The language of the Canon requires only that "credit be not given to the sole confession" of the party; and Oughton's comment shows the proper construction of this to be, not that a decree may not be rendered upon the confession as the sole testimony to the direct fact of the charge, but that credit is not to be given to it for that purpose until all fear of collusion or duress is removed. In other words, the *corroboration* from other evidence need not directly bear upon the main fact, but need only be such as restores confidence in the confession itself. This is the view taken in the more careful rulings;³ although ordinarily the distinction seems to have been ignored. As to any further detailed rules defining the nature of the corroborative evidence, the orthodox practice refuses properly to make any.⁴

(4) That the confession is at least and always *admissible*, and that the rule merely declares it insufficient unless corroborated, is plain enough on principle; and this is generally conceded.⁵ Nevertheless, their inadmissibility has sometimes been asserted inadvertently or in ambiguous language,⁶ and even deliberately;⁷ and the phrasing of a statute has in some jurisdictions perpetuated this totally groundless rule and has forced the Courts to follow it in those jurisdictions.⁸

¹ Cases cited *ante*, § 2067. The rule, however, applies only to proof of the cause for divorce, and not to proof of the fact of marriage: 1868, *Hitchcock v. Hitchcock*, 2 W. Va. 435, 438 (Maxwell, J., diss.). For the rule as to proof of marriage, see *post*, § 2082.

² 1792, *Timmings v. Timmings*, Eng., cited *ante*, § 2067; 1837, *Richardson v. Richardson*, 4 Port. 467, 477.

³ For example, in *Billings v. Billings*, 11 Pick. 461, cited *ante*, § 2067.

⁴ English cases cited *ante*, § 2067.

⁵ 1814, *Kent, C.*, in *Betta v. Betta*, 1 John. Ch. 197, 199 ("The confession of the accused is a legitimate species of proof, which is recognized throughout the whole law of evidence"); 1859, *Baker v. Baker*, 18 Cal. 37, 96 (Field, J.): "Having in view, then, the doctrine of the law as it existed previous to the adoption of the statute, and the reason of it, and regarding the statute as merely declaratory of that doctrine, we are necessarily led to the conclusion that it was never intended to exclude entirely the introduction of the confessions, but only, as the

statute in terms purports, that upon them the decree shall not be granted"); 1860, *Johns v. Johns*, 29 Ga. 718, 722; 1887, *Mack v. Handy*, 30 La. An. 491, 496, 2 So. 181; 1877, *Richardson v. Richardson*, 50 Vt. 119, 122.

⁶ 1858, *Scott, J.*, in *Viser v. Bertrand*, 14 Ark. 267, 278; 1831, *Vance v. Vance*, 8 Greenl. 182 (confession admitted where collusion was wanting; but here the decree seems to have been given upon the confession alone, and the ruling seems to have been upon its sufficiency); 1794, *Tewksbury v. Tewksbury*, 2 Dane's Abr. 310, *semble* (similar); 1805, *Baxter v. Baxter*, 1 Mass. 346 (confession uncorroborated, held "inadmissible"; but here no other evidence was offered, and the ruling was really upon the sufficiency of the confession).

⁷ 1849, *Hansley v. Hansley*, 10 Ind. 508, 510, *semble*.

⁸ 1837, *Richardson v. Richardson*, 4 Port. 467, 477 ("Our statute has not left the discretion to any Court to receive aid from a confession"); 1847, *Moyler v. Moyler*, 11 Ala. 620, 628; 1849, *Gray v. Gray*, 15 Ill. 778, 785 (the Code, cited

§ 2070. *Uncorroborated Confession of Accused in Criminal Cases; English rule.* Whether the uncorroborated confession of the accused in a criminal case is alone sufficient to support a conviction is a question which for more than a hundred years has been culpably left unsettled in English law.¹ Frequent opportunities were presented for settling it, but they were not improved; and the law was left in an unfortunate state of obscurity subject to much difference of opinion.

To begin with, there is a report of a ruling in 1784 that such a confession sufficed;² but neither the report nor the ruling was treated as of final authority. It is fairly clear that before that time no special requirement existed and that the matter was unhampered by any quantitative rule.³ But during the 1800s the question was frequently raised; and, while the trend of opinion was apparently disfavored such a fixed rule, none of the decisions enunciated a clear proposition or put the matter beyond controversy.⁴

ante, § 2067, afterwards changed the law in this State); 1832-4, *Brainard v. Brainard*, *Bascom v. Bascom*, Wright Ch. 354, 692; 1848, *Sheffield v. Sheffield*, 3 Tex. 79, 83 (inadmissible, probably, under a statute requiring a degree to proceed upon "evidence independent of the confession"); 1884, *Endick v. Endick*, 61 Md. 559, 561.

¹ The principle that an extrajudicial confession, without corroboration, does not suffice, was an important one in the Continental legal systems; 1900, *Pertile*, *Storia del diritto italiano*, 2d ed., vol. VI, pt. 1, p. 426; 1822, *Reinein*, *Histoire de la procédure criminelle en France*, 269, 278. Examples of its application may be seen in *Fensterbach's Remarkable* (German) Criminal Trials (1846; tr. Duff-Gordon), *passim*, and in N. W. Senior's essay on *Fensterbach*, in his *Biographical Sketches* (1863).

² 1784, *R. v. Wheeling*, 1 Leach Cr. L., 4th ed., 311, in note to *R. v. Jacobs* ("In the case of John Wheeling, tried before Lord Kenyon at the summer assizes at Salisbury, 1789, it was determined that a prisoner may be convicted on his own confession, when proved by legal testimony, although it is totally uncorroborated by any other evidence").

³ The passages from Lord Hale and Sir Edward Coke, quoted post, § 2081, are sometimes cited upon the present point; but it is obvious that they have nothing to do with a confession rule. Whatever rule there was in earlier times would have looked in the opposite direction, i. e. the confession would have been regarded as the strong and necessary evidence; for example: 1660, *Hulet's Trial*, 5 How. St. Tr. 1179, 1195 (L. C. B. Bridgman, charging the jury: "If you believe it upon these relations [of witnesses], and after his own confession, . . . then he is to be found guilty. . . . If you take it singly, if you have nothing of other proof, what another man says of me doth not charge me, unless there be something of my own. . . . It is my duty to tell you that what is said by another of me, that alone is not a pregnant evidence").

The civil law rule about confessions throws

no light on the subject, because it rested on a different theory of proof; see the citations *supra*, note 1, and Professor Lowell's articles on the Judicial Use of Torture, 11 Harv. L. Rev. 29.

⁴ 1821, *R. v. Eldridge*, R. & R. 440 (larceny of a mare; whether the mare had been stolen or had been found as an stray was in issue; "a very full confession" was read; the question was reserved "whether a prisoner ought to be convicted of a felony on his confession merely, without other proof of felony having been committed"; the judges held that there was "sufficient evidence to confirm the confession," thus not deciding the question); 1822, *R. v. Falkner*, ib. 48 (robbery; the prosecuting witness not appearing; the confessions were used; the question being reserved, the judges "held the conviction right, yet here there was evidence that one defendant was desirous to prevent the witness from appearing"); 1822, *R. v. White*, ib. 509 (larceny of oats; explicit confessions of guilt; the trial judge doubted about using them, as the prosecutor "could not establish that a felony had been committed," but after admitting the confessions and reserving the point, "the judges present held the conviction right"; from the report, however, it would seem that there was in fact sufficient independent evidence of the larceny of the oats); 1824, *R. v. Tippet*, ib. 509 (similar charge; on reserving the question, all the judges meeting held that there was sufficient independent evidence, "and most of the learned judges thought that without the owner's evidence the prisoner's confession was evidence upon which the jury might have convicted"); 1824, *Hawkins*, *Pleas of the Crown*, 8th ed. b. 2, c. 46, § 37 ("But if a confession be voluntarily made and regularly proved on the trial, it is sufficient, if the jury believe it to be true, to convict the prisoner without any corroborative evidence to support it"; so also ib. § 42, citing *Hall's case*, MS., 1790, "before the judges"); 1831, *R. v. Taffs*, 5 C. & P. 167 (Lord Lyndhurst, C. B.; larceny of heifers; the heifers were not proved to be missed, but on the defendant's confession that he had taken two heifers from

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§ 2070-2074] ACCUSED'S CONFESSION CORROBORATED.

§ 2070

The proposed rule appeared in two variations; by the one, the corroborative evidence might be of any sort whatever; by the other, it must specifically relate to the *corpus delicti*, i. e. the fact of injury. The latter form tended to prevail; but in neither form did the rule obtain a general footing. So far as it can be supposed to obtain at all to-day in the English and Irish courts,¹ it is apparently restricted to the case of homicide:

1874, *Fitzgerald, J.*, in *R. v. Unkle*, Ir. R. 8 C. L. 50, 53: "The rule is rather one of judicial practice than part of the law of evidence. . . . It would perhaps at present be more correct to define it thus, that a party accused of homicide ought not to be convicted on his own confession merely, without proof of the finding of the dead body or evidence *abundant* that the party alleged to have been murdered is in fact dead."

The policy of any rule of the sort is questionable. No one doubts that the warning which it conveys is a proper one; but it is a warning which can be given with equal efficacy by counsel or (in a jurisdiction preserving the orthodox function of judges) by the judge in his charge on the facts. Common intelligence and caution, in the jurors' minds, will sufficiently appreciate it, without a laying on of the rod in the shape of a rule of law. Moreover, the danger which it is supposed to guard against is greatly exaggerated in common thought. That danger lies wholly in a false confession of guilt. Such confessions, however, so far as handed down to us in the annals of our courts, have been exceedingly rare (*ante*, § 867). Such a rule might ordinarily, if not really needed, at least be merely superfluous. But this rule, and all such rules, are to-day constantly resorted to by unscrupulous counsel as mere verbal formulas with which to entrap the trial judge into an error of words in his charge to the jury. These capabilities of abuse make it a positive obstruction to the course of justice.

§ 2071. Same: (2) Rule in the United States. The conflicting state of the English rulings left it open to the different Courts of this country to choose which rule they might please. Except in a few jurisdictions, where no final settlement has been reached,¹ they seem to have preferred, wherever the

the "World's End Deliver," this, with evidence that the prosecutor's farm was the only one of the name, was held sufficient); 1831, *R. v. Edgar*, note by Mr. Greaves to Russell on Crimes, 4th ed., III, 367, 325 (indictment for obtaining money by false pretences; Patteson, J.: "Could a man be convicted of murder on his own confession alone, without any [other] proof of the person being killed? I doubt it"); 1847, *R. v. Maherry*, 2 C. & K. 722 (bigamy; the defendant had surrendered himself voluntarily as a felon, saying "that he had married two wives, both of whom were now with him, and that he could have no peace or quiet with them"; Pollock, C. B., held that his mere confession was not sufficient); 1854, *R. v. Burton*, Deane, Cr. C. 282 (cited *post*, § 2076; the defendant here had said, "Don't be hard on me"; taking this as a confession, the case is still inconclusive as a ruling on the present point). The following learned writers have also expressed the opinion that no clear decision was deducible in these

rulings: 1843, Mr. Greaves, note to Russell on Crimes, 4th ed., III, 366, 325; 1843, Professor Greenleaf, Evidence, § 217 ("In each of the English cases usually cited in favor of the sufficiency of this evidence, there was some corroborating circumstance").

¹ 1874, *R. v. Unkle*, Ir. R. 8 C. L. 50 (unlawful disclosure by election agent of the tenor of a vote; defendant's confession as to the tenor of the vote held sufficient; "it is not open now to doubt that the mere confession of the accused alone is sufficient to warrant his conviction," but conceding the special rule of practice as to homicide; Whitehead, C. J., diss.); 1887, *R. v. Sullivan*, Ir., 16 Cox Cr. 347 (unlawful publication of notice of seditious meeting; assuming that the actual holding of such a meeting was a necessary part of the *corpus delicti*, held that "an uncorroborated confession is sufficient to sustain a conviction for larceny" or any other crime, except homicide).

² *Hawaii*: 1894, *Republic v. Tokaji*, 9 Haw.

question has come up for decision, to adopt the fixed rule that corroboration was necessary,—chiefly moved, in all probability, by Professor Greenleaf's suggestion³ that "this opinion certainly best accords with the humanity of the criminal code and with the great degree of caution applied in receiving and weighing the evidence of confessions in other cases."

In a few jurisdictions, the rule is properly not limited to evidence concerning the *corpus delicti*; i. e. the corroborating facts may be of any sort whatever, provided only that they tend to produce a confidence in the truth of the confession:

1836, *Stinner, J.*, in *Bergen v. People*, 17 Ill. 426, required "some proof that a crime had been committed, or of circumstances corroborating and fortifying the confession; . . . proof of any number of these facts and circumstances consistent with the truth of the confession, or which the confession has led to the discovery of, and which would not probably have existed had the crime been committed, necessarily corroborate it; . . . the corroborating fact or facts in proof need not necessarily, independent of the confession, tend to prove the *corpus delicti*."⁴

But in most jurisdictions the stricter form of rule is taken, and the evidence must concern the *corpus delicti*:

1876, *Brickell, C. J.*, in *Matthews v. State*, 55 Ala. 187, 194: "Evidence of facts and circumstances attending the particular offence, and usually attending the commission of similar offences, or of facts to the discovery of which the confession has led, and which would not probably have existed if the offence had not been committed, or of facts having a just tendency to lead the mind to the conclusion that the offence has been committed, would be admissible to corroborate the confession."⁵

543, 552 (question not decided); *Massachusetts*: Corroboration not necessary: 1862, *Com. v. Tarr*, 4 All. 315, *semble* (adultery); 1867, *Com. v. McCann*, 97 Mass. 880, *semble* (arson); necessary: 1857, *Com. v. Howe*, 9 Gray 116, *semble* (burglary); 1876, *Com. v. Smith*, 119 Mass. 305, 306, 312, *semble* (arson); undecided: 1900, *Com. v. Morrissey*, 175 Id. 264, 86 N. E. 255; *North Carolina*: 1797, *State v. Long*, 1 Hayw. 455 [524] ("A naked confession, unattended with circumstances, is insufficient. . . . As there are no confirmatory circumstances in the present case, it is better to acquit the prisoner"); 1847, *State v. Cowan*, 7 Ired. 239, 244, *semble* (not necessary); *United States*: 1858, U. S. v. Williams (quoted *infra*).

³ Evidence, § 217.

⁴ Accord: Ga. Code 1895, § 1005 ("A confession alone, uncorroborated by other evidence, will not justify a conviction"); 1871, *Murray v. State*, 43 Ga. 256 (arson); 1872, *Holcomb v. State*, 45 Id. 42, 56 (murder; under the Code, "we do not feel authorized to draw any line; the confession must be corroborated, but how far and in what particulars is not said; . . . each case must stand on its own footing, the jury being the judges"); 1876, *Crowder v. State*, 56 Id. 44 (aiding an escape; corroboration found); 1876, *Williams v. State*, 57 Id. 478 (murder; same); 1879, *Daniel v. State*, 63 Id. 389 (same); 1880, *Paul v. State*, 65 Id. 152 (same); 1882, *Williams v. State*, 69 Id. 11, 24 (same); 1883, *Anderson v. State*, 72 Id. 98,

105 (same); 1883, *Burger v. State*, 81 Id. 196, 63 E. 282 (corroboration found); 1893, *Schaefer v. State*, 93 Id. 177, 18 S. E. 552 (murder; same; compare the later cases cited in the next note); *Id.*: 1856, *Bergen v. People*, 17 Ill. 426 (innocent; rule restricted to felonies; but compare the later cases cited in the next note); *Ind.* Rev. St. 1897, § 1893 ("A confession made under inducements is not sufficient to warrant a conviction without corroborating testimony"); *N. J.*: 1818, *State v. Aaron*, 1 South, 232, 239, 244 (murder; confession of a child, held not sufficient without some corroboration); 1828, *State v. Guild*, 10 N. J. L. 163 (not deciding the point, but holding that the corroboration need only involve any circumstances "such as serve to strengthen it, . . . to impress a jury with a belief in its truth"); *R. I.*: 1899, *State v. Jacobs*, 21 R. I. 260, 43 Atl. 31 (the other evidence need not prove the crime independently of the confession); *U. S.*: 1858, U. S. v. Williams, 1 Cliff. 5, 21, 22, 27 ("All that can be required is that there should be corroborative evidence tending to prove the facts embraced in the confession"; but "whether under any circumstances a free and voluntary confession, deliberately made, would be sufficient without corroboration, it is not necessary now to decide"); *Wash. C. & Sta.* 1897, § 6942 ("A confession made under inducement is not sufficient to warrant a conviction without corroborating testimony").

⁵ Accord: *Ala.*: 1860, *Moss v. State*, 36

No further detailed rules as to the nature of the corroborative evidence seem to have been attempted.⁶ As to the application of the rule, it remains only

Ala. 211, 261 (murder; "the corpus delicti being otherwise established," confession sufficient, if satisfactorily proved); 1876, *Matthews v. State*, 55 id. 187, 184 (rape; rule, as stated, confined to felony); 1877, *Johansen v. State*, 59 id. 37 (larceny; extrajudicial confession, "not corroborated by independent evidence of the corpus delicti," insufficient); 1884, *Winalow v. State*, 76 id. 42, 47 (arson; general principle affirmed); 1890, *Ryan v. State*, 100 id. 54, 11 Mo. 808 (larceny; general principle affirmed); 1902, *Hall v. State*, 134 id. 90, 23 So. 760; *Ark. State*, 1194, § 2291 (if not made in open court, not sufficient "unless accompanied with other proof that such offense was committed"); 1884, *Melton v. State*, 48 Ark. 367, *semble* (murder); *Cal.*: 1867, *People v. Jones*, 31 Cal. 565 (for felony; here robbery); 1875, *People v. Thrall*, 50 id. 415 (robbery); *Fla.*: 1894, *Lambright v. State*, 34 Fla. 564, 375, 16 So. 532 (murder); 1897, *Holland v. State*, 39 Fla. 178, 22 So. 296; 1900, *Mitchell v. State*, — id. —, 33 So. 1000 (corpus delicti must include the criminal agency); *Ga.*: 1890, *Wimberly v. State*, 105 Ga. 168, 31 S. E. 102; 1890, *Davis v. State*, ib. 308, 32 S. E. 183, *semble* (some evidence of corpus delicti needed); 1900, *Blease v. State*, — id. —, 45 S. E. 576 (arson; the evidence other than the confession must show the burning to have been felonious); *Ill.*: 1879, *May v. People*, 93 Ill. 242, 345, *semble* (larceny); 1892, *Williams v. People*, 101 id. 322, 386 (receiving stolen goods); 1894, *Andrews v. People*, 117 id. 195, 202, 7 N. E. 265 (similar); 1895, *Bartley v. People*, 156 id. 234, 40 N. E. 831, *semble*; 1895, *Campbell v. People*, 159 id. 9, 42 N. E. 123; 1896, *Gore v. People*, 162 id. 250, 44 N. E. 500; 1902, *Johansen v. People*, 197 id. 45, 64 N. E. 236 (Gore v. People approved); *Ind.*: Code 1897, § 5401 ("The confession of the defendant, unless made in open court, will not warrant a conviction unless accompanied with other proof that the offense was committed"); 1865, *State v. Turner*, 19 Ia. 145 (under the Code); 1878, *State v. Knowles*, 48 id. 596 (here held not a confession); 1879, *State v. Felton*, 51 id. 495, 801, 1 N. W. 755 (murder); 1880, *State v. Dubois*, 54 id. 343, 9 N. W. 578 (larceny); *Ky.*: C. Cr. Pr. 1898, § 240 ("A confession of the defendant, unless made in open court, will not warrant a conviction, unless accompanied with other proof that such an offense was committed"); 1872, *Cunningham v. Com.*, 9 Bush 149, 152 (murder; the Code held to imply corroboration by evidence tending to connect the accused); 1867, *Patterson v. Com.*, 85 Ky. 312, 320, 5 S. W. 267 (murder; preceding construction disapproved); 1891, *Wigginton v. Com.*, 92 id. 222, 229, 17 S. W. 634 (murder; the construction in the *Cunningham* case definitely repudiated); 1897, *Dugan v. Com.*, 192 id. 241, 43 S. W. 418 (declaring the *Cunningham* case overruled); 1901, *Gilbert v. Com.*, 111 id. 793, 64 S. W. 846 (a confession needs no corroboration, if the corpus delicti is otherwise evidenced);

Mich.: 1892, *People v. Lane*, 49 Mich. 240, 13 N. W. 622 (attempt to murder); *Minn.*: Gen. St. 1894, § 5766 (a confession is not "sufficient to warrant his conviction, without evidence that the offense charged has been committed"); 1890, *State v. Lallyer*, 4 Minn. 268, 375 (murder); 1892, *State v. Gear*, 39 id. 221, 222, 13 N. W. 140 (assault); *Miss.*: 1853, *Stringfellow v. State*, 36 Miss. 157, 163 (murder; restricting the rule to "capital felonies"); 1856, *Brown v. State*, 32 id. 432, 436 (murder; preceding case cited); 1867, *Sam v. State*, 38 id. 247, 252 (arson; general principle affirmed); 1877, *Jenkins v. State*, 41 id. 593 (larceny; same); 1870, *Pitts v. State*, 43 id. 472, 481 (murder; same); *Mo.*: 1849, *Robinson v. State*, 12 Mo. 592, 596 (larceny); 1859, *State v. Lamb*, 39 id. 218, 229, *semble* (murder); 1867, *State v. Scott*, 39 id. 424, 425 (robbery); 1874, *State v. Gorman*, 54 id. 526, 529 (murder); 1881, *State v. Patterson*, 78 id. 695, 708 (murder); 1882, *State v. Dickson*, 78 id. 428, 447 (murder); 1903, *State v. Costa*, 174 id. 394, 74 S. W. 844 (the corpus delicti need not be "absolutely proven, independent of the confession"); *Mont.*: 1871, *Terr. v. McClain*, 1 Mont. 294, 296 (burglary); *Nebr.*: 1880, *Priest v. State*, 10 Nebr. 293, 299, 6 N. W. 465 (murder); 1885, *Smith v. State*, 17 id. 358, 361, 23 N. W. 730 (larceny); 1899, *Sullivan v. State*, 58 id. 796, 79 N. W. 721; *N. Y.*: 1836, *People v. Hennemary*, 15 Wend. 147, *semble* (embezzlement); 1836, *People v. Badgley*, 16 id. 53, 57 (forgery); 1855, *People v. Porter*, 2 Park. Cr. C. 14 (blasphemy); 1859, *U. S. v. Mulvaney*, 4 id. 164 (opening a letter before delivery); C. Cr. P. 1891, § 395 (a confession is insufficient "without additional proof that the crime charged has been committed"); 1886, *People v. Jaehne*, 103 N. Y. 182, 199 (any circumstances which are "calculated to suggest the commission of crime" suffice; though *semble* they do not touch the corpus delicti); 1883, *People v. Deacons*, 109 id. 374, 377, 16 N. E. 676 ("The meaning of the Code is that there must be some other evidence of the corpus delicti besides the confession"); 1903, *People v. White*, 176 id. 331, 68 N. E. 630 (statute applied); *Oh.*: 1872, *Blackburn v. State*, 23 Oh. St. 146, 149, 164 (homicide); *Or. C. Cr. P.* 1892, § 1266 (a confession is insufficient "without some other proof that the crime was committed"); *Pa.*: 1852, *Gray v. Com.*, 101 Pa. 390, 396 (homicide); *S. C.*: 1852, *State v. Vaigneur*, 5 Rich. L. 391, 401 (not clear); *Tex.*: 1854, *Jones v. State*, 13 Tex. 168, 177; in this State the rule's application seems to have been supplanted by the other rules about corpus delicti (*post*, § 2182) and confessions (*ante*, § 381).

⁶ The testimony of an accomplice may suffice: 1867, *Patterson v. Com.*, 85 Ky. 313, 320, 5 S. W. 267. *Contra, semble*: 1854, *Melton v. State*, 48 Ark. 367, 370. Conversely, a confession only corroborated may serve as sufficient, under § 2059, *ante*, to corroborate an accomplice: 1893, *Schaefer v. State*, 23 Ga. 177, 18 S. E.

to note that it has of course no bearing upon an infra-judicial confession, which is in effect a plea of guilty.⁶

§ 2072. *Same*: (3) *Definition of Corpus Delicti*. The meaning of the phrase *corpus delicti*¹ has been the subject of much loose judicial comment, and an apparent sanction has often been given to an unjustifiably broad meaning. It is clear that an analysis of every crime, with reference to this element of it, reveals three component parts, *first*, the occurrence of the specific kind of injury or loss (as, in homicide, a person deceased; in arson, a house burnt; in larceny, property missing); *secondly*, somebody's criminality as the source of the loss, — these two together involving the commission of a crime by somebody; and, *thirdly*, the accused's identity as the doer of this crime.

(1) Now, the term *corpus delicti* seems in its orthodox sense to signify merely the first of these elements, namely, the *fact of the specific loss or injury sustained*:

1705, *Captain Green's Trial*, 14 How. St. Tr. 1190, 1246; piracy; the ship said to have been seized was not shown to be missing; Counsel for defence: "By the '*corpus delicti*,' subject of the crime, is not meant that the subject of the crime must be so extant as to fall under the senses, but that the loss sustained is felt and known. As for example, in the crime of murder, though the body cannot be reached, yet the particular loss is known; it is notorious the queen wants a subject, friends want a relation whom they can point out; in piracy and robbery, merchants want their ships and goods; so that the loss is felt and known, though *de facto* the subject cannot be pointed out. . . . And this is the true meaning of what is '*corpus delicti*,' the subject of the crime."

1870, *Burgett, J.*, in *State v. Potter*, 52 Vt. 33, 39: "The idea and the rule is . . . that a person should not be convicted of having killed a person until it was proved that that person is in fact dead. When that is made out, the *corpus delicti* is made out, — that is, the subject-matter of the alleged crime, namely, a person dead."

This, too, is *a priori* the more natural meaning; for the contrast between the first and the other elements is what is emphasized by the rule; i. e. it warns us to be cautious in convicting, since it may subsequently appear that no one has sustained any loss at all; for example, a man has disappeared, but perhaps he may later reappear alive. To find that he is in truth dead, yet not by criminal violence — i. e. to find the second element lacking, is not the discovery against which the rule is designed to warn and protect us.

(2) But by several judges the term has been said to include the second element also:

1850, *Shaw, C. J.*, in *Com. v. Webster*, Mass., Bemis' Rep. 473: "In a charge of criminal homicide, it is necessary in the first place by full and substantial evidence to establish what is technically called the *corpus delicti*, — the actual offence committed; that

553; 1867, *Patterson v. Com.*, 86 Ky. 312, 320.

⁶ And this should include a confession to a committing-magistrate: 1876, *Matthews v. State*, 55 Ala. 187, 190, *semble*; 1859, *State v. Lamb*, 26 Mo. 218, 230; 1847, *State v. Cowan*, 7 Ired. 230, 244.

The rule at large has been erroneously said to apply to the admissions of a plaintiff suing for a

defamatory charge of crime: 1876, *Georgia v. Kephord*, 45 Ia. 43, 52.

For the rule in *treason*, where a confession in open court dispenses with the two witnesses, see *ante*, § 2038.

¹ "The term *corpus delicti* first appears in Farinaccio, *Questiones*, 1, 6" (Pertile, *Storia del diritto italiano*, 2d ed., 1900, vol. VI, pt. 2, p. 144); compare the quotations in Kemein (1893), *Hist. de la procédure criminelle*, 267.

is, that the person alleged to be dead is in fact so; that he came to his death by violence and under such circumstances as to exclude the supposition of a death by accident or suicide and warranting the conclusion that such death was inflicted by a human agent; leaving the question who that guilty agent is to after consideration."

1872, *Church, C. J.*, in *People v. Bennett*, 49 N. Y. 187, 143: "The *corpus delicti* has two components, viz., Death as the result, and the criminal agency of another as the means."

This broader form makes the rule much more difficult for the jury to apply amid a complex mass of evidence, and tends to reduce the rule to a juggling-formula.

(5) A third view, indeed, too absurd to be argued with, has occasionally been advanced, at least by counsel, namely, that the *corpus delicti* includes the third element also, i. e. the accused's identity as the criminal. By this view, the term *corpus delicti* would be synonymous with the whole of the charge, and the rule would require that the whole be evidenced in all three elements independently of the confession.

To illustrate the different definitions by the various crimes, it would follow, under the orthodox definition, that in homicide the fact of death, whether or not feloniously caused, is the *corpus delicti*;² in arson, the fact of burning, whether or not wilful;³ and in false representations, the fact of the acting in reliance upon representations, whether or not they were false.⁴

§ 2073. Same: (4) Order and Sufficiency of Evidence of Corpus Delicti. (a) That the evidence of the *corpus delicti* should be put in before the confession is certainly good practice, and is occasionally said to be the rule;⁵ but the better view is that the trial judge may determine the order of this evidence,⁶ in the general principles otherwise prevailing (*ante*, §§ 1867, 1869).

² This is the more common phrasing of this second form. But originally it appears merely in the form "death by the agency of another, i. e. not necessarily by a criminal act, but merely a death other than by the operation of disease or other natural force." A loose reading of this original phrasing, which probably belongs under the first form, led to the second form quoted above; the original phrasing may be seen in the following opinions: 1858, *Olifford, J.*, in *U. S. v. Williams*, 1 Cliff. 5, 25; 1871, *Christian, J.*, in *Smith v. Com.*, 21 Gratt. 809, 812.

³ See the quotations *supra*. The identification of the deceased is not a part of the *corpus delicti*: 1888, *People v. Palmer*, 109 N. Y. 110, 114, 16 N. E. 539 (in a lucid opinion by Finch, J.).

⁴ 1857, *Sam v. State*, 23 Minn. 247, 252, *contra*: 1884, *Winalow v. State*, 76 Ala. 42, 45; 1895, *People v. Simonson*, 107 Cal. 345, 40 Pac. 440; 1898, *People v. Jones*, 128 Id. 65, 55 Pac. 698.

⁵ 1876, *State v. Lewis*, 45 Ia. 20. *Contra*: 1895, *People v. Simonson*, 107 Cal. 345, 40 Pac. 440.

These definitions are seldom directly passed upon, and it would be unprofitable to trace the various older expressions in judicial opinion.

² 1884, *Winalow v. State*, 76 Ala. 42, 47 ("some preliminary testimony, tending to show the *corpus delicti*"); 1902, *Smith v. State*, 133 Id. 145, 31 So. 506 (no authority cited); 1901, *People v. Ward*, 134 Cal. 301, 66 Pac. 372 (the order of evidence, except where a confession is offered, is in the trial Court's discretion); 1899, *Gentling v. State*, 41 Fla. 587, 26 So. 737.

³ 1897, *Holland v. State*, 39 Fla. 178, 23 So. 296; 1898, *Whitney v. State*, 53 Nebr. 287, 73 N. W. 696; 1860, *State v. Laliyer*, 4 Minn. 363, 378; 1882, *State v. Gear*, 29 Id. 221, 222, 13 N. W. 140; 1879, *State v. Potter*, 52 Vt. 33, 49. *Undecided*: 1900, *Carl v. State*, 125 Ala. 89, 28 So. 506.

Other rulings dealing with the order of evidence are: 1839, *R. v. Howell*, 3 State Tr. N. S. 1067, 1104 (felonious burning during a riot; principle applied so as to require evidence of identity after proof of burning the house in question and before other evidence of the riot was offered); 1902, *Anthony v. State*, — Fla. —, 32 So. 818; 1899, *People v. Benham*, 160 N. Y. 402, 55 N. E. 11 (the order as between *corpus delicti* and motive is in the trial Court's discretion).

(b) The application of all rules of evidence rests with the judge, not the jury; hence, under this rule requiring the existence of some corroborative evidence of the *corpus delicti*, it is for the trial judge to say whether there is such evidence; i. e. on the general principle of the judicial function (*post*, § 2550) he may take the case from the jury if there is not at least some evidence sufficient to satisfy the rule:

1884, *Clepton, J.*, in *Winslow v. State*, 76 Ala. 42, 47: "It is the province of the judge to determine whether there is testimony sufficient to make it appear *prima facie* that a crime has been committed. The evidence on which the judge acts may not necessarily establish the *corpus delicti*. It may be and often is conflicting and contradictory. In such case, the credibility of the witnesses and the sufficiency of the entire evidence are for the ultimate decision of the jury."³

(c) Yet for the jury again the same question comes up for determination, after retiring to consider their verdict. They are bound by the rule of evidence not to convict unless there is in their belief some evidence of the *corpus delicti* to corroborate the confession. The judge's ruling was provisional only, as preliminary to allowing the case to go to the jury; and they in their turn must conclude, without reference to the judge's ruling, whether the corroboration exists to satisfy them.⁴

(d) Supposing that it does, the rule of evidence is at an end for them, and they are left with nothing but the general duty in criminal cases to be convinced of the defendant's guilt beyond a reasonable doubt. Here, however, it is often said that they must be convinced beyond such a doubt both as to the *corpus delicti* and the defendant's guilty participation.⁵ But this is unnecessary. They cannot believe the defendant's guilt of crime beyond a doubt without also believing that the harm charged as the *corpus* of the crime was sustained.⁶

§ 2074. Same: (5) Other Rules as to Sufficiency of Admissions and Proof of *Corpus Delicti*, discriminated. (a) Whether the accused's statement amounts to a confession, so as to require corroboration under the present rule, depends on the definition of a confession (*ante*, § 821).

(b) Whether a confession, otherwise inadmissible at all, becomes admissible when confirmed by discovering the facts confessed, involves another principle (*ante*, § 856).

(c) The supposed rule that the *corpus delicti* must be evidenced by direct testimony, or eye-witnesses (*post*, § 2081) has nothing to do with the rule

³ 1894, *Lambright v. State*, 34 Fla. 564, 575, 16 So. 582; 1890, *State v. Lallyer*, 4 Minn. 368, 377; 1882, *Gray v. Com.*, 101 Pa. 380, 386 (there need be offered only "sufficient evidence of the *corpus delicti* to entitle the case to go to the jury").

⁴ 1884, *Winslow v. State*, 76 Ala. 42, 47; 1899, *Coley v. State*, 110 Ga. 371, 34 S. E. 845.

⁵ 1884, *Winslow v. State*, 76 Ala. 42, 47; 1893, *Ryan v. State*, 100 id. 94, 95, 14 So. 808 ("If upon the whole evidence the jury are satis-

fied beyond a reasonable doubt both as to the *corpus delicti* and the identity of the defendant as the guilty perpetrator, it becomes their duty to convict"); 1894, *Lambright v. State*, 34 Fla. 564, 575, 16 So. 582; 1890, *State v. Lallyer*, 4 Minn. 368, 377 (going upon the statutory word "proof"); 1870, *Pitts v. State*, 43 Miss. 472, 481.

⁶ This seems the view taken in the following opinions: 1882, *Gray v. Com.*, 101 Pa. 380, 386; 1858, *State v. Davidson*, 30 Vt. 377, 383.

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about confessions; except that the definition of *corpus delicti* is common to both discussions.

(d) *Confessions of adultery* may call for the application of several independent rules.¹

¹ In a suit for *divorce*, the general principle (*ante*, § 2067) applies to a confession of adultery. In a criminal *prosecution for adultery*, the general principle (*ante*, §§ 2070-2073), requiring corroboration of an accused's confession, may be applied to a confession of adultery. In a similar prosecution, the rule, if it existed, requiring the *corpus delicti* to be proved by eye-witnesses (*post*, § 2081), would equally apply to a charge of adultery. In a similar prosecution, or in a suit for divorce grounded on adultery, the question whether a marriage may be sufficiently proved

by admissions or confessions, without eye-witness proof (*post*, § 2086), may be raised; but there the subject of the confession is supposed to be the fact of marriage, not the adultery.

In a few other instances, the sufficiency of admissions in certain *civil cases* have been already dealt with under other heads: *ante*, §§ 1256, 1259 (admissions as dispensing with the production of a documentary original); § 1300 (admissions as dispensing with proof of execution by an attesting witness).

TITLE V (continued): QUANTITATIVE RULES.

SUB-TITLE II: KINDS OF WITNESSES REQUIRED.

CHAPTER LXX.

§ 2078. Nature of these Rules.

§ 2079. In Criminal Cases, All Eye-Witnesses, or Witnesses Indorsed on the Indictment, must be Produced by the Prosecution; (1) History and Present State of the Law.

§ 2080. Same: (2) Policy of the Rule.

§ 2081. *Corpus Delicti* must be proved by Eye-Witnesses, not merely by Circumstantial Evidence.

§ 2082. Proof of "Marriage in Fact"; (1) Marriage in Evidence and in Substantive Law.

§ 2083. Same: (2) Habit and Reputation as the Ordinary Evidence.

§ 2084. Same: (3) Lord Mansfield's Rule in *Morris v. Miller*.

§ 2085. Same: (4) Eye-Witness required for Criminal Conversation and Bigamy.

§ 2086. Same: (5) Eye-Witness not required when Proof is by Admissions.

§ 2087. Same: (6) Other Rules affecting Proof of Marriage, distinguished.

§ 2088. Same: (7) Celebrant's Certificate or Register not preferred to Oral Eye-Witness.

§ 2089. Owner's Testimony to Non-Consent, in a charge of Larceny.

§ 2090. Miscellaneous Proposals as to Requiring Testimonial Evidence for Wills, Contracts, etc.

§ 2091. Statute of Francis; Written Admissions of the Party to be charged.

§ 2078. Nature of these Rules. The nature of these rules has been already briefly examined, in surveying the various kinds of Quantitative rules (*ante*, § 2030). We are here concerned with such rules as require a particular kind of witness to be indispensably included in the whole mass of evidence upon a given subject. The distinction between the preceding sort of Quantitative rules (*ante*, § 2034) and the present sort is that those require a specified number of witnesses, while these require a specified kind of witness. For example, a rule requiring that among the evidence of a certain fact there should always be the testimony of a white person, or the testimony of a male person, or the testimony of a military officer, or the testimony of a citizen, would be a rule of the present sort.

In fact, however, rules of this sort are almost wholly lacking in our law. They rest upon the assumption that, no matter how strong and complete the remainder of the evidence may be, a particular kind of testimony will always be, for the subject in hand, relatively so valuable that it should be indispensably required in every case whatever. Such an assumption, in its rigidity, is wholly opposed to that spirit of our law of evidence (*ante*, § 1286) which trusts, for the due securing of evidence, rather to the interested zeal of the parties than to the command of the law. There has been practically no attempt to establish such a rule except for one class of testimony, namely, *eye-witnesses*. Even for that class, there is to-day no universally accepted rule making an eye-witness indispensable, and the one rule that has any considerable vogue was an anomalous creation intruded into the common law merely by the powerful pronouncement of Lord Mansfield. This type of rule is opposed to the genius and traditions of the common law.¹

¹ Such a rule must, however, be distinguished from a rule of Preference. A rule preferring provisionally a certain kind of witness has the effect of requiring such a witness to be produced, or shown unavailable, before any other evidence can be used; but if he is un-

The various proposed rules fall under three heads, according as they concern proof of crimes, of marriage, and of miscellaneous matters.

§ 2079. In Criminal Cases, All Eye-Witnesses, or Witnesses Indorsed on the Indictment, must be Produced by the Prosecution; (1) History and Present State of the Law. In England, many things are done, and left undone, by custom and understanding, in the practice of the law, though no rule of law compels or forbids the doing. Especially in the conduct of a criminal prosecution are tacit traditional dictates of professional etiquette, wholly lacking the force of legal rules, daily observed by counsel for the prosecution. Among these customs, based on a supposed fairness and honorable decency, seems to have been a practice of calling *all the witnesses* whose names were by law required by statute in cases of felony to be *indorsed upon the indictment*, as having testified before the grand jury. This indorsement was intended as a measure of fairness to give notice to the accused of the witnesses to be produced against him; its effect as excluding witnesses not so indorsed has been already considered (*ante*, § 1850). In its present aspect, the additional effect was recognized that all witnesses thus indorsed were to be called, without omission.

This custom, doubtless of not much earlier standing, appears noted in the reports by 1820-1830. During the next decade, there appears a related though distinct custom of professional ethics, having the same bearing for *known eye-witnesses* of the facts, whether or not such witnesses had testified before the grand jury and been indorsed on the indictment. In a long series of *Nisi Prius* rulings, these two practices are noticed in the reports, the different judges taking more or less rigid views of their stringency as rules of professional behavior. But it will be apparent, from the judicial language, and in the light of the known relations between bench and bar in England, that at no time did this principle of professional behavior receive the sanction of a rule of law.¹

available, other testimony may suffice. By the present type of rule, it is not required that such a witness be called before any other can be offered, yet if he is not ultimately called, the impossibility of obtaining him is no excuse. At both points, the two types of rule are opposed. Compare the nature of the Preferential rules as already examined (*ante*, §§ 1285, 1286, 1335-1339).

¹ 1823, *R. v. Simmonds*, 1 C. & P. 84 (larceny; Hullock, B.: "Though the counsel for the prosecution is not bound to call every witness whose name is on the back of the indictment, it is usual for him to do so; and if he does not, I, as the judge, will call the witness, that the prisoner's counsel may have an opportunity of cross-examining him"); 1823, *R. v. Whitbread*, *ib. note* (Holroyd and Barrough, JJ., held that the prosecution was not bound to call every indorsed witness); 1824, *R. v. Taylor*, *ib. note* (Park, J., called all the witnesses, to allow cross-examination); 1825, *R. v. Hollingsberry*, 6 Dowl. & R. 345, 348

(not all witnesses before the grand jury need be called); 1830, *R. v. Beasley*, 4 C. & P. 220 (Littledale, J., said that all ought to be called); 1833, *R. v. Bodle*, 6 id. 186 (if the prosecution declines to call, the Court may in discretion order his examination); 1838, *R. v. Chapman*, 8 id. 558 (murder; an eye-witness, defendant's brother; *semble* that the prosecution ought to, but need not, call him); 1838, *R. v. Holden*, *ib. 606, 609* (murder; prosecution required by Patterson, J., to call defendant's daughter, an eye-witness; "every witness who was present at a transaction of this sort ought to be called"); 1839, *R. v. Bull*, 9 id. 22 (manslaughter; Vaughan, J.: "I think that every witness ought to be examined; in cases of this kind counsel ought not to keep back a witness because his evidence may weaken the case for the prosecution; our only object here is to discover truth"); 1839, *R. v. Vincent*, 2 State Tr. n. s. 1037, 1064 (calling of indorsed witnesses is discretionary even in felony, "but it is a discretion always exercised"; here done for

But these *Nisi Prius* rulings, in which the judicial language varied somewhat, coming incompletely to the notice of some American Courts, and being considered without due regard to the impalpable but real distinction at the English bar between professional custom and a rule of law, served to establish in some quarters the notion that a rule of common law existed, requiring the prosecution to call all indorsed witnesses or all eye-witnesses. This notion first obtained a recognition in Michigan, where it became firmly established.¹ But in only one or two other jurisdictions has

a misdemeanor); 1844, *R. v. Carpenter*, 1 Cox Cr. 72 (rape; every witness deposing to the magistrate should go before the grand jury, be indorsed, and summoned at the trial; per Alderson, B.); 1845, *R. v. Stroner*, 1 O. & K. 650 (rape; a person to whom the woman had complained, and a washerwoman who had washed her clothes, were not indorsed nor summoned, but were in attendance for the defence; Pollock, C. B.: "They must both be called as witnesses for the prosecution; but I shall allow the counsel for the prosecution every latitude in examining them"); 1847, *R. v. Woodhead*, 2 id. 520 (prosecution not bound to call all indorsed witnesses, "the rule which the judges have lately laid down"; but they "should be here," because otherwise the defendant might rely on the indorsement and neglect to summon them himself); 1847, *R. v. Barley*, 3 Cox Cr. 191 (arson; Pollock, C. B., at first agreed with an unreported ruling of Alderson, B., that indorsed witnesses need not be called, but "after consulting Coleridge, J., intimated that the witnesses ought to be called"); 1848, *R. v. Edwards*, 3 id. 82 (Erie, J.: "I believe a majority of the judges have distinctly decided that the counsel for the prosecutor is not bound to call all the witnesses at the back of the bill"); 1848, *R. v. Farrell*, ib. 139 (Ireland; Pennelfather, B.: "It is not only due to the public, but also due to the prisoner, that every one produced before the grand jury should be called"); 1857, Monaghan, O. J., in Spollen's Trial, Ire., pamph. 123 ("We see no obligation to examine any witness. The duty of the crown is simply this, to examine and bring forward every trustworthy witness upon whose truth and accuracy they can rely; but it is not their duty to bring forward any witness that they may think is not telling the truth"); 1856, *R. v. Cassidy*, 1 F. & F. 79 (Parke, B., "said that certainly the usual course was for the prosecutor to call the witness, and if he declined to examine, the prisoner might cross-examine him. He thought, however, the practice did not stand upon any very clear or correct principle, and was supported only on the authority of single judges; "the correct principle" being merely that the prosecutor "by having had certain witnesses examined before the grand jury whose names were on the back of the indictment, he only impliedly undertook to have them in court for the prisoner to examine them as his witnesses; for the prisoner, on seeing the names there, might have obtained from subpoenaing them"; and he ruled that the prosecutor was

not bound to call); 1876, *R. v. Thompson*, 13 Cox Cr. 131 (Lush, J., followed *R. v. Edwards*).² The rule begins in 1872, with *Hurd v. People*; but the opinion in that case sought to support it by prior unrelated rulings, which really dealt only with the relevancy of circumstantial evidence; whether the rule in Michigan to-day applies to indorsed witnesses also, or only to eye-witnesses, is doubtful; 1862, *Maher v. People*, 10 Mich. 212, 225 (murder; evidence of the deceased's adultery with the defendant's wife just before the killing, and of the defendant's information of it, held admissible for the defendant, on the ground that the prosecution should not "designated select a part of the facts," but should "show the transaction as a whole"; citing, "by analogy," the above English cases, and adding *obiter*: "For myself, I am inclined to the opinion that all the facts constituting the *res gestæ*, so far as the prosecuting counsel is informed of and has the means of proving them, should . . . be laid before the jury by the prosecution"); 1868, *Brown v. People*, 17 id. 429, 433 (murder; prosecution's evidence of a smell of chloroform about the premises, admitted; because it was "both the right and the duty of the prosecution . . . to give to the jury by evidence as complete a picture as possible of all the surroundings"); 1871, *Strang v. People*, 24 id. 1, 10 (rape; defendant's conduct before and after, admitted for prosecution, citing the *Brown* case); 1872, *Hurd v. People*, 25 id. 404, 416 (murder; circumstances affecting self-defence considered; the principle of the *Maher* case invoked as authority for a ruling that the prosecution should have produced a certain eye-witness of the assault; the English cases cited, and the present rule here first laid down); 1874, *Wellar v. People*, 30 id. 10, 23 (murder; one of two eye-witnesses required to be called; the rule does not perhaps require all where they would be too numerous; but indorsement of name involves no more than to "have the witness in court ready to be examined"); 1877, *Bunker v. People*, 37 id. 4, 8 (celebrating unlawful marriage; certain bystanders not required to be called, because merely cumulative and also participants in crime); 1878, *Thomas v. People*, 39 id. 309, 312 (assault with intent to murder; failure of the only eye-witness to certain conduct to respond to subpoena, no excuse for not producing); 1878, *People v. Goldberg*, ib. 545 (receiving stolen goods; defendant's brother-in-law, at whose house the goods were afterwards deposited, not required to be called); 1879, *People*

it found favor, and in those it is not clear that the rule in both branches has been accepted.³

v. Gordon, 40 id. 718, 720 (burglary; available eye-witness not produced; inference may be drawn); 1899, *People v. Long*, 44 id. 296, 6 N. W. 673 (larceny; defendant's father, who searched him immediately afterwards, not required to be called); 1883, *People v. Quick*, 51 id. 547, 18 N. W. 375 (larceny; prosecution need not call every witness named on the information; no cases cited); 1898, *People v. Wolcott*, ib. 612, 618, 17 N. W. 78 (larceny; defendant's wife indorsed, not required to be called on account of relationship); 1884, *People v. Henshaw*, 52 id. 564, 18 N. W. 360 (larceny; same; indorsed witness not present at the offence need not be called); 1889, *People v. Swetland*, 77 id. 53, 57, 43 N. W. 779 (forgery; persons whose names were borne on the instrument, required to be called by prosecution); 1890, *People v. McCullough*, 81 id. 25, 24, 45 N. W. 515 (manslaughter; "there is no rule requiring the prosecution to call accomplices as witnesses," but it should not at the same time join them, if eye-witnesses, as defendants, so as to disqualify them for defendant); 1891, *People v. Deitz*, 86 id. 419, 428, 49 N. W. 296 (assault with intent to do bodily harm; prosecution held bound to call four eye-witnesses); 1892, *People v. Wright*, 90 id. 362, 51 N. W. 517 (keeping a house of ill-fame; a companion of one witness to an act of prostitution, not required to be called, the act being merely evidence and not the offence); 1892, *People v. Kenyon*, 93 id. 19, 22, 52 N. W. 1033 (assault and battery; a fifth person present, the only indifferent one, required to be called); 1894, *People v. Germaine*, 101 id. 435, 60 N. W. 44 (assault with intent to murder; the second of two eye-witnesses required to be called); 1894, *People v. Kindra*, 102 id. 147, 150, 60 N. W. 456 (keeping open a saloon after hours; witnesses merely cumulative to a matter fully proved, not required to be called; rule depends upon circumstances); 1895, *People v. Conidine*, 105 id. 149, 63 N. W. 196 (certain witnesses required, in trial Court's discretion, to be called); 1895, *People v. Bash*, 107 id. 251, 65 N. W. 99 (accomplice need not be called); 1896, *People v. Pope*, 108 id. 361, 66 N. W. 213 (calling and tendering for cross-examination sufficient); 1896, *People v. Grant*, 111 id. 246, 70 N. W. 647 (rule applied); 1897, *People v. Baker*, 112 id. 211, 70 N. W. 431 (accomplice need not be called); 1897, *People v. Savant*, 112 id. 297, 70 N. W. 576 (calling one who did not see the affray, not necessary); 1898, *People v. Haghea*, 116 id. 80, 74 N. W. 260 (the witness need not be asked about the act charged; calling, swearing, and tendering, sufficient).

From the following rulings on the present point should be distinguished (as they sometimes are not) the rule and the precedents (*ante*, §§ 1850-1855), as to the exclusion of undorsed witnesses.

³ *Aris*, 1900, *Haldeman v. Turr.*, — *Aris*.

—, 60 Pac. 877 (rule entirely repudiated); *Fla.*: 1886, *Selph v. State*, 22 Fla. 537, 543 (prosecution need not call all eye-witnesses nor all indorsed witnesses; see quotation *post*, § 2080); 1899, *Alvarez v. State*, 41 id. 532, 27 So. 40 (Selph case approved); *Ida.*: 1901, *State v. Rice*, 7 Ida. 762, 66 Pac. 87 (failure to call an indorsed witness, held not error on the facts); *Ill.*: 1880, *Lamb v. People*, 96 Ill. 73, 91 (murder; per Craig, J., the prosecution is not bound to call all the indorsed witnesses); 1886, *Bressler v. People*, 117 id. 422, 437, 8 N. E. 62 (larceny; prosecution not compelled to call all the indorsed witnesses); 1902, *Cario v. People*, 200 id. 494, 66 N. E. 32 (similar rule); *Ind.*: 1877, *Winsett v. State*, 57 Ind. 26, 30 (illegal sale of liquor; prosecution not bound to call "all the witnesses present at the transaction"); 1889, *Keller v. State*, 123 id. 110, 111, 23 N. E. 1138 (assault and battery; similar ruling); 1892, *Siberry v. State*, 133 id. 677, 685, 33 N. E. 681 (calling of eye-witnesses not necessary, where unavailable; whether ever: demandable, undecided); *Rev. St.* 1897, § 1730 (in a complaint before a justice for assault or battery, no trial can be had unless the injured party "be present as a witness at the trial, or having been subpoenaed refuses to attend and cannot be compelled to attend by attachment for any other cause than sickness or inability to attend by reason of the injuries" alleged, or unless he is subpoenaed and returned not found, etc.; and "no trial shall be had upon a complaint for an affray, unless some person who saw the same shall be present as a witness, or having been subpoenaed refuses to attend"); *Ida.*: 1883, *State v. Middleham*, 62 La. 150, 153, 17 N. W. 446 (murder; prosecution not bound to call all eye-witnesses); 1899, *State v. Hudson*, 110 id. 663, 80 N. W. 232, *semble* (rule not accepted); *La.*: 1904, *State v. Gossy*, 111 La. —, 35 So. 786 (the Michigan doctrine given an indefinite approval; here, with reference to putting on the stand a co-indictee not on trial); *Mass.*: 1803, *Com. v. Kinison*, 4 Mass. 646 (counterfeit note; the receiver of it testified by accidental marks to its identity, but a person to whom he had passed the note received was not called; held, on the principle of the best evidence and the authority of *Williams v. E. I. Co.*, quoted *ante*, § 1339, that the other person should have been called); 1885, *Com. v. Haskell*, 140 id. 126, 2 N. E. 773 (arson; "there is no law which required the Government, rather than the defendant, to hold or call him [an alleged accomplice] as a witness"); *Minn.*: 1899, *State v. Smith*, 78 Minn. 362, 81 N. W. 17 (not necessary to call all indorsed witnesses, nor, *semble*, all eye-witnesses); *Miss.*: 1880, *Morrow v. State*, 57 Miss. 836 (murder; the stepdaughter of defendant's brother, an eye-witness, whose former testimony exonerated defendant, not required to be produced; production not necessary in general, except in the Court's discretion, or where the eye-witness is biased against defendant);

§ 2080. *Same*: (2) *Policy of the Rule*. The arguments advanced in favor of the rule are in effect two only. The first, which applies only to the

1894, *Hale v. State*, 73 id. 140, 144, 16 So. 357 (murder; prosecution held not compelled to call the eye-witnesses, who were here the accused's sister and a co-defendant); 1895, *Carlisle v. State*, 73 id. 387, 19 So. 207 (criminal seduction; trial Court's discretion approved in not requiring production of the woman, who would have favored defendant); *Mo.*: 1879, *State v. Kilgore*, 70 Mo. 548, 549 (question raised, but not decided; the desired person not being "certainly" an eye-witness); 1882, *State v. Eaton*, 75 id. 584, 593 (on the suggestion of defendant's counsel that there were other eye-witnesses, no calling is required; rule wholly repudiated); 1895, *State v. Harian*, 130 id. 351, 33 S. W. 967 (same); 1896, *State v. David*, 131 id. 380, 33 S. W. 28 (same); 1897, *State v. Billings*, 140 id. 193, 41 S. W. 778 (no rule requires calling all that have been summoned); *Mont.*: P. C. 1895, § 2082 ("Upon a trial for murder or manslaughter it is not necessary for the State to call as witnesses all persons who are shown to have been present at the homicide; but the Court may require all of such witnesses to be sworn and examined"); 1894, *Torr. v. Hanna*, 5 Mont. 248, 5 Pac. 252 (murder; wife of deceased required to be called, the deceased's family being the only eye-witnesses; the authorities described as "clear and conclusive," citing only the Michigan and earlier English cases; here the Code was enacted; then: 1899, *State v. Russell*, 13 id. 164, 169, 33 Pac. 554 (murder; one not an eye-witness, not required to be called); 1894, *State v. Metcalf*, 17 id. 417, 424, 43 Pac. 182 (murder; one of two persons present required to be called, though drunk at the time of the affray; the rule applies to "those witnesses who were present at the transaction, or who can give direct evidence on any branch of it, . . . unless possibly where too numerous"); 1898, *State v. Rolla*, 21 id. 592, 55 Pac. 523 (under P. O., § 2082, the calling of eye-witnesses is in the Court's discretion); 1903, *State v. Tigue*, 27 id. 327, 71 Pac. 3 (all need not be called); *N. Y.*: 1857, *People v. Fitzpatrick*, 5 Park. Cr. C. 26 (rule denied); *N. C.*: 1841, *State v. Martin*, 2 Ired. 101, 119 (murder; rule wholly repudiated); 1849, *State v. Stewart*, 9 id. 342, 344 (murder; preceding case approved); 1853, *State v. Perry*, Busbee 330, 333 (same); 1876, *State v. Smallwood*, 75 N. C. 104, 106 (same); 1880, *State v. Baxter*, 82 id. 602, 606 (same); *N. D.*: 1893, *State v. McGahay*, 3 N. D. 293, 301, 55 N. W. 753 (shooting with intent to kill; a seventh eye-witness not required to be called; precise rule not clearly stated); *Or.*: 1898, *State v. Barrett*, 33 Or. 194, 54 Pac. 907 (no such rule of compulsory calling exists; but the trial Court might in discretion require the production of testimony which the prosecution was attempting to suppress; quoted *post*, § 2080); *Pa.*: 1880, *Donaldson v. Com.*, 95 Pa. 21, 24 (rape; a physician who had examined the woman "should have been called as a witness," but "we do not reverse for this reason . . . but merely express

our opinion as to what should have been done in the peculiar circumstances of this case"); 1883, *Rice v. Com.*, 102 id. 408 (criminal seduction; it was "the plain duty" of the prosecution to call the woman's father, who was present at an alleged admission of a promise of marriage); 1899, *Com. v. Keller*, 191 id. 122, 43 Atl. 196 (cumulative testimony to threats; calling not required); *Tex.*: 1876, *Porter v. State*, 1 Tex. App. 394, 396 (assault with intent to murder; assaulted party required to be called, on the "best evidence" principle); 1886, *Hunnicutt v. State*, 30 id. 632, 639 (murder; three other eye-witnesses required to be called, though relatives of the defendant; general principle sanctioned); 1886, *Phillips v. State*, 22 id. 139, 174, 2 S. W. 601 (murder; whether a certain witness should be called, left to the trial Court's discretion); 1887, *Wheeler v. State*, 23 id. 238, 245, 5 S. W. 224 (same); 1891, *Thompson v. State*, 30 id. 235, 328, 17 S. W. 449 (murder; certain eye-witnesses held improperly not put on the stand); 1893, *Mayes v. State*, 33 Tex. Cr. 33, 41, 24 S. W. 421 (like *Phillips v. State*); 1894, *Boyona v. State*, ib. 142, 144, 25 S. W. 786 (same); 1895, *Kidwell v. State*, 35 id. 264, 33 S. W. 842; 1896, *Williford v. State*, 36 id. 414, 424, 37 S. W. 761 (murder; defendant's mother not required to be called; "there is no rule of law to compel the State to put on every witness who may have been near and knew of any circumstance connected with the killing"); 1899, *McGrew v. State*, — id. —, 49 S. W. 226 (similar); 1900, *Robinson v. State*, — id. —, 57 S. W. 611 (similar); *U. S.*: 1834, *U. S. v. Gibert*, 2 Sumner 19, 31 (piracy, and setting fire to a ship; a witness who saw the match applied, not required, in preference to one who saw the smoke, etc.); *Utah*: 1896, *People v. Oliver*, 4 Utah, 490, 11 Pac. 612 (assault; an indorser witness out of the jurisdiction, not necessary to be called); 1880, *People v. Robinson*, 6 id. 101, 104, 21 Pac. 403 (assault, "we know of no law requiring the prosecution to call the witnesses whose names are indorsed"; yet if the transaction is only imperfectly disclosed, it is the prosecution's duty to call those who can complete it); *Vt.*: 1877, *State v. Magoon*, 50 Vt. 323, 340 (said *obiter* that "the State is bound to produce and use all witnesses within reach of its process, of whatever character, whose testimony will throw light upon and characterize the transaction under inquiry"; compare the citation *ante*, § 918); 1894, *State v. Harrison*, 66 id. 523, 527, 29 Atl. 807 (same, said *obiter*); 1897, *State v. Slack*, 69 id. 486, 33 Atl. 311 (same); *Va.*: 1892, *Hill v. Com.*, 88 Va. 633, 639, 14 S. E. 230 (shooting with intent to wound; indorser witnesses need not all be called, unless the trial Court in discretion requires it; "it is for the representative of the Commonwealth to say what witnesses he may call"; yet the trial Court may in discretion make an order requiring a certain eye-witness to be called); 1893, *Clark v. Com.*, 90 id. 360,

case of indorsed witnesses, is that the failure to call them may deprive the accused of their testimony, since he has properly expected, from observing their names indorsed on the indictment, to find them called by the prosecution, and may therefore have omitted to secure them by summons on his own behalf.¹ The second argument, which applies to both branches of the rule, is that the burden and risk of calling a hostile witness, and of being obliged to examine a material witness under the restrictions applicable to examining one's own witness (*ante*, § 896), should fall upon the prosecution rather than upon the accused:

1873, *Christiancy, C. J.*, in *Hurd v. People*, 25 Mich. 404, 416: "The prosecutor in a criminal case is not at liberty, like the plaintiff in a civil case, to select out a part of an entire transaction which makes against the defendant, and then to put the defendant to the proof of the other part, so long as it appears at all probable from the evidence that there may be any other part of the transaction undisclosed, especially if it appears to the Court that the evidence of the other portion is attainable. The only legitimate object of the prosecution is to show the whole transaction as it was, whether its tendency be to establish guilt or innocence."

1874, *Campbell, J.*, in *Wells v. People*, 30 Mich. 16, 24: "If such witness need not be called by the prosecution, the defense cannot impeach him, and must either call him and run the risk of finding him against them, or, if they fail to call him, be prejudiced by the argument that they have omitted to prove what was in their power, and must have done so because they dared not call out the facts. There is no fairness in such a practice, and a prosecutor should not be permitted to resort to it. He is not responsible for the shortcomings of his witnesses, and he is responsible for any obstacle thrown in the way of eliciting all the facts."

Any rule supported by the names of Campbell and Christiancy must receive respectful consideration; but it may be doubted whether they ever lent their great authority to a doctrine of so little worth. As to the first argument above noted, it is sufficiently met by the trial judge's unquestioned power to postpone the trial in case of a real hardship; ordinarily, the accused's counsel can protect himself by ascertaining beforehand the intentions of the prosecuting counsel, which the latter is in fairness bound to disclose. As to the second argument, it is as easily answered. There is no question, it must be remembered, of losing useful testimony; for the accused has the power to summon the same witness if he desires to. The question is merely whether the accused can force the prosecution to summon him and tender his testimony. The efforts to establish the rule have been made by counsel who wish to have a witness' testimony without the restrictions of using him as their own. These restrictions are no doubt artificial and impolitic (*ante*, § 899), and the present issue is merely another instance of the absurdity of the rule against impeaching one's own witness. But so long as the rule

367, 18 S. E. 440 (murder; same ruling as to eye-witnesses; here the trial Court had exercised its discretion to call the witness); *Wash.*: 1895, *State v. Payne*, 10 Wash. 545, 39 Pac. 57 (prosecution need not produce all its witnesses); *W. Va.*: 1882, *State v. Cain*, 20 W. Va. 679, 685, 693 (murder; State not required to call an eye-witness; rule wholly repudiated, on the

ground that defendant has equal power to produce the witness); *Wyo.*: 1899, *Ross v. State*, 8 Wyo. 351, 57 Pac. 924 (eye-witness not required to be called); 1899, *Johnson v. State*, 16 Wyo. 494, 58 Pac. 761 (indorsed witness, not being an eye-witness, not required to be called).

¹ Stated by Parke, B., in *R. v. Cassidy*, quoted *ante*, § 2079.

exists, and exists equally for accused and for prosecution, there is no reason why the former should be allowed to evade it by indirection. Its burden must be borne by one party as well as by the other. So far as the leading-question rule is concerned, it does not hamper the direct examination of a hostile witness (*ante*, § 774); and it thus disappears from consideration. The sum and substance, therefore, of the proposed rule here under consideration is that the counsel for the accused desires to be freed from the disadvantage of not being able to impeach a witness called by himself; that is the *animus* of all these efforts. If that rule is a good one, it ought not to be evaded in this way; if it is a bad one, there ought to be no exemption for one side which is withheld from the other side.² There is no occasion for a new rule compelling the prosecution to call a witness for no other reason than to relieve the defence from those restrictions. This answer, in one form or another, has been repeatedly expounded in repudiation of the proposed rule:

1892, *Henry, J.*, in *State v. Eaton*, 75 Me. 586, 584: "One accused of crime is entitled in this country to the State's process to compel the attendance of such witnesses as he may desire; and there is therefore no sound reason for requiring the State to introduce all persons to testify who were witnesses to the alleged criminal act. It is not unfrequently the case that a hundred persons are present at a homicide, and to require the State to introduce them all would unreasonably protract a trial and cause a vast and unnecessary accumulation of costs. We see no reason why the State's attorney, acting under official oath, and as much bound as the representative of the State to protect the innocent as to bring the guilty to justice, should not be left to his discretion as to what number and character of witnesses he will call for the State to prove an alleged crime against the accused. If others than those called by him know facts favorable to the accused, he may have process to compel their attendance; and if they come to speak the truth, a cross-examination by the State's attorney can be a matter of no consequence to them."

1896, *McWhorter, C. J.*, in *Seip v. State*, 23 Fla. 537, 544: "There is no necessity for any such practice in this State. The prisoner . . . is entitled to the compulsory process of the Court to compel the attendance of his witnesses, and if he introduces no evidence, he is entitled to the concluding argument to the jury. Every lawyer knows the value to the prisoner of this privilege. Were the rule as insisted on in force in this State, it would be difficult to convict a prisoner where the State was compelled to introduce the evidence relied on by him for his defence, and then, because he had not introduced any evidence himself, allow him the concluding argument to the jury. Besides this, the compulsion of one side to introduce witnesses for the other would create confusion in practice as to the right of contradiction of witnesses and their cross-examination; and would be useless, as the prisoner has the power to put the witnesses on the stand himself if he desires it."

1892, *Lewis, P.*, in *Hill v. Com.*, 35 Va. 622, 630, 14 S. E. 320: "It is obvious that the rule contended for by the prisoner would, if adopted, lead to very serious results in the administration of justice. If the prosecuting attorney were bound to call all attainable witnesses present at the transaction, he might often be compelled to introduce witnesses unworthy of credit, and yet not be permitted to impeach them. He might be unwittingly compelled to call confederates of the defendant, and thus by his own evidence win an easy victory for the accused at the expense of justice."

1898, *Beau, J.*, in *State v. Barrett*, 28 Or. 194, 84 Pac. 807: "[The practice] probably came into use in England at a time when the right of a defendant in a criminal case to

² In some jurisdictions, the just method is the witness is one called by the Court using its taken of allowing either party to impeach, where discretion (*ante*, § 912).

be represented by counsel, or to have witnesses appear and testify in his behalf, was either denied entirely, or very much abridged. Under such circumstances, it was, of course, important that the prosecution be compelled to prove the entire transaction, and to call all the witnesses present at the time, whether they would testify for or against the defendant. But these restrictions upon the rights of a defendant do not, and never did, exist in this country. Here the right of the accused to appear by counsel, and to have compulsory process for obtaining witnesses in his favor, is everywhere recognized, and generally guaranteed by the fundamental law. There is therefore no necessity for requiring the State to call all the persons who were present when the offense was committed, or any particular number of them. The rights of the defendant are not in any way abridged by a failure to do so. He has the assistance and advice of counsel selected by himself, if able to employ one, and, if not, appointed by the Court, and compulsory process for obtaining witnesses at the public expense. In addition to this, the State is bound to make out its case beyond a reasonable doubt; and if the prosecuting officer does not call sufficient witnesses for that purpose, or if any unfavorable inference can be drawn from his failure to call any witness, the defendant is not likely to suffer by the omission; and if he calls only such witnesses as are favorable to the State, the defendant has a right to call any others which he may suppose will relate the facts favorable to him."

§ 2081. *Corpus Delicti* must be proved by Eye-witnesses, not merely by Circumstantial Evidence. The attempt has often been made to establish a rule that, for proving the *corpus delicti* — the fact of death, on a charge of homicide, or of abstraction of goods, on a charge of larceny¹ —, there must be direct or testimonial evidence, i. e. a witness who has seen the lifeless body of the person, or the vacant place where the goods were. This attempt has been founded chiefly upon a cautionary passage of Lord Hale's and a misunderstood utterance of Lord Stowell's:

1690, Sir Matthew Hale, *Pleas of the Crown*, II, 290: "I would never convict any person for stealing the goods *cujusdam ignoti* merely because he would not give an account how he came by them, unless there was due proof made that a felony was committed of these goods. I would never convict any person of murder or manslaughter, unless the fact were proved to be done, or at least the body found dead, — for the sake of two cases, one mentioned in my lord Coke's P. C. cap. 104, p. 232, a Warwickshire case,² another that happened in my remembrance in Staffordshire."³

1790, Sir Wm. Scott (Lord Stowell) in *Evans v. Evans*, 1 Hagg. Cons. 35, 105 (divorce for cruelty; the particular issue being whether the husband had wilfully pushed the wife out of bed, and the only fact established being that the wife somehow had fallen out of bed): "I certainly shall not presume circumstances in order to make out such a case [of intentional ejection]. It has been asked, and very properly asked, 'Don't Courts of justice admit presumptive proof? Do you expect ocular proof in all cases?' I take the rule to be this: If you have a criminal fact ascertained, you may then take presumptive proof to show who did it, — to fix the criminal, having then an actual *corpus delicti*. Show

¹ The definition of the term *corpus delicti* has been already examined (*ante*, § 2072).

² The following is the case referred to: 1622, *Coke*, Third Institute, 282 (Warwickshire case of 1611; an uncle, charged with the murder of a niece who had disappeared, produced another child to impersonate the niece; the fraud being discovered, he was hanged; in truth, the niece had run away, and at the age of sixteen returned to claim her property).

³ This was a case resembling that of the *Perry*, cited *infra*, and perhaps that very case.

A similar warning to Lord Hale's was later given in a forcible passage not so often cited: 1688, Sir John Hawles, Solicitor-General, Remarks on Cornish's Trial, 11 How. St. Tr. 463: "To say truth, when verdicts have been given on such evidence [probable presumptions or inferences], they have been often faulty. [After noting the *Perry* case and the Warwickshire case,] therefore it is a most dangerous and unwarrantable thing for a jury in criminal matters, especially in treason, to convict a person upon the evidence of probabilities."

me, then, in this case, that the crime has been committed, and I shall not be at a loss to fix the criminal. But to take presumptions in order to swell an equivocal fact, a fact that is absolutely ambiguous in its own nature, into a criminal fact, is a mode of proceeding of a very different nature, and would, I take it, be an entire misapplication of the doctrine of presumptions. The fact, then, not being a criminal one upon the face of it, and being subject to three or four different interpretations, all of which are perfectly innocent, I think myself by no means at liberty to say that I ought by presumption merely to make out this fact to be necessarily an act of delinquency."

1868, *Johnson, C. J., in Ruleff v. People*, 16 N. Y. 179, 184: "[The rule] may have its probable foundation in the idea that where direct proof is absent as to both the fact of the death and of criminal violence capable of producing death, no evidence can rise to the degree of moral certainty that the individual is dead by criminal intervention, or even lead by direct inference to those results; and that where the fact of death is not certainly ascertained, all mere inculpatory moral evidence wants the key necessary for its satisfactory interpretation and cannot be depended on to furnish more than probable results. It may be also that such a rule has some reference to the dangerous possibility that a general pre-conception of guilt, or a general excitement of popular feeling, may creep in to supply the place of evidence, if upon other than direct proof of death or a cause of death the jury are to be permitted, upon whatever evidence may be presented to them competent upon any part of the case, to pronounce a defendant guilty."

The class of cases referred to by Lord Hale certainly call attention to the risk of hastily concluding that an accused is guilty before it appears plainly that the alleged injury has been actually suffered. These cases, to be sure, are rare enough; not half a dozen seem to be recorded in all our annals.⁴ But their rarity of occurrence makes caution none the less necessary. Lord Hale's remark, however, appears to be nothing more than a general expression of caution, not a definite rule of law. Moreover, a caution as to the degree of proof or persuasion is a very different thing from a requirement as to a specific kind of evidence; and it does not appear that he meant to say definitely that an eye-witness of the *corpus delicti* was necessary. As to Lord Stowell's remark, he was in the first place dealing with the civil-law rules of evidence, which rested on a different classification;⁵ and in next place, he merely requires that some evidence be produced, and that one's conclusion be not formed merely by bare presumption or inference. The supposed authorities, in short, yield scanty support for the rule.

⁴ Besides the Staffordshire and Warwickshire cases, the following are the only ones of false conviction that appear to be recorded: 1705, *Captain Green's Trial*, 14 How. St. Tr. 1199, 1294, 1809, 1812 (piracy by seizing a ship in the East Indies; it subsequently appeared that the ship and crew in question were safe and had never been seized at all); 1660, *Perry's Case*, 14 How. St. Tr. 1312 (murder; the supposed murdered man, whose body was not found, returned home two years after the accused's execution); 1819, *Boon's Case*, Rutland, Vt., *Fay & Bart's Pam. Report*, 5 *Law Reporter* 193, 10 *North Amer. Review* 418, *Greenleaf's Evidence*, 7th ed., § 214, note (murder; several years after the disappearance, there was a confession, trial, and conviction; the culprit was about to be hung, when the supposed deceased was discovered alive and brought back; but here parts

of the body were believed to have been found). Compare the cases of false confession (*ante*, § 867).

⁵ It may be noted here that the passage in the Roman *Digest*, sometimes put forward as the source of the supposed rule, concerns an altogether different problem: *Digesta*, 28, 5, 1, §§ 1, 24: *De senatus consulto Silianiano et Claudiano*: "Cum aliter nulla domus tuto esse possit, nisi periculo capitis sui custodiam dominis tum ab domesticis quam ab extraneis praestare servi cogantur, ideo senatus consulta introducta sunt de publica quaestione (torture) a familia necatorum habenda. . . . Item illud sciendum est, nisi constet aliquem esse occisum, non haberi de familia quaestionem; liquere igitur debet scelere interruptum, ut senatus consulto locus sit."

Concluding, then, that a caution is desirable as to the degree of persuasion that ought to be insisted on in the tribunal, i. e. a rule in the nature of the reasonable-doubt rule (*post*, § 2497), but asking whether there is any proper place for a rule of evidence requiring an eye-witness to the fact of loss or injury, the unnecessary and impracticable nature of such a fixed rule is apparent. It would be unnecessary, because complete persuasion may often be attained without such testimony. It would be impracticable, because such testimony may often be unattainable, and then the effect of such a rule is merely to promise immunity to such criminals as can also succeed in making that kind of testimony unavailable:

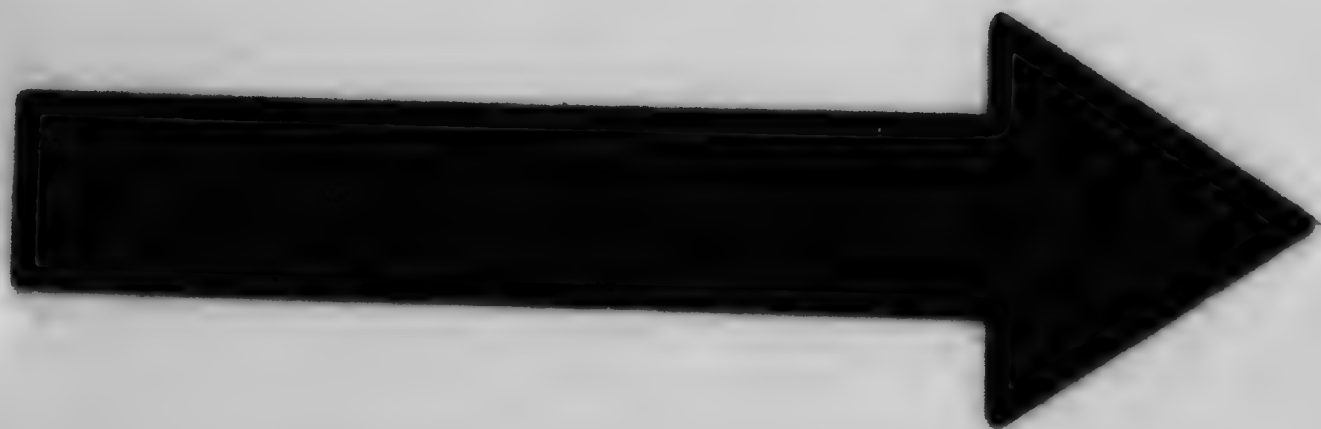
1834, *R. v. Burton*, Deane Cr. C. 262, 18 Jan. 1837; the defendant was found, with pepper in his pocket, coming out of a warehouse containing a large quantity of similar pepper, both loose and in bags; it was impossible to ascertain directly whether there was any shortage in the warehouse amount; Mr. Ribton, of counsel: "It is submitted that the *corpus delicti* must be proved in every case, and you cannot make any difference in the application of the rule"; Maule, J.: "The offence must be proved. If a man go into London Docks sober, without means of getting drunk, and comes out of one of the cellars very drunk wherein are a million gallons of wine, I think that would be reasonable evidence that he had stolen some of the wine in that cellar, though you could not prove [by direct testimony] that any wine was stolen or any wine missed." Mr. Ribton: "The *corpus delicti* must be proved"; Maule, J.: "Where is the rule that the *corpus delicti* must be expressly proved?"; Mr. Ribton: "In Lord Hale it is so laid down"; Maule, J.: "Only as a caution in cases of murder"; Jervis, C. J.: "We are all of opinion that there is nothing in the objection."

1834, *Story, J.*, in *U. S. v. Gilbert*, 2 Sumn. 19, 27: "[This] proposition [that the body must be found] certainly cannot be admitted as correct in point of common reason or of law. . . . A more complete encouragement and protection for the worst offenses of this sort could not be invented than a rule of this strictness. It would amount to a universal condemnation of all murders committed on the high seas."

1850, *Shaw, C. J.*, in *Com. v. Webster*, Mass., Bemis' Rep. 479: "It has sometimes been said by judges that a jury ought never to convict in a case of homicide unless the dead body be found and identified. This, as a general proposition, is undoubtedly true and correct; and disastrous and lamentable consequences have resulted from disregarding the rule. But, like other general rules, it is to be taken with some qualification. It may sometimes happen that the dead body cannot be produced, although the proof of the death is clear and satisfactory; as in a case of murder at sea, where the body is thrown overboard in a dark and stormy night, at a great distance from land or any vessel; although the body cannot be found, nobody can doubt that the author of that crime is chargeable with murder."

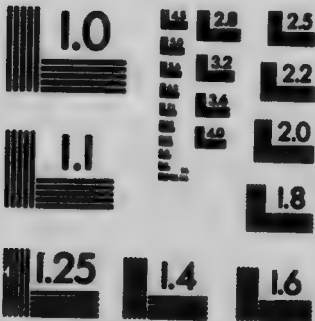
A striking example, both of the sufficiency of circumstantial evidence for purposes of this kind and of the impracticability of a rule requiring any other sort of evidence, is found in a celebrated trial of some piratical murderers, in which Mr. Justice Story illuminated the subject in his charge to the jury:

1818, *Williams' Trial*, U. S. Circ. Ct. Boston, Russell & Gardner's Rep. 42, 66, 80; murder on the high seas; Mr. Samuel L. Knapp, for the defence: "The difference between a certainty to a common intent, and a certainty to an absolute intent, is greater than we commonly imagine. If a man goes out to sea in a small boat, and a storm arises,



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and afterwards the boat is found upset, it is fair and just, to all common purposes and intents, to infer that he has perished; but still he might not be dead; such instances have occurred in our time, and the supposed deceased was afterwards found to be alive. Would you not say, gentlemen, that a man who was seen going over the falls of Niagara in a skiff, and never heard of more, was dead? Yet men have gone over the falls safe, and it would not be impossible that he might be alive whom we thought was lost. When Daniel was cast into the lion's den, it might have been fairly inferred that he was instantly destroyed. But still that inference would have been false; for he was not killed; the angel of the Lord shut the mouths of the famished lions. Does not that same angel walk on the waters to rescue his charge from the deep? It was indeed a special providence; but that special providence which all acknowledge, and which no one can define, is constantly operating on all the incidents of life. If Baynard should at this time come into this court, it would surprise us; but stranger things than that have happened. In this case you have no right to conjecture or reason upon his being dead. The only question is, has his death been proved to a demonstration?" Mr. *George Blake*, for the prosecution: "First, then, gentlemen, is it true that Thomas Baynard, the person alluded to, is actually dead? . . . Without the aid of inference or presumption, the fact is now established that the body of this supposed victim was seen upon the deck of the schooner *Plattsburgh* breathless, and to all appearance lifeless, on the night of that day which is mentioned in the indictment. That while lying in this situation, it was taken from the deck by two of the prisoners at the bar, Williams and Rog, and thrown into the sea. He was never afterwards seen on board the vessel; nor does it appear that, from that day to this, any man has seen or heard from him, as being alive on the face of the earth. The vessel, at the time of this occurrence, was upon the ocean, and at the distance of several hundred miles from any land. No other vessel was then in view; nor was any one seen for several days preceding or subsequent to the period alluded to. Such, gentlemen of the jury, are the circumstances, upon which the allegation is founded that this man is dead. Permit me to inquire, can there be a doubt of the fact? It is true indeed, that the body of this sufferer was not followed to his deathbed in the ocean, by either of the witnesses, who have spoken on this occasion. No one has declared to you, upon the sanctity of an oath, that he watched the process of that suffocation which is described in the indictment, or witnessed the very last gasp of the deceased. It has, therefore, been insisted by the counsel in the defence, and with a degree of earnestness that would denote their sincerity in the objection, that our evidence of the death is yet incomplete. The wide ocean must be ransacked, the dead body must have been discovered, or it would be unsafe and presumptuous to convict for the murder. Such, gentlemen, is the argument of counsel in the defence. . . . [But I say to you that] so sure as that the life of Thomas Baynard was not preserved by a miracle, if his body as well as spirit (as in one memorable instance that might be mentioned) were not literally translated, that fatal night, from its abiding place on earth, to another and a brighter world, so certain is the conclusion, that he is not now existing"; *Story, J.*, charging the jury: "The counsel for the prisoner contend to you, that there is no evidence of the actual death of Baynard, that it is still possible he may have been saved, by some miraculous interposition, from the devouring waves to which he had committed him. But by what spirit of the deep was he protected? to what region has he been conveyed? He has gone, gentlemen, you will think, I believe, to that region towards which we are all of us advancing. If you are satisfied with the truth of the evidence presented to you, it is impossible for you to indulge the least doubt on the point of his actual death. In no case can you arrive, perhaps, at absolute certainty of the death of an individual. There always remains some ground for the conjectures of the doubting. They may say that your own senses are not always sufficient to satisfy you. Should you even see a man laid out in his coffin, you may yet call to mind, that there have been instances of resuscitation, which have contradicted the tenor of human experience. But you must act as reasonable men on reasonable evidence; and in this case, that can leave doubt that Baynard is dead."

In the rulings in *England*, there was at first some indication of a willingness to erect Lord Hale's caution into a definite rule of law. But it may now be said that no such fixed rule is there countenanced, either at large, or for the specific cases of larceny and murder;⁶ and in the ecclesiastical Courts Lord Stowell himself early repudiated such a rule for the proof of adultery.⁷

In the *United States*, it has been generally conceded that no such rule exists; i. e. that *circumstantial evidence* of a proper degree of strength is sufficient to prove the death of the person, loss of the goods, or other injury forming the *corpus delicti*, and that testimony by eye-witnesses of the deed done, or at least of the person's dead body, or of the vacant place where the goods were, is not required.⁸ In two jurisdictions, however, such a rule has

⁶ 1792, *R. v. Hindmarsh*, 2 Leach Cr. L., 4th ed., 569 (murder on shipboard by throwing the captain overboard; counsel for the defendant argued that the death was not shown and the captain might have been picked up by other ships; the Court "admitted the general rule of law," presumably meaning L. C. B. Hale's rule, and Mr. J. Ashurst "left it to the jury upon the evidence to say whether the deceased was not killed before his body was cast into the sea"; all the judges approved the finding of murder); 1820, *Best, J.*, in *R. v. Burdett*, 4 B. & Ald. 95, 122 (criminal libel; the issue being whether there was evidence of publication in Leicestershire, to support the venue; "We must act on presumptive proof or leave the worst crimes unpunished. I admit, where the presumption is attempted to be raised as to the *corpus delicti*, that it ought to be strong and cogent; but in a part of the case relating merely to the question of venue, leaving the body of the offence untouched, I would act on no slight grounds of presumption as" in the most trifling case); 1838, *R. v. Hopkins*, 3 C. & P. 591 (infanticide; a body, differing in description, being found, Abinger, L. C. B., said the defendant need not account for her child "unless there be evidence to show that her child is actually dead"); 1845, *R. v. Dredge*, 1 Cox Cr. 235 (larceny of a doll; the goods being found on the defendant, but the prosecuting witness being unable to identify them or to swear that he had not sold them, an acquittal was ordered); 1854, *R. v. Burton*, Dears. Cr. C. 282 (larceny; see quotation *supra*); 1857, *R. v. Hooper*, 1 F. & F. 85 (larceny of coal; there being no testimony that coal from the place in issue was missed, Willers, J., left it to the jury to say whether any had been taken); 1862, *R. v. Cheverton*, 2 id. 833 (infant-murder by mother; the body of a child was found near the place next day, but was not identified; Erie, C. J.: "It is no doubt essential that you should be satisfied that the body found in the Colne was the body of the prisoner's child, and put there by her. . . . [After referring to Lord Hale,] On the whole evidence, are you satisfied that the body found in the river was the body of the prisoner's child and that it was put there by her?"); 1868, *R. v. Mockford*, 11 Cox Cr.

16 (larceny of fowls; circumstantial evidence of the loss of the fowls, held sufficient).

⁷ 1798, *Williams v. Williams*, 1 Hagg. Cons. 299 (Sir Wm. Scott: "[The Court will be] vigilant to see that the two main points of such cases [of adultery] are sufficiently proved, viz. the criminal act, and that the person against whom the proofs of that act is established was the wife. It is undoubtedly true that direct evidence of the fact is not required, as it would render the relief of the husband almost impracticable; but I take the rule to be that there must be such proximate circumstances proved" as satisfy the Court); 1810, *Loveden v. Loveden*, 2 id. 1, 2 (Sir Wm. Scott: "It is a fundamental rule that it is not necessary to prove the direct fact of adultery").

⁸ The following cases declare this, except so far as any qualifications are expressly noted; the qualification, sometimes made, that direct evidence must be produced *when it is obtainable*, lacks of course the most objectionable feature of the proposed rule, and expresses nothing more than the practice which any competent prosecuting officer would naturally observe: *Ala.*: 1878, *Colquitt v. State*, 61 Ala. 48, 52, *semble*; 1884, *Winalow v. State*, 76 id. 42, 47; 1893, *Ryan v. State*, 100 id. 94, 95, 14 So. 868; 1900, *Martin v. State*, 125 id. 64, 28 So. 92; *Cal.*: 1880, *People v. Alvino*, 55 Cal. 230, 233 (murder; in exceptional case); *Fla.*: 1899, *Gantling v. State*, 41 Fla. 587, 26 So. 737 (murder); *Ga.*: 1859, *Phillips v. State*, 29 Ga. 105, 108, *semble* (arson; opinion not clear; perhaps *contra* for murder); *Ill.*: 1894, *Carlton v. People*, 150 Ill. 181, 186, 37 N. E. 244 (arson); 1895, *Campbell v. People*, 159 id. 9, 42 N. E. 122 (infanticide); *Ind.*: 1855, *Stocking v. State*, 7 Ind. 326, 330 (murder); 1874, *McCulloch v. State*, 48 id. 109, 111 (murder; but no decision made as to a case where no remains of the person are found); *Ia.*: 1870, *State v. Keeler*, 29 Ia. 551 (murder); 1897, *State v. Millmeier*, 102 id. 692, 72 N. W. 275 (arson); *Ky.*: 1890, *Laughlin v. Com.*, — Ky. —, 37 S. W. 590 (murder); *Kan.*: 1876, *State v. Winner*, 17 Kan. 298, 305 (murder); *Mass.*: 1850, *Com v. Webster*, 5 Cush. 295, 310 (murder); 1898, *Com v. Williams*, 171 Mass. 461, 50 N. E. 1035; *Minn.*: 1867, *State v. Hogard*, 12 Minn.

been enacted by statutes; * one of which, at least, seems to be, in Mr. Justice Story's phrase, "a condonation of all murders" in which the murderer has successfully destroyed his victim's body.

§ 2082. *Proof of a "Marriage in Fact";* (1) *Marriage in Evidence and in Substantive Law.* The possible modes of evidencing a marriage depend so intimately upon the theory of the marriage-contract in substantive law that the main features of the latter must be kept in mind in examining the rules of evidence.

As the common law emerged into the 1800s, and the question of the elements of a valid marriage came exclusively within the jurisdiction of the common-law Courts, after the long domination of the ecclesiastical Courts over that subject, a controversy upon a fundamental point, requiring a long historical survey for its proper understanding, came up everywhere for settlement. That controversy was, briefly, over this question: Whether for a valid marriage-contract an informal and private exchange of consent, similar to that by which any other contract could be made, would suffice; or whether the

293, 298, a *noble* (larceny); *N. M.*: 1902, *U. S. v. Grigo*, — *N. M.* —, 72 *Pac.* 20 (adultery); *N. C.*: 1860, *State v. Williams*, 7 *Jones L.* 446, 454 (homicide); *Or.*: 1899, *State v. Hanna*, 35 *Or.* 195, 57 *Pac.* 629, *semble* (larceny); *Pa.*: 1846, *Com. v. Harman*, 4 *Pa. St.* 269, 272, *semble* (homicide); 1882, *Gray v. Com.*, 101 *id.* 380, 386, *semble* (homicide); *S. C.*: 1896, *State v. Martin*, 47 *S. C.* 67, 25 *S. E.* 113 (though not definitely deciding more than that the identification of a body found may be made by circumstantial evidence); *Tenn.*: 1844, *Tyner v. State*, 5 *Humph.* 383, *semble* (larceny); 1847, *Carey v. State*, 7 *id.* 499, *semble* (stealing); 1891, *Lancaster v. State*, 91 *Tenn.* 367, 369, 18 *S. W.* 777, *semble* (murder); *U. S.*: 1834, *U. S. v. Gilbert*, 2 *Summ.* 19, 27 (quoted *supra*); 1858, *U. S. v. Williams*, 1 *Cliff.* 5, 20 (a rule requiring the finding of the body "ought always to be enforced whenever direct proof exists and it is practicable to obtain it"); *Vt.*: 1858, *State v. Davidson*, 30 *Vt.* 377, 385, *semble* (robbery); 1879, *State v. Potter*, 52 *id.* 33, 39; 1896, *State v. Briuk*, 68 *id.* 659, 35 *Atl.* 492 (adultery; overruling *State v. Way*, 6 *Vt.* 311); 1902, *State v. Kimball*, 74 *id.* 223, 52 *Atl.* 430 (adultery); *Va.*: 1871, *Smith v. Com.*, 21 *Gratt.* 809, 813 (murder); 1878, *Johnson v. Com.*, 29 *id.* 796, 820 (burglary; preceding case approved); *Wash.*: 1902, *State v. Gates*, 28 *Wash.* 689, 69 *Pac.* 385; *W. Va.*: 1885, *State v. Flanagan*, 26 *W. Va.* 116, 123 (murder); *Wis.*: 1892, *Zoldoske v. State*, 82 *Wis.* 580, 597 (murder); 1899, *Buel v. State*, 104 *id.* 182, 80 *N. W.* 78; 1903, *Paulson v. State*, 118 *id.* 89, 94 *N. W.* 771; *Wyo.*: 1898, *Dalzell v. State*, 7 *Wyo.* 450, 53 *Pac.* 297 (no rule laid down; evidence here held sufficient).

* *New York*: 1856, *People v. Wilson*, 3 *Park. Cr. C.* 191, 207, *semble* (murder; circumstantial evidence suffices); 1858, *Ruloff v. People*, 18 *N. Y.* 179, 184 (the law in homicide "does not permit a conviction without direct proof of the

death or of the violence or other act of the defendant which is alleged to have produced death"); 1872, *People v. Bennett*, 49 *id.* 137, 143 ("The point of the [preceding] decision is that, as to one or the other of the component parts of the *corpus delicti*, there must be direct evidence; that both cannot be established by mere circumstantial evidence; but the Court affirms the rule that when one is proved by direct evidence, the other may be by circumstances"); 1881, *Penal Code*, § 181 ("No person can be convicted of murder or manslaughter unless the death of the person alleged to have been killed, and the fact of killing by the defendant as alleged, are each established, as independent facts; the former by direct proof, and the latter beyond a reasonable doubt"); 1888, *People v. Beckwith*, 108 *N. Y.* 67, 71, 15 *N. E.* 53 (murder; statute applied); 1888, *People v. Palmer*, 109 *id.* 110, 112, 16 *N. E.* 529 (murder; statute construed; *corpus delicti* does not include identity of the deceased); *Texas*: 1874, *Wilson v. State*, 41 *Tex.* 320, 325, 43 *id.* 412, 476, *semble* (murder; circumstantial evidence suffices); 1876, *Brown v. State*, 1 *Tex. App.* 154, *semble* (same; larceny); 1885, *Lightfoot v. State*, 20 *id.* 77, 96, *semble* (same; murder); *P. C.* § 549 ("No person shall be convicted of any degree of homicide unless the body of the deceased, or portions of it, are found and sufficiently identified to establish the fact of the death of the person charged to have been killed"); 1889, *Purveyor v. State*, 28 *id.* 73, 78, 11 *S. W.* 929 (statute applied); 1898, *Kugardt v. State*, 38 *Tex. Cr.* 681, 44 *S. W.* 989 (the identification, under the statute, may be by circumstantial evidence); 1899, *Gay v. State*, 40 *id.* 242, 49 *S. W.* 612 (preceding case followed); 1900, *Bailey v. State*, 42 *id.* 289, 59 *S. W.* 900 (following *Kugardt v. State*); 1902, *Landreth v. State*, — *id.* —, 70 *S. W.* 758 (preceding case approved).

exchange of consent must take place before an ordained clergyman or other person authorized to celebrate marriages. In 1843, the latter requirement was declared to be and to have been the common law of England;¹ though it seems entirely clear that the former view is historically the correct one;² and it has in fact been taken as the law for Scotland and for probably every one of the jurisdictions in the United States.³ The controversy in the substantive law thus lay between the private or informal consent and the public or ceremonial consent.

Now this ceremonial marriage, so important in the substantive law, though open to confusion with the "marriage in fact" of the law of evidence, is unquestionably distinct in its meaning; indeed the evidential rule about a "marriage in fact" was laid down nearly a century before the case of *R. v. Millis*, and at a time when the erroneous doctrine about a ceremonial marriage had not yet been clearly adopted by English Courts. The meaning of "marriage in fact" is simple and undoubted, (though it is not a meaning for which any clue is given by the unfortunate phrase itself); it is a marriage which can be evidenced by an *eye-witness of the act of exchanging consent*.⁴ It is thus apparent that, so far as the theory of law is concerned, the informal marriage can be equally a "marriage in fact" with the ceremonial one; that is to say, a friend who is present at the informal exchange of consent may testify as an eye-witness to the "marriage in fact" and thus satisfy the rule of evidence. Conversely, a ceremonial marriage may in the substantive law be required (as in England), and yet may be evidenced merely by habit and repute, where the rule of evidence requiring proof by an eye-witness does not apply. It can be understood, then, at the outset, that the evidential rule about a "marriage in fact" has nothing essentially to do with the controversy of substantive law as to a ceremonial marriage.

There is, to be sure, an accidental relation between the two so far as concerns the ease of proof of one sort or another. (1) On the one hand, proof of a "marriage in fact" i. e. by an eye-witness, will be more likely to be available in a jurisdiction where the ceremonial marriage is the only valid one. The celebrating clergyman or magistrate being an eye-witness, his certificate serves as eye-witness proof (*post*, § 2087), and either this or the marriage-register kept by him will generally be available; moreover, the persons usually required in such jurisdictions to attend the ceremony as witnesses will furnish another available source of eye-witness proof. In a jurisdiction sanctioning the informal exchange of marriage-consent, no eye-witness proof will be available, if the parties have taken the full liberty of the law and have exchanged consent privately and without the presence of either clergyman, magistrate, or friends. Consequently, to require as a rule of evidence, eye-witness proof of marriage in such jurisdictions often amounts to practically the same thing as requiring, by rule of substantive law, a ceremonial

¹ *R. v. Millis*, 10 Cl. & F. 534; Beamish v. Beamish, 9 H. L. C. 274.

² Pollock & Maitland, *History of the English Law*, II, 362-382.

³ 1891, Bishop, *Marriage, Divorce, and Separation*, § 409; 1904, Howard, *History of Matrimonial Institutions*.

⁴ See the quotations *post*, § 2085.

marriage; because the required eye-witness cannot be had.⁶ Nevertheless, this is purely an accidental coincidence of fact, and not the result of any legal identity of ceremonial marriage and "marriage in fact"; as is easily seen by supposing the case of a consent informally exchanged before friends; for this would not be a ceremonial marriage valid by the substantive law of England, although it would furnish the eye-witness proof sufficient to satisfy the rule of evidence. (2) On the other hand, proof by habit and repute, *i. e.* by conduct as married persons and by reputation of the community (*post*, § 2083), will be more significant and cogent in jurisdictions where the substantive law requires no more than an informal and private exchange of consent to constitute a valid marriage. But in a jurisdiction where a ceremonial marriage is alone valid and must therefore have been alleged in the pleadings, here, though from habit and repute it may still be inferred that this ceremonial marriage had been performed, yet the inference will not be so readily drawn unless some satisfactory explanation can be given of the absence of that eye-witness evidence which ought ordinarily to be available if in truth there was a ceremonial marriage, — for example, the certificate or the register. Thus, in such a jurisdiction, as a mere coincidence, that kind of evidence — habit and repute — may often be discredited in a way which would be impossible in other jurisdictions, — a difference often noticeable between Scotch and English marriages in their consideration by the House of Lords. This difference, however, will be seen, from what has been said, to be merely a practical consequence of the substantive law, and not of any difference in the rules of evidence as to the sufficiency of habit and repute.

§ 2083. *Same*: (2) *Habit and Repute as the Ordinary Evidence*. The act of exchange of marriage-consent, as constituting a marriage, may conceivably be evidenced by various sorts of evidence, any one of which might suffice to persuade the tribunal, in the absence of some special quantitative requirement. One of these kinds would be the testimony of a person present and seeing or hearing the words of consent. Another would be the admissions of a party-opponent to the suit. Both of these would be ordinary instances of evidence usually employed for proving any other fact in litigation. But two other kinds are also available, by way of exception to the general rules of evidence. In the first place, the *conduct of the persons*, in living together in the manner usual for married persons, is some circumstantial evidence that they exchanged consent at a prior time. The evidential nature of this inference has been already examined (*ante*, § 268); its general admissibility is unquestioned. It is enough here to note that this evidence from conduct is commonly spoken of as "*habit*"; and that it is something more than mere cohabitation, or living together, because it signifies living together and behaving in every way with the evident belief and assumption that they have the

⁶ See Lord Eldon's amusing anecdote of the Irish peer (*ante*, § 1642). But even in the Gretna Green marriages it was once in a while resorted to: 1827, Wakefield's Trial, Pelham's

Chronicles of Crime, ed. 1891, II, 192 (where David Laing himself, the celebrated blacksmith-parson, was a witness).

rights and responsibilities of persons who have contracted a lawful marriage. In the second place, the *repute of the community* or neighborhood that these persons have been lawfully married is a kind of testimony which is based partly on the parties' habit as married persons, partly on contributions of personal knowledge by those who have witnessed the exchange of consent, and partly on the absence of contrary evidence which would naturally have come to light had it existed. This net result of the sifting of the facts by gossip and by interested investigation is summed up in the community's reputation; and this, though it would ordinarily be inadmissible by the Hearsay rule, is by long acceptance admissible under a special exception to that rule. The scope and reason of this Exception, making reputation admissible to prove marriage, has already been considered, (*ante*, §§ 1602-1605); it is enough here to note that it is always admissible.

Now these two sorts of evidence, habit and reputation, are commonly found available together, and are therefore commonly offered at the same time. They are admitted on distinct theories, the one being circumstantial in its nature, the other testimonial; but in practical use they are generally found associated. The typical judicial treatment of them may be gathered from the following exposition:

1867, L. C. *Chalmersford*, in the *Breadalbane Case*, L. R. 1 Sc. App. 182, 192, 196, 211: "Habit and repute arises from parties cohabiting together openly and constantly, as if they were husband and wife, and so conducting themselves towards each other for such a length of time in the society or neighborhood of which they are members as to produce a general belief that they are really married"; Lord *Wentbury*: "Cohabitation as husband and wife is a manifestation of the parties having consented to contract the relationship *inter se*. It is a holding forth to the world by the manner of daily life, by conduct, demeanor, and habit, that the man and woman who live together have agreed to take each other in marriage and to stand in the mutual relation of husband and wife; and when credit is given by those among whom they live, by their relatives, neighbors, friends, and acquaintances, to these representations and this continued conduct, then habit and repute arise and attend upon the cohabitation. The parties are holden and reputed to be husband and wife; and the law of Scotland accepts this combination of circumstances as evidence that consent to marry has been lawfully interchanged."

These two kinds of evidence, then, being always admissible (*ante*, §§ 268, 1602), the question now to be considered is whether there is any quantitative rule as to their sufficiency; *i. e.* are they alone sufficient, if the jury trust them, to prove a marriage, or is proof by an eye-witness indispensable? Is it of no avail to furnish evidence of habit and repute unless also a certificate or register or oral testimony of a bystander is furnished? Here we may start with the general proposition that *habit and repute alone suffice ordinarily in civil cases*. There is a common-law rule declaring them insufficient in bigamy and criminal conversation (*post*, § 2085); there is a further field for controversy as to their sufficiency in other criminal charges and in suits for divorce (*post*, § 2085); and there is sometimes a distinction as to marriage documents (*post*, § 2088). But, apart from these special rules, there remains the uncontroverted field of civil cases in general; and here the

universally accepted principle, serving as the normal doctrine, is to be understood as making no discrimination against this sort of evidence:

1878, *Campbell, C. J.*, in *Proctor v. Bigelow*, 38 Mich. 262: "In most cases where the right to property is to be made out by proof of a marriage, the witnesses who were present are not living or attainable. One or both of the married persons must die before any inheritance or dower can exist. It would be impossible in a majority of such cases to prove a marriage by any better testimony than conduct and reputation."¹

But is this true except of the two kinds of evidence, habit and repute,

¹ *Accord: Eng.*: 1806, *Leader v. Barry*, 1 Esp. 353 (non-assumpsit; Lord Kenyon said "an action for criminal conversation was the only civil case where an actual marriage, by producing a copy of the register, need be proved; the same strictness was required in an indictment for bigamy"); 1837, *Doe v. Fleming*, 4 Bing. 366 (ejectment; quoted *infra*); 1832, *Maxwell v. Maxwell*, Milward Eccl. 290, 292 (restitution of conjugal rights); the following early case is therefore of no validity: 1754, *Coaran v. Lowe*, 1 Lee Eccl. 630, 638 (on the facts, proof of cohabitation held insufficient without calling a witness to the ceremony, in a claim for restitution of conjugal rights); *Can.*: 1835, *Currie v. Stairs*, 35 N. Br. 4, 7 (slander charging adultery); 1858, *Graham v. Law*, 6 U. C. C. P. 310, 313 (dower); *Cal.*: 1864, *People v. Anderson*, 26 Cal. 129, 133 (proving a witness incompetent by marriage); *Conn.*: 1812, *Hammick v. Johnson*, 5 Day 290, 293 (ejectment, title depending on marriage); 1885, *Northrop v. Knowles*, 53 Conn. 522 (title depending on legitimacy; reputation of adulterous relation, excluded on the principle *ante*, § 1602; present point not involved); *Ill.*: 1875, *Miller v. White*, 80 Ill. 580, 585 (trespass); 1878, *Lowry v. Coster*, 91 Id. 182, 184 (loss of support by sale of liquor); *Ind.*: 1846, *Fleming v. Fleming*, 8 Blackf. 234 (dower); *Ky.*: 1808, *Crosier v. Gano*, 1 Bibb 257, 258 (detinue); 1831, *Sneed v. Ewing*, 5 J. J. Marsh. 460, 491 (inheritance and legitimacy); 1885, *Storer v. Boswell*, 3 Dana 232, 233 (dower); 1844, *Taylor v. Shemwell*, 4 B. Monr. 575, 576 (ejectment); 1846, *Kuhl v. Kuaner*, 7 Id. 130 (claim against husband for deceased wife's estate; here proof of a marriage in fact was required, because "a direct issue is made up by the parties" on that point; no authority cited; the other cases in this State leave this ruling of no authority); 1847, *Donnelly v. Donnelley's Heirs*, 8 Id. 113, 116 (dower); 1859, *Chiles v. Drake*, 2 Metc. 146, 154 (death by wrongful act); *La.*: 1831, *Taylor v. Swett*, 3 La. 23, 36 (inheritance); 1833, *Holmes v. Holmes*, 6 Id. 463, 471 (breach of carrier's contract); 1847, *Hobby v. Jones*, 2 La. An. 944 (slander charging concubinage); 1878, *Blasini v. Blasini*, 30 Id. 1288, 1297 (succession); *Me.*: 1849, *Taylor v. Robinson*, 29 Me. 323, 326 (slander spoken of plaintiff's wife); *Md.*: 1750, *Cheseldine v. Brewer*, 1 H. & McH. 152 (ejectment); 1828, *Fornahill v. Murray*, 1 Bland Ch. 479, 482 (distribution of estate; eye-witness required; this and the

following case are of no authority in view of the other rulings); 1836, *Sellman v. Bowen*, 8 G. & J. 50, 54 (dower; eye-witness required); 1848, *Cope v. Pearce*, 7 Gill 247, 263 (distribution of estate); 1868, *Boone v. Purnell*, 28 Md. 607, 629 (ejectment); 1873, *Redgrave v. Redgrave*, 38 Id. 93, 97 (administration); *Mass.*: 1812, *Newburyport v. Boothbay*, 9 Mass. 414 (pauper settlement); *Mich.*: 1878, *Proctor v. Bigelow*, 38 Mich. 262 (dower); *Miss.*: 1877, *State v. Worthingham*, 23 Miss. 528, 534 (bastardy complaint); *Miss.*: 1849, *Stevenson v. McReary*, 12 Sm. & M. 9, 56 (ejectment); 1856, *Henderson v. Cargill*, 31 Miss. 367, 409 (distribution of estate); *Mo.*: 1857, *Boatman v. Curry*, 25 Mo. 493, 493 (title to sue as husband and wife); *N. H.*: 1841, *Wendell v. Safford*, 12 N. H. 179, 184 (breach of promise); 1843, *Young v. Foster*, 14 Id. 114, 118 (dower); 1846, *Dalton v. Bethlehem*, 20 Id. 505, 514 (pauper settlement); 1858, *Stevens v. Reed*, 37 Id. 49, 53 (dower); *N. Y.*: 1809, *Fenton v. Reed*, 4 John. 52 (insurance); 1820, *Jackson v. Claw*, 18 Id. 347 (ejectment); 1842, *Re Taylor*, 9 Paige 611, 614 (innate's estate); 1850, *Clayton v. Wardell*, 4 N. Y. 230, 234 (legitimacy); 1868, *O'Garra v. Eisenlohr*, 38 Id. 296, 298 (administration); 1832, *Jenkins v. Bisbee*, 1 Edw. Ch. 377 (creditor's bill); 1877, *Chamberlain v. Chamberlain*, 71 N. Y. 423, 427 (distribution of estate); *N. C.*: 1799, *Telts v. Foster*, Taylor 121 (remainder over on marriage); 1827, *Weaver v. Cryer*, 1 Dev. 337, 341 (trover); 1859, *Archer v. Halthcock*, 6 Jones L. 431; *Ph.*: 1816, *Chambers v. Dickson*, 2 S. & R. 475 (dower); 1855, *Thorndell v. Morrison*, 25 Pa. 326, 327 (ejectment); 1866, *Com. v. Stamp*, 53 Id. 132, 135 (inheritance tax); 1873, *Richard v. Brum*, 73 Id. 140, 144 (ejectment); *Tex.*: 1847, *Tarpoley v. Poage*, 2 Tex. 139, 149 (promissory note); *Vt.*: 1819, *Poultney v. Fairhaven*, Brant. 185 (pauper settlement; to prove a woman not the lawful wife of S., prior cohabitation and reputation as the wife of A. were held "not proper to disprove her the wife of S."; not cited, but practically repudiated, in the next case); 1860, *Northfield v. Vershire*, 33 Vt. 110, 112 (facts substantially similar; "evidence of reputation and cohabitation is competent to prove a marriage whenever the question arises in any civil action, except in actions for criminal conversation"); *Va.*: 1899, *Eldred v. Eldred*, 97 Va. 604, 34 S. E. 477 (title depending on legitimacy).

in combination? Will either alone equally suffice? In practice, the conditions which furnish the one sort usually furnish the other; so that the question rarely arises for decision. Moreover, the terms are not always used with precision, for in judicial utterances each of the two words is frequently found employed in the sense of both combined. Nevertheless, in evidential theory the two are distinct; and there seems no sound reason for treating them as valueless unless coupled.

(a) *Habit*, then, or conduct as married persons, ought of itself to be sufficient:

1844, *Mr. J. Hubback, Succession*, 248: "The mere cohabitation of two persons of different sexes, or their behavior in other respects, as husband and wife, always affords an inference of greater or less strength that a marriage has been celebrated between them. Their conduct, being susceptible of two opposite explanations, is to be moral rather than immoral, and credit is to be given to their own assertions, whether express or implied, of a fact peculiarly within their own knowledge. The presumption of marriage from these circumstances is too reasonable not to have a place in the laws of other countries. 'Cohabitation,' says Lord Stair, 'and the behaving as man and wife for a considerable time, presumeth marriage, though there be neither contract, promise, nor sponsalia preceding, nor evidence of copulation by children.' 'Oritur presumptio matrimonii ex tractatu quo vir et mulier ut conjuges alter alterum se habet' (Mascardus). . . . If the marriage to be proved was kept secret and disavowed by the parties, and thus not only wants the aid of reputation in its favor, but may also be encountered by declarations and reputation of a contrary tendency, it will be important to adduce evidence of reasons for the concealment."

(b) *Repute*, also, may alone suffice; and in practice, it may well occur that reputation-evidence alone will be available:

1827, *Parks, B., in Doe v. Fleming*, 4 Bing. 206: "The general rule is that reputation is sufficient evidence of marriage, and a party who seeks to impugn a principle so well established ought at least to furnish cases in support of his position."

¹ *Accord: Eng.*: 1751, *Revel v. Fox*, 2 Ves. Br. 269 (bill by remainder-man against a woman who was given an estate till marriage; the defendants denied the marriage; L. C. Hardwicke: "The great thing in this case is the shortness of time in which the cohabitation subsisted; . . . those circumstances are certainly proper evidence of the marriage, for on a limitation over in case of marriage, if marriage is had, it is probably clandestine; if therefore the Court was to say such circumstances were evidence, it would be impossible to prove it. But, both defendants denying it on oath, and insisting on trying it, it must be tried; for a jury are proper judges of the fact"); 1762, *R. v. Stockland*, 2 Burr. Sett. Cas. 508 (pauper settlement; "Lord Mansfield seemed to think that thirty years' cohabitation as man and wife was sufficient proof"); 1874, *Lyle v. Ellwood*, L. R. 19 Eq. 98, 106, *semble*; *U. S.*: 1852, *Morris v. Morris*, 20 Ala. 168, 172, *semble* (divorce for adultery); 1846, *Dalton v. Bethlehem*, 20 N. H. 505, 514. *Contra*: 1876, *Argyle v. Wood*, 63 Mo. 501, 513; 1866, *Com. v. Stump*, 53 Pa.

182, 185; 1893, *Arnold v. Chesebrough's Ex'r*, 7 C. C. A. 572, 58 Fed. 927. In these opposed cases, the judges probably use "cohabitation" as meaning merely "living together"; this of course makes their statement correct enough, since (as above explained) the "habit" which is evidence of marriage is something more than mere cohabitation in the narrow sense; it is "living together as husband and wife."

² *Accord: Eng.*: 1790, *Sherborne v. Naper*, 2 Ridgw. P. C. 224 (not clear); 1795, *Reed v. Passer*, Peake N. P. 231, 233, *semble*, per Kenyon, L. C. J.; 1832, *Evans v. Morgan*, 2 Cr. & J. 453, 456; 1843, *R. v. Millis*, 10 Cl. & F. 534, 596, per L. C. Lyndhurst; 1858, *Goodman v. Goodman*, 4 Jur. N. s. 1220, 1224, 28 L. J. Ch. 745 (*Doe v. Fleming* approved); *U. S.*: 1841, *Wendell v. Safford*, 12 N. H. 179, 186 (breach of promise). *Contra*: 1814, *Lori Redesdale*, in *Cunningham v. Cunningham*, 2 Dow 492, 510; 1903, *Summerville v. Summerville*, 31 Wash. 411, 79 Pac. 84.

That a divided reputation is insufficient is noticed *ante*, § 1603.

§ 2084. *Same*: (3) Lord Mansfield's Rule in *Morris v. Miller*. The cast of thought, in that greatest of English judges, was a strong and individual one; and his instincts of justice and common sense were at the same time so keen that his influence upon the whole body of English law was not only marked but beneficent. It goes with such a nature to disregard precedent, where precedent, or the lack of it, seems to stand in the way of good sense; he did not sit there (in his celebrated phrase) "to take the rules of evidence from Keble or Siderfin."¹ Yet the guidance of instinct alone — one's individual or momentary views of justice — may prove erroneous, by the broader standard either of other men or of other times; and in such instances the willingness to disregard precedents appears, for the case in hand, as a regrettable source of error. In the course of events, little opportunity has arisen to pass such censure upon Lord Mansfield's judgments; his immediate successors, smaller men than he, were shocked at his innovations; but Time has been his vindicator. Yet in the law of evidence, oddly enough, it has been his fate not to find this vindication. Rarely did he make any real contribution to its theory or its practice;² not infrequently he helped to obscure it; and in several respects he created, in scorn of precedent, rules which merely encumbered the law of evidence with unnecessary and impolitic restrictions.³ One of these was the rule requiring *proof of a "marriage in fact"* in *bigamy* and *criminal conversation*.

This rule he laid down in the following cases:

1767, *Morris v. Miller*, 4 Burr. 2057; the opinion of the Court was asked "upon the following question, 'whether to support an action for criminal conversation, there must not be proof of an actual marriage'; the fact was, they were married at Mayfair chapel; the register or books could not be admitted in evidence; Keble, who married them, was transported; and the clerk, who was present, was dead; so that the plaintiff could not prove the actual marriage by any evidence." Counsel for plaintiff argued that "we proved articles [of post-nuptial settlement], . . . cohabitation, name, and reception of her by everybody as his wife; though we did not indeed prove it by any register or by witnesses who were present at the marriage"; Lord Mansfield said: "It certainly may be done so in all cases except two," namely, bigamy and criminal conversation. The plaintiff's counsel argued that the defendant's admission of the marriage sufficed. The defendant's counsel argued that the reputation evidence "does not come up to the rule of being the best evidence in the plaintiff's power," and that it was not an actual i. e. ceremonial marriage; Lord Mansfield, C. J.: "Proof of actual marriage is always used and understood in opposition to proof by cohabitation and reputation and other circumstances from which a marriage may be inferred. . . . We are all clearly of opinion that in this kind of action, an action for criminal conversation with the plaintiff's wife, there must be evidence of a marriage in fact; acknowledgment, cohabitation, and reputation, are not sufficient to maintain this action. . . . It shall not depend upon the mere reputation of a marriage, which arises from the conduct or declarations of the party himself. . . . Inconvenience might arise from a contrary determination; which might render persons liable to actions founded upon evidence

¹ *Lowe v. Jolliffe*, 1 W. Bl. 365.

² The notable instance is his rule for compelling documentary discovery on motion (*ante*, § 1858).

³ The others were the rule excluding *alibi*.

gane suam turpitudinem (*ante*, § 525), the rule against parents "bastardizing their issue" (*ante*, § 2063), and the rule against jurors in passing their verdict (*post*, § 2352).

made by the persons themselves who should bring the action.⁴ . . . Perhaps there need not be strict proof from the register, or by a person present, but strong evidence must be had of the fact, — as, by a person present at the wedding dinner, if the register be burnt and the parson and clerk are dead.”

1779, Lord Mansfield, C. J., in *Birt v. Barlow*, 1 Doug. 171, 174: “An action for criminal conversation is the only civil case where it is necessary to prove an actual marriage; in other cases, cohabitation, reputation, etc., are equally sufficient, since the Marriage Act is before. But an action for criminal conversation is a mixture of penal prosecution; for which reason, and because it might be turned to bad purposes by persons giving the name and character of wife to women to whom they are not married, it struck me, in the case of *Morris v. Miller*, that in such an action a marriage in fact must be proved.”

Certain things may plainly be gathered from these two cases, upon which the rule has always been supposed to be founded. (a) It does not appear that there was any such restriction before these opinions were rendered.⁵ “It struck me,” says Lord Mansfield, that there ought to be such a rule. No doubt the then prevalent canon of the “best evidence,”⁶ invoked by counsel in argument, served as the justifying principle. (b) The phrase “proof of a marriage in fact,” or “actual marriage,” signified, as a rule of evidence in these decisions, *proof by an eye-witness*, i. e. either by the register containing the parson’s entry or by the oral testimony of parson, clerk, or some other person present at the ceremony. This has since been the accepted meaning;⁷ though in a jurisdiction where a ceremonial marriage is not required by the substantive law (*ante*, § 2082) the term covers also proof by an eye-witness to the exchange of marriage-consent, even when given informally. (c) This special requirement, as declared by Lord Mansfield, was limited to two kinds of issues, one a criminal charge, namely, *bigamy*, the other a civil action, namely, *criminal conversation*. (d) The requirement of eye-witness proof, as made by him, clearly declared evidence of habit and repute insufficient. He further mentioned “acknowledgment” as insufficient; but here he probably signified merely that acknowledgment which is to be found in conduct as a married person, in other words, “habit” (*ante*, § 2082), and did not mean to include an *express admission*, in words, of the performance of a marriage ceremony. Nevertheless, his meaning is open to dispute; and hence different judicial views have since been taken upon the question whether by Lord Mansfield’s rule eye-witness proof was required even where the marriage had been expressly admitted by the defendant.⁸

The policy of Lord Mansfield’s rule has received but scanty judicial exposition. (1) For the action of *criminal conversation* it was placed by him on

⁴ The following sentence is from the report in 1 W. Bl. 632.

⁵ The only prior cases on the subject seem to have been one in the Ecclesiastical Court, *Conran v. Lowe*, 1754, 1 Lee Eccl. 630, cited *ante*, § 2083, and *R. v. Norwood*, 1765, cited *post*, § 2086.

⁶ *Ante*, § 1173.

⁷ 1843, Gilchrist, J., in *State v. Winkley*, 14 N. H. 480, 495: “In criminal prosecutions, like indictments for bigamy, adultery, etc., direct evidence of the marriage is required, and

this may appear from the testimony of witnesses who were present at the ceremony. This constitutes proof of a marriage in fact, and is merely direct evidence of the marriage, as contradistinguished from cohabitation, etc., which is indirect evidence of the marriage.”

⁸ The best judicial examinations of the decision in *Morris v. Miller* are those of Smith, J., in *West v. Stain* (1853), 1 Wis. 209, 216, and of White, J., in *Warner v. Com.* (1817), 2 Va. Cas. 95, 98, where its significance is carefully analyzed.

the ground, partly that the action was penal in its nature (as indeed it has always been treated, in a marked degree, in England), partly that to receive habit and repute alone might enable a man having a mistress to recover damages from another man for the seduction of a woman whose relation to the plaintiff did not justify him in claiming any right to her chastity. So far as the first reason is concerned, it stands or falls with the general policy of establishing a special rule for criminal cases. So far as the second reason is concerned, it indeed is based on a real contingency; yet it is doubtful whether there is any need of exercising special vigilance in behalf of a defendant whose conceded conduct deprives him of honorable sympathy.* (2) For the charge of *bigamy*, there is in the first place the general policy of caution applicable to all criminal cases. Nevertheless, this seems sufficiently met by the broad rule of reasonable doubt (*post*, § 2497); moreover, it was clearly not Lord Mansfield's reason, for he expressly confines the rule to a charge of bigamy, and the reason must therefore be sought in some circumstance peculiar to that offence. Here he vouchsafed no light in his opinion. What reasons there are, *pro* and *con*, may partly be gathered from the judicial language later quoted (*post*, § 2086). On the whole, the reasons against making such a requirement in the present connection seem plainly to preponderate. Whatever peculiarity there is to the offence of bigamy points indeed to a looser rather than a stricter rule as appropriate. What is the peculiar immorality of the offence of bigamy? Usually, it is the deception of the other party to the marriage, by leading her (or him) into a void and unsanctioned relation, and by afterwards deserting for another; as well as the injury to the progeny by placing them in the world without the rights of legitimate children. Now this deception and desertion and social wrong are equally consummated by a relation appearing in habit and repute to be a marriage, even though it be not a valid one. The moral meanness of that man, and the social consequences of his misconduct, are equally reprehensible, whether or not his first marriage could be proved by an eye-witness, and whether the marriage was legally binding or not. If it was not, it ought to have been. That the lack of evidence, instead of applying the equitable maxim that what ought to have been done will be treated as having been done, should let him go free from the charge of bigamy, precisely because he did not do the honest and lawful thing, is a singular instance of *hæret in cortice*. As the rule of evidence is confessedly based on a moral tenderness for the accused, it would seem that this moral tenderness should not be shown to a person whose conduct is equally reprehensible in any case. The most meritorious opponent in a criminal case, whether it be a wife, or heirs, or creditors, may be deprived of his alle-

* It may be added that the action for criminal conversation, in Lord Mansfield's time, occupied a far more prominent position and was therefore more liable to abuse. The prevalence of rakish habits among men of fashion and birth, and the practical lack of divorce, made this action frequent as the sole means of self-vindication for the injured husband; in this manner

it came naturally to present also an attractive means of blackmail. Lord Baltimore's case (quoted *ante*, § 782), into which Lord Mansfield himself was drawn as a mediator, was a typical and celebrated instance of the social condition amid which he laid down the rule in *Morley v. Miller*.

rights upon proof of marriage not consisting in eye-witness testimony. It is a scandal to be more cautious and tender in favor of an opponent in that particular criminal charge in which the opponent has placed himself on a level of moral meanness below that of the least meritorious opponent in any civil case.

§ 2085. Same: (4) *Eye-Witness required for Criminal Conversation and Bigamy.* It remains to notice the state of the law to-day in respect to Lord Mansfield's rule:

(a) In the civil action for *criminal conversation*, there is no doubt about the common law; it was plainly determined in *Morris v. Miller* and *Birt v. Barlow* (*ante*, § 2084), and has ever since been accepted.¹ The comparative infrequency of this action nowadays has allowed the rule to continue without dispute. (b) On a charge of *bigamy*, the English rule has in a few jurisdictions been followed.² But in the great majority it has been rejected, either by judicial ruling or by statutory change;³ so that in the latter juris-

¹ 1784, *Hemmings v. Smith*, 4 Doug. 83 (an eye-witness proved the marriage-ceremony, but did not identify the then wife with the person debauched by defendant; Buller, J.: "Upon the point of identity there is no difference between this action and others; it is only in the proof of a marriage in fact that it differs"; and the fact that the woman married was alive as wife in 1778, four or five years before the adultery, was held sufficient to go to the jury as to her identity with the woman debauched); 1844, *Catherwood v. Caslon*, 13 M. & W. 260 ("the uniform practice ever since" *Morris v. Miller* and *Birt v. Barlow* requires proof of a marriage in fact); 1818, *Kibby v. Rucker*, 1 A. K. Marsh. 391; 1875, *Hutchins v. Kimmell*, 31 Mich. 136, 130; 1883, *Perry v. Lovejoy*, 49 id. 529, 532, 14 N. W. 485 (the rule does not apply to an action for enticement, not alleging criminal intercourse). Add to these the citations under § 2086, *post*; Courts there adopting the eye-witness rule would equally do so here; the statutes also, in the next note, sometimes deal with this action.

For the question whether other evidence is needed of the *identity* of the person named in the marriage-register or by the oral witness, see *post*, § 2529, where the presumption of identity from name is treated.

² 1879, *Halbrook v. State*, 34 Ark. 511, 514, *semble* (for the second marriage); 1855, *Green v. State*, 21 Fla. 403 (polygamy); 1895, *Hiler v. People*, 156 Ill. 511, 520, 41 N. E. 181 (but compare the statute *infra*, note 3); 1829, *Damon's Case*, 6 Greenl. 143, 149; N. H. Pub. St. 1891, c. 174, § 17 (cited *infra*, note 7); Tex. P. C. 1895, § 348 (on a trial for bigamy or racial intermarriage, "proof of marriage by mere reputation shall not be sufficient"); Wash. C. & Stats. 1897, § 7232 (on charge of bigamy, adultery, etc., "a recorded certificate of marriage, . . . there being no decree of divorce, proves the marriage of the person"). Add to these the Courts in the following notes requiring eye-witness proof for other issues; they would cer-

tainly require it for bigamy also. So also the Courts cited in § 2086, *post*, as requiring it even where admissions are offered, would also require it where habit and repute are offered.

³ *Ala.* 1898, *Bynon v. State*, 117 Ala. 80, 23 So. 640 (for the first marriage); 1898, *Moore v. Heinke*, 119 id. 627, 24 So. 374 (same); for prior Alabama rulings, see *post*, § 2086; *Ariz.* P. C. 1887, § 1656 (on a charge of bigamy, evidence of "either of the marriages by the register, certificate, or other record evidence," is not necessary, but only "such evidence as is admissible to prove a marriage in other cases"); *Cal.* P. C. 1872, § 1106 (in bigamy, "it is not necessary to prove either of the marriages by the register, certificate, or other record evidence thereof"); *Colo.* Annot. Stats. 1891, § 1317 (like Ill. Rev. St. c. 38, § 29); *Ida.* Rev. St. 1887, § 7867 (bigamy; proof of marriage by "register, certificate, or other record evidence," not necessary; marriage provable as "in other cases"); *Ill.* Rev. St. 1874, c. 38, § 29 (St. 1845; in bigamy, "it shall not be necessary to prove either of the marriages by the register or certificate thereof, or other record evidence; but the same may be proved by such evidence as is admissible to prove a marriage in other cases"); *Ind.* St. 1899, c. 239, § 2 (proof as in other cases); *Kan.* Gen. St. 1897, c. 96, § 60 (cohabitation and reputation, receivable); *Mass.* Pub. St. 1882, c. 145, § 31 ("When the fact of marriage is required or offered to be proved before a Court, evidence of the admission of such fact by the party against whom the process is instituted, or evidence of general repute or of cohabitation as married persons, or any other circumstantial or presumptive evidence from which the fact may be inferred, shall be competent"); *Rev. L.* 1902, c. 151, § 39 ("Marriage may be proved by evidence of the admission thereof by an adverse party, by evidence of general repute or of cohabitation by the parties as married persons, or of any fact from which the fact may be inferred"); 1876, *Com. v. Holt*, 121 Mass. 61;

dictions habit and repute suffice, as on other issues (*ante*, § 2083). (c) On a prosecution for adultery or incest, Lord Mansfield's rule would not be applicable. In a few jurisdictions it has been extended to those offences;⁴ but this is not justified either by precedent or by policy, and has elsewhere been denied.⁵ (d) In criminal cases in general the rule as stated in terms by Lord Mansfield does not apply.⁶ Nevertheless, a few Courts have seen fit to expand the rule to cover all criminal cases.⁷ (e) In suits for divorce, founded on adultery, Lord Mansfield's rule has of course no application; nevertheless the rule has occasionally been applied in such a proceeding.⁸ Much less has

Mass. Gen. St. 1894, § 5763 (whenever marriage is in issue, the admission of it by the opponent, or general repute, or cohabitation, or "any other circumstantial or presumptive evidence from which the fact may be inferred, shall be competent"); 1867, *State v. Johnson*, 12 Minn. 476, 483 ("competent" means here "such evidence as if believed would authorize a jury to find the fact of marriage"; and thus changes the common-law rule as to sufficiency); 1878, *State v. Armington*, 25 id. 29, 35; *Mo. 1883, State v. Gonce*, 79 Mo. 600, 601, *semble*; 1890, *State v. Cooper*, 108 id. 266, 271, 15 S. W. 327; *Mont. P. C. 1895, § 2083* (like Cal. P. C. § 1106); *N. D. Rev. C. 1895, § 8215* (like Cal. P. C. § 1106); *Okla. Stats. 1893, § 3228* (like Cal. P. C. § 1106); § 3224 (marriage consent and consummation "may be proved under the same general rules of evidence as facts in other cases"); *S. D. Stats. 1899, § 3672* (like Cal. P. C. § 1106); *Vt. St. 1894, § 5060* (cohabitation and admissions, competent in prosecutions involving marriage); 1896, *State v. Sherwood*, 68 Vt. 414, 35 Atl. 352, *semble* (eye-witness not necessary to show a previous marriage which would make a later one no bigamy); *Wyo. Rev. St. 1887, § 968* (bigamy; like Colo. Annot. Stats. § 1817).

⁴ 1827, *State v. Roswell*, 6 Conn. 446 (incest with daughter; to prove the marriage with her mother, marriage in fact must be shown; admissions and reputation insufficient; rule for bigamy and crim. con. held applicable); 1875, *Arnold v. State*, 53 Ga. 574 (adultery by marrying another's wife); 1896, *Republic v. Kuhia*, 10 Haw. 440 (adultery; here the testimony of the celebrant himself, without his record, was held sufficient); 1896, *Republic v. Waipa*, ib. 442 ("on a charge of adultery, marriage must be proved by direct evidence"); 1841, *State v. Hodgkins*, 19 Me. 155, 157; 1868, *Boone v. Purnell*, 28 Md. 607, 629; 1799, *Com. v. Mofat*, 2 Dane's Abr. 296 (must be proved by a witness present or by a register-certificate); 1818, *Com. v. Littlejohn*, 15 Mass. 163 (low cohabitation with a married person; the marriage not sufficiently provable by cohabitation); 1893, *Bailey v. State*, 36 Nebr. 303, 312, *semble*; 1843, *State v. Winkley*, 14 N. H. 430, 495; 1789, *State v. Annies*, N. Chipm. 9.

⁵ 1834, *Ewell v. State*, 6 Yerg. 364, 369 (incest; proof of marriage by eye-witnesses not required; here reputation sufficed); *Tex. P. C. 1895, § 352* (on a trial for incest, the relation-

ship may be proved as in civil suits). The statutes cited in note 3, *supra*, also often bear on this point. For Alabama rulings, see *post*, § 2086.

⁶ 1765, *R. v. Norwood*, East Pl. Cr. I. 337 (wife's murder of husband, i. e. petit treason; Lord Mansfield, C. J., with others); 1826, *R. v. Hassall*, 2 C. & P. 435 (indictment against Sarah H., as single woman, and James H., for stealing; defence, that Sarah H. was wife of James H. acting under coercion; habit and repute held insufficient on the facts, by Garrow, B.; but "I quite agree with my Lord Mansfield that the two cases mentioned are the only ones in which it is necessary to give direct proof of an actual marriage"); 1899, *Mobley v. State*, 41 Fla. 621, 26 So. 732 (murder of paramour; eye-witness not necessary to prove defendant's marriage to another woman); Ill. Rev. St. 1874, c. 38, § 491, St. 1893, June 17 (in a prosecution of a husband for abandoning his family, no other evidence of marriage is necessary than is required "in a civil action"); St. 1901, May 11, § 3 (in prosecutions for abandonment of wife or child, no other evidence of marriage shall be required than in civil actions); *Mo. Rev. St. 1899, § 1861* (on a prosecution for abandonment of wife or child, proof of marriage or paternity as in civil cases suffices); 1859, *Archer v. Hatchercock*, 6 Jones L. 421 ("in criminal proceedings, it is confined to an indictment for bigamy"); 1880, *Jackson v. State*, 8 Tex. App. 60 (assault with intent to murder). Add also the statutes cited in note 3, *supra*.

⁷ 1852, *Cook v. State*, 11 Ga. 53, 61; N. H. Pub. St. 1891, c. 174, §§ 16, 17 (in civil actions, except for criminal conversation, "acknowledgment, cohabitation, and reputation is competent proof of marriage"; in indictments for "bigamy, adultery, and the like," and actions for criminal conversation, "there must be proof of a marriage in fact"); 1872, *Dove v. State*, 3 Heisk. 348, 355, 365 (woman offered by the State, objected to as defendant's wife; on the facts, proof by certificate or eye-witness required; no authority cited); 1853, *West v. State*, 1 Wis. 209, 216, 225 (here, seduction by a married man).

⁸ 1814, *Ellis v. Ellis*, 11 Mass. 92 (divorce for adultery by second marriage; the hearsay certificate not sufficient; oath in Court required); 1861, *Case v. Case*, 17 Cal. 598, 600 (divorce for adultery; proof of "actual marriage" necessary); 1896, *People v. Stokes*, 7 id. 263, 12 Pac. 71 (open cohabitation; opinion

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it any proper place in divorce suits founded on other causes; and on this there has been general agreement.²

§ 2086. *Same*: (5) *Eye-Witness not required when Proof is by Admissions*. Should Lord Mansfield's rule be extended to require eye-witness evidence, not only in addition to habit and repute, but even where the defendant's express admissions of the marriage can be shown? This is the part of the controversy about which there has been most argument. The authorities for enlarging the rule to that extent have never been numerous, but they have served to force the question strongly upon the attention of almost every Court. The argument in favor of such an extension has been set forth as follows:

1803, *Serjeant East, Pleas of the Crown*, I, 471: "It may be difficult to say that it is not evidence to go to the jury, like the acknowledgment of any other matter *in pais* where it is made by a party to his own prejudice at the time. But it must be admitted that it may under circumstances be entitled to little or no weight; for such acknowledgments, made without consideration of the consequences and palpably for other purposes at the time, are scarcely deserving of that name in the sense in which acknowledgments are received as evidence, — more especially if made before the second marriage, or upon occasions when in truth they cannot be said to be to the party's own prejudice nor so conceived by him at the time."

1858, *Campbell, J., in People v. Lambert*, 5 Mich. 349, 366: "Some confusion has been created by not distinguishing between the various kinds of confessions. A deliberate confession in open court is treated as sufficient evidence, always, so far as it goes, if made on the trial of the cause, and perhaps even on the preliminary hearing, provided it is made freely. It is regarded as proof on the same principle as a plea of guilty, because the accused cannot be supposed to act without consideration. But confessions made extrajudicially are often misunderstood and easily perverted. . . . There would be a peculiar difficulty in resting upon confessions and cohabitation alone, arising from the fact that persons forming illicit connections are very rarely bold enough to live openly in the community in such a relation and avow its existence. To confess it would expel them from all decent society; and very few are so infatuated as to forego the advantages of social intercourse and respectability if they can obtain them by the assumption of

not clear). The statutes cited *ante*, note 3, would probably affect these rulings. The rule would be absurd in application to divorce.

² 1869-71, *Barns v. Burns*, 13 Fla. 369, 390, *semble* (cruelty); Ill. Rev. St. 1874, c. 40, § 11 (in divorce proceedings, a marriage in a "foreign state or country" is provable by "acknowledgment of the parties, their cohabitation, and other circumstantial testimony"); 1850, *Trimble v. Trimble*, 2 Ind. 76 (unspecified grounds); 1884, *Cross v. Cross*, 55 Mich. 280, 21 N. W. 309, *semble* (cruelty and abandonment); Oh. Rev. St. 1898, § 5698 (in divorce and alimony cases, habit and repute are "competent testimony"); 1832, *Houpt v. Houpt*, *Wright* 156 (but only under statute, for the marriage to be dissolved; for any other marriage, such evidence is probably to be rejected in discretion); Okl. State. 1898, § 4556 (in divorce and alimony proceedings, cohabitation and reputation "may be received as evidence of the marriage"); § 1566 (marriage in a foreign State, provable in divorce cases "by the acknowledgment of the parties, their cohabitation, or other circumstantial evidence"); 1851, *Wright v. Wright*, 6 Tex. 3, 19 (cruelty);

1839, *Mitchell v. Mitchell*, 11 Vt. 184 (unspecified grounds); 1903, *Summerville v. Summerville*, 31 Wash. 411, 72 Pac. 84; 1868, *Hitchcox v. Hitchcox*, 2 W. Va. 435, 438, *semble* (cruelty). *Contra*: 1854, *Harman v. Harman*, 16 Ill. 85 (divorce for cruelty; but this ruling is probably affected by the statute cited *supra*).

It must of course be understood, looking both at the general nature of this class of rules (*ante*, § 2077) and at the principle of receiving habit and repute as ordinarily sufficient (*ante*, § 2083), that habit and repute are always *admissible*, even where by the present rule eye-witness evidence is required in order that the case may go to the jury (1860, *Com. v. Hurley*, 14 Gray 411, and cases cited *ante*, §§ 268, 1602; *contra*: 1867, *Berry, J., in State v. Johnson*, 12 Minn. 476, 482; but this view is without any support whatever). The rule, in other words, merely declares habit and repute insufficient evidence without eye-witness evidence, precisely in the same way that an accomplice's testimony is by some Courts (*ante*, § 2056) held insufficient without corroboration.

virtue. For civil rights the law holds them to their professions; but in criminal cases the offense must actually exist. No doubt, in these as in all other criminal prosecutions, circumstantial evidence of a conclusive nature may often avail, where direct testimony is inaccessible. But it must be testimony not reasonably capable of any other interpretation. . . . Circumstantial evidence assumes many forms, and cannot always be limited or defined in advance. We do not mean to decide whether or not evidence by an eye-witness of an actual marriage may not in some cases be dispensed with where there is other circumstantial evidence going to establish it conclusively. But it would be very unsafe to permit a conviction upon any proof which is susceptible of two interpretations and upon which any theory can reasonably be based of innocence of the offense charged. We think the first marriage and its legality must be affirmatively proved by evidence beyond the mere confessions and conduct of the prisoner [so far] as shown in the bill of exceptions."

The answer to this argument has been frequently expounded. It is, in brief, that no more consideration should be shown to a defendant in this sort of a case than in any other; that an express confession or admission, at any rate when corroborated (*ante*, § 2070) is sufficient evidence in all other criminal cases; and that the eye-witness rule, when admissions are available, is a serious obstacle to the due punishment of the offense of bigamy:

1825 (?), *President King*, in *Com. v. Murtagh*, 1 Ashm. Pa. 272, 274: "I would yield without hesitation to the reasoning on which [the ruling of this Court in *Forney v. Hallacher*] rests, drawn from the habits, manners, and peculiar condition of the country, which makes so strict a rule as that established in *Morris v. Miller* inapplicable to our peculiar condition. In a country where no public or ecclesiastical agency is requisite to give a marriage validity, where a contract in *verba de presenti* made between the parties capable of contracting matrimony is all that is required to make a good marriage, where we have no uniform and permanent registry of marriages, where the youthful and active part of our population are daily bending their steps to the rich and boundless fields of enterprise in the region of the father of the waters, and where so great a portion of our population are foreigners whose marriages have been celebrated in lands afar remote, the most manifest inconvenience would result if we servilely followed a rule of evidence applicable to a people living in a state of society so artificial as that of modern England, — a rule obviously the offspring of the British marriage acts, and which is not satisfactory even there. . . . The reason for relaxing the rule, if it existed *proprio vigore* in England, would be the great moral necessity which required it from the peculiar character and condition of our community; and necessity, moral or absolute, has been said to be sufficient ground for dispensing with the usual rules of evidence."

1884, *Mellen, C. J.*, in *Ham's Case*, 11 Mo. 391, 394: "The question which at once presents itself on this occasion is, Why should not the defendant's deliberate and explicit confession of his marriage, in such a prosecution, be as competent evidence to prove such marriage as a similar confession is to prove the crime of adultery charged? If either fact exists, it must certainly be within his own knowledge; and, as a general proposition it is certainly true that a deliberate and voluntary confession, understandingly made, is the best evidence; for he who makes it speaks from his actual knowledge of the fact; no one has any interest in its truth or interest in disputing it. . . . Viewing the question under consideration independently of decided cases, there would seem but one reason why the deliberate confession of his marriage, made by defendant in a prosecution against him for bigamy or adultery, should not be received as competent and satisfactory evidence of such marriage, — namely, that the person solemnizing the marriage had no legal authority to do it, and yet the want of authority might not have been known by the person officiating or by the defendant himself when he made the confession. . . . In no other cases,

however, do we perceive that any unfavorable consequences could ensue which would not follow upon a conviction upon undisputed proof of a legal marriage. . . . [Yet] the plea of guilty is a confession of the crime, which includes a confession of the marriage, that being essential to the existence of the crime; the Court receives such a plea and passes sentence on the offender, though even this solemn confession in open court may be made under a mistaken belief that the marriage was solemnized by a person duly authorized, though the fact was otherwise. . . . The question then is, whether a deliberate confession of marriage is not as convincing evidence of the fact as the testimony of a witness present; for in the case of confession [as well as of eye-witnesses] the question of identity can never arise. . . . When we take all the foregoing circumstances into consideration, together with the known fact that marriages are seldom recorded as the law requires, and the difficulty of ascertaining who were present at the marriage, especially among the lower classes and after the lapse of a few years, we apprehend that the interests of public justice would be advanced by a relaxation of the rules of evidence touching the point before us and by a more liberal principle applied in the investigation of facts, so that the laws of the land may be more surely enforced against unprincipled offenders and the public morals be more faithfully and effectually guarded."

1876, *Ceser, J.*, in *Com. v. Jackson*, 11 Bush 679, 685 : "[In actions for criminal conversation,] the plaintiff knows when, where, and by whom he was married, and at least some of the persons who were witnesses of the fact, and generally has it in his power to offer direct and positive proof. But the case is often quite otherwise with the government in prosecutions for bigamy. The prosecuting officer must often be wholly ignorant of the time and place of the prisoner's first marriage, of the names and residence of those present at its consummation, and the avenues of information will generally be closed to him, especially when the first marriage took place (as is generally the case with bigamists) in some other State or country. . . . It is difficult to perceive any reason for discriminating between admissions to prove a marriage and [admissions to prove] other facts essential to constitute the legal guilt of the accused. There can be no more danger of doing injustice in receiving such evidence in the class of cases under consideration than in any other. Where the declarations of the prisoner and the fact that he has recognized and cohabited with the woman alleged to be his wife are alone relied upon, the jury should still be told that this is only evidence to prove an actual marriage, and that it is for them to decide whether the facts proven are sufficient to warrant them in finding that the prisoner was in fact married to the alleged wife, and unless they so believe they should acquit, although they may believe he recognized and cohabited with her as his wife. This will place the declarations of one indicted for a crime in which proof of actual marriage is necessary to make out his guilt upon the same footing with those charged with other crimes, and will not give comparative immunity to this detestable crime by obstructing the path of the prosecutor with a rule of evidence which it is believed would render conviction impossible in a large majority of such cases where the moral evidence of guilt is conclusive, and where a conviction could be had by simply applying to that class of cases the same rules of evidence applied to other crimes subjecting the offender to like punishment."¹

These opposing reasons have generally been regarded as preponderating. (a) In actions for *criminal conversation*, the defendant's admissions seem to have been held sufficient in England from the outset,² in spite of the ambiguous

¹ The following are other good opinions: 1822, *Gibson, J.*, in *Forney v. Hallacher*, 8 S. & R. 158; 1827, *Johnson, J.*, in *State v. Hilton*, 3 Rich. L. 434; 1852, *Nisbet, J.*, in *Cook v. State*, 11 Ga. 53, 59, 68.

² 1789, *Rigg v. Cargenven*, 2 Wils. 395, 399 (bribery at elections; answering an argument of the counsel in which *Morris v. Miller* was cited, the Court of Common Bench, Wilmut, C. J.,

said: "As to the case mentioned of criminal conversation, to be sure a defendant's saying, in jest or in loose rambling talk, that he had laid with the plaintiff's wife, would not be sufficient alone to convict him in that action; but if it were proved that the defendant had seriously or solemnly recognised that he knew the woman he had laid with was the plaintiff's wife, we think it would be evidence proper to be left to a jury

language of Lord Mansfield in *Morris v. Miller* (*ante*, § 2084); in the United States, the same view has been shown some favor.² (b) In prosecutions for *bigamy*, Lord Mansfield's rule was never accepted in England as requiring eye-witness proof where the defendant had deliberately admitted the marriage;⁴ and the same view has generally been taken in the United States.⁵ Nevertheless, in a few jurisdictions, the contrary result, based chiefly on an early New York ruling, has been accepted.⁶ (c) In a prosecution for *adultery*, the

without proving the [actual] marriage"); yet compare the contrary suggestion by some of the judges in *R. v. Truman*, cited *infra*, note 4.

² 1823, *Forney v. Hallacher*, 8 S. & R. 168 (crim. con.; eye-witness not necessary as against confessions; but, *semble*, reputation not sufficient; *Morris v. Miller* on the former point repudiated; Mr. J. Gibson's vigorous opinion makes this the leading case on this part of the subject); 1825 (7), *Com. v. Murtagh*, 1 Ashm. Pa. 473 (declaring the ruling in *Forney v. Hallacher* to be the law); 1855, *Thorndell v. Morrison*, 25 Pa. 328, 328 (same). *Contra*: 1818, *Kibby v. Rucker*, 1 A. K. Marsh. 391, *semble*; 1876, *Com. v. Jackson*, 11 Bush 679, 683, *semble*; 1834, *Ham's Case*, 11 Me. 391, 397.

³ 1805, *R. v. Truman*, East Pl. Cr., 1, 470 (before cohabitation, a document was proved which, being a proceeding in a Scotch Court to punish the defendant for secretly contracting the first marriage, contained an indorsement in the defendant's hand acknowledging that marriage; this was held sufficient, all the Judges being present except Perryn, B., and Buller, J.; two of the judges thought that the acknowledgments being in writing upon the Court proceedings distinguished the case; but "some thought that the acknowledgment alone would have been sufficient," distinguishing *Morris v. Miller* because "the acknowledgment of the defendant in such an action of the plaintiff's marriage might be of a fact not within his knowledge; as [on the contrary] it must be [of his own knowledge] if a defendant in bigamy admitted his own marriage"); 1859, *R. v. Upton*, 1 C. & K. 165 note, *Erskine, J.*; 1840, *Woods v. Woods*, 2 Curt. Eccl. 516, 521, *semble* (in criminal cases acknowledgment suffices); 1843, *R. v. Newton*, 2 Moo. & Rob. 503, *Wightman and Cresswell, JJ.*; 1843, *R. v. Simmonsto*, 1 C. & K. 164 (same case as the preceding, under a different name); *Con.*: 1860, *R. v. Creamer*, 10 Low. Can. 404, 408.

⁴ Add to the following rulings the statutes cited *ante*, § 2085: *ILL.*: 1854, *Harman v. Harman*, 16 Ill. 83, 83 (common law rule not decided); 1886, *Tucker v. People*, 117 Id. 88, 92, 7 N. E. 51, *semble*; 1837, *Tucker v. People*, 122 Id. 553, 592, 13 N. E. 300 (under the statute *ante*, § 2085; but "whether the marriage . . . might be established solely by such evidence, it will not be necessary here to determine"); 1895, *Hiler v. People*, 156 Id. 511, 520, 41 N. E. 181 (evidence including admissions, held insufficient, but no express statement is made as to the sufficiency of admissions; opinion loose; *Tucker v. People* not cited); 1898, *Low-*

ery v. People, 176 Id. 463, 50 N. E. 165 (oral admissions may suffice, on a charge of bigamy); *Ind.*: 1861, *State v. Seale*, 16 Ind. 352; 1874, *Squire v. State*, 46 Id. 459, 460; *Ky.*: 1876, *Com. v. Jackson*, 11 Bush 679; *Mo.*: 1897, *State v. Jenkins*, 139 Mo. 535, 41 S. W. 229; *N. C.*: 1892, *State v. Wyld*, 110 N. C. 500, 15 S. E. 5; 1897, *State v. Melton*, 120 Id. 591, 26 S. E. 933; *Ok.*: 1847, *Wolverton v. State*, 16 Oh. 173, 176, *semble*; 1867, *Stanglein v. State*, 17 Oh. St. 453, 461, *semble*; *Pu.*: 1825 (2), *Com. v. Murtagh*, 1 Ashm. 372; *R. I.*: 1897, *State v. Gallagher*, 20 R. I. 266, 38 Atl. 655; *S. C.*: 1827, *State v. Britton*, 4 McC. 256 (admissions, with cohabitation, held sufficient; probably the same case as the next); 1827, *State v. Hilton*, 3 Rich. L. 434 (same); *Tex.*: 1833, *Dumas v. State*, 14 Tex. App. 464, 472 (reputation, with cohabitation and admission, "is competent evidence to establish a *prima facie* case sufficient to sustain a verdict"); 1899, *Waldrop v. State*, — Tex. Cr. —, 53 S. W. 130, *semble*; *U. S.*: 1880, *Miles v. U. S.*, 13 U. S. 304, 311; *Utah*: 1879, *U. S. v. Miles*, 2 Utah 19, 25; 1835, *U. S. v. Simpson*, 4 Id. 237, 230, 7 Pac. 257; 1887, *U. S. v. Bassett*, 5 Id. 131, 137, 13 Pac. 237; 1888, *U. S. v. Harris*, ib. 621, 19 Pac. 197, *semble*; 1890, *U. S. v. Schow*, 6 Id. 381, 24 Pac. 30; *Va.*: 1817, *Warner v. Com.*, 2 Va. Cas. 95, 98; 1867, *Oneale v. Com.*, 17 Gratt. 582, 587; 1871, *Bird v. Com.*, 21 Id. 800, 807. Add to these the rulings to the same effect in note 7, *infra*, concerning adultery; such Courts would perhaps make a similar ruling in bigamy.

⁵ *Mich.*: 1858, *People v. Lambert*, 5 Mich. 249; 1896, *People v. Isham*, 109 Id. 72, 67 N. W. 819; *N. Y.*: 1810, *People v. Humphrey*, 7 John. 314 (going merely upon the authority of *Morris v. Miller* and *Birt v. Barlow*); 1850, *Clayton v. Wardell*, 4 N. Y. 230, 234 (*People v. Humphrey* disapproved; "this rule is far from being well established"); 1853, *Gahagan v. People*, 1 Park. Cr. 378, 385 (following *People v. Humphrey*); 1862, *Hayes v. People*, 25 N. Y. 390, 393, 396 ("To convict of bigamy, a marriage in fact must be proved"); *U. S.*: 1851, *Gaines v. Relf*, 12 How. 472, 534 (mere confession of a husband, not a privy in interest, that he was formerly married, held not sufficient to "overthrow his marriage"; but here the declarant was assumed to be living, and was not a party or privy). Add to these the Courts ruling the same way for adultery, *infra*, note 8; such Courts would apply the same rule for bigamy.

The Alabama rulings leave the law perhaps uncertain: 1842, *Ford v. Ford*, 4 Ala. 142, 144

eye-witness rule should not apply;⁷ yet in a few jurisdictions the requirement is made.⁸ (d) To criminal cases in general there is of course no ground for extending the rule.⁹ (e) In suits for divorce, founded on adultery, the rule has equally no place;¹⁰ as also in suits for divorce founded upon any other cause. (f) In civil cases in general, just as habit and repute may suffice (*ante*, § 2083), so also the opponent's admissions of the marriage are unquestionably sufficient, so far as any rule of law is concerned.¹¹

In any case, no matter what the rule as to eye-witness proof, the admission or confession is receivable. The eye-witness rule merely declares it insufficient of itself to support a verdict.¹² What constitutes an admission or confession has

(dower; said *obiter* that in bigamy and crim. con. the register or an eye-witness is necessary); 1847, *Morgan v. State*, 11 id. 289 (incestuous adultery; admission of relationship, uncorroborated, insufficient); 1848, *Cameron v. State*, 14 id. 546 (living in adultery; defendant's oral admission of marriage, sufficient; *Morris v. Miller* repudiated); 1853, *Martin v. Martin*, 22 id. 86, 102 (dower; register or eye-witness not required); 1857, *Langtry v. State*, 30 id. 536 (bigamy; cohabitation and a written admission offered; neither register nor eye-witness necessary); 1870, *Williams v. State*, 44 id. 24 (bigamy; point not decided); 1875, *Brown v. State*, 52 id. 338 (bigamy; cohabitation alone, not sufficient); 1875, *Williams v. State*, 54 id. 131 (bigamy; repeated oral admissions of a foreign marriage, sufficient); 1876, *Buchanan v. State*, 55 id. 164 (living in adultery; admissions of the marriage held "competent," but repute held "not legal proof"); 1877, *Brewer v. State*, 59 id. 101 (bigamy; sufficiency of admissions, not decided); 1884, *Parker v. State*, 77 id. 47 (bigamy; admissions sufficient).

GA.: 1852, *Cook v. State*, 11 Ga. 53, 59 (incestuous adultery); *Me.*: 1830, *Cayford's Case*, 7 Greenl. 57 (but not deciding that a confession of a domestic marriage, without any corroboration, would suffice); 1834, *Ham's Case*, 11 Me. 391, 396 (the above doubt settled; the principle being equally applicable to a domestic marriage; quoted *supra*); 1841, *State v. Hodgskins*, 19 id. 155, 158; 1858, *State v. Libby*, 44 id. 469, 478; *Mass.*: 1876, *Com. v. Holt*, 121 Mass. 61, 63; *Mo.*: 1857, *State v. McDonald*, 25 Mo. 176, *semble* (but the distinction between sufficiency and admissibility is not noticed); 1883, *State v. Gouge*, 79 id. 600, 601, *semble*; 1890, *State v. Cooper*, 103 id. 266, 271, 15 S. W. 327; *R. I.*: 1867, *State v. Medbury*, 8 R. I. 543. Add also the statutes cited *ante*, § 2085.

Conn.: 1827, *State v. Roswell*, 6 Conn. 446 (cited *ante*, § 2085, note 4). *Mass.*: 1799, *Com. v. Moffat*, 2 Dane's Abr. 296 ("In this case the Court decided, on agreement, that no written or parol proof that he confessed he was married in England could be good. . . . This decision was on the authority of *Morris v. Miller* and other cases cited"); *Miss.*: 1860, *State v. Armstrong*, 4 Minn. 335, 344; 1867, *State v. Johnson*, 12 id. 476, 481. Yet for the last two jurisdictions compare the statutes cited *ante*, § 2085. For Alabama rulings, see note 6, *supra*.

* 1765, *R. v. Norwood*, East Pl. Cr., I, 337 (wife's murder of a husband as petit treason; on objection that there must be proof "of actual marriage, and that such proof could only be by producing a copy of the register of such marriage or by some person who was present at the time," the evidence in the case being of cohabitation and admissions and the defendant's brother's testimony, *Manfield, L. C. J.*, with *Parker, C. B.*, *Smythe, Bathurst, Perrot*, and *Aston, JJ.*, "were of opinion that the marriage was sufficiently proved"); 1896, *State v. Misenheimer*, 123 N. C. 758, 31 S. E. 852 (criminal slander; admissions of a divorce, allowed); 1853, *West v. State*, 1 Wis. 209, 218 (seduction by a married man).

¹⁰ *Accord*: the statutes cited *supra*, § 2085, frequently declare this, and the rulings cited in the foregoing notes to the present section will usually indicate the same result. *Contra*: 1855, *Simons v. Simons*, 13 Tex. 463, 473 (in divorce for adultery, under the statutory rule of § 2067, *ante*). *Undecided*: 1831, *Fuller v. Fuller*, 17 Cal. 605, 611.

¹¹ 1774, *Mace v. Cadell*, Cowp. 232 (trover by a bankrupt's creditors against a woman claiming the goods as *feme sole*; her admission of marriage to the bankrupt, held sufficient); 1866, *Laughlin v. Eaton*, 54 Mo. 156, 157 (malicious prosecution on charge of adultery); 1889, *Applegate v. Applegate*, 45 N. J. Eq. 116, 119, 17 Atl. 293, *semble*; (bill for support); 1859, *Hill v. Hill's Adm'r*, 32 Pa. 511, 513 (dower; intestate's admission of marriage to claimant, received); 1860, *Kenyon v. Ashbridge*, 35 id. 157 (title depending on legitimacy; father's admissions of marriage, receivable); 1877, *Greenawalt v. McEnelley*, 35 id. 253, 355 (title depending on legitimacy; father's admissions, cohabitation, and repute, sufficient; in bigamy and crim. con., admissions said to be "sufficient evidence"); 1810, *Purcell v. Purcell*, 4 Hen. & M. 507, 512 (alimony). *Contra*: 1813, *Wilson v. Mitchell*, 3 Camp. 393 (assault; plea, coverture; plaintiff's admissions held insufficient, per Lord Ellenborough; this ruling is anomalous and inexplicable). For the Alabama rulings, see note 6, *supra*.

For a comparison of other rules as to sufficiency of admissions, see *ante*, § 1055.

¹² 1853, *Parker, J.*, in *Gahagan v. People*, 1 Park. Cr. 373, 386. *Contra*: 1827, *State v. Roswell*, 6 Conn. 446 (*Peters and Lanman, JJ.*,

here received little attention in judicial definition.¹³ It may be supposed that in general the sense of the word, as used for the confessions of accused persons (*ante*, § 821), would be followed, i. e. any express statement in words declaring that a marriage took place or that the relation of husband and wife exists. There can be within this broad notion no further limitation by rule of law. This or that admission may by the jury be held not persuasive under the circumstances, but the rule of law will not attempt to discriminate further.¹⁴

§ 2037. *Same*: (6) *Other Rules affecting Proof of Marriage, distinguished*. (a) In dealing with the precedents on the foregoing topic, particularly in criminal prosecutions for bigamy and adultery, it is to be understood that the case may also be affected by a distinct rule (*ante*, § 2070) applicable (in the jurisdictions recognizing it) in all *criminal cases* alike, namely, the rule that an *uncorroborated confession of the accused* is insufficient. Under that rule, the confession is of the fact of marriage, which is for bigamy and adultery only one element of the charge; while the confession to which the corroboration-rule applies is a confession of the crime as a whole. (b) In a suit for divorce, the *uncorroborated admission* of the respondent as to the cause for the divorce is generally held insufficient, by a different rule (*ante*, § 2067). That rule, however, properly has no reference to the proof of the marriage upon which the petitioner's claim rests, but only to the proof of the cause for divorce.¹

§ 2088. *Same*: (7) *Celebrant's Certificate or Register not preferred to Oral Eye-Witness*. Some heresies die a hard death. With a phoenix-like persistence they arise again and again, after repeated judicial pronouncement which ought to have been final, to plague each new generation and to call for

disa. on this point); 1867, *State v. Johnson*, 13 Minn. 476, 482 (cohabitation, repute, conduct, and admissions, not admissible at common law); McMillan, J., *disa.*). There is no ground whatever for the view taken in these two rulings; it proceeds merely upon an early looseness in the use of the word "competent" in the case of "sufficient." The same fallacy has already been noted (*ante*, § 2069, par. 4, and § 2085, note 9) as to evidence of confessions and of habit and repute.

¹³ 1869, *Vincent's Appeal*, 60 Pa. 228, 241 (indorsement on a false certificate that it was true, held sufficient).

¹⁴ In particular, any such limitation as that proposed in the following passage is unsound: 1853, *Smith, J.*, in *West v. State*, 1 Wis. 209, 226, 228, "Declarations of the defendant, made idly, or with a view to shield himself from prosecution or public censure while living in a state of concubinage, . . . so also, declarations made to parry social criticism or to avoid legal inquisition, are of little or no weight. But marriage in fact is the point to be established by proof; a confession, therefore, of the fact of marriage, — not of the relation of husband and wife; a distinct unequivocal confession, seriously and solemnly made, of the fact of the

marriage rite having been performed . . . should be held sufficient."

² Numerous other rules affect the proof of marriage. Whether the wife may testify to the fact of marriage, against one charged with bigamy, is a question of privileged testimony (*post*, § 2231). Whether the parent may be *loardies the issue*, by testifying to non-access to non-marriage, has been already dealt with (*ante*, § 2063). Whether the hearsay statement of a deceased member of the family, as to the fact of marriage, may be admitted is a question of the Pedigree exception to the Hearsay rule (*ante*, §§ 1480-1503). In the same way, the admissibility of affidavits (*ante*, § 1710), of registers of marriage (*ante*, § 1642), and of certificates of marriage (*ante*, § 1645), has been already dealt with in considering other Hearsay exceptions. The question whether marriage will be presumed from cohabitation after a legal obstacle has been removed is a question of the law of presumptions, and, so far as it has any place in the law of evidence, is noticed *post*, § 2506; expressions about eye-witness proof in such case are really expressions as to the effect of a presumption. So also the question whether the authority of the celebrant must be expressly shown (*post*, § 2505).

fresh incinerations. One of these is the supposition that, as between possible sorts of eye-witness evidence, the *celebrant's certificate* or *register-entry* is preferred to the *oral testimony* of celebrant, clerk, or bystander. This, if it were the law, would be a genuine rule of preference as between different kinds of testimony (*ante*, §§ 1286, 1335). But there is no such rule. The marriage-certificate was at common law probably not even admissible (*ante*, § 1645); and it has always been recognized that both certificate and register were of inferior value, inasmuch as further evidence of the identity of the parties named may be required:

1834, *Mellen, C. J.*, in *Ham's Case*, 11 Mo. 391, 396: "It is an admitted principle, and constantly adopted in practice, that the testimony of a witness who was present at the marriage ceremony is legal evidence, and in fact it is better evidence than the record; because the record does not establish the fact of identity, but a witness on the stand proves not only the marriage solemnized but that the defendant on trial was one of the parties."

That the certificate or register, or a copy, should have been thought to be preferred to oral testimony could hardly be due to Lord Mansfield's language in the original cases.¹ Nor did the later English rulings give the notion any countenance.² Yet not only have the Courts been constantly called upon to repeat the primal ruling, but Legislatures have frequently deemed it necessary to dispel some apparently persistent misconception by declaring the same thing in statutes. These statutes usually deal only with the issue of bigamy, because upon that issue the eye-witness rule was chiefly invoked.³ The judicial utterances have declared that no such rule exists for *bigamy*,⁴ or for *adultery*,⁵ or

¹ 1765, *R. v. Norwood*, East Pl. Cr., I, 237 (quoted *ante*, § 2086, note 9); 1767, *Morris v. Miller*, 4 Burr. 2057 (quoted *ante*, § 2084); 1779, *Birt v. Barlow*, 1 Doug. 171 (crim. con.; the register-copy being offered, the trial Court ruled "that the Marriage Act had directed the witnesses to subscribe their names to the register in order to facilitate the investigation of the legal evidence of marriages; and that till these five witnesses and the minister were accounted for, as by shewing them all dead or the like, I could not admit less proof than that of some person present to demonstrate the identity of the parties"; Lord Mansfield, C. J.: "[The registers] are meant as well to prevent false entries as to guard against illegal marriages without license or the publication of banns; . . . but it would be very prejudicial if the act were so construed as to render the proof of marriages more difficult than formerly; . . . registers are in the nature of records, and need not be produced, nor proved by subscribing witnesses; . . . as to the proof of identity, whatever is sufficient to satisfy a jury is good evidence").

² 1840, *Woods v. Woods*, 2 Curt. Eccl. 516, 522 (incent); Dr. Lushington: "The evidence of any one person present at the marriage is sufficient, without calling for the register at all"; quoted *ante*, § 1335; 1762, *St. Devereux v. Much Dew Church*, 1 W. Bl. 367 (pauper set-

tlement; marriage provable by bystander, without celebrant or lawful register); 1839, *State v. Schweitzer*, 57 Conn. 533, 537, 18 Atl. 787 (failure to support wife).

³ These are quoted *ante*, § 2085.

⁴ 1840, *Jackson v. People*, 3 Ill. 231 (statute applied); 1865, *State v. Williams*, 20 Ia. 98; 1888, *People v. Perriman*, 72 Mich. 184, 187, 40 N. W. 425 (marriage certificate not preferred; eye-witnesses said to supply "more direct and reliable testimony" than documents); 1839, *State v. Kean*, 10 N. H. 347, 349; 1857, *State v. Marvin*, 35 id. 22; 1845, *State v. Robbins*, 6 Ired. 23, 26; 1817, *Warner v. Com.*, 2 Va. Cas. 95, 108 (marriage certificate, required by law in Pennsylvania, not preferred to testimony of eye-witness on the stand); 1867, *Oneale v. Com.*, 17 Gratt. 582, 587; 1871, *Bird v. Com.*, 27 id. 800, 806.

⁵ *Ia.*: 1867, *State v. Wilson*, 22 Ia. 364; 1874, *State v. Hazen*, 39 id. 648; *Mass.*: 1813, *Com. v. Norcross*, 9 Mass. 492; 1818, *Com. v. Littlejohn*, 15 id. 163; 1892, *Com. v. Dill*, 156 id. 226, 228, 30 N. E. 1016; 1896, *Com. v. Hayden*, 163 id. 453, 456, 40 N. E. 846 (under statute); *N. H.*: 1843, *State v. Winkley*, 14 N. H. 480, 495; 1857, *State v. Marvin*, 35 id. 22, 27 (town register, not preferred to other testimony; here, of the celebrant); 1874, *State v. Clark*, 54 id. 456, 460; *Vt.*: 1834, *State v. Way*, 6 Vt. 311, *semble*; *Wash.*: *State v. Mc-*

for criminal cases in general,⁶ or for criminal conversation,⁷ or for divorce,⁸ or for civil cases in general.⁹

§ 2089. *Owner's Testimony to Non-Consent, in a Charge of Larceny.* At the suggestion of two eminent American writers and judges, based upon a single English ruling afterwards repudiated, a rule came near to being built up that, on a charge of larceny, the evidence that the taking was done against the owner's consent must include the owner's testimony as an indispensable element. That suggestion was placed on the following grounds:

1856, Messrs. *East Cowen and Nicholas Hill*, Note to the Fourth Edition of Phillips on Evidence, No. 183, p. 635: "Where non-consent is an essential ingredient in the offense, as it is here, direct proof alone, from the person whose non-consent is necessary, can satisfy the rule. You are put to prove a negative, and the very person who can swear directly to the necessary negative must if possible always be produced.¹ Other and inferior proof cannot be resorted to till it be impossible to procure this best evidence. . . . In such cases mere presumptive, *prima facie*, or circumstantial evidence, is secondary in degree and cannot be used till all the sources of direct evidence are exhausted. Indeed the rule is general. You shall not be permitted to grope in the twilight of circumstantial evidence when the broad daylight of direct and positive proof is attainable."

This proposed rule — which might perhaps be more correctly classed as a rule of preference (*ante*, § 1335) — had but a slight foundation. Premised by certain unimportant English rulings as to the burden of proof in showing a negative,² there came a single tentative ruling requiring, in proof of non-consent, the testimony of the person whose non-consent was affirmed.³ This was afterwards wholly repudiated in England.⁴ Nevertheless, the approval of the eminent writers above quoted gave the question a vogue in this country, and

Gilvery, 20 Wash. 240, 55 Pac. 115 (incest); *Wis.*: 1839, *Mills v. U. S.*, 1 Pinney, 73, 75, *semble*; 1897, *State v. H.*, 69 Wis. 182, 184, 33 N. W. 57.

⁶ 1839, *State v. Schweitzer*, 57 Conn. 532, 537, 13 Atl. 787 (neglect to support a wife); 1884, *Firnels v. State*, 61 Wis. 140, 142, 20 N. W. 663 (desertion of children); 1899, *Jennens v. State*, — *id.* —, 30 N. W. 759 (failure to support).

⁷ 1836, *Nixon v. Brown*, 4 Blackf. 157, *semble*; 1867, *Kilburn v. Mullen*, 22 Ia. 498, 503; 1895, *Jacobson v. Siddal*, 12 Or. 280, 7 Pac. 108.

⁸ 1814, *Ellis v. Ellis*, 11 Mass. 92 (divorce for adultery; certificate of marriage not sufficient; proof must be "on oath").

⁹ 1842, *Arthur v. Broadnax*, 3 Ala. 557; 1903, *Casley v. Mitchell*, — Ia. —, 96 N. W. 725 (dower); 1883, *Baughman v. Baughman*, 20 Kan. 293 (said generally of all cases); 1871, *Shotwell v. Harrison*, 22 Mich. 410, 415; 1902, *Rhode Island H. T. Co. v. Thorndike*, 24 R. I. 105, 52 Atl. 873; 1848, *Patterson v. Gainca*, 6 How. 550, 589; 1893, *McQuade v. Hatch*, 65 Vt. 482, 483, 27 Atl. 136 (loss of support by liquor furnished).

Whether the certificate or register needs to be supplemented by evidence of the identity of the persons named and the parties in the case

is a question involving the presumption of identity of person from identity of name, treated *post*, § 2529.

¹ Citing *R. v. Rogers*, *infra*, note 3, and *Williams v. East India Co.*, cited *ante*, § 1339.

² 1801, *R. v. Stone*, 1 East 639 (shooting game, not being qualified); 1802, *Frontine v. Frost*, 3 B. & P. 302 (quitting a ship without leave).

³ 1811, *R. v. Rogers*, 2 Camp. 654 (indictment for coursing a deer without the consent of the owner; the question being whether "the onus lay upon the prisoner to prove that he had the consent," Lord Ellenborough, C. J., held that the owner must be called to negative consent).

⁴ 1826, *R. v. Hazy*, 2 C. & P. 458 (cutting timber without the owner's consent; the steward testified to the non-consent of the deceased owner; Bayley, J., left it to the jury to say whether there was "reasonable evidence" to show this); 1826, *R. v. Allen*, 1 Moo. Cr. C. 154 (killing deer, etc., without the owner's consent Gaselee, J., on the citation of *R. v. Rogers*, consulted the Judges who met and held that the owner need not be called); 1856, *R. v. Wood Dears. & B.* 1 (being unlawfully on land to take game; on objection that the "direct evidence of tenant or landlord must be brought to prove lack of permission, the Court for Crown Cases Reserved overruled the objection).

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left it a living one long after the suggestion had been negatived in England. In at least three jurisdictions the suggestion seems to have become the law, and perhaps in one or two others.⁵ In the remainder, no notice of the suggestion has in general been taken.⁶ So far as the policy of it is concerned, there is nothing to be said in its favor. The accused is amply protected by the rule of reasonable doubt (*post*, § 2497); and the proposed rule merely adds an unnecessary complication and an opportunity for contriving a verbal trap for the judge in his instructions to the jury.

§ 2090. *Miscellaneous Proposals as to requiring Testimonial Evidence for Wills, Contracts, etc.* (1) It has been at least once decided that the proof of the contents of a lost will must include the testimony of an eye-witness, i. e. one who has read it;¹ but this ruling seems to stand alone.

⁵ *Id.*: 1869, *State v. Osborne*, 28 Ia. 9 (rule accepted, on the authority of the note to Phillips; testimony of the owner's son in possession, the owner being ill, held here sufficient); *Nebr.*: 1891, *Bubster v. State*, 38 Nebr. 663, 50 N. W. 933 (larceny of a buggy; the owner required to be called, on the authority of the note to Phillips); 1896, *Perry v. State*, 44 id. 414, 63 N. W. 26 (larceny of a buggy; same ruling); 1897, *Rena v. State*, 52 id. 375, 72 N. W. 474 (if the owner testifies, he must deny consent); 1901, *Trimble v. State*, 61 id. 604, 85 N. W. 844 (owner's testimony here held satisfactory); 1903, *Van Syoc v. State*, — id. —, 94 N. W. 206 (circumstances may suffice); *Tenn.*: 1833, *Lowrance v. State*, 4 Yerg. 145 (owner's daughter's testimony as to ownership of money, sufficient); *Tex.*: Here the rule was first repudiated, then adopted, and then intermittently applied: 1855, *Henderson v. State*, 14 Tex. 503, 513 (death of a person whose name was forged need not be proved by "direct evidence"); 1876, *Wilson v. State*, 46 id. 76, 78 (charge that want of consent could be established by the owner or possessor or "by facts and circumstances . . . of such a nature as to exclude absolutely every reasonable presumption" of consent, approved; owner need not be called); 1876, *McMahon v. State*, 1 Tex. App. 102, 105 (want of consent may be established "by circumstantial as well as direct testimony; this we regard as a settled proposition . . . acted on by our own Supreme Court without variation from the decision in *Henderson v. State* down to the present time"; defendant had here argued that the owner's testimony was "the best evidence"); then a change of ruling took place: 1876, *Erskine v. State*, 1 Tex. App. 405 (possessor required, as the "best evidence," to be called, on authority of the note in Phillips; none of the preceding cases alluded to, and no other authority cited in support); 1879, *Jackson v. State*, 7 Tex. App. 363 (person having actual possession, required to be called); 1880, *Rains v. State*, 1h. 588 (owner not required to be called); 1882, *Wilson v. State*, 12 id. 481, 497 (where there are both owner and possessor and want of consent of both is essential, each must be called, if available, before resorting to circumstantial evidence);

1893, *Rowling v. State*, 13 id. 333 (same); 1893, *Williamson v. State*, 1h. 514, 519 (same); 1893, *Dresch v. State*, 14 id. 175, 178 (second Wilson case approved); 1901, *Wisdom v. State*, 42 Tex. Cr. 576, 61 S. W. 926 (burglary; owner's lack of consent may be evidenced circumstantially, but not when direct testimony is available); 1902, *Spars v. State*, — id. —, 69 S. W. 533 ("It appears to be the rule now that the want of consent of the owner to the taking must be proved by positive testimony, where this is attainable, and circumstantial evidence, no matter how strong, will not suffice"); *Wis.*: 1853, *State v. Morey*, 2 Wis. 495 (larceny of meat; testimony of owner, if known, must be offered; on the authority of the note in Phillips); 1877, *State v. Moon*, 41 id. 684 (larceny of mare; same ruling; testimony other than the owner's can be resorted to only as secondary); 1901, *Fetkenhauer v. State*, 112 id. 491, 85 N. W. 294 (failure to call the owner does not of itself require a verdict to be directed for defendant).

⁶ Except in the following rulings repudiating it: 1822, *Com. v. James*, 1 Pick. 375, 381 (larceny of barilla-soda, by a miller mixing with it other substances and retaining part of the original; held, that the truckman carrying the goods to and from the mill need not be produced to negative adulteration during transport); 1847, *Com. v. Kenney*, 12 Metc. 235, 236 (robbery); 1889, *People v. Jacks*, 76 Mich. 218, 221, 42 N. W. 1134; 1901, *Filson v. Terr.*, 11 Okl. 351, 67 Pac. 473; 1901, *State v. Wong Quong*, 27 Wash. 93, 67 Pac. 355. The following ruling seems to be of the present sort: 1809, *White v. Fox*, 369, 370 (prosecuting attorney, not preferred in proving consent of prosecutor).

¹ 1847, *Chisholm v. Ben*, 7 B. Monr. 408, 412 (contents and execution not sufficiently proved; there must be some testimony by persons who have seen the will; testator's declarations alone not enough). Distinguish the rules as to the qualifications of a witness to the contents (*ante*, § 1278), the preferences for a copy (*ante*, § 1267), and the completeness of the terms as proved (*post*, § 2106); there is no rule requiring two witnesses to contents (*ante*, § 2052).

(2) There is for some kinds of documents a rule that certain sorts of testimonial evidence shall be preferred to others in *proving a copy*; but these are Preferential rules (*ante*, § 1267).

(3) The question of substantive law whether a *promise to marry* suffices if made by implication in conduct, and not expressly in words (a question generally answered in the affirmative), has sometimes been discussed as if it involved the question whether testimonial evidence was necessary and circumstantial evidence insufficient;² but this is merely a case of the misuse of evidential terms.

§ 2091. *Statute of Frauds; Written Admission of the Party to be charged.* Under this head — i. e. as a quantitative rule — falls the requirement of the Fourth and the Seventeenth Sections of the Statute of Frauds and Perjuries that no action shall be maintainable upon certain kinds of contracts unless there be "some note or memorandum in writing of the said bargain" "signed by the parties to be charged." The effect of these provisions is not to require the contract to be constituted in and by the writing, but to declare that, on a trial for its enforcement, the evidence shall be insufficient, no matter what it may amount to, unless it includes "the admission in writing of the party to be charged."¹ The application of the rules of the Statute is impossible and unnecessary to be followed in this work. But it may be observed that its evidential policy is sound:

1893, *Best*, C. J., in *Strother v. Barr*, 5 Bing. 136, 151: "I seldom pass a day in a Nisi Prius Court without wishing that there had been some written statement evidentiary of the matters in dispute. More actions have arisen, perhaps, from want of attention and observation at the time of a transaction, from the imperfection of human memory, and from witnesses being too ignorant, too much under the influence of prejudice, to give a true account of it, than from any other cause. There is often a great difficulty in getting at the truth by means of parol testimony."²

The requirements of the remaining Sections of the Statute are distinct in theory; they make the writing a constitutive formality of the act; the transaction shall be "utterly void" if not "in writing." In this aspect their place in the law is elsewhere briefly examined (*post*, §§ 2454–2455).

¹ *E. g.* in *Honeyman v. Campbell*, 3 Dow & Cl. 252.

² 1895, *Browne*, Statute of Frauds, 5th ed., § 354 a; and the further exposition in this treatise, *post*, § 2454.

³ The radical difference of proportion, in the part played by this rule, between the Continental law and our own, is emphasized in Mr. Bodington's essay on *The French Law of Evidence* (1904).

TITLE V (continued): QUANTITATIVE RULES.

SUB-TITLE III: VERBAL COMPLETENESS.

CHAPTER LXXI.

§ 2094. General Principle of Completeness: Verbal Utterances must be taken as a Whole, not by Fragments or by Summary.

§ 2095. Two Branches of the Rule; Compulsory and Optional Completeness; Precision and Entirety.

I. MUST THE WHOLE OF THE UTTERANCE BE FIRST OFFERED BY THE PROPONENT?

A. Oral Utterances.

§ 2097. (a) Verbal Precision; General Principle, and its application to Conversations, Admissions, Confessions, Slanders, and Sundry Utterances.

§ 2098. Same: Application to Testimony as a Former Trial.

§ 2099. (b) Entirety of Parts; General Principle, as applied to Admissions, Conversations, Slanders, Former Testimony, and the like.

§ 2100. Same: Application to Accused's Confessions.

B. Documents.

§ 2102. (a) Documents produced in Court; must the Whole be put in?

§ 2103. Same: Depositions and Former Testimony.

§ 2104. Same: Separate Documents referred to in the Writing offered; Letters of a Correspondence.

§ 2105. (b) Documents Lost or Destroyed; (1) Deeds, Letters, Contracts, Abstracts; Substance of the Material Parts suffices.

§ 2106. Same: (2) Wills.

§ 2107. (c) Public Records; (1) Lost or Destroyed; Substance suffices; Burnt Record Acts.

§ 2108. Same; (2) Record Accessible; Copy of Whole required.

§ 2109. Same: Application to Sundry Public

Records (Deed-Register, Land-Paten Assessors' Book, Corporate Record, Statute-Roll, Marriage-Register, etc.).

§ 2110. Same: Application to Judicial Records (Common-Law Judgment, Chancery Decree, Probate of a Will, Criminal Conviction, Sheriff's Deed, etc.).

§ 2111. Same: Application to Bill, Answer, and Deposition in Chancery.

II. MAY THE WHOLE OF THE UTTERANCE BE AFTERWARDS PUT IN BY THE OPPONENT?

§ 2113. General Principle: the Whole on the Same Subject, if Relevant, may be put in.

§ 2114. Other Principles discriminated (Relevance, Witness' Explanation of Inconsistencies, Admissions by Reference or by Silence, Letters explaining Conduct, etc.).

§ 2115. Principle's Application: (1) Oral Admissions, Conversations, Confessions, Former Testimony, Depositions.

§ 2116. Same: (2) Sundry Writings.

§ 2117. Same: (3) Charge and Discharge Statements.

§ 2118. Same: (4) Account-Books.

§ 2119. Separate Utterances excluded: (1) Conversations, Oral Admissions and Confessions, Libels, etc.

§ 2120. Same: (2) Utterances incorporated by Reference, Other Letters of a Correspondence, etc.

§ 2121. Chancery Answer: (1) Used at Law as an Evidential Admission.

§ 2122. Same: (2) Used in Chancery as a Pleading; Charge and Discharge Clauses.

§ 2123. Same: (3) Anomalous New York Rule; "Responsive" Parts may be read.

§ 2124. Same: (4) Party's Answers to Statutory Interrogatories.

§ 2125. Inspection of Opponent's Writing, as making the Whole of it admissible.

§ 2094. General Principle: Verbal Utterances must be taken as a Whole, not by Fragments or by Summary. When an ordinary act or occurrence is testified to—as, a collision on the highway or an affray in a room,—the witness relates whatever circumstances are deemed useful by the party offering him, and then rests. There is no rule specifying how much of the entire happening, or how many particulars in the sequence of events, must be placed before the tribunal by him as a condition precedent to his relating

¹ "Verbal" is here used in its proper sense of "consisting in words," whether spoken or written. "Oral" signifies "consisting in speech," and not written or printed. Unless these two terms are kept distinct, scientific discussion is impossible.

anything at all. There is for at least four reasons no need of such a rule. First, the remainder of the relevant facts known to the witness may be fully brought out upon cross-examination; this is, indeed, one of the chief functions and utilities of the process of cross-examination (*ante*, §§ 1361, 1368). Secondly, a single witness is seldom acquainted with the entire sequence of events or of conduct, and it would therefore be impracticable to reject any one witness because he cannot recount the whole. Thirdly, a rule requiring the party to offer the whole of the occurrences through the several witnesses who together could testify about the whole would be unduly exigent, because presumably the opponent is equally well acquainted with the possible sources of testimony and can equally well call such witnesses to supplying missing material circumstances. Finally, matters of conduct and external event are seldom so inseparably united that any one act or occurrence would by itself be wholly misleading, and therefore could seldom need to be compared with other acts and occurrences to arrive at a true comprehension of the sense of the former; the whole, to be sure, will need to be known, but each event has in itself usually a clear and unchangeable significance. For example, on a charge of larceny of a horse, one witness testifies to having seen the defendant driving the horse on a certain day at a certain street corner. Here, whatever else significant there was at that time and place, as observed by the witness, can be ascertained on cross-examination; again, it would be absurd to require that this one witness, who happened to see merely this one act, should testify to all the rest of the defendant's conduct, as a condition of testifying at all; furthermore, it would be equally unfair to require the prosecution through other witnesses to cover the entire matter of the defendant's conduct or of the horse's fate since the date of the taking; and, finally, nothing is lost by not so doing, because the fact (if believed to be so) of the defendant's possession of the horse at the time and place stated remains absolute and unchangeable, no matter what innocent explanation the defendant may subsequently give; the inferences to be drawn from his possession may be changed, but, whether it appears that he had bought or had borrowed the horse or had taken him by mistake or had stolen him, the possession at that place and time remains as a constant fact and has suffered no change in the course of the later testimony. In general, then, looking at the usual character and practical bearings of conduct and events not involving verbal utterances, there is for such facts no need and no opportunity for a rule requiring the whole of the deed or the occurrence to be offered or taken together.²

But where *words* are the object of proof, the conditions are decidedly otherwise. Verbal³ utterances are attempts to express ideas in words. The more complicated the idea, the more elaborate is the structure of the verbal utterance. A simple life, reduced to its lowest terms, may be lived in a dwelli-

² It is true that the Michigan rule about calling all the eye-witnesses of a crime (*ante*, § 5079) was originally based on the suggestion

of some such principle as the above; but such doctrine has been advanced elsewhere. ³ See note 1, *supra*.

of one room; but a *fin-de-siècle* existence, with all its appurtenant needs, conveniences, luxuries, and follies, demands a complex mansion with scores of apartments, countless petty fittings, and a huge estate of many departments. The rural weekly newspaper and the metropolitan daily journal represent, in their contrast between brief simplicity and voluminous detail, the contrasts of life in country and city. So with any utterance of any thought; the complexity of the latter produces elaboration in the former. It follows that the thought as a whole, and as it actually existed, cannot be ascertained without taking the utterance as a whole and comparing the successive elements and their mutual relations. To look at a part alone would be to obtain a false notion of the thought. The total — that is to say, the real — meaning can be got at only by going on to the end of the utterance. One part cannot be separated and taken by itself without doing injustice, by producing misrepresentation.

Now the *sources*, or causes, of an *incomplete reproduction* of an utterance, in making proof in court, are diverse, and thus lead to diverse expedients to cure them. For example, where a written utterance is *produced*, all the words are then and there before the tribunal, and the only source of incompleteness would be the party's failure to read or to show the whole; the remedy for this — to compel complete reading or exhibition — is simple, and lies ready at hand (*post*, § 2102). If, however, the original cannot be brought into court, but is available — as, a public record — for *taking a copy*, or if it is a lost private document but a copy has been preserved, the remedy lies in requiring the use of the copy (*post*, §§ 2105, 2108). But if the document is lost and no copy exists, or if the utterance was originally oral and was not reduced to writing at the time, there is no source of reproducing it except the *memory* of those who saw or heard it. Here the question becomes a serious one whether we are to be satisfied with as much as can be remembered of it, or whether none is to be listened to because of the risk of obtaining only an imperfect and perhaps misleading account. The law has solved this problem by declaring that the substance shall suffice, even if verbal precision and minor portions are sacrificed (*post*, §§ 2097, 2099, 2105). A contrary rule would no doubt be unendurable, and the risk of error must be incurred in preference to the certainty of hardship which would otherwise ensue. Nevertheless, the great possibilities of error in trusting to recollection-testimony of oral utterances, supposed to have been heard, have never been ignored; but an antidote is constantly given by an instruction to the jury against trusting overmuch to the accuracy of such testimony. In the following passage, the typical warning is well phrased; here, as usually, it is applied specifically to proof of oral admissions or confessions of a party, because these are the commonest in practice; but the general warning applies to all oral utterances:

1893, *Earle v. Picken*, 5 C. & P. 542: "In the course of this circuit, Mr. Justice Parkes several times observed that too great weight ought not to be attached to evidence of what a party has been supposed to have said, as it very frequently happens, not only that the

witness has misunderstood what the party has said, but that by unintentionally altering a few of the expressions really used, he gives an effect to the statement completely at variance with what the party really did say."⁴

1866, *Redfield*, C. J., Note to Greenleaf on Evidence, 12th ed., § 200: "In a somewhat extended experience of jury trials we have been compelled to the conclusion that the most unreliable of all evidence is that of the oral admissions of the party. And especially where they purport to have been made during the pendency of the action, or after the parties were in a state of controversy. It is not uncommon for different witnesses of the same conversation to give precisely opposite accounts of them; and in some instances it will appear that the witness deposes to the statement of one party as coming from the other; and it is not very uncommon to find a witness of the best intentions repeating the declarations of the party in his own favor as the fullest admissions of the utter falsity of his claims. When we reflect upon the inaccuracy of many witnesses in their original comprehension of a conversation, their extreme liability to mingle subsequent facts and occurrences with the original transactions, and the impossibility of recollecting the precise terms used by the party, or of translating them by exact equivalents, we must conclude that there is no substantial reliance upon this class of testimony."

1875, *Neilson*, J., in *Tilton v. Beecher*, Abbott's Rep. II, 837 (on the above quotations being cited to him): "When you and I were boys, we found that general principle cited in all the text-books very much after the form that you have put it. . . . Perhaps the best statement of that has been given in Starkie on Evidence, to the effect that this kind of testimony is dangerous, first, because it may be misapprehended by the person who hears it; secondly, it may not be well-remembered; thirdly, it may not be correctly repeated."⁵

Such, then, are the sources of incompleteness, and the appropriate remedies which they suggest.

As to the forms in which the incompleteness may appear, they are reducible to two, namely, lack of *verbal precision* and lack of *entirety of parts*. Upon this distinction will depend many of the rules applying the general principle (*post*, §§ 2097, 2099), because the defect to be cured may exist in only one of these forms without the other; and their difference may properly be illustrated at the outset:

(1) *Verbal*⁶ precision is of course important to the correct understanding of any verbal utterance, whether written or oral, because the presence or absence or change of a single word may substantially alter the true meaning of even the shortest sentence. The fact is undoubted; although the law cannot deter tribunals from accepting the best precision that is obtainable merely because of the inherent possibilities of vital error on individual words. The following illustrations will serve to show something of the part this danger has played in judicial annals:

1824, Mr. Thomas Starkie, Evidence, 7th Am. ed., II, 549: "Of all kinds of evidence, that of extrajudicial and casual observations is the weakest and most unsatisfactory. Such words are often spoken without serious intention, and they are always liable to be mistaken and misremembered, and their meaning is apt to be misrepresented and exaggerated. I once heard a learned judge (now no more), in summing up on a trial for forgery, inform the jury that the prisoner, in a conversation which he had had with one of the

⁴ So also: 1808, *Trimble*, J., in *Myers v. Baker*, Hardin 344, 549; 1830, *Walworth*, M. C., in *Law v. Merrill*, 6 Wend. 268, 277.

⁵ For a further consideration of the grounds

of distrust as affecting an accused's confession, see *ante*, § 866.

⁶ See note 1, *supra*.

witnesses, had said, 'I am the drawer, the acceptor, and the indorser of the bill. Whilst the learned judge was commenting on the force of these expressions, he was, at the instance of the prisoner, set right as to the statement of the witness, which was that the prisoner had said, 'I know the drawer, the acceptor, and the indorser of the bill.' Had the witness, and not the judge, made the mistake, the consequences might have been fatal. The prisoner was acquitted."

1875, *Tilton v. Beecher*, Abbott's Rep., II, 305, 307, 815; the plaintiff, in his action for criminal conversation, was confronted with a public statement of his, in which he had printed certain of the evidence in his possession as to the defendant's adultery with his wife; a part of this consisted of passages from letters to him from his wife, showing her consciousness of the temptations of the defendant, her original resistance, and her subsequent yielding; one of these extracts as printed was: "To love is praiseworthy, but to abuse the gift is sin. Here I am strong. No demonstrations or fascinations could cause me to yield my womanhood." The defence showed that the original passage read: "I have been thinking, my darling, that, knowing as you do your immense power over an audience to move them as you will, — that same power you have with all public men, over any woman whom you may love — to love is praiseworthy, but to abuse your gift of influence is sin; therefore I would fain help restore to you that which I broke down, — self-respect. Your manhood and its purity and dignity, if you feel it, is stronger than even love itself. I know this; because here I am strong. No demonstrations or fascinations could cause me to yield my womanhood." The defence claimed that this letter was written just after a mutual explanation in which he had confessed to her that he had gone too far in his relations with women-friends, and in which she had received his expressions of contrition, forgiven him, and sought to restore his sense of self-respect; so that the extract quoted was made, by the omission of the words above italicized, to refer to her temptations, when in fact it referred to his own; Mr. Tracy, for the defendant, thus arguing: "This is the letter, gentlemen, which was so marvelously garbled by the plaintiff in the early part of this controversy before the church, — so garbled as to put upon the wife an imputation that she herself was tempted, and was likely to fall, and was resisting her own temptation. He made it read, as you remember, speaking of herself: 'To love is praiseworthy, but to abuse the gift is sin. Here I am strong. No temptation could induce me,' etc. But when you get at this letter and read the whole of it, you see that she is speaking of him, and the abuse of his influence over women, and she is remonstrating with him against that abuse."

(2) *Entirety of parts* is equally essential to the correct understanding of an utterance. A word is interpretable in the light of the use of the same word in another part; a clause is modified by a prior or subsequent clause; one sentence qualifies another; and one paragraph may form only a part of the whole exposition. We must compare the whole, not because we desire the remainder for its own sake, but because without it we cannot be sure that we have the true sense and effect of the first part. Entirety of parts is thus as essential as verbal precision; for the greatest possibilities of error lie in trusting to a fragment of an utterance without knowing what the remainder was. Apparent as this is to all, the following illustrations emphasize its truth in judicial annals:

1883, *Algernon Sidney's Trial*, 9 How. St. Tr. 817, 829, 868; seditious libel; Mr. Williams, his counsel, had instructed him: "In the evidence against you for your writing, take care that all that was writt by you on that subject be produced, and that it be not given in evidence against you by pieces, which must invert your sense"; on the trial, one of the passages read against Sidney from his manuscript was: "The general revolt

of a nation from its own magistrates can never be called rebellion"; *Sidney*, arguing against using these passages piecemeal, said: "My lord, if you will take Scripture by pieces, you will make all the penmen of Scripture blasphemous. You may accuse David of saying, 'There is no God,' and accuse the Evangelists of saying, 'Christ was a blasphemer and a seducer,' and the Apostles, that they were drunk"; *L. C. J. Jeffries*: "Look you, Mr. Sidney; if there be any part of it that explains the sense of it, you shall have it read. Indeed, we are trifled with a little. It is true, in Scripture it is said, 'There is no God'; and you must not take that alone, but you must say, 'The fool hath said in his heart, 'There is no God.' Now here is a thing imputed to you in the libel; if you can say there is any part that is in excuse of it, call for it." 7

1888, *Parnell Commission's Proceedings*, 85th day, *Times' Rep.* pt. 23, p. 227; the Land League and its leaders were charged with encouraging crime and outrage, by speech and action; *Mr. T. D. Sullivan* was cross-examined as to speeches of his which seemed to encourage crime; *Q.* "Now I will call your attention to a speech of yours at Kilbrennon on the 18th of October, 1880. (Reading.) 'We will so organize the Irish counties that they will want extra police in every county in Ireland.' I would you make it necessary to have extra police force; by crime, or not by crime?" By no crime; by an extension of the National organization to those counties." . . . *Q.* "Will you explain what you mean by the words 'they will want extra police in every county'?" *A.* "Please read the other portion of my speech." *President Hannen*: "I am bound to say that I think that that requires explanation; but the witness asks that the context should be read"; *Mr. Murphy* (reading): "'Against that accursed system the people are rising in peaceful revolt, and it is high time that they should do so; and I tell you that that peaceful revolt of theirs cannot be put down if the people prove true to each other. . . . A few days ago there was issued from Dublin Castle a circular announcing that an increased force of constabulary would be sent to the counties of Galway and Mayo, and the increased charges of these constabulary, it is said, will be put on the people. I will tell you what to do with those increased charges. The people are already paying as much as they can pay, and a great deal more than they ought to pay, and if this increased charge or increased rate is put on the tenantry in any part of Ireland, I tell them to go and stop it out of their rent. Let them tell the landlord that this increased police rate exceeds their power to meet or discharge, that they have no way under heaven of paying it unless by stopping it out of their rents. But once the landlords find out that you are on the track, you will see how soon they will manage to do without this extra force. . . . I tell you that for the working out of your cause no outrages on your part are necessary or desirable. If you spread through your county, and if there is spread through all Ireland, this organization I speak of, it will be more powerful than any amount of terrorism or outrage that could be committed in any one corner of the land.'" *Witness*: "My meaning is practically plain; that extra police force was sent to that part of the country for the suppression of a legal and righteous agitation and the extent of that legal and righteous agitation in other parts of the country would put a burden upon the landlords in Dublin Castle which they would not like to bear."

7 Scripture passages are sometimes in danger from this rule, as the following anecdote shows: "J. T. Trowbridge, the aged author, is writing his autobiography at his home in Arlington, Mass. Mr. Trowbridge was born in Ogden, N. Y. The other day he said: 'I went to school at Lockport in my boyhood, and there was a Lockport stonecutter whom I used to like to talk to, for he had a mind as simple as a child's. I remember a job that he once undertook—the job of cutting a sentence from Scripture over the door of a little stone church. The committeemen who intrusted him with this job did not comprehend his childlike, unreflecting nature, or they would not have coached

their order in the terms they did. The wanted the sentence: "My house shall be called a house of prayer." He told them they had better write it down for him. But they said it would only be necessary to write down the chapter and verse, and he could copy the sentence right out of the good book. We our Lockport stonecutter copied the sentence but he did not end where he should have ended. He went right on to the sentence's conclusion. The result was that the legend over the church door read: "My house shall be called a house of prayer; but ye have made it a den of thieves" (*Chicago Record-Herald*, Aug. 23, 1903).

President *Hannon*: "I think I see the witness's meaning; his explanation is that the Government would suppress their agitation, though a legal one, and by extending the organization they would make it necessary for the Government to employ more police in suppressing what he regards as a legal organisation."

But what is *the whole* of the utterance? No doubt this principle of entirety is flexible in its application. A simple thought requires but a simple utterance; a complex thought, a complicated utterance. When, therefore, we obey the canon that the whole of the utterance must be considered, the scope of our survey may be very variable, so far as concerns the mere number of words, sentences, or paragraphs. The whole that is to be considered is obviously not the whole of a phrase or a paragraph, any more than it is the whole of the printer's line or page, but the whole of the thought,—that is, such a quantity of utterance as the utterer has indicated to be distinct and entire in itself, for the purpose of representing a distinct thought. If this dividing line can be ascertained, there is no need of looking beyond it. A cry for "help!" is entire in a single exclamation. A local railroad-passenger contract is entire upon a small piece of pasteboard. But a treatise in defence of usury will require a perusal of several chapters to discover the entire thesis. Thus the possibilities are infinite and the boundaries indefinite, in this search for entirety of utterance. It will be difficult for the law, in applying the principle, to employ any fixed test. Yet the law cannot be expected to be satisfied practically with the indefiniteness which in theory the conception of entirety involves; and therefore the application of it is full of difficulties.

The general principle, then,—which may be termed the principle of Completeness—that the *whole of a verbal utterance must be taken together*, is accepted in the law of evidence; for the law in this respect does no more than recognize the dictates of good sense and common experience. There are in the application of it important qualifications and exceptions, but the recognition of the principle, and the reason for it, is unquestionable. It appears clearly conceded and consciously applied as early as the 1600s,⁹ and no doubt

⁹ Even better, if that were possible, than Sidney's celebrated illustration, is the following anecdote; *si non è vero, è ben trovato*: "One evening there was arrested in the city an old gentleman of position and cheery habits. The policeman said he had found the old gentleman on the street very drunk. The complaint was entered against him, but he was released on his recognizance, and sent home in a hack. When his case came up in court, the only witnesses summoned to prove his condition were the policeman and the old family servant of the accused, a faithful and devoted retainer. The policeman had given his testimony to the fact of the old gentleman's intoxication. Then the old servant was called to the stand. He testified flatly, to the surprise of the court room, that the old man was sober when he came home. The prosecuting attorney proceeded to question. 'You say that Mr. — was sober when he came home?' 'Yes, sir.' 'Did you put him to

bed?' 'Yes, sir.' 'And he was perfectly sober?' 'Yes, sir.' 'What did he say when you put him to bed?' 'He said "Good night." 'Anything else?' 'He said as how I was to call him early.' 'Anything else?' 'Yes, sir.' 'What was it?' 'Tell us exactly what he said, every word.' 'He said as how I was to call and wake him early, for he was to be queen of the May!' 'The old gentleman was fined.'

¹⁰ The following precedents seem to show that the rule, as such, dates definitely from the 1600s: 1571, *Newis v. Lark*, 2 Plowd. 403, 410 (awise of disseizin; objection "to the manner of giving evidence," that "the whole last will and testament was not shewn, but part of it only; . . . and forasmuch as the last will is the foundation of the evidence, it was said that the plaintiffs ought to shew it fully and entirely as it is, for it may be that there is some other matter of substance precedent, as a condition or other circumstance, limited to all that which comes after;

was implicitly understood long before that period. Nothing turns upon its history as a general principle (though there have been historical changes in specific rules coming under it), because it has had little distinct individuality in judicial practice and has thus had no independent development as a whole. In the following passages, scattered through three centuries, will be found some of the most interesting and instructive expositions of the principle:

Ante 1625, Stukeley v. Butler, Hob. 168, 170: "It is a good rule, *incivile est, nisi tota sententia perspecta, de aliqua parte judicare* . . . And indeed in one sentence it is vain to imagine one part before another; for though words can neither be spoken nor written at once, yet the mind of the author comprehends them at once, which gives *vitam modum* to the sentence."

Circa 1690, Sir John Hawles, Solicitor-General, Remarks on Lord Russell's Trial, 9 How. St. Tr. 809: "How could Sheppard speak positively of the discourse, or of the design of it, when he owns he did not hear all the discourse, and gives a very good reason for it. For he said he went several times down to fetch wine, sugar, and nutmeg, and did not know what was said in his absence: he said he heard nothing about a rising, nor heard any further discourse; but on recollection, he heard something about a declaration of grievances in order to a rising, as he supposed; the particulars he could not tell. No witness shall be permitted to give evidence of the content of a deed or writing, without producing the deed or writing itself, or a true copy of it, and upon very good reason; for he may make an untrue construction of it. I remember a witness who swore to the content of a deed of entail, and being asked, whether he knew a deed of entail, and by what he knew the deed, he answered he knew a tailed deed very well, and he knew the deed to be a tailed deed, because it had a tail half as long as his arm (meaning the label of the deed). And if this be the practice and the reason of the practice, in civil matters, shew me any authority or reason anything should be permitted to be given in evidence in treason, which is not permitted to be given in evidence in the trial of a civil matter."

Ante 1767, Buller, J., Trials at Nisi Prius, 228: "When a man gives in evidence a sworn copy of a record, he must give the copy of the whole record in evidence, for precedent or subsequent words or sentence may vary the whole sense and import of the thing produced, and give it quite another face."

1789, *Mr. Thomas Erskine, for the defence, in Stockdale's Trial*, 22 How. St. Tr. (the alleged libel was a pamphlet criticising the prosecution of Warren Hastings as fair and corrupt, and certain extreme passages were set out in the indictment): "A work consisting of about two thousand five hundred and thirty lines of most spirited eloquence, only forty or fifty lines are culled from different parts of it and fully put together, so as to rear up a libel out of a false context by a supposed connection of sentences with one another, which are not only entirely independent, but when compared with their antecedents, bear a totally different construction! In manner the greatest works upon government, the most excellent books of science, the sacred Scriptures themselves, might be distorted into libels, by forsaking the general context and hanging a meaning upon selected parts. Thus, as in the text put by Algernon Sidney, 'The fool has said in his heart, There is no God,' the attorney-general

for which reason it was said that the whole ought to be shewn. But all the justices argued to the contrary; for the party in any title or bar or other matter, where land or other thing may be gained or lost, shall not be forced to shew more than that which serves his purpose"; 1613, *Read v. Hyde*, Judges partly dissenting; 1613, *Read v. Hyde*, Coke's Third Institute, 173 ("It was resolved

that no exemplification ought to be of any libel or of any other record, or of the content thereof; but the whole record or the libelment thereof ought to be exemplified, so that the whole truth may appear, and not of part as make for the one party and not that makes against him or that manifestly true")

on the principle of the proceeding against this pamphlet, might indict the publisher of the Bible for blasphemously denying the existence of Heaven, in printing 'There is no God.' These words alone, without the context, would be selected by the information, and the Bible, like this book, would be underscored to meet it. Nor could the defendant in such a case have any possible defence, unless the jury were permitted to see, by the Book itself, that the verse, instead of denying the existence of the Divinity, only imputed that imagination to a fool."

1820, *Abbott, C. J.*, in *The Queen's Case*, 2 B. & B. 287 (for all the judges): "One of the reasons for the rule requiring the production of written instruments is in order that the Court may be possessed of the whole. If the course which is here proposed should be followed [i. e. not producing it] the Court may never be in possession of the whole, though it may happen that the whole if produced may have an effect very different from that which might be produced by a statement of a part."

1823, *Abbott, C. J.*, in *Thomson v. Austen*, 2 Dowl. & R. 361: "It is at all times a dangerous thing to admit a portion only of a conversation in evidence, because one part taken by itself may bear a very different construction and have a very different tendency to what would be produced if the whole were heard; for one part of a conversation will frequently serve to qualify and to explain the other."

1851, *Curia*, in *Bank v. Brown*, Dudley 62, 65: "It is an established rule that the whole of a document or writing offered in evidence must be read, if required. Otherwise there would be no certainty as to the sense and meaning of the entire document. The dangerous tendency of permitting an extract from a letter to be read in evidence is at once obvious; by suppressing a part, the meaning of the writer may be entirely perverted."

1858, *Merrick, J.*, in *Com. v. Keyes*, 11 Gray 323, 324: "It is undoubtedly the general rule that whenever the statements, declarations or admissions of a party are made subjects of proof, all that was said by him at the same time and upon the same subject is admissible in his favor, and the whole should be taken and considered together. This is essential to a complete understanding of what he intended to express by the particular phrases and language which he used. To give effect to general statements, without regard to the qualifications with which they are accompanied, and by which they may be materially modified, would manifestly lead to error, and be likely to be directly productive of injustice. All therefore is to be heard and weighed before it can be affirmed that the force and effect of language, whether written or spoken, are fully and justly apprehended. In the construction of contracts, the same principle prevails, requiring that each particular part shall be examined and considered, in order to learn and comprehend the scope and purport of the whole. All writings, whether of a public or private character, are to be subjected to the same kind of scrutiny. No provision of a statute, however minute, is to be overlooked when searching for the design and object of the Legislature in its enactment, and in considering how it ought to be interpreted and explained; just as particular covenants in a deed, or devises in a will, are to be construed according to the intent of the parties in the one case, and of the testator in the other, so far as it can be ascertained by bringing into view all the expressions and provisions contained in these respective instruments."

§ 2095. **Two Branches of the Rule; Compulsory and Optional Completeness; Precision and Entirety.** (1) The application of the general principle takes, first of all, two distinct aspects having practical consequences; they are represented by the questions, *Must* the whole be offered? and, *May* the whole be offered? I. The first is obviously a question asked by the *original proponent* of the utterance. He proposes to prove a part of a conversation, a deed, or a record; he is met by the objection that he can offer no part unless he offers the whole; and the question for him is, *Must* he do this?

This is, in practical application, the stricter effect of the principle, and indeed is not enforced invariably or for all classes of utterances. II. Supposing that a part only is deemed sufficient, the further question then arises, but this time for the *opponent*, against whom the utterance is offered, namely, *May the whole be now put in?* Here the principle has naturally a universal application. To arrive at the sense of the utterance as a whole, the remainder of it may now be put in by the opponent. The chief practical question here is, of course, as to the limits to be set to these complementary parts, in order to admit nothing more than what really qualifies the first utterance, for otherwise the rule would become a mere excuse for the intrusion of irrelevancies.

(2) Under the first head, in applying the rule that the whole must be put in (and in theory under the second head also, but not commonly in practice) the principle divides into two sub-principles, which may be termed respectively the principles of *Precision* and of *Entirety* (*ante*, § 2094). The distinction rests on the obvious fact that the incompleteness of a verbal utterance may lie either in using a summary of its effect, without the precise words, or in using a fragment only, verbally precise as far as it goes, but wholly lacking the complementary portion. By the sub-principle of *Precision*, verbal accuracy of reproduction is required; by the sub-principle of *Entirety*, the presence of all the parts is required. Either of these may be dispensed with, while requiring the other; and circumstances often make desirable this partial modification of the general principle.

(3) A difference of rule may often turn upon the circumstance that an utterance, when *in writing*, is *produced before the tribunal*, available for direct use in evidence by the opponent, or is not so produced. On the one hand, the requirement of *Precision* may be impracticable in the latter case, but plainly feasible in the former. On the other hand, the requirement of *Entirety* may be dispensed with in the former case, because the opponent has easily in his power to put in the complementary portions.

(4) Finally, the rules must often, by practical necessity, be different for *oral* and for *written utterances*. The former lie in memory only, and much cannot be demanded in the reproduction of words by mere memory. The latter may be copied literally and entirely, or may be produced in part (*ante*, § 1179). Hence, less strictness may be shown in applying the principle to the former class of utterances.

An arrangement of rules, in such a way as to exhibit the practical consequences connected with these vital distinctions, while at the same time keeping together the various kinds of utterances (letters, conversations, records, depositions, and so on) that naturally classify themselves in ordinary usage, seems to be not entirely feasible. But, with a view to a clear exposition of principle and also to practical convenience, the following arrangement seems most satisfactory:

I. *Must the Whole of the Utterance be first offered by the Proposer?*

A. Oral Utterances; considered with reference to (a) Verbal Precision; and (b) Entirety of Parts. B. Documents: considered according as they are (a) Produced in court; or (b) Lost or destroyed; (c) Public records. II. *May the Whole be afterwards offered by the Opponent?* (a) General principle; and its application to various kinds of utterances. (b) Application to separate speeches or writings. (c) Application to answers in chancery.

I. MUST THE WHOLE OF THE UTTERANCE BE FIRST OFFERED BY THE PROPONENT?

A. ORAL UTTERANCES.

§ 2097. (a) *Verbal Precision; General Principle, and its Application to Conversations, Admissions, Confessions, Slanders, and Sundry Utterances.* Complete certainty as to an utterance's true meaning can be ascertained only by considering every word in it. The change, omission, or addition of even a single word may radically alter the meaning. But for oral utterances such verbal precision need not and cannot be required. It need not be, for the importance of single words in oral discourse is comparatively much less than in writings; and it cannot be, since memory does not retain precise words, except of simple utterances and for a short time. Hence, verbal precision is in general *not required in proving oral utterances*; the *substance* or effect is sufficient:

1830, *Richardson, C. J.*, in *Eaton v. Rice*, 8 N. H. 380: "It can rarely happen that a witness who was present when a conversation was had between two individuals can at any time afterwards, and particularly at any distant time, state precisely what was said by them, although he may recollect distinctly an agreement made between them at the time. If, then, in all cases the witness is required to state what was said so accurately that the jury may be enabled to judge by the terms used what a contract was, it must frequently happen that a contract not in writing cannot be proved at all. . . . The recollection of a witness as to what an agreement between parties was, according to his understanding of what was said by them at the time, may be very satisfactory evidence, although he may not be able to recollect distinctly one word that was said. . . . The credit that may be due to a witness in these cases may depend much on his being able to detail enough of the conversation to show that his understanding of the matter was probably right. But what he understood is in all cases evidence to be weighed by the jury."

1893, *Cooley, J.*, in *Bathrick v. Detroit Post & T. Co.*, 50 Mich. 629, 637, 16 N. W. 172 (dealing with a question as to the plaintiff's admission of carnal intercourse): "It would have been entirely proper to permit the witness to testify that he had conversations in which the criminal intercourse was admitted or assumed, even though he did not remember the words made use of. It is not surprising that a man should remember the substance or the result of a conversation, and yet not be able to recall the words made use of; and it sometimes casts suspicion on the veracity of a witness that he assumes to remember the very words of a conversation, when there was nothing in the case which was likely to impress upon his mind anything beyond the general result. But if a witness fails to remember words when it would seem that he ought to do so, the jury must be relied upon to give due weight to the fact when considering his evidence."

The general rule, universally accepted, is therefore that the substance or effect of the actual words spoken will suffice, the witness stating this sub-

stance as best he can from the impression left upon his memory. He may give his "understanding" or "impression" as to the net meaning of the words heard. This rule is applicable to oral utterances in general, — including admissions, conversations (whether as forming contracts or merely as admissions), and the like.¹ It applies also to an accused's confessions,² and to seditious utterances;³ yet it is commonly said that precise proof must be made for defamatory utterances,⁴ — though here the rulings under the present principle can with difficulty be distinguished from those applying the doctrine of variance in the law of pleading.⁵

The Opinion rule is sometimes given an improper effect in excluding such evidence of the "substance" or "effect" of utterances. Supposing that the

¹ 1871, *Heim v. Cantrell*, 59 Ill. 524, 531 ("the witness does not pretend to give either the conversation or the substance of it," but says that C. "fully admitted his liability on the note"; held inadmissible, as an inference); 1879, *Hewitt v. Clark*, 91 id. 608; 1886, *Lewis v. Brown*, 41 Mo. 448, 451 (the witness could not recollect the language of a compromise agreement, but "understood" from him that he would limit his claim; not excluded, but treated as inconclusive); 1901, *Worthington v. State*, 93 Md. 322, 48 Atl. 355 (a witness' "impression" as to the substance of a dying declaration; "it was rather the recollection than the impression of the witness which was sought; . . . the law does not require that the very words be repeated"); 1873, *Kittredge v. Russell*, 114 Mass. 68; 1903, *Hayes v. Pitta-Kimball Co.*, 182 id. 262, 67 N. E. 249 (the exact words of a deceased's statement, admissible under St. 1898, c. 535, are not required); 1875, *Willard v. Fralick*, 31 Mich. 435; 1876, *Chambers v. Hill*, 34 id. 523, 524 (title to personality; that the plaintiff's intestate spoke of it "as the defendant's," allowed; though "the witness should certainly have given the words of the intestate if she could do so"); 1883, *Bathrick v. D. P. & T. Co.*, 50 id. 629, 637 (quoted *supra*); 1867, *Buchanan v. Atkinson*, 39 Mo. 504; 1875, *Cornet v. Bertelsmann*, 61 id. 126 (admissible; but of little weight); 1836, *Eaton v. Rice*, 8 N. H. 380; (quoted *supra*); 1841, *Maxwell v. Warner*, 11 id. 569; 1844, *Braley v. Braley*, 16 id. 432; 1864, *Kingsbury v. Moses*, 45 id. 222, 225 ("he may mean to state what the parties in fact or in substance said as he understood them, or merely to give his inferences drawn from what was said; in the former case the testimony would be competent"); 1897, *State v. Robertson*, 121 N. C. 151, 29 S. E. 59; 1895, *Norton v. Parsons*, 67 Vt. 526, 32 Atl. 491; 1898, *Fertig v. State*, 100 Wis. 301, 75 N. W. 960 (the substance of the relevant parts, sufficient). The following distinction is sound, but rests ultimately on the principle of leading questions (*ante*, § 769): 1897, *Chatfield v. Bunnell*, 69 Conn. 511, 37 Atl. 1075 (excluding the question whether to A, who heard the defendant talk with B, the defendant said the same as to B; "a witness cannot thus be allowed to testify in gross as to the similarity of separate and distinct conversations with different persons on the same subject"). Compare similar rulings for proof of former testimony, *post*, § 2098.

For proving the substance of dying declarations, see *ante*, § 1448.

² 1855, *Brister v. State*, 26 Ala. 107, 127; 1883, *State v. Donovan*, 61 La. 278, 281, 16 N. W. 130 (the witness "could not give the language used by defendant, but could testify only from the impressions received and the ideas formed from the conversations"; held sufficient); 1877, *State v. Hughes*, 29 La. An. 514; 1895, *State v. Madison*, 47 id. 30, 16 So. 546; 1896, *State v. Desroches*, 48 id. 30, 19 So. 250. For the rule as to putting in the remainder of the confession, see *post*, § 2101.

³ 1820, *R. v. Hunt*, 1 State Tr. x. s. 171, 252 (seditious meeting; the sense of the spoken utterances, though not the exact words, allowed); 1821, *R. v. Edmonds*, ib. 785, 820 (conspiracy; the substance of words in a speech allowed; L. C. B. Richards: "Am I not to hear in court what a gentleman says of what passes because he cannot give the words?"); 1843, *R. v. O'Connell*, 5 id. 1, 196 (notes of the substance of portions of a speech, admitted, though other portions of the speech were not noted by the witness).

⁴ 1838, *Harrison v. Bevington*, 8 C. & P. 708 (slander; a witness testified: "I do not remember the words at all, only the impression made upon my mind; it was respecting Harrison the conversation was with Mr. L; the defendant began it"; Abinger, L. C. B.: "What were the words? This is an action for slander; you cannot have the impression"); 1845, *Teague v. Williams*, 7 Ala. 844, 847 (he "cannot be allowed to state the impression produced," but "must state the language that was employed according to the best of his recollection"); 1844, *Douge v. Pearce*, 13 id. 127, 130 ("while it is not proper for a witness to give his impression derived from the conversation," yet he may "give the substance of the conversation").

⁵ And for that reason it is useless to examine here the mass of decisions inextricably dealing with the two principles. The following may serve as illustrations: 1802, *Maitland v. Goldin*, 2 East 426, 437 (to prove words "to the effect those set forth" is not enough); 1811, *Nye v. Otis*, 8 Mass. 122; 1826, *Fox v. Vanderbeck*, Cow. 513, 515 ("they must be proved substantially as laid; all the words need not be proved but it is enough to prove some material part of them"); 1828, *Olmstead v. Miller*, 1 Wend 510 (preceding case approved).

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§ 2094-2125] PRECISE WORDS OF A CONVERSATION, ETC. § 2098

witness could relate from memory the precise words used, the Opinion rule would operate to prohibit him from condensing them into a summary statement of their substance or effect, because by that rule the data observed by the witness must be laid in detail before the jury, *if they can be*, without his inferences based upon them (*ante*, § 1918). But if they cannot be laid before the jury, then the witness' inferences, or net impressions, are by that very rule allowable. Consequently, if his memory of the precise words fails him, his impression of their net meaning is not forbidden by the Opinion rule. That rule does not require the impossible; it merely forbids the superfluous. It does not, in its proper use, commit the absurdity of saying that, even when the witness cannot remember the precise words, he is forbidden from giving any account at all of what he heard. Nevertheless, some Courts misguided by the Opinion rule, have reached that result (*ante*, § 1969).⁶

§ 2098. *Same: Application to Testimony at a Former Trial.* A controversy was once rife, and came up for settlement in almost every Court, over the propriety of making an exception to the general rule in offering evidence of testimony at a former trial. This may be proved under certain conditions (*ante*, §§ 1373, 1401), and a witness speaking merely from memory is equally receivable with a written report (*ante*, § 1330). For the witness, speaking from memory, then, is there to be any stricter rule as to verbal precision than there is for the proof of other kinds of utterances? Must the former witness' very words be reproduced? If they must, then a special exception to the general rule here obtains. The propriety of such an exception has been defended in the following passage:

1836, *Putnam, J.*, in *Com. v. Richards*, 18 Pick. 434, 439: "We require full proof of all that the deceased witness swore to. His words . . . are to be recited; . . . Some part which was said and not recollected might certainly limit and qualify the meaning of the words which are recollected. Hence it is that persons who are in hearing, who are favorably inclined to one party, may recollect a particular expression which conformed to their wishes, and wholly omit the words of qualification; while others, who incline towards the other side, will remember the words of qualification and forget or take no notice of the particular expression. . . . To be worth anything, the whole of what the deceased said upon the matter should be stated. And if you get the whole, it is very defective; for you cannot have a true representation of the countenance, manner, and expression of the deceased witness, which either confirmed or denied the truth of the testimony. . . . It is true that this strictness will generally exclude such testimony."

But this strictness is in fact neither necessary nor feasible. The objections to recognizing such an exception to the general rule are forcibly stated in the following passages, which are also useful for their broad statements as to the universality of the principle:

1843, *Hubbard, J.*, in *Warren v. Nichols*, 6 Metc. Mass. 261, 268: "Such a rule is in my judgment rather a provision for the exclusion than for the admission of such testimony, because as a matter of fact not one person in ten thousand can possibly recollect

⁶ Furthermore, the word "impression" or "understanding," may be used by the witness in the sense that he never actually heard the utterance plainly; and in that view it may be a question whether he is qualified at all as a witness. The principle and the rulings governing such instances have been already considered in dealing with testimonial qualifications, *ante*, § 658, 727.

the very words used by the witness. It is the constant observation of lawyers familiar with trials at Nisi Prius that the testimony of witnesses is never taken down by different persons in the same words, though the facts and ideas are substantially the same; and also that the same witness, when called to testify on a second trial, does not and cannot repeat the very words used by himself on the first hearing, though he is narrating the same events or expressing the same thoughts. . . . In other cases, where a person is called to testify to words spoken, as in actions of slander, [or] to the declarations of a party or of a witness with a view of contradicting him, he is not required to give the identical words of the party or the witness, but he may state the substance of what he has heard and in language as nigh that which was used as he can recollect. What sufficient reason, then, exists in the present case to depart from the rule as practised upon in other cases? It is said that a slight variation may substantially affect the testimony. Very possibly it may; but is there not the like exposure to material variation in those cases where the substance of the declaration is admitted? It is argued that the deceased party was under oath, and therefore the same words should be given; but such is the case with living witnesses whose declarations under oath are testified to with the view of contradicting them. The substance of what the witness said, the facts he stated, the opinions he expressed, the reasons he assigned, the explanations he gave, the motives he avowed, may all be faithfully testified to without repeating all his words. The synonymy of our language is such that a literal adherence to the same expressions is not necessary to the conveying of the same ideas. . . . [The stricter view would] prescribe a rule for the admission of testimony which the imperfection of our nature in the structure of our memories will not warrant. It in truth excludes the thing which it proposes to admit, and at the same time opens a door for knaves to enter where honest men cannot approach."

1846, *Perley, J.*, in *Young v. Dearborn*, 22 N. H. 372, 377: "Where the former testimony has any complication or any considerable extent, no cautious and conscientious witness would take it on himself to repeat it in the exact words from memory, or from any notes that could possibly be taken. To hold a rule so stringent would be likely to encourage rash and unscrupulous witnesses to undertake an exact recital of the evidence, and exclude the cautious and guarded statement of others who were conscious of the extreme difficulty of such a task and would venture to give no more than the substance."

1856, *Bartley, C. J.*, in *Summons v. State*, 5 Oh. St. 325, 346, 351: "There would seem to be no sound reason for subjecting it [former testimony] to a rigid rule amounting to its almost total exclusion, which is inapplicable in other cases where testimony showing words spoken or the statements of a party or other person is admissible. In prosecutions for perjury, the testimony of the accused upon which perjury is assigned is not required to be *ipseiusimis verbis*, but allowed to be given in substance; so with the declarations of a co-conspirator, declarations made *in extremis*, or the admissions or confessions of a party. So also with testimony of a verbal slander, or the declarations or statements of a party or witness, offered for purposes of contradiction or impeachment. . . . What sufficient reason can exist for a departure from the rule in case of the testimony of a deceased witness on a former trial?"

The stricter doctrine was clearly not the original and orthodox one in England,¹ and seems to have come first into existence there under Lord Kenyon;² but apparently did not long persist.³ In the United States, Lord

¹ 1685, *Cornish's Trial*, 11 How. St. Tr. 434; Sir John Hawles' commenta, ib. 459; 1696, Sir John Fenwick's Trial, 13 id. 620; 1754, *Canning's Trial*, 19 id. 514.

² 1791, *R. v. Jolliffe*, 4 T. R. 284, 290 (Kenyon, L. C. J.; a person who "could not undertake to give his words, but merely to swear to the effect of them," was rejected); 1791, *R. v. Jones, Peake* N. P. 37 (Kenyon, L. C. J.; "The whole of the

defendant's evidence on the former trial should be proved, for if in one part of his evidence he corrected any mistake he had made in another part of it, it will not be perjury"); 1793, *R. v. Dowlin*, ib. 170 (same; yet where a matter could only be dealt with on cross-examination, proof of the whole cross-examination was sufficient).

³ 1825, *R. v. Rowley*, Mood. Cr. C. 111 (perjury as to a vehicle accident; the witness recited

Kenyon's ruling served to raise the question, which passed along from Court to Court, in the first half of the 1800s, as one of the serious controversies of the day in the law of evidence. But the better view finally prevailed everywhere; the general principle that verbal precision was not necessary, and that the substance or effect would suffice, came to be accepted as the sound one; and the contrary rule now survives only in the one or two jurisdictions bound by early decisions,—decisions which are gradually being whittled away so as to leave at least an endurable and not wholly impracticable rule.⁴

"all [of the testimony] that was material to this inquiry"; "all of the evidence of the prisoner relative to the accident, to the best of his recollection"; admitted, by all the Judges. *Contra*, in Canada: 1851, *Fraser v. Black*, 2 All. N. Br. 312 (the words used by the former witness, required to be proved).

In the following citations, the substance or effect is held sufficient; an additional note is made where some form of qualification is used, or where the principle of Entirety, and not merely of Verbal Precision, is dealt with, since under the principle of Entirety (*see* § 2103) the present rulings often serve also as authorities: Ala.: 1845, *Gildersleeve v. Caraway*, 10 Ala. 360, 363 (yet here excluded, where the witness had forgotten the substance of the cross-examination); 1849, *Tharpe v. State*, 15 id. 749; 1850, *Davis v. State*, 17 Ala. 354, 357; 1850, *Cleeland v. Hale*, 18 Ala. 343, 346; 1855, *Thompson v. State*, 106 id. 67, 17 So. 512; Ark.: 1894, *Vaughan v. State*, 58 Ark. 353, 376, 34 S. W. 886; Cal.: 1872, *People v. Murphy*, 45 Cal. 137, 145; Del. (see *infra*); Ga.: Code 1893, § 5186, Cr. C. § 1001 (must remember "the substance of the entire testimony as to the particular matter about which he testifies"); 1852, *Riggins v. Brown*, 12 Ga. 271, 275 (a "brief" of testimony "as M. gave it," admitted); 1859, *Trammell v. Hemphill*, 27 id. 525, 537 ("the substance of the words"); 1879, *Puryear v. State*, 63 Ga. 622; 1882, *Atkins v. State*, 69 id. 595, 596; 1883, *Mitchell v. State*, 71 id. 123, 124; 1900, *Denson v. Denson*, 111 id. 600, 35 S. E. 680; Ill.: 1849, *Marshall v. Adams*, 11 Ill. 41 (the "words substantially must be given, and not the result of what his evidence proved"); 1883, *Iglehart v. Jernegan*, 16 id. 513 (undecided; the rule that the substance is sufficient, preferred); Ind.: 1864, *Horne v. Williams*, 23 Ind. 37, 40 (repudiating Ephraim v. Murdock, 7 Blackf. 10, which had been doubted in *Ward v. State*, 8 id. 101); 1893, *Bass v. State*, 136 id. 165, 170, 36 N. E. 124 (all on the particular subject suffice); Ia.: 1851, *Riveron v. St. Ament*, 3 G. Greene 119; 1870, *Woods v. Gevecke*, 20 Ia. 561; 1876, *Harrison v. Charlton*, 43 id. 573, 575; 1876, *Fell v. R. Co.*, 43 id. 177, 179; 1884, *State v. Fitzgerald*, 63 id. 271, 19 N. W. 202; 1881, *Small v. R. Co.*, 55 id. 522, 522, 8 N. W. 437; 1890, *State v. O'Brien*, 81 id. 83, 90, 46 N. W. 752 (substance sufficient; but it must include the cross-examination); St. 1898, c. 9, § 1, Code Suppl. 1902, § 245 a (transcript of the shorthand notes of a court reporter must be certified to contain "the whole of the shorthand notes of the evidence of each witness," "but the party offering the

shall not be compelled to offer the whole of such transcript"); 1905, *Connell v. Connell*, 119 Ia. 602, 93 N. W. 583 (under St. 1898, c. 9, the shorthand transcript must contain the "whole of the evidence of such witness"); Kan.: 1874, *Gannon v. Stevens*, 13 Kan. 460; 1885, *Solomon R. Co. v. Jones*, 34 id. 461, 8 Pac. 730; Ky.: 1856, *Thompson v. Blackwell*, 17 B. Monr. 609, 623 ("substance of all that was sworn," sufficient); 1882, *Bush v. Com.*, 20 Ky. 247; Me.: 1855, *Emery v. Fowler*, 39 Me. 326, 332; 1864, *Lime Rock Bank v. Hewett*, 52 id. 531, 534; Md.: 1821, *Bowie v. O'Neale*, 5 H. & J. 226, 231 (not the "legal effect," but "what he did actually prove"); 1840, *Garrot v. Johnson*, 11 G. & J. 173, 182 (sufficient "to prove facts," i. e. that the deceased "in giving his testimony deposed to certain facts"); 1872, *Waters v. Waters*, 35 Md. 559 (here excluded because the cross-examination was omitted); 1873, *Black v. Woodrow*, 39 id. 194, 220 (not "the precise language," but "the facts proved, and not the mere substance of the evidence"); Mass. (see *infra*); Mich.: 1870, *Burson v. Huntington*, 21 Mich. 429; 1873, *Fisher v. Kyle*, 27 id. 455; Mo.: 1863, *Jaccard v. Anderson*, 37 Mo. 94; 1867, *Morris v. Hammerle*, 40 id. 489, 496; 1877, *State v. Able*, 65 id. 357, 371 (substance, but not merely effect, receivable; good instance of the mode of applying the principle); 1887, *Scoville v. R. Co.*, 94 id. 84, 87, 6 S. W. 634 ("substantially the same," though not all nor in the very language, suffice); Nebr.: 1896, *Twobig v. Leamer*, 48 Nebr. 247, 67 N. W. 152; N. H.: 1846, *Tibbets v. Flanders*, 18 N. H. 284, 292 (excluded, where not reciting "the substance of the whole of his testimony"); 1851, *Young v. Dearborn*, 22 id. 372 (the "substance" is sufficient; quoted *supra*); N. J.: 1843, *Sloan v. Somers*, 20 N. J. L. 66, 67 (testimony as to "substantially what he then stated," apparently held sufficient; but here certain notes supplied the words also); N. Y. (see *infra*); N. C.: 1832, *Ballenger v. Barnes*, 3 Dev. 460, 465 (the substance is sufficient, but not merely the effect); 1836, *Ingram v. Watkins*, 1 Dev. & B. 443, 444 (where the testimony is offered in chief, the whole must be given; but where offered only to show a self-contradiction as impeaching, only "all that the impeached witness said in relation to the matter in which the repugnancy is alleged"); 1848, *Edwards v. Sullivan*, 8 Fred. 302, 304 (preceding case approved); 1855, *Jones v. Ward*, 3 Jones L. 24, 26 (approving *Ballenger v. Barnes*); 1875, *Buie v. Carver*, 73 N. C. 264 (the witness had not heard all that the other had said; excluded);

By many Courts, however, a distinction is taken between the "substance" and the "effect" or "legal effect" of the testimony as heard, the former being

1900, *State v. McLaughlin*, 126 Id. 1090, 35 R. R. 1067 (that the former testimony "was substantially the same" as the present, excluded, in impeaching a witness; details must be specified); *Id.*; 1848, *Wagers v. Hickey*, 17 Oh. 439, 440; 1856, *Bumhouse v. State*, 5 Oh. 328, 329 (quoted *supra*; practically repudiating *Bliss v. Long*, *Wright* 351); *Pa.*; 1823, *Cornell v. Green*, 10 S. & R. 16 (practically repudiating *Lightner v. Wike*, 4 Id. 203); 1834, *Wolf v. Wyoth*, 11 Id. 149; 1834, *Watson v. Gilday*, 1b. 337, 348 (but the cross-examination must be incriminating); 1830, *Smith v. Lowe*, 12 S. & R. 34; 1839, *Case v. Chess*, 17 Id. 409, 411; 1843, *Moore v. Pearson*, 6 W. & S. 53; 1848, *Goulet v. Crawford*, 2 Pa. St. 86, 90; 1864, *Philadelphia & R. R. Co. v. Spencen*, 47 Id. 300, 306 (though a witness took only such part of a cross-examination as was material, it was received as sufficient); 1873, *Brown v. Corn*, 73 Id. 326; 1881, *Hepner v. Bank*, 97 Id. 430, 434 ("He may state in his own language the facts as detailed by that witness, as they were impressed on his mind at the time. . . . All that is required is that the recollection of the witness be reasonably clear as to the facts testified to, and how, if at all, such testimony was affected by the cross-examination"); *S. C.*; 1848, *State v. Jones*, 29 R. C. 201, 229, 7 S. R. 296; *Tenn.*; 1850, *Kendrick v. State*, 10 Humph. 479, 488 (substance sufficient, provided the whole, including the cross-examination, is given); 1871, *Planters' Bank v. Massey*, 2 Heisk. 360, 367 (substance on the particular subject, sufficient); 1871, *Kinnard v. Willmore*, 1b. 619, 621 (the witness could not remember what M. had sworn at a former trial where he was present, but was sure that, whatever it was, it was the same as at another trial; excluded, as having no real memory); 1872, *Wade v. State*, 7 Bart. 80 (substance sufficient; that different accounts differ in detail is immaterial); 1898, *Weeks v. McNulty*, 101 Tenn. 498, 49 S. W. 609 (whole of former testimony, so far as relevant, admissible); *Tex.*; 1866, *Thurmond v. Trammell*, 26 Tex. 371, 383; 1883, *Parks v. Caudle*, 38 Id. 320; 1893, *Bennett v. State*, 32 Tex. Cr. 216, 219, 23 S. W. 687 (substance of the particular subject only is sufficient); *U. S.*; 1838, *U. S. v. White*, 5 Cr. C. C. 457 (the "very words" not necessary); 1851, *U. S. v. Macomb*, 5 McLean 286, 293, 299 (substance, including cross examination, sufficient; practically repudiating the prior rulings of *U. S. v. Wood*, 3 Wash. C. C. 440, and *Bennett v. Adams*, 2 Cr. C. C. 551); 1878, *Ruch v. Rock Island*, 97 U. S. 698 (precise words not necessary; the "main and principal points" sufficient); 1897, *Chicago & St. P. M. & O. R. Co. v. Myers*, 25 C. C. A. 496, 80 Fed. 261 (the testimony had shown the place where the plaintiff was standing when injured, and effected this by verifying certain photographs; the non-production of the photographs with the stenographic report was held to leave the latter substantially defective); *Vi.*; 1845, *State v. Hooker*, 17 Vt. 670 (any quantity of recollection sufficient); 1849, *Marsh v. Jones*, 31 Id. 378, 380 (the substance in the very words

of the deceased, required; "this is the rule required in proving the words spoken in slanders, libels, and on indictments for perjury; and substantially the same rule is required" for parties' admissions); 1861, *Williams v. Ward*, 27 Id. 369, 376 (the witness could not recollect the deceased's cross-examination, but thought he should have recollected had it altered the testimony in chief; held sufficient); 1883, *Bowman v. Rowell*, 34 Id. 343, 346 (like *Marsh v. Jones*); 1867, *Whitcher v. Moore*, 30 Id. 470; 1873, *Earl v. Tupper*, 43 Id. 284; *Pa.*; 1827, *Caton v. Lewis*, 5 Rand. 31, 39 (enough to give "the matter substantially"); *Wis.*; 1892, *Jackson v. State*, 21 Wis. 127, 132, 31 N. W. 60 ("substantially correct" sufficient); *Wyo.*; 1903, *Foley v. State*, — *Wyo.* —, 73 Pac. 631 (the substance of the whole of what related to the subject must be given).

In *Delaware* the stricter rule has been laid down, and would perhaps be followed today. 1843, *Kinney v. Homan*, 5 Harringt. 397 ("even to his very words"; but only as to the relevant portions).

In *Massachusetts* the strict rule was originally adopted and for a long time persevered with. 1828, *Meivin v. Whiting*, 7 Pick. 79, 81, *semble* (words required); 1836, *Com. v. Richards*, 18 Id. 434, 438 ("his words . . . are to be recited"); 1843, *Warren v. Nichols*, 6 Metc. 361 ("The witness must be able to state the language in which the testimony was given, substantially and in all material particulars"; distinguished the case of perjury, where it is enough to prove that the witness testified positively to a fact and did not afterwards . . . retract or modify that statement"; *Hubbard*, J., diss., quoted *supra*); 1852, *Gould v. Norfolk Lead Co.*, 2 Cash. 346; 1860, *Corey v. Jones*, 15 Gray 544; 1867, *Woods v. Keyes*, 14 All. 256, 258; but the paring process has since been begun, usefully modifying the rule; 1879, *Costigan v. Lunt*, 127 Mass. 354 ("the language must be given 'substantially and in all material particulars,' but not necessarily with absolute verbal identity").

In *New York* there has been a similar progress from strictness to liberality: 1806, *Jackson v. Bailey*, 2 John. 17, 20 ("what such witness had formerly sworn, received; *Livingston*, J., diss. because the testimony cannot be sufficiently recollected"); 1826, *Wilbur v. Selden*, C. Cow. 162, 165 ("the words of the witness must be given, not what is supposed to be the substance of his testimony"); 1836, *Clark v. Vorce*, 11 Wend. 193, 195 (over-strictness discountenanced; a witness admitted "who could not pretend to give his precise words," but "intended to take down the words" and had taken "very full and particular minutes"); 1853, *Huff v. Bennett*, 31 N. Y. 337 (minutes which "were pretty full," but "he would not say that they contained the testimony of S. accurately," excluded); 1863, *Martin v. Cope*, 3 Abb. App. C. 182, 192 (minutes containing "not substantially the meaning, but substantially the language of the witness, received"); 1867, *McIntyre v. R. Co.*, 37 N. Y.

received, the latter rejected. The distinction seems to have originated in the following passage:

1854, *Bartley, C. J.*, in *Summers v. State*, 5 Oh. St. 238, 231: "There is a distinction, however, between narrating the statements made by the deceased witness and giving the effect of his testimony. This distinction may be illustrated thus: If a witness state that A, as a witness on a former trial, proved the execution of a written instrument by it, that would be giving the effect, which is nothing else than the result or conclusion produced by A's testimony. But if the witness state that A testified that he had often seen B write, that he was acquainted with his handwriting, and that the name subscribed to the instrument of writing exhibited was B's signature, that would be giving the substance of A's testimony, though it might not be in the exact words."

It is true enough that by the Opinion rule the witness should perhaps be forbidden to give the merely legal effect of the testimony, as illustrated in the above passage,—provided at least that he can remember the further details from which he drew his inference. But the terms "substance" and "effect" are ill calculated to convey any tangible distinction to the mind of the witness, and their use tends to degenerate into an unprofitable quibble. It would be simple enough to leave the application of the principle entirely in the hands of the trial judge, who will see that the witness searches his memory for as precise an account as he can give.⁵

But it is proper enough, in applying the principle of Entirety of Parts (post, § 2099), to discriminate to this extent, that when the former testimony is used not as that of an independent witness (ante, § 1373) but merely as containing a self-contradictory statement by the same witness on the stand (ante, § 1032), or as containing a party's admission (ante, §§ 1048, 1075) to put in only the part containing the self-contradiction⁶ or the admission.⁷

267, 291 (minutes containing the "substance," admitted, though they had not "the whole language of the witness, nor the whole of his testimony"); 1882, *Trimmer v. Trimmer*, 90 id. 676 (one who remembered "the general topics to which B testified and the subject of some of the evidence," allowed to give "the substance" of that evidence).

⁵ Another distinction, occasionally drawn, is between the "substance of the words" and the "substance of the testimony"; but this is a futile one and comes fairly within the definition of a quibble; it is merely another way of telling the witness that he must give the testimony as nearly as he can in the original words.—Still another discrimination, lacking any virtue, but sometimes met with, is that the substance suffices for former testimony, when used in contradiction (ante, § 1032), but not when used as independent testimony (ante, § 1373): 1852, *Gould v. Lead Co.*, 9 Conn. 338, 347; 1867, *Day v. Stickney*, 14 All. 260 (distinguishing the asking of such a question merely by way of fair notice to the witness before proving the contradiction; the Massachusetts rule not requiring this under the rule of §§ 1025, 1029 ante).

⁶ 1873, *Bryson v. Hamilton, N. Br., Stevens* Dig. 1880, p. 619; 1871, *Pound v. State*, 43 Ga. 130; 1891, *Barnett v. State*, 87 id. 622, 13 S. E.

552; 1898, *State v. Sooter*, 32 id. 531, 540, 34 Pac. 1036 (defendant's preliminary examination; all that bears on subject in question, sufficient); 1892, *Maxted v. Fowler*, 24 Mich. 111, 33 N. W. 921 (even for a written report of the testimony; compare *Lightfoot v. People*, cited post, § 2106, for a deposition); 1902, *Zibbell v. Grand Rapids*, 129 id. 659, 89 N. W. 863; 1903, *McMaster v. State*, — Miss. —, 35 So. 302 (accused's testimony); 1836, *Ingram v. Watkins*, 1 Dev. & B. 442, 444 (cited in note 4, supra); 1848, *Edwards v. Sullivan*, 8 Ired. 304; 1863, *Rounds v. State*, 57 Wis. 48, 14 N. W. 865 (defendant's preliminary examination); 1896, *Emery v. State*, 92 id. 146, 65 N. W. 848 (parts of testimony before the coroner).

⁷ 1803, *Collett v. Lord Keith*, 4 Esp. 212 (the defendant's testimony at a former trial, admitted, though the judge had there told him, at a certain point, "he need not indicate his conduct by giving reasons; the whole world would agree with him," and the witness had refrained; this circumstance held merely to be "matter of observation to make to the jury"); 1902, *Southern L. & T. Co. v. Benbow*, 131 N. C. 413, 42 S. E. 596 (former testimony as admissions; entirety not required); 1868, *Johnson v. Powers*, 40 Vt. 611, 612 (examination in chief of an opponent witness, where the

Where the former testimony is offered in the shape of a *written report* or of a *deposition*, it is no longer offered as an oral utterance but as a writing, and is amenable to a somewhat different principle, later dealt with (*post*, § 2103).³

§ 2099. (b) *Entirety of Parts: General Principle, as applied to Admissions, Conversations, Slanders, Former Testimony, and the like.* It has been already noted (*ante*, § 2095, par. 2) that the idea of Completeness involves, not merely Verbal Precision, but Entirety of Parts. The second branch of inquiry therefore is, how far the principle of Completeness requires the offering at the same time of all the parts of an oral utterance, as a condition of offering any part of it. This inquiry conceives of an utterance as composed, not simply of consecutive words, but of clauses and sentences, forming connected parts of a single effort to express a general thought having various details. It is understood on all hands that the opponent may in any event afterwards put in the remainder (*post*, § 2103); but the question here is, whether the proponent must in the first instance put in all the parts, or may merely select that part which serves his purpose.

On this point, there is a singular lack of judicial authority. While working out in fair detail the application of the principle of Entirety to written utterances (*post*, §§ 2102 ff.), the Courts have almost ignored its development in application to oral utterances. We are relegated for information to the general spirit pervading their treatment of other aspects of the principle and are obliged to depend upon an implied rather than an expressed rule. These general indications are of three sorts. In the first place, the existence of copious rulings allowing the opponent afterwards to put in the remainder of the utterance (*post*, § 2115), and the absence of rulings requiring the proponent to put in the whole at first, indicate that there is no general and accepted principle or practice making the latter requirement. In the next place, however, the language judicially used in applying the rule of Verbal Precision requiring the "substance" to be offered (*ante*, § 2097) suggests that this "substance," though not reproducing the precise words, should at least represent the tenor of the utterance as a whole, and not mere fragments of it. In the third place, the single case in which Entirety of Parts is clearly required, namely, testimony at a former trial (*infra*, par. 4) appears to be treated judicially as exceptional. So far, then, as judicial indications have gone, it may be said that there is no general rule requiring the proponent to put in the whole of an oral utterance (either the whole as it was in fact

witness was unable to give the cross-examination, unless the opponent had no opportunity to show that the cross-examination qualified the direct.

³ Distinguish, of course, the question, under the Hearsay rule, whether a judge's note or a magistrate's or stenographer's written report of testimony is admissible to prove what was said (*ante*, §§ 1666, 1667, 1669), and also the question, under the same rule, whether a bill of exceptions is receivable for the same purpose

(*ante*, § 1668); the exclusion of the latter some Courts is partly based on the incompleteness of the testimony set forth in such a bill, i. e. the present principle is given a certain effect in reaching that result. Distinguish also the question, under the question of Preference, whether a magistrate's report of testimony is preferred to a witness speaking from memory or not (*ante*, §§ 1329, 1330) and whether such a report is conclusive as to the tenor of the testimony (*ante*, § 1349).

uttered or the whole of what a specific witness heard), but that in exceptional instances some such a requirement would be made. The following passages will illustrate both this general tendency and also the absence of a positive rule:

1888, *Parnell Commission's Proceedings*, 1st, 4th, 6th, 7th, 8th days, *Times'* Rep. pt. 1, p. 236, pt. 2, pp. 28, 101, 100; pt. 28, p. 60. The Land League and its leaders were charged with encouraging outrage and crime, and numerous speeches were offered to prove this; repeated discussion took place, during the trial, as to the fair and proper way of using the passages relied upon; in the Attorney-General's opening, the following statements were made; the *Attorney-General*: "I have not got the whole of the speeches; I have only reports. A man may speak for two hours, but I may have only a few lines of his speech"; President *Hannen*: "If you have not got the whole of them, it will be open to Sir Charles Russell to correct you by referring to such reports as do exist; but what you do use [in your opening address] you will put in the whole of it [in evidence later]"; the *Attorney-General*: "Without exception, the whole extract at my command of every speech I read shall be put in." Then at a later day, when certain speeches were put in evidence by Sir *H. James* from constables' notes, Mr. *Healy* having claimed that "the proper course is to read the entire speech," President *Hannen* said: "It is not necessary for you, Sir Henry, to read the whole speech, but only those portions on which you rely. . . . The only regular course is this (and whatever it leads to, it must be followed): You, Sir Henry, will call attention to what you consider the material parts of the speech, and Sir C. Russell can on cross-examination refer to other portions which he may consider, and, if necessary, the cross-examination can be postponed until he has had an opportunity of seeing the full speeches." Shortly afterwards, the counsel for the *Times* proposed an arrangement by which copies of all the reports of speeches were to be prepared and underlined and furnished to all parties for convenient reference, when Mr. *Healy* inquired: "Some of the speeches made would cover two or three columns if taken verbatim, but they have been condensed [in the constables' notes] into three or four sentences. What is the intention with regard to them?" Sir *H. James*: "We can only present the short report in those cases, because that is all we have got." On a still later occasion, Mr. *Reid*, the counsel for Mr. O'Brien, read passages from his speeches showing his opposition to criminal methods, and was interrupted by the *Attorney-General*: "You have omitted a passage which precedes that"; Mr. *Reid*: "I thought the rule was that what you wished to read should be read subsequently"; *Attorney-General*: "I was only suggesting that the course which has been pursued on every other occasion by Sir Charles Russell and yourself should be pursued now"; President *Hannen* (to Mr. *Reid*): "This question arose before, and there was great complaint on your part that the *Attorney-General* did not read all, and then you read, or Sir C. Russell read something. But I have laid down the rule that, unless you can come to a compromise, the true rule is for you to read what you attach importance to and for the other side to do the same."

In order to ascertain the propriety of any exceptions to the rule, it may be noted that three general considerations affect here the policy of requiring the whole of an oral utterance. In the first place, oral utterances are not marked off as distinct wholes in the way that written utterances are. It is simple enough to see that one letter or one deed ends at the signatures, and that the piece of paper is an entirety by itself. So one account in a ledger, or the judicial record of a single cause, plainly constitutes a connected series of written utterances having an entirety and a distinct existence of its own. But oral utterances can usually not be given any such separate unity of character; nor can it be told whether a later utterance will concern the

prior one; and the process of discovering in advance such unity as may here and there exist would result, on the whole, in innumerable subtle discriminations and tedious investigations, with rarely any profit to correspond. In the second place, oral utterances (even assuming that some entirety could be predicated of them) are often or usually so delivered that no one witness could testify to the entire utterance on the subject in question. This witness may have heard a definite portion, and yet the speaker may have delivered a qualifying remainder after the departure or during the inattention of the particular hearer. More commonly still, and most important of all, the hearer will have remembered only that portion in which he was interested or in which he heard what he wished to hear; the remainder he has made no effort to remember. If, then, any requirement of entirety existed, that witness would perhaps seldom be found who could honestly aver that he heard and remembered all the parts of the entire utterance. In the third place, the opponent himself, in many or most instances, has it in his own power to remedy any defects in the proponent's proof of parts of utterances by bringing forward, at his stage of the proof, the remaining parts, if any which qualify the others. This consideration, so far as it goes, reduces to a minimum the need for any requirement that the proponent should prove the whole in the first instance.

Keeping in mind, then, the relative force of these three considerations, and applying them to the most common kinds of oral utterances which come to be proved in litigation, it may be suggested that the following rules would adequately meet the needs of proof in the present respect:

(1) For a *party's admissions* and conversations involving admissions, for *witness' self-contradictions at a prior time*, and for oral words charged with *seditious or defamatory*, the proponent need prove in the first instance the part only which serves his purpose;¹ and this would mean not only that the whole utterance need not be proved, but not even all that the witness heard.

(2) For *contracts* and other oral utterances having in themselves a legal effect — *notices, demands, orders to an agent*, and the like —, all material parts should be offered at once, subject to exceptions in the circumstances of each case.²

(3) For *dying declarations* and other oral utterances admissible under exceptions to the Hearsay rule, since the above considerations usually conflict in result, no general rule can fairly be laid down.³

¹ 1803, *Sylvester v. State*, — Fla. —, 35 So. 142; 1876, *Davis v. Smith*, 75 N. C. 115 (witness called by the parties to answer a question, allowed to give what fragments he heard of their conversation); 1883, *State v. Lawhorn*, 88 id. 634, 637; and cases cited *ante*, § 2097, note 1, § 2098, notes 6, 7.

The following rulings require the whole of an admission: 1853, *Brown v. Upton*, 12 Ga. 505, 507; 1828, *Quick v. Johnson*, 6 Mart. n. s. 522. Compare the cases cited *ante*, § 2097.

The subject of proof of oral utterances evidenced by notes or a written report sworn to is apt to be confused with the proof of a writing admissible for its own sake (*post*, §§ 2103-2111).

² 1877, *Flood v. Mitchell*, 68 N. Y. 507, (memorandum of an oral agreement, omitted "two articles"; not admitted, because "it not an accurate statement of the conversation and agreement").

³ For *dying declarations*, the cases are collected *ante*, § 1443.

(4) For *testimony at a former trial*, the first consideration above noted is lacking, since the cross-examination often results in decided modifications of the direct examination. Nevertheless, many topics are often dealt with in a single testimony, so that what is needed is only the part dealing with that particular topic, on both the direct and the cross-examination. The second and third considerations above also are often lacking. Accordingly, the fair rule, and the one generally applied judicially, is to require the witness to be able to state *all the material parts of the testimony on that topic, both in direct and in cross-examination.*⁴

§ 2100. *Same: Application to Accused's Confessions.* (5) For an *accused's confessions*, the second and third considerations above point to the same result as in ordinary admissions; yet the first is not of such force, since a confession in the stricter sense (*ante*, § 821) is usually a distinct connected statement. As a practical compromise, then, the rule might well be that the witness should state the material parts of all that he heard; but no more should be required. The precise judicial rule, however, is not entirely clear:

(a) In the first place, it is generally conceded that the whole of the utterance is not required if it was not heard, but *only so much as was heard and is remembered.*¹

(b) In the next place, the circumstance that there were at another time *separate utterances*, touching the same subject, but not otherwise connected, does not exclude the one utterance offered.²

(c) In the third place, for the remaining case — *an entire utterance, wholly heard* — the precise rule of law is obscure. It is commonly said that the

⁴ The cases to this effect have been for convenience placed *ante*, § 2098; it is difficult to separate the rulings upon that topic and this.

For written reports or depositions, see *post*, § 2111.

¹ *Cal.*: 1895, *People v. Daniels*, 105 Cal. 262, 36 Pac. 720; 1896, *People v. Dice*, 120 id. 189, 52 Pac. 477 (murder; substance of threats, though only a part of the whole conversation, sufficient); *Ga.*: 1872, *Westmoreland v. State*, 45 Ga. 225, 279; 1890, *Woolfolk v. State*, 85 id. 69, 99, 11 S. E. 814; *La.*: 1835, *Mays v. Deaver*, 1 La. 216, 222 ("That he did not hear all, would go to the effect of the testimony, and not to its admissibility"); 1863, *State v. Elliott*, 15 id. 72, 74 (conversation overheard in jail; the part heard may be received); 1890, *State v. Moelchen*, 53 La. 310, 314, 5 N. W. 186 (a witness to a quarrel in a foreign language, who understood only one word used, "knife," admitted); *La.*: 1895, *State v. Vallery*, 47 La. An. 182, 16 So. 743; 1897, *State v. Daniel*, 49 id. 954, 22 So. 415 (part of an altercation between deceased and defendant, received); 1900, *State v. Spillens*, 105 La. 163, 29 So. 480; *N. C.*: 1897, *State v. Robertson*, 121 N. C. 551, 28 S. E. 89, *semble*; 1892, *State v. Covington*, 2 Bail. 569, 570 ("That which is heard may be given in evidence, but that which is not heard cannot, from necessity"); 1856, *State v. Gossett*, 9 Rich L.

428, 436; *Va.*: 1858, *Shifflet's Case*, 14 Gratt. 652, 657 (testimony of one who did not hear the whole of a confession, received). *Contra*: 1870, *People v. Gelabert*, 39 Cal. 643 ("The alleged confession was partly in Spanish and partly in broken English, and the witness stated that he did not understand all that the prisoner said in Spanish"; excluded); 1874, *State v. Gilcrease*, 26 La. An. 622 (no precedent cited).

There might be an exception where the utterance was palpably incomplete with reference to the accused's intended utterance, — as where an external interruption cuts off his statement before he has voluntarily stopped: 1865, *William v. State*, 39 Ala. 532 (slave's confession, stopped at a certain point by his master's command, excluded entirely). Compare the similar rule for dying declarations, *ante*, § 1448.

² 1872, *Com. v. Pitsinger*, 110 Mass. 101; 1899, *Com. v. Chance*, 174 id. 245, 54 N. E. 551 (certain conversations of defendant, held not connected); 1847, *State v. Cowan*, 7 Ired. 239, 242 (the witness had overheard a conversation between two prisoners in jail, but not the conversation that they had at other times; held, sufficient to state all that was said by them on the one occasion, and, *semble*, merely on the one subject in controversy); 1856, *State v. Gossett*, 9 Rich L. 437; 1854, *Jones v. State*, 13 Tex. 163, 177.

whole of the confession must be taken together; but this obviously leaves unsettled whether it is meant that the prosecution must put it all in at first, or merely that the accused may call for or offer the remainder (*post*, § 2115), on cross-examination or otherwise, — two very different meanings in practical effect. The following classical passages illustrate the usual obscure tenor of judicial utterances on this point:

1696, *R. v. Paine*, 5 Mod. 163; seditious libel; the defendant had confessed "that he wrote the libel, but that he did neither compose or publish it, but only delivered it, instead of another paper, to B."; *Per Curiam*: "As to the first point, [whether he was the author and composer of the libel,] there was no proof that he was the composer of it, or that he wrote it, but by his own confession before the mayor. Now if such confession shall be taken as evidence to convict him, it is but justice and reason, and so allowed in the civil law, that his whole confession shall be evidence as well for as against him; and then there will be no proof of a malicious and seditious publication of this paper, for he confessed that it was delivered by mistake."

1716, *Serjeant Hawkins*, Pleas of the Crown, II, c. 46, § 40: "It seems an established rule that, wherever a man's confession is made use of against him, it must all be taken together and not by parcels."

1868, *Wilson, J.*, in *Johnson v. Powers*, 40 Vt. 611, 612: "The object of the party using such declarations or admissions against the party who made them is only to ascertain that which he conceded against himself; yet, unless the whole is received and considered, the true meaning and import of the part which is evidence against him cannot be ascertained. It is therefore a rule of evidence that the whole declaration or admission of the party made at one time shall be taken together; but the jury are at liberty to believe a portion and disbelieve the other, as they are all evidence."

* In an occasional decision a rule is sometimes enforced that the whole must be presented in the first instance; but it cannot be said that this is in general the implied meaning. It is only possible to note this universally accepted, but inconclusive phrase, that "the whole of the confession must be taken together": *Eng.*: 1827, *R. v. Jones*, 2 C. & P. 629 (the defendant had confessed that she cut the child's throat, but had also said that it was stillborn; *Bosanquet, Serjt.*: "There is no doubt that if a prosecutor uses the declaration of a prisoner, he must take the whole of it together, and cannot select one part and leave another"); 1829, *R. v. Higgins*, 3 id. 603 (larceny; the prisoner's statement before the magistrate "was read as evidence on the part of the prosecution"; in it he said that the goods were "honestly bought and paid for"; *Parke, J.*: "If the prosecutor makes the prisoner's declaration evidence, it then becomes evidence for the prisoner, as well as against him; but still, like all evidence given in any case, it is for you to say whether you really believe it"); 1830, *R. v. Steptoe*, 4 id. 397 (oral statement; *Park, J.*, "You are to take what he says altogether; you are not bound to take the exculpatory part as true, merely because it is given in evidence"); *Ala.*: 1845, *Wilson v. Calvert*, 8 id. 757; 1854, *Eckridge v. State*, 25 id. 33; 1855, *Chambers v. State*, 26 id. 59, 63; 1858, *Corbett v. State*, 31 id. 329, 341; 1872, *Parke v. State*, 48 id. 266, 268; 1873, *Burns v. State*, 49 id. 370, 374; 1875, *Eiland v. State*, 52 id. 335; 1893, *Wehr v. State*, 100 id. 47, 51, 14 So. 865; *Ark.*: 1883, *Frasier v. State*, 42 Ark. 72; 1901, *Williams v. State*,

69 id. 599, 65 S. W. 103; *Cal.*: 1853, *People v. Naira*, 3 Cal. 106; 1870, *People v. Gelabert*, 3 id. 463; 1875, *People v. Keith*, 50 id. 137; *Ga.*: 1857, *Long v. State*, 22 Ga. 40, 42; 1896, *Myer v. State*, 97 id. 76, 25 S. E. 252; *Ill.*: 1857, *Comfort v. People*, 54 Ill. 404, 406; *Ind.*: 1899, *State v. Novak*, 109 Ia. 717, 79 N. W. 465; *Ky.*: 1873, *Berry v. Com.*, 10 Bush 17; *Mass.*: 1899, *Com. v. Campbell*, 155 Mass. 537, 30 N. E. 7; 1892, *Com. v. Trefethen*, 157 id. 180, 197; *N. E.* 961; 1893, *Com. v. Russell*, 160 id. 8, 35 N. E. 84; *Miss.*: 1849, *Coon v. State*, 13 S. & M. 249; 1850, *McCann v. State*, ib. 498; *Mo.*: 1838, *Bower v. State*, 5 Mo. 382; 1874, *State v. Carlisle*, 57 id. 106; *N. C.*: 1870, *State v. Worthington*, 64 N. C. 594, 595; *Tenn.*: 1870, *Tipton v. State*, Peck 307, 314; *Tex.*: 1870, *Conner v. State*, 34 Tex. 659, 661; *Vt.*: 1870, *State v. Mahon*, 32 Vt. 244; *Va.*: 1838, *Brown Case*, 9 Leigh 633; *Wis.*: 1869, *Griswold v. State*, 24 Wis. 148.

Supposing all to be required, it may of course be supplied by combining the testimony of one or more witnesses: 1874, *People v. Ah Wee*, Cal. 236 (here the deceased's remark in English was reported by one, and the defendant's answer in Chinese by another person); 1875, *People v. Keith*, 50 id. 137, 139.

In many of these rulings, it is a favorable and cautionary addition that the exculpatory part need not be believed; the opinion in *Tipton v. State*, *Tenn.*, *supra*, perhaps best phrases it: it is never denied, and citations in detail are unnecessary. But obviously it is a superfluous statement. No witness need be believed (a

It may be suggested, however, that where the confession is presented in *written form* — as, in a magistrate's report of a preliminary examination — the considerations affecting written documents should apply (*post*, § 2103), and the whole need not be put in, because the writing is before the Court, and the accused may have the remainder read for himself.⁴ This, however, was apparently not the English practice; the whole was read for the prosecution; although, since the confessions were not admissible against third persons (*ante*, §§ 1076, 1079), the names of such persons were by most judges ordered to be omitted.⁵

B. DOCUMENTS.

§ 2102. (a) *Document produced in Court; must the whole be put in?* When a document is produced in Court, the principle of Verbal Precision (*ante*, § 2095, par. 2) is of course usually satisfied, because the document itself contains all of its very words. The only question can be as to the applicability of the other principle, Entirety of Parts (*ante*, § 2095, par. 2). Here, too, it would seem at first sight that the principle was amply satisfied, since the whole and every part of it is in fact produced in the document itself. Yet not every part may be desired to be put in evidence and read as such by the offeror at that time. Undoubtedly it may be read later by the opponent (*post*, § 2113). But *must* the offeror read it then as a part of his evidence?

In the majority of instances, perhaps, the decision of this question either way is of no real consequence, and the application of the rule becomes a mere

§ 2034); the jury may always believe as much or as little as they please of his testimony. Furthermore, the complementary and exculpatory part of the confession is put in, not as testimony, but merely as qualifying the effect of the confessing portions; this is more fully considered at large, *post*, § 2113. There is but one instance in which the tribunal must accept the qualifying portions of a statement and give effect to them as true, and that is a pleading not traversed; because the other party has there admitted the statements in the pleading to be true; this principle is illustrated *post*, § 2122, in the question whether an entire answer in chancery is to be taken as true.

⁴ 1893, *Webb v. State*, 100 Ala. 47, 52, 14 So. 865 (entire confession need not be offered by the prosecution). Add here the cases cited *ante*, § 2098, notes 4, 6, 7, dealing with a defendant's examination before the magistrate.

For the rule of preference that the *magistrate's written report* must be produced, see *ante*, § 1326.

⁵ 1830, Note by the Reporters, 4 C. & P. 225 ("The practice has been, in reading confessions, to omit the names of other accused parties, and, where they are used, to say 'another person,' 'a third person,' etc., where more than one other prisoner was named; and some judges have even directed witnesses who came to prove verbal declarations to omit the names of those persons in like manner"). But by other judges the names were ordered read and the jury in-

structed not to use the confession against them: 1830, *R. v. Clewes*, 4 C. & P. 221, 224; *R. v. Fletcher*, ib. 250; *R. v. Hearn*, ib. 215 (all per Littledale, J.); compare *R. v. Walkley* (1833), 6 id. 175. In the United States the latter practice is favored: 1893, *State v. Donelon*, 45 La. An. 744, 749, 12 So. 922; 1896, *State v. Thibodeaux*, 48 id. 600, 19 So. 680; 1900, *State v. Robinson*, 52 id. 616, 27 So. 124; 1901, *State v. Sims*, 106 La. 453, 31 So. 71; 1896, *Com. v. Bishop*, 165 Mass. 148, 42 N. E. 560; 1897, *State v. Collins*, 121 N. C. 667, 28 S. E. 520; 1881, *State v. Workman*, 15 S. C. 540, 545; 1881, *State v. Dodson*, 16 id. 453, 460; 1896, *U. S. v. Ball*, 163 U. S. 662, 16 Sup. 1192; 1895, *State v. Cram*, 67 Vt. 650, 32 Atl. 502; 1896, *State v. Fournier*, 68 id. 262, 35 Atl. 178. The statement need in theory be only in the nature of an admission (*ante*, § 1049); yet practically, when it involves others, it ought to be a real confession (*ante*, § 821): 1897, *State v. Green*, 48 N. C. 136, 26 S. E. 234; 1897, *State v. Mitchell*, 49 id. 410, 27 S. E. 424 (here the whole was excluded, because it was in no sense a confession, but merely a throwing of blame on the other defendant).

The principle upon which the confession can be used against a co-defendant has been considered *ante*, § 1076; it is only on the supposition that the confession cannot lawfully affect the co-defendant that the above question arises as to omitting names.

quibble, or a skirmish for a tactical position, involving the rule against impeaching one's own witness (*ante*, § 909). But in a given case this may not be so, and the question must be answered on principle. Unfortunately, no generally accepted rule seems to have been established, as the following passages illustrate:

1794, *Eaton's Trial*, 23 How. St. Tr. 1030; Mr. Gurney, for the defence: "I desire that the whole of the [alleged seditious] speech of Mr. Thelwall may be read, a part only of which is included in the indictment"; Mr. Fielding, for the prosecution: "You may read it as part of your evidence"; Mr. Gurney: "I know I may; but I conceive I have a right to have it read as; art of yours. Whenever a part of a paper is read in evidence by one party, the other party has a right to insist upon the whole being read at that time"; Mr. Recorder: "I think you [to Mr. Gurney] must read it as a part of your evidence, if you wish to have it read."

1837, *Messrs. Moody & Robinson*, Note to 2 Mo. & Rob. 46: "It seems reasonable that, where a party produces a document in evidence, he must be considered as producing the whole of the document; his opponent has therefore a right to refer to any part of it as already in proof. In other words, he may extract the remaining contents of the document (provided they be relevant to the subject-matter) and bring them before the jury on the same principle that he may by cross-examination extract from a witness all facts within that witness' memory, provided they be relevant to the subject-matter."

1875, *Tilton v. Beecher*, N. Y., Abbott's Rep. II, 270; Mr. Evarts (cross-examining): "Look at this article, Mr. Tilton, . . . and say if it was written by you and published in your newspaper?" A. "Yes, sir"; Mr. Shearman: "It is an article entitled, 'Mr. Tilton's Rejoinder to Mr. Greeley'"; Mr. Fullerton: "If we have the sermon, let us have the text"; Mr. Beach: "I think it is the rule, sir, that where an answering letter is read, the letter to which it was a reply should be read also"; Judge Neilson: "That is the rule. Perhaps if counsel will look at it they can judge whether it is material"; Mr. Evarts: "Your Honor, we understand exactly what the rule is. All that can be claimed by our learned friends is that it gives them a right to read any part of the paper to which it is a reply, if they see fit. They cannot make us read it"; Judge Neilson: "I have had occasion to say that where one party puts a paper in they were at liberty to read a part of it. But it was deemed all put in by them, and the other side could read any portion of it they thought proper"; Mr. Fullerton: "That does not present this case"; Mr. Evarts: "How does it fail to present this case? Supposing it is all in, are we obliged to read all? . . . I do not understand that we are obliged to read the whole article to get at the point which is important to us"; Judge Neilson: "The whole must be deemed put in by you"; Mr. Evarts: "That may be"; Judge Neilson: "And you read such part of it as you now think proper, and they can afterwards call attention to other parts. I think I will answer."

It would seem that the general tendency is to require the whole of a similar document to be put in and treated as the evidence of the party desiring to offer a part only, even though the actual reading be postponed. But the rulings are not harmonious, nor always definite.¹ The matter should be left entirely to the discretion of the trial Court.

¹ 1862, *Milne v. Leisler*, 7 H. & N. 766, 795 (whole of a letter must be read); 1869, *Spanagel v. Dellinger*, 38 Cal. 279, 283 ("they were entitled on demand to a reading of the remaining portions thereof immediately and before the intervention of other evidence"; here, the opponent's pleading in a former suit); 1875, *Lester v. Ins. Co.*, 55 Ga. 475, 479 (part only

of a letter may be read; "the whole letter in evidence," and either party might read relevant portions); 1898, *Slingloff v. Bruner*, 17 Neb. 561, 51 N. E. 772 (letters showing a testator's feelings; the whole not required to be read); 1899, *Wright v. Bragg*, 37 C. C. A. 574, 96 Fed. 729 (on a witness' admission of genuineness of letter and passage in it, opposing counsel

§ 2103. *Same: Depositions and Former Testimony.* (1) A deposition represents the answers to the direct examination and the cross-examination. Since the proponent of a witness testifying *viva voce* offers merely his answers to the direct examination, and the opponent may or may not choose to obtain further testimony on cross-examination, it would seem, by analogy, that the *taker* of a deposition, when using it, need put in the direct examination only,¹ leaving to the opponent to use the cross-examination or not, as he pleases.² The same rule — that not all need be read — should also obtain for the *non-taker* wishing to use a deposition which the taker has failed to use; and this much seems generally conceded.³ Where the deposition (so-called) consists of the *opponent's answers to interrogatories* in the nature of a bill of discovery, the analogy of answers in chancery is the controlling one (*post*, § 2124).⁴

inspect the letter to find explanations in other parts of it).

For the general right to inspect a document before cross-examination begun, see *ante*, § 1859.

For the time of putting in a contradictory document in impeachment and the time of re-examining upon it for explanations, see *ante*, § 1261.

¹ Accord: 1897, *Bussel v. Mass*, 116 Ala. 68, 23 So. 568; 1903, *Reed v. Ins. Co.*, 117 Ga. 116, 43 S. E. 453, *semble* (remainder of answers to interrogatories may be put in by the opponent, as the evidence of the party offering the first part); 1899, *Watson v. R. Co.*, 76 Minn. 358, 79 N. W. 308 (part may be read, subject to trial Court's order to read all at the same time); 1841, *Southwark v. Ins. Co.*, 6 Wh. 327, 330 (all of the direct examination must be read); 1892, *Thomas v. Miller*, 151 Pa. 482, 486, 25 Atl. 127 (same for party's own deposition). *Contra*: 1832, *Temperley v. Scott*, 5 C. & P. 341 (proponent of a deposition required to read the cross-examination after the direct examination; *Tindal*, C. J.: "If the witness was here, the cross-examination would immediately follow on the examination in chief; and I do not see any reason why they should be separated when the examination is in writing"); 1901, *Orland v. Farrell*, — Cal. —, 65 Pac. 976; 1872, *McArdle v. Bullock*, 45 Ga. 89, 92; 1875, *Kilbourne v. Jennings*, 40 Ia. 473, 474 (co-defendant firm reading a deposition of a partner, obliged to read the whole, so far as pertinent); 1899, *Walkley v. Clark*, 107 id. 451, 78 N. W. 70 (must read all material parts); 1875, *Grant v. Pendery*, 15 Kan. 236, 243 (cross-examination also must be read); 1868, *Lightfoot v. People*, 16 Mich. 507, 511, 516 (the whole must be read, whether used as independent evidence or as containing inconsistent statements serving to impeach); 1874, *Hamilton v. People*, 29 id. 193, 198 (preceding case approved); 1859, *Hill v. Sturgeon*, 28 Mo. 323, 329; 1883, *Converse v. Meyer*, 14 Nebr. 190, 15 N. W. 340. *Not decided*: 1905, *Alexander v. Grand Lodge*, 119 Ia. 519, 93 N. W. 508. But of course the whole of each answer must in any case be read and not be taken by sentences or fragments: 1842, *Perkins v. Adams*, 5 Metc. 44, 48; compare § 2121, *post*.

² Whether the proponent should read the

cross-examination immediately after the taker has read the direct examination, as ruled in *Temperley v. Scott*, *supra*, is merely a question of the time and order of evidence (*ante*, § 1884).

Of course the opponent in such case is not obliged to put in the cross-examination unless he pleases, — any more than he would be obliged to cross-examine on the stand; this is elementary: 1849, *Williams v. Kelsey*, 6 Ga. 365, 375; 1890, *Byers v. Orenstein*, 42 Minn. 386, 44 N. W. 129 (here omitting a part only); compare §§ 909, 1893, *ante*.

But the direct examiner may, on the present principle, put in the cross-answers to a deposition if the cross-examiner does not do so; 1849, *Williams v. Kelsey*, 6 Ga. 365, 375.

³ 1885, *Citizens' Bank v. Rhutzel*, 67 Ia. 316, 319, 25 N. W. 261 (the party reading a deposition taken but not used by the opponent must read all that covers "any given subject," but need read no more); 1899, *Watson v. St. P. C. R. Co.*, 76 Minn. 358, 79 N. W. 308; 1883, *Converse v. Meyer*, 14 Nebr. 190, 15 N. W. 261; 1901, *Hamilton B. S. Co. v. Milliken*, 22 id. 114, 86 N. W. 913 (need not use the whole, but must offer all that affects a given subject); 1902, *First Nat'l Bank v. Minneapolis & N. E. Co.*, — N. D. 280, 91 N. W. 436 (only parts that are relevant must be read); 1844, *Calhoun v. Hays*, 8 W. & S. 127, 130. *Contra*: *Hill v. Sturgeon*, 28 Mo. 323, 329.

But here may the cross-examiner put in merely the cross-answers, without the related direct answers? On the present principle, he may not; for the cross-answers, like bill and answer in chancery (*post*, § 2111), are connected with the direct questions. But the same consequence follows also under the rule for order of examination (*ante*, § 1893), and the authorities are there examined.

If however the cross-examiner does put in the whole, he is not prevented from doing so by the fact that he did not take the deposition; for either party may use a deposition once taken (*ante*, § 1389).

Whether former testimony reported in writing need be proved by the writing at all is examined elsewhere (*ante*, § 1326).

⁴ An opponent's answer in chancery, when

(2) When *testimony at a former trial* is offered in the shape of a written verbatim report, and is not proved by oral testimony resting on recollection the analogy of a deposition would seem to apply, so that the offeror need not read any more than he considers material, the opponent having it conveniently in his power to use the remainder afterwards.⁵ Yet the general rule applied for oral utterances, namely, that all the parts must be given, in substance, and so far as relevant (*ante*, § 2098), would probably by some Courts be here applied.⁶

§ 2104. *Same: Separate Writings referred to in the Writing offered; Letters of a Correspondence.* Where a writing offered refers to another writing the latter should also be put in at the same time, provided the reference is such as to make it probable that the latter is requisite to a full understanding of the effect of the former. The same principle would apply to another writing, not expressly referred to, but necessary by the nature of the documents to a proper understanding of the one offered. Much, therefore, will depend upon the circumstances of each case and the character of each document, and no fixed rule can fairly be laid down; the trial Court's discretion should control. Such separate writings have been required to be offered in various classes of cases;¹ in particular, the requirement may be made for other documents referred to in a *deposition*,² or for prior *letters of a correspondence* referred to in subsequent ones offered,³ though on the latter point inconsistent general rules have been laid down.

used in evidence at law, must by a rule of long tradition be read as a whole if used at all; but, when used in the same suit in chancery, it is a pleading, and only so much need be used as is desired by the one using it, provided he does not separate grammatically connected parts. This much is accepted on all hands. But the subject is so closely united, in the course of precedents, with the further question how much the opponent may put in by way of explanation, that the two matters cannot well be dealt with separately, and they are therefore considered *post*, § 2121. Whether the *bill* must be put in with the answer is considered *post*, § 2111.

¹ 1897, *Waller v. State*, 102 Ga. 684, 28 S. E. 284 (in reading the report of a deceased witness' testimony, the prosecution need offer only the direct examination, or such portions as it deems material; the defence being at liberty to read the remaining portions).

² The cases have been placed *ante*, § 2098.

³ 1837, *Thornton v. Stephen*, 2 Mo. & Rob. 45 (libel; another document referred to, required to be read by the plaintiff); 1901, *Barber v. International Co.*, 73 Conn. 547, 49 Atl. 758 (admission of a contract referring to a schedule, without the schedule, held not improper on the facts); 1895, *Elmore v. Overton*, 104 Ind. 548, 555, 4 N. E. 197 (action for maliciously refusing a license to a qualified teacher; parts of a full set of examination papers rejected); 1846, *Cordray v. Mordecai*, 2 Rich. 518, 525 (an order to sell a ship, and a guaranty by the purchaser, executed at the same time, required to be read together).

⁴ 1826, *Yates v. Carnes*, 3 C. & P. 99 (defendant had been examined in bankruptcy, and his books had at that time been inspected by his office for convenience' sake; held that his examination and the inspection were "all of one transaction," and the latter could not be used without the former); 1831, *Hewitt v. Pigo*, 5 id. 75 (letter to the plaintiff, handed in with his answer in chancery in another proceeding, not allowed to be used here without the answer in chancery); 1837, *R. v. Dennis*, 2 Lew. Cr. 261 (defendant's examination before a magistrate may be put in without putting in all the preceding depositions, because it is "not an answer to the depositions but to the charge"; but a particular deposition referred to must be read).

⁵ 1801, *Johnson v. Gilson*, 4 Esp. 21 (opponent's letter produced and read; held, that reference in the letter to papers inclosed in the letter in such a way that it is necessary to incorporate the papers inclosed with the body of the letter in order to make it intelligible or sense complete," but not if they were "independent papers not referred to by the letter but which it only covers"); 1844, *Watson v. Moore*, 1 C. & K. 636 (a letter offered which appeared to be an answer to one of the offeror's, the latter required to be offered with it); 1846, *Coats v. Gregory*, 10 Ind. 345, 346 (letter plaintiff offered as containing extracts from letters and statements of defendant; rejected the whole of the quoted letters, etc., not accompanying it). *Contra*: 1795, *Barrymore v. Taylor*, 1 Esp. 396 (because the prior letters were

a written collection, need not t conven- neral rule on, in sub- me Courts

ered; Let- ter writing, eference is nderstand- to another the docu- refore, will each docu- discretion e offered in e made for f a cor- the latter

C. & P. 99 (de- ankruptcy, and a inspected at held that his were "all one d not be used v. Pigott, anded in with er proceeding, ut the answer 2 Lew. Cr. C. re a magistrate all the preced- not an answer ege"; but any must be read). Esp. 21 (oppo- ; held, that a inclosed in it f it "refers to ecessary to in- ith the body of eiligible or the y were "inde- by the letter 44. Watson v. offered which of the offeror's; with it); 1858, 346 (letter of extracts from dant; rejected, etc., not accom- more v. Taylor, letters were in

§§ 2094-2125] SEPARATE DOCUMENT; LOST DOCUMENT.

§ 2105

§ 2105. (b) Document Lost or Destroyed; (1) Deeds, Letters, Contracts, Abstr. etc., etc.; Substance of the Material Parts suffices. In dealing with the general principle requiring the production of a documentary original if it is available, it has already been seen (*ante*, § 1267) that testimony based on recollection is an allowable mode of proof for lost documents, though for some kinds of documents testimony by copy is preferred if it can be had (*ante*, §§ 1268-1272). Assuming, then, that there is no prohibition of any qualified witness to the contents of a lost or destroyed document, the question arises, under the present principle, how far Completeness is required in the proof of its terms.

Here must be distinguished the sub-principles (*ante*, § 2095, par. 2) of Verbal Precision and of Entirety of Parts. (a) As to the latter, it is clear that for documents having in themselves a legal effect — such as deeds and contracts — all the material parts must be established by the testimony to contents. It would be imprudent to act judicially upon a part of a document whose material effect must depend equally upon other and missing parts. This practice, doubtless, would sometimes leave honest rights unenforceable because their tenor is unknown; but this contingency is preferable to the constant and greater risk in the other direction. Much will depend, to be sure, on the circumstances of each case, for certain parts of a document might alone be material in certain litigation and the remainder immaterial. Moreover, for writings not having in themselves a legal effect — such as letters involving admissions — less strictness ought to be observed. (b) As to the other sub-principle, however, namely, Verbal Precision, the opposite conclusion is to be approved. Not only are the identical words not always essential, but the proof of them, when a copy does not exist, is practically impossible. To insist on complete verbal accuracy would be in effect to prohibit entirely the proof of lost documents by recollection, and this, as above noted, would be contrary to a fundamental principle. Verbal precision of proof, then, is usually not insisted upon, and could not be. The substance of the material parts, but by no means the words themselves (except,

the receiver's hands, "and if he thought them necessary to explain the transaction, he might produce them"); 1850, *DeMedina v. Owen*, 3 C. & K. 72; 1897, *Barnes v. Trust Co.*, 169 Ill. 112, 48 N. E. 31 (letter by the defendant in answer to one from the plaintiff, put in by the plaintiff; held, that the one from the plaintiff need not be put in at the same time, being receivable afterwards from the defendant); 1871, *Brayley v. Ross*, 33 La. 508, 508 (not required, unless the initial letter is necessary to the correct understanding of the reply); 1870, *Stone v. Sanborn*, 104 Mass. 319, 324 (breach of promise of marriage; the plaintiff offered certain of the defendant's letters containing admissions of the promise and words constituting a breach; held, that so far as any letter of the defendant appeared to be a reply to a letter of the plaintiff, this did not require the latter to be put in jointly; "when a particular communication

which refers to a previous one is not introduced as containing the terms of a contract, we see no more reason for obliging the party to put in the previous communication also, when the communications are written, than when they are oral"); 1899, *New Hampshire T. Co. v. Korsmeyer P. & H. Co.*, 57 Nebr. 784, 78 N. W. 303 (in offering a reply-letter of opponent, the answered letter need not be offered, where the former "is fairly self-explanatory"); 1832, *U. S. v. Doeblie*, 1 Baldw. 519, 522, *semble* (forgery; an accomplice wrote to defendant telling him to write if he wanted any more forged notes; defendant wrote to ask for some; the latter letter proved, without proving the former); 1856, *Hayward R. Co. v. Dunklee*, 30 Vt. 29, 39 (letter leading to a reply-letter from a third person; former letter not required, being unavailable).

of course, so far as the witness is able), is the rational limit of the law's requirement. This principle has been repeatedly enunciated judicially:

1794, *L. C. J. Eyre*, in *Hardy's Trial*, 34 How. St. Tr. 681: "That paper being destroyed, the witness will give such account of it as he can; he may either refresh his memory by looking at this paper, or if he can venture to say that this contains in it the substance of the other, it may be received upon that account as the best evidence."

1828, *Marshall, C. J.*, in *Taylor v. Riggs*, 1 Pet. 591, 600: "When a written contract is to be proved, not by itself but by parol testimony, no vague uncertain recollection concerning its stipulations ought to supply the place of the written instrument itself. The substance of the agreement ought to be proven satisfactorily."

1857, *Geekins, J.*, in *Thompson v. Thompson*, 9 Ind. 323, 333 (holding that the date of a deed need not be shown): "Proof of its contents is necessarily addressed to the jury but under the direction of the Court that on the one hand vague and uncertain recollection will not do, and on the other that a degree of precision which the memory never retains is not required. The property conveyed, the estate created, the conditions annexed to the signing, sealing, and delivery, are required to be proved with reasonable certainty by witnesses who can testify clearly to its tenor and contents."

1861, *Jenkins, J.*, in *Roe & McDowell v. Doe & Irwin*, 32 Ga. 39, 50: "We know of no rule which determines with precision the degree of fulness with which the contents of a deed shall be stated in such cases. We think all the law requires is a statement of the substantial, material parts of a deed, so that the jury may determine who were the parties, what the subject of conveyance, whether a deed was really signed, sealed, delivered, and attested as the law requires, and, as nearly as may be, the time of execution."

1884, *Scholfeld, C. J.*, in *Perry v. Burton*, 111 Ill. 138, 140: "A witness testifying to the contents of a lost deed is not to be expected to be able to repeat it *verbatim* from memory. . . . All that parties, in such cases, can be expected to remember is that they made a deed, to whom, and about what time, for what consideration, whether warranty or quitclaim, and for what party. To require more would, in most instances, practically amount to an exclusion of oral evidence in the case of a lost or destroyed deed."

In the application of this principle, there is ample room for difference of opinion as to the soundness of particular rulings; the principle deserves liberal treatment, and this it has not always received. But, as to the principle itself, there seems to be no controversy.¹

¹ *Can.*: 1841, *Doe v. Stiles*, 1 Kerr N. Br. 339, 346 (deed's terms held not sufficiently shown); 1849, *Doe v. Jack*, 1 All. N. Br. 476 (surrender of lease; rules of sufficiency, declared); 1887, *Ross v. Williamson*, 14 Ont. 184 (agreement; sufficiency of contents, defined); *Ala.*: 1859, *Shorter v. Sheppard*, 33 Ala. 648, 653 (proof must be "clear and satisfactory and such as to secure as far as possible the safety designed to be given by the written evidence"); 1888, *Potts v. Coleman*, 86 id. 94, 100, 5 So. 780 (substance or substantial parts of a lost deed, sufficient); 1895, *Elyton Land Co. v. Denny*, 108 id. 553, 561, 18 So. 561 (acreage and grantor of deed mentioned, but not signature, attestation, record, length, boundaries, or words; excluded); 1901, *Anniston C. L. Co. v. Edmondson*, 127 id. 445, 30 So. 61 (parts of a deed allowed to be proved); 1901, *Laster v. Blackwell*, 128 id. 143, 30 So. 663 (testimony to the substance of a lost deed, held sufficient); *Ark.*: 1838, *Brown v. Hicks*, 1 Ark. 233, 243, *semble* (copy of a bill of sale "substantially the same," held not sufficient);

1853, *Hooper v. Chism*, 13 id. 496, 501 ("reasonable certainty" required as to its terms; here a lost bill of sale, insufficiently proved); *Cal.*: 1855, *Porten v. Ramette*, 5 Cal. 469; 1861, *Collier v. Corbett*, 15 id. 183, 186 (contents of lost deeds, held sufficiently proved); 1903, *Kinniff v. Canfield*, 140 id. 34, 73 Pac. 803 (substance of a deed sufficient); *Fla.*: 1895, *Edwards v. Rives*, 35 Fla. 89, 17 So. 416 (substance sufficient; see this case in another aspect, ante § 1957); *Ga.*: 1831, *Bank v. Brown*, Dudd § 1957; 62, 65 (part of a letter, insufficient on the facts); 1861, *Roe & McDowell v. Doe & Irwin*, 32 Ga. 39, 50 (deed sufficiently proved on the facts); 1861, *Bond v. Whitfield*, ib. 215, 217 (judicially established copy of a bill of exchange, here imperfect on the facts); 1896, *Neely v. Carter*, 26 id. 197, 23 S. E. 313 (copy of a deed shown by several signers, though the execution by only had been proved, excluded); *Ill.*: 1884, *Rector v. Rector*, 7 Ill. 105, 119 ("it should be made satisfactorily to appear what were the substantial conditions and covenants"; here a

It would follow from the foregoing that, as to lost deeds, a conveyancer's abstract of title, as ordinarily made up, would suffice when verified by him

of specific enforcement of a contract); 1880, Rankin v. Crow, 19 Id. 430; 1880, Bennett v. Walker, 20 Id. 97, 103 (contents of a deed sufficiently shown; careful opinion); 1884, Owen v. Thomas, 23 Id. 320, 325 (deed; contents not sufficiently proved); 1872, Case v. Lyman, 66 Id. 329, 333 (lost letter; contents sufficiently shown); 1874, King v. Worthington, 73 Id. 161, 167 (substance of deeds, etc., sufficient); 1889, Rhode v. McLane, 101 Id. 467, 471 (bond sufficiently proved); 1884, Parry v. Barton, 111 Id. 138 (quoted *supra*); 1899, Harrell v. Enterprise Sav. Bank, 163 Id. 538, 54 N. E. 63 (Perry v. Barton approved; an entry that land had been "conveyed," held sufficient on the facts); 1908, South Chicago B. Co. v. Taylor, 306 Id. 133, 68 N. E. 733 (a quitclaim deed said to be "similar" to one lost, excluded); *Ind.*: 1897, Thompson v. Thompson, 9 Ind. 323, 333 (date of a deed need not be proved); 1893, Wiggins v. Holley, 11 Id. 11 (not sufficient on the facts); *Id.*: 1879, Elwell v. Walker, 52 Id. 256, 261, 3 N. W. 64 (ante-nuptial contract in letters; proof of contents not sufficiently definite); 1880, Jackson v. Benson, 54 Id. 635, 7 N. W. 88 (that a deed was a warranty deed, excluded); 1884, Ross v. Loomis, 64 Id. 437, 20 N. W. 749 (substance of a deed, sufficient); *Mt.*: 1853, Tobin v. Shaw, 45 Mo. 331, 349 (contents of letters, "so far as she recollected," allowed); 1886, Camden v. Beigrade, 78 Id. 204, 3 Atl. 632 (substance sufficient; here a marriage certificate); *Md.*: 1893, Baltimore v. War, 77 Md. 593, 603, 27 Atl. 65 (letter described as being "an order to put B. to work," held insufficient); *Mass.*: 1858, Clark v. Houghton, 13 Gray 44 (substance sufficient); *Mich.*: 1882, People v. McKinney, 49 Mich. 334, 336, 13 N. W. 619 (letters; one who remembered a part of their substance, admitted); 1890, Shoular v. Bonander, 80 Id. 331, 535, 46 N. W. 457 (substance must be shown; here, an agreement); 1899, Holmes v. Deppert, 123 Id. 275, 80 N. W. 1094 (lost deed; "the words or the substance of the words," sufficient, but not the "sense of the deed"); *Minn.*: 1889, Wakefield v. Day, 41 Minn. 344, 347, 43 N. W. 71 (lost deed's contents must be "clearly established"); *Miss.*: 1854, Mayson v. Beasley, 27 Miss. 106 (full abstract of the contents of lost partnership-books, admitted); 1876, Jinks v. Barrett, 52 Id. 315, 321 (lost deeds, map, etc., proved in sufficient fulness); *Mo.*: 1878, Wilkerson v. Allen, 67 Mo. 502, 510 (contents of advertisement, sufficiently proved); 1886, Strange v. Crowley, 91 Id. 257, 294, 3 S. W. 421 (substance of a letter, received); *N. Y.*: 1820, Jackson v. M'Vey, 18 John. 330, 333 ("We consider the conclusion unsound that because a witness cannot recollect the courses of the description in a deed, that therefore he cannot prove the contents of it"); 1847, Sizer v. Bart, 4 Den. 426, 429 (a witness to the contents of a memorandum of claims spoke of it as "containing a list of claims . . . but these two were all that in any way referred to" the claim in hand, and then read a copy of those two items in the memorandum; held, that he had in substance given the entire contents, and that therefore the fact that the exact copy covered a part only was immaterial); 1840, Metcalf v. Van Benthuysen, 3 N. Y. 434, 439 ("the substance of the contents of the operative parts of the instruments," required; here on the facts a deed was not substantially proved); 1863, Graham v. Crystal, 2 Abb. App. C. 263 (one who "thought he might perhaps state" the substance of letters, held properly excluded); 1878, Edwards v. Noyes, 65 N. Y. 126, *semble* (substance required); *N. C.*: 1835, Kello v. Magot, 1 Dev. & B. 414, 424 (abstract of a bond receivable, where no copy exists); *Oh.*: 1878, Gillmore v. Fitzgerald, 26 Oh. St. 171, 174 (deed's contents not sufficiently shown); *Pu.*: 1821, Dennis v. Barber, 6 S. & R. 420 (an over-strict ruling); 1832, Hart v. Yunt, 1 Watts 253 (brief abstract of receipts, showing only the sums mentioned in each, *semble*, inadmissible); 1834, Bell v. Young, 3 Grant 175 ("As to the degree of certainty required in secondary evidence, the law has no rule, except that it need not be a copy of the lost instrument"; here testimony that a note was for "about \$80, above \$70," was held sufficient); 1840, Boyd v. Com., 26 Pa. 355, 359 (docket entry of contents of a trustee's bond, filed but lost, received); 1870, Cox v. England, 65 Id. 212, 233 (portion of contents of a letter, held insufficient); 1895, Burr v. Kase, 166 Id. 91, 31 Atl. 954 (proof insufficient on the facts); *Tex.*: 1887, Shifflet v. Morelle, 68 Tex. 382, 387 (title-documents destroyed; testimony that in substance they vested title in J. M., excluded; opinion rule invoked); *U. S.*: 1822, U. S. v. Britton, 2 Mason 464, 466 (the contents must be "pointedly and clearly" described); 1828, Riggs v. Taylor, 1 Pet. 591, 600 (contract; quoted *supra*); 1831, U. S. v. Macomb, 5 McLane 286, 296 (substance of an instrument, sufficient); *Vt.*: 1830, Booge v. Parsons, 2 Vt. 456, 459 (lost deed; testimony that P. "deeded to O. and J. his right in said town, designating lot No. 57 as a part of said right," held insufficient by itself); 1839, Cleaveland v. Burton, 11 Id. 138 (bond apparently destroyed; evidence held not "clear, satisfactory, and conclusive"); *Va.*: 1871, Poague v. Spriggs, 31 Gratt. 220, 231 (loose testimony as to the contents of important letters, received, but held insufficient to produce persuasion).

The same principle should apply where the original, though produced, is illegible: 1842, Lord Trimbletown v. Kemmis, 9 Cl. & F. 749, 775 (mutilated deed, received on the facts); 1812, Peart v. Taylor, 2 Bibb 558, 559 (mutilated letter, received, as "its fair import can be collected with certainty"); 1827, Rhoades v. Selin, 4 Wash. C. C. 715, 717 (a copy "so far as the deed is legible," admitted). The following ruling is over-strict: 1798, R. v. Jackson, Dublin, Ridgeway's Rep. 67 (a seditious letter was offered to be proved by a press copy; but as it was "not legible throughout," it was excluded).

Compare the cases applying the *Opinion rule*

as a witness on the stand.³ To avoid the inconvenience of calling such persons in every instance, and to meet the objection of the Hearsay rule, as well as to provide for the preservation of trustworthy abstracts and notes, a statute has in several States authorized the use of such abstracts under special conditions without calling the maker.⁴ A peculiar case arises where the deed is sought to be proved (the production of the original being excused) by a public *deed-register* containing only an *abstract*, not a full copy, of the deed. Here the present principle would not necessarily allow the use of these recorded-abstracts, because the original might still be available, though not required to be produced (*ante*, § 1224); accordingly they have sometimes been excluded.⁵ But the matter is also complicated by the question whether these records are (as official statements) sufficiently authorized by law to be used at all, even if they are full copies; and the rulings under that principle (*ante*, §§ 1648, 1651, 1682) must be considered in reaching a conclusion.⁶

to a witness' impression or understanding (*ante*, § 1957).

Distinguish the following question of criminal pleading: 1901, *State v. Peterson*, 129 N. C., 356, 40 S. E. 2 (indictment for forging a lost note; proof of the substance, held sufficient).

Whether the copy of a recorded deed must indicate or recite the existence of the seal on the deed was formerly a much mooted topic; it involved three questions, whether the deed was valid without bearing a seal, whether the record was valid without recording the seal, and the present one, whether the copy sufficed in completeness; the substantive law being so much involved, the authorities cannot be here collected; the following will give a clue: 1859, *Smith v. Dall*, 15 Cal. 510; 1864, *Holbrook v. Nichol*, 36 Ill. 161, 164; 1866, *Deininger v. McConnell*, 41 Id. 227, 232; 1900, *Pease v. Sanderson*, 188 Ill. 397, 59 N. E. 423; 1899, *Switzer v. Knapp*, 10 Ia. 72, 75; 1816, *Hedden v. Overton*, 4 Bibb 406; 1874, *Starkweather v. Martin*, 28 Mich. 471; 1901, *Strain v. Fitzgerald*, 126 N. C. 395, 36 S. E. 229; 1899, *State v. Cooper*, — Tenn. Ch. —, 33 S. W. 391; 1893, *Rensens v. Lawson*, 91 Va. 296, 31 S. E. 347; 1909, *Virginia Coal & I. Co. v. Keystone C. & I. Co.*, — id. —, 45 S. E. 391 (land-patent); 1850, *Williams v. Bass*, 22 Vt. 352; 1902, *Peters v. Reichenbach*, 114 Wis. 209, 90 N. W. 184.

³ Some of the foregoing cases were doubtful of this sort.

⁴ These have been placed *ante*, § 1705, with the rulings applying them. Compare the citations *post*, § 2106.

⁵ 1839, *New Jersey R. & T. Co. v. Saydam*, 17 N. J. L. 23, 59, per Dayton, J. (a registry of mortgages contained by law merely an abstract; neither the registry nor a copy of it admissible to show the contents of the original). *Contra*: 1886, *Smith v. Lindsey*, 89 Mo. 76, 80, 1 S. W. 86 (abstract or index of deeds, made by law, admissible where the full records are destroyed and the originals unavailable); 1851, *Garrigues v. Harris*, 16 Pa. St. 344, 353 (abstract of a N. J. mortgage, received, because supposed to be there

allowed by law); 1829, *Bird v. Smith*, 8 McC. 300 (under a statute authorizing certified copies of North Carolina grants, a certified copy of the plat and the memorial or abstract of the grant was receivable, the complete grant being well understood not to be recorded). Compare § 1225, *ante*. Sometimes a statute expressly regulates the matter: Ont. Rev. St. 1897, c. 134, § 2 (contracts for sale of land; quoted *ante*, § 1225); Mich. Comp. L. 1907, §§ 2932, 3244, 3413 (village or city or county condemnation proceedings; register's or deputy's certified abstract of title, admissible to show ownership).

⁶ From the above general principles must be distinguished the operation of certain distinct principles which sometimes have a bearing on the same situation: (a) A witness who has not read all of a document is not qualified to speak to its terms, and is therefore excluded at the outset (*ante*, § 1378). Supposing him to be properly qualified in this respect, the present principle then operates to exclude his testimony if he cannot recollect the substance of the contents. (b) A witness must not, in testifying to the contents of a deed or the like document, give his opinion as to its legal effect, but must state the concrete facts of its terms. This application of the Opinion rule to proof of the contents of a document has already been considered (*ante*, § 1957); but in one or two instances the rulings above cited appear to proceed upon this ground; the rulings (*ante*, § 2097) distinguishing between the "substance" and "effect" of an oral utterance, proceed upon the same principle. (c) It is a much mooted question whether an opponent's admissions of document's contents suffice to exempt from producing the original (*ante*, § 1255); assuming they do, it would seem to follow that the admission need not be precise and detailed as to the terms of the document, but may merely admit general tenor and effect: 1851, *Pritchard v. B. shawe*, 11 C. B. 459, 463 ("an abstract of deeds received as an admission of the deeds' contents"; *Jervis, C. J.*: "It would be a dangerous principle to lay down that a statement made by

§ 2106. *Same*: (2) *Wills*. It has already been seen (*ante*, § 1267) that the contents of a lost will may be proved by testimony from recollection as well as by copy. But, in applying the present principle and asking what detail of terms must be reached by the proof, it is obvious that somewhat more strictness is allowable for proof of wills. Not only is the case of a lost will commonly more material (owing to the lack of a registration system) than of an alleged lost deed, but the contingent harm at stake is less, since the devolution of property to the legal heirs is (in the traditional English belief) less of an injustice to the devisee who cannot prove the will than would be the loss of title by a grantee who was unable to prove the terms of his deed against the grantor or his successors. There is therefore, both in policy and in practice, more strictness shown in requiring proof of the terms of an alleged lost will. They must be "clearly and satisfactorily" proved, it is usually said; and, though the situation obviously admits of no fixed rule, the following passages will illustrate the general mode of judicial treatment:

1870, *Cockburn, C. J.*, in *Sugden v. St. Leonards*, L. R. 1 P. D. 154, 161, 230 (here the will was lost, but there was evidence of its contents in the shape of a summary by a witness who had many times read it or heard parts read, of eight codicils, and of other fragmentary evidence): "[As regards the question] whether, assuming that we have not before us all the contents of the lost will, probate should be allowed of that which we have, so long as we are satisfied that we have the substantial parts of the will made out, I cannot bring myself to entertain a doubt. If part of a will were accidentally burnt, or if a portion of it were torn out designedly by a wrongdoer, it would nevertheless, in my opinion, be the duty of a court of probate to give effect to the will of the testator as far as it could be ascertained. It is not because some, who would otherwise have benefited by the will, may thus fail to profit by the intended dispositions of the testator, that his will should be frustrated and fail of effect where his intentions remain clearly manifest. . . . I think that there could not be a more mischievous consequence; and although it may be unfortunate that the will cannot be carried into execution to the full extent of the testamentary dispositions of the testator, I think that of two evils or inconveniences it is far better, where the Court can see its way to the essentially substantial dispositions made in a will, that it should give effect to them, although possibly some of the intentions of the testator may not be carried into effect."

1849, *Wooten, J.*, in *Butler v. Butler*, 5 Harringt. 178, 179: "Proving part only of the contents of a will which is lost or destroyed is not sufficient to establish it, even as to the part so proved, unless it satisfactorily appears that there is nothing in the preceding or subsequent part of the will which would qualify, change, or in any way alter the particular devise proved; for without knowing the certainty of the will, and the language used by the testator, it would be impossible to determine what estate would pass by it. The words of the particular devise which may be attempted to be established might convey a fee simple; yet something might precede or follow which would reduce it to a life estate or subject it to some other restriction or limitation; or the words of the devise might create but a life estate, which by the preceding and subsequent part of the will might be enlarged and extended to a fee simple; and either an estate in fee simple, for life, or for years, might depend entirely upon some contingencies, conditions, limitations, or restrictions imposed by some subsequent part of the will. . . . [The proof should be] at least sufficient to form the basis of a correct conclusion as to the legal import of the

party is not evidence against him because it is not quite full"). *Contra*: 1859, *Porter v. Shepard*, 33 Ala. 648, 658, *semble* (admission that a

person had "reconveyed," held insufficient to establish its contents).

will, and the nature and extent of the estate conveyed by it. Any rule less stringent would, instead of closing the avenues to fraud, throw open the door to those of a much more serious and dangerous character than could reasonably be expected to result from the loss or destruction of such instruments."

1882, *Mulkey, J.*, in *Anderson v. Irwin*, 101 Ill. 411, 414: "The law is intended to be practical in its application to the varied transactions and circumstances which go to make up the affairs of life and which are constantly giving rise to legal controversies. . . . The counterpart of this [the best evidence] rule is, the law is always satisfied where the fact sought to be established has been proven by the best evidence of which in its nature it is susceptible. . . . The instrument in controversy having been destroyed without the fault of the defendant in error and with the connivance of a part if not all of the plaintiffs in error who interposed any defence in the court below, and there not appearing to be any copy of it in existence, it would be equivalent to denying the plaintiff relief altogether to require her to prove the very terms in which it was conceived. All that could reasonably be required of her under such circumstances would be to show in general terms the disposition which the testator made of his property by the instrument, that it purported to be his will, and was duly attested by the requisite number of witnesses."

This general principle has been applied in different courts with varying degrees of strictness, and no more detailed rule can be deduced; a statute, however, often adopts a rule in some similar form of words.¹

¹ These rulings, as noted *infra*, deal also in part with the degree of persuasion which the tribunal must reach; but it is practically convenient to place them all here: *Eng.*: 1823, *Lemann v. Bousall*, 1 Add. 389, 390 (nuncupative will; "the true import and substance, at least," must be proved); 1823, *Foster v. Foster*, ib. 462, 465 (a good example of a will made up of torn fragments with the gaps supplied by the draftsman's recollection); 1876, *Sugden v. St. Leonards*, L. R. 1 P. D. 154 (quoted *supra*); 1890, *Harris v. Knight*, L. R. 15 id. 170, 179 ("by evidence which is so clear and satisfactory as to remove, not all possible, but all reasonable doubts on those points"); *Can.*: 1890, *McLeod's Estate*, 23 N. Sc. 154, 162 (codicil's contents held not sufficiently shown); *Ala.*: 1884, *Jaques v. Horton*, 76 Ala. 238, 245 (proof must be "clear and positive"); 1886, *Skeggs v. Horton*, 82 id. 353, 354, 2 So. 110 (but it need not be proved beyond a reasonable doubt); *Ark. Stats.* 1894, § 7445 (inadmissible "unless its provisions be clearly and distinctly proved by at least one witness, a correct copy or draft being deemed equivalent to one witness"); *Cal. C. C. P.* 1872, § 1339 ("its provisions" must be "clearly and distinctly proved by at least two credible witnesses"); 1901, *Camp's Estate*, 134 Cal. 233, 66 Pac. 227 (will held sufficiently established on the facts); *Conn.*: 1874, *Johnson's Will*, 40 Conn. 587, 589 (not sufficiently proved on the facts); *Del.*: 1849, *Butler v. Butler*, 5 Harringt. 178 (see quotation *supra*); *Ga. Code* 1895, § 3289 (must be "clearly proved"); *Ill.*: 1882, *Anderson v. Irwin*, 101 Ill. 411, 415 (will sufficiently proved on the facts; quoted *supra*); *Ind.*: 1894, *Jones v. Casler*, 139 Ind. 382, 384, 38 N. E. 812 (will sufficiently proved on the facts); *Ky.*: 1838, *Allison's Dev. v. Allison's Heirs*, 7 Dana 90, 95 (proof of "the substance of the different devise, as to the property or interest devised, and to whom devised," held sufficient); 1844,

Steele v. Price, 5 B. Monr. 58, 65 (will sufficiently proved on the facts); *Mass.*: 1844, *Davis v. Sigourney*, 3 Metc. 487 (where the proof is by "the recollection of witnesses, the evidence must be strong, positive, and free from doubt"; here there was some doubt as to whether certain estates were for life or in fee); 1900, *Tarbell v. Forbes*, 177 Mass. 236, 58 N. E. 873 ("what is required is the substance of its material provisions"; explaining *Davis v. Sigourney*); *Mo.*: 1835, *Jackson v. Jackson*, 4 Mo. 210 (part of a lost will may suffice); 1839, *Dickey v. Malech*, 6 id. 177, 184 (same); 1903, *Williams v. Miles*, — Nebr. —, 94 N. W. 705 (there must be "clear and convincing" proof); *N. J.*: 1863, *Wyckoff v. Wyckoff*, 16 N. J. Eq. 401, 405 ("The true rule is that the will may be established upon satisfactory proof of the destruction of the instrument and of its contents or substance; whether the proof be by one witness or by many, it must be clear, satisfactory, and convincing"); 1898, *Coddington v. Jenner*, 57 id. 528, 41 Atl. 874 (must be "clear, satisfactory, and convincing"); *N. Y.*: 1844, *Grant v. Grant*, 1 Sandf. Ch. 235, 243, *semble* ("substantial contents" suffice); *Ok. Rev. St.* 1898, § 5947 (contents of lost or destroyed will may be "substantially proved"); *Okl. Stats.* 1893, § 1208 ("No will shall be proved as a lost or destroyed will . . . unless its provisions are clearly and distinctly proved by at least two credible witnesses"); *S. D. Stats.* 1899, § 6918 (like *Okl. Stats.* § 1208); *Tenn.*: 1897, *McNeely v. Pearson*, — Tenn. —, 42 S. W. 185 (must be "clear and convincing"); *Vi.*: 1842, *Minkler v. Minkler*, 14 Vt. 125, 127; 1868, *Dudley v. Wardner*, 41 id. 69 ("full and satisfactory" proof; here a copy was said to be receivable); *Va.*: 1896, *Thomas v. Ribble*, — Va. —, 24 S. E. 241 (proof must be very clear).

From the operation of the present principle, however, must be distinguished certain others:

§ 2107. (c) *Public Records; (1) Lost or Destroyed; Substance suffices; Burnt Record Acts.* When a public record is *lost* or *destroyed*, the same situation exists as for private documents lost or destroyed; hence, as already noticed (*ante*, § 2105), verbal precision of proof cannot be required, but entirety of material parts must be insisted upon. The *substance* of the missing document suffices.¹ It follows that the proof of lost deed-records by an *abstract of title* based upon them would at common law suffice, if duly authenticated on the stand by the person who made it; the chief object, therefore, of the "burnt-record acts" of several States is to authorize the hearsay use of conveyancers' abstracts without calling the maker to the stand (*ante*, § 1705).²

But, though under the present principle, the substance as proved by a witness from recollection or memoranda may thus suffice, yet by another principle—that of Preference—proof by *written copy* is always preferred, in the case of a public record; i. e., if a written copy is known to be in existence and can be obtained, it must be used (*ante*, § 1269).

(a) The degree of persuasion—whether beyond a reasonable doubt, or the like—which is required for the tribunal in proof of a lost will is apparently greater than that ordinarily demanded—i. e. persuasion by preponderance of evidence—in other civil cases (*post*, § 2498). The same rulings usually lay down both principles without discrimination in the same phrases (as illustrated in the citations above); yet the fulness of detail as to the contents of the will and the degree of persuasion as to the fact of these contents are certainly different things, and may properly be distinguished even though judges may fail to do so. (b) The number of witnesses required in proof of the contents of a lost will is no other than is required in other documentary cases (*ante*, § 2052); yet the execution of it must of course be proved by the same number that would have been required for a will produced in *specie* (*ante*, §§ 1304, 2048, 2049). (c) A fragment of a will never executes; it is of course not receivable because it never became a will (1824, *Montefiore v. Montefiore*, 2 Add. Ecl. 354); but it is in that case not rejected because of the present rule. (d) When a will has been *probated*, it becomes part of the record of the judgment of probate; whether it can be used in another court by copy of the will alone, without also bringing a copy of the remainder of the probate proceedings, is therefore a question of proving the parts of a judicial record (*post*, § 2110).

¹ 1836, *Sturtevant v. Robinson*, 18 Pick. 175, 179 (paper containing "the substantial contents of the lost paper," here a writ, received, nothing better being available); 1851, *Com. v. Roark*, 8 Cush. 210, 213 (*verbatim testimony* to a part of a lost judicial record, not necessary); 1875, *Cunningham v. R. Co.*, 61 Mo. 33, 36 (nature and substance of the lost record must be shown); 1849, *Browning v. Flanagan*, 22 N. J. L. 567, 571 ("a mere abstract of the writ," sufficient on the facts); 1865, *Leland v. Cameron*, 31 N. Y. 115, 120

(lost execution; an attorney's entry of its issuance, held sufficient evidence; "its contents were prescribed either by statute or by the practice of the Courts," and "we must assume that the execution was in due form"); 1876, *Mandeville v. Reynolds*, 68 id. 528, 533 (contents of a lost judgment-roll, sufficiently shown by a judgment-docket verified by the clerk upon past recollection as substantially correct, and by a "judgment-book," similarly verified; "where the lost paper is of a kind which is usually drawn up in accordance with a statute and usually follows a form devised for that kind of instrument," such evidence suffices to show that the document contained the essential legal features).

A statute sometimes expressly provides for this subject: Ind. Rev. St. 1897, § 473 (burnt record of partition proceedings, provable by certified transcript of judgment "without the residue of the record"); § 474 (burnt or lost record of deed or mortgage; "general index of the record," sufficient to prove "proper execution and record"); Md. Pub. Gen. L. 1888, Art. 35, § 51 (land-office commissioner's certified copy under seal of extract of deed transmitted by court clerk, admissible if deed and record are lost or destroyed); W. Va. Code 1891, St. 1872-73, c. 164 (proceedings of commissioners to establish contents of burnt records, usable when "no higher or better evidence can be had"). Add here the statutes dealing with the use of judicially established copies (*ante*, § 1660), and of illegible, mutilated, or other records recopied (*ante*, § 1275).

The use of a clerk's docket or minute-book is further considered *post*, § 2450, under the principle that it is the record itself, when the judgment-roll has not been made up or is lost.

² For an abstract of title as an admission by the party making it, see *ante*, § 2105, note 5. The proof of the lost deed itself by a record containing only an abstract has already been considered in § 2105, note 4.

§ 2108. *Same*: (2) *Record Accessible; Copy of Whole required*. Where the public record is in existence, it is usually no more procurable for presentation in Court than when it is lost, and therefore, being by law irremovable, its production *in specie* is ordinarily not required (*ante*, §§ 1215-1222). But, with reference to the proof of its contents, a very different application of the principle of Completeness ensues; for, since the original is in existence and accessible to all, it is still feasible to reproduce the original by written copy, in full both as to verbal precision and as to entirety of parts. Since this is feasible, it may well be required, having in mind the great importance, especially for legal documents, of comparing every word and part in the whole before determining the total sense and effect that should be given it. Accordingly, it has always been an accepted principle, for accessible public records, that the proof must be by written *verbatim* copy of the whole:

Ante 1726, Chief Baron Gilbert, Evidence, 17, 23: "When any record is exemplified, the whole record must be exemplified, for the construction must be taken from the view of the whole matter taken together; . . . for the precedent and subsequent words and sentence may vary the whole sense and import of the thing produced, and give it quite another face; and therefore so much at least ought to be produced as concerns the matter in question."

1820, Johnson, J., in *Vance v. Reardon*, 2 N. & McC. 299, 303: "The mischiefs of confounding them [copies and extracts] appear to me too manifest to need exposure. A party is not presumed, nor is he bound, to know what evidence his adversary will adduce against him; and if he [the adversary] be permitted to extract from a record only so much as he may deem necessary to his own side of the question and to give it in as evidence, he will always take care to leave out that which makes against him. By the same rule, the opposite party would have the same right to extract so much as was subservient to his side of the question, which, from the specimen of extraction furnished by this case, would produce inexplicable difficulties."

1829, Porter, J., in *Dismukes v. Musgrove*, 8 Mart. n. s. 375, 381: "The necessity of producing the whole of a record is founded on the idea that the part omitted contains something unfavorable to the party offering it, and that the construction must be gathered from the whole taken together."

Before noticing the application of this principle, certain others must be called to mind which lead by other roads to the same result in certain respects. (a) By the rule about producing originals, a *voluminous record* (usually of pecuniary accounts, sometimes of other entries) may be proved by a summary or abstract (*ante*, § 1230). This is in form an exemption from producing the original, but practically involves the present rule also. (b) By the exception to the Hearsay rule for Official Statements, a *certified copy* of a public record is admissible when made by an officer having authority to furnish copies. Now this authority is universally conceded to extend merely to the furnishing of full copies, and consequently an official *certificate of the effect or substance* of a record is not receivable under that Hearsay exception, unless by statute express authority to give such certificates has been conferred (*ante*, § 1678). The result of that principle is to require a *verbatim* copy from official certi-

flera.¹ But obviously it says nothing as to the use of sworn or examined copies, i. e. verified on the stand by the witness who has made them; and in his case, therefore, the requirement of Completeness is due solely to the present principle; though for certified copies the present principle and the above Hearsay exception coincide in their effect. (c) By a rule of Preference, a written copy is always preferred to oral testimony by recollection, in proving the contents of a public record (*ante*, § 1269). Its practical effect coincides with that of the present rule of Completeness. Nevertheless, it is genuinely a rule of Preference, because, even if a witness could repeat the record's contents *verbatim* from recollection, still a written copy would be preferred; so that the rule of preference is directed to the priority of written-testimony over recollection-testimony, and does not in itself declare anything as to the *verbatim* tenor of the testimony. (d) Last of all comes the present principle of Completeness, by virtue of which the record's contents must be reproduced *verbatim*, — this principle being independent of the other two, and having an operation of its own over and above theirs, even though at some points there may be a coincidence of effect, apparent or real.

By the rule of Completeness, then, there is required (*ante*, § 2095, par. 2) both *verbal precision* and *entirety of parts*:

(1) *Verbal precision* might be satisfied by a recollection-witness testifying *verbatim* to the record's contents. But by the rule of Preference above noted, this *verbatim* report must be in writing, i. e. a "copy." That a *written copy of the record* must be produced is thus the composite result of the two rules.²

(2) The requirement of *entirety of parts* renders it necessary to examine the different kinds of public records, in order to ascertain in what consists entirety, and what portions belong together as inseparable parts of a single whole. To that question we now come:

§ 2109. Same: Application to Sundry Public Records (Deed-Registers, Land-Patents, Assessors' Books, Corporate Records, Statute-Rolls, Marriage-Registers, etc.). The various sorts of public records differ so widely in tenor and constitution of parts that no fixed rule is possible. In general, there is a broad distinction between records which merely copy in succession for permanent reference single private documents each complete in itself — such as records of deeds or land-patents —, and records which contain successive entries of officers as to their doings from time to time in a certain class of matters. In the former instance, the same rule should apply that would have been applied to the document if proved by copy from the original (*ante*, §§ 1268-1272), i. e. the copy must be of the whole document as recorded, but not of any other document that may happen to be recorded in the same book.¹ But in the

¹ Whether the certificate is in form correct — as, by using the words "a true copy," "a correct copy" — also concerns the principle of § 1678, *ante*.

² The authorities have been placed *ante*, § 1269.

³ 1850, *Nelthrop v. Johnson*, Clayt. 142 ("in this case, part of a long patent was copied out, and sworn true and [that] it was so much of it

as did concern the thing in question"; excluded, "for that there may be provisos, etc., in the patent, and the witness could not swear he did read the roll throughout of this patent, . . . *quod nota*, if he could, it seems it had been admitted"); 1846, *Rice v. Cunningham*, 29 Cal. 492, 497 (book of official grants, with an entry of a grant to K.; the marginal entry, "not taken," required to be read also); 1834, *Hamil-*

other class of records, where successive entries are made by the officer in a single book, concerning many persons or pieces of property, the same person or property being dealt with in perhaps various parts of the book, it is not necessary to reproduce any but the entries affecting the subject-matter of the litigation.² In particular, the use of copies of entries in a *parish-register* of marriages, births, and deaths will depend much on the scope of the family occurrences desired to be proved;³ so also the proof of *corporate records* will naturally vary according to the matters in issue.⁴ The parts of a *statute* are in no less a degree composite and variant, and the extent to which a copy must reproduce the terms depends on the issue and on the scope of the statute.⁵

§ 2110. *Same: Application to Judicial Records (Common-Law Judgment, Chancery Decree, Probate of Will, Criminal Conviction, Sheriff's Deed, etc.).*
(1) A judicial record, made up as it is of separate documents and entries

ton v. Shoaff, 39 Ind. 63, 65 (record of a deed; answers in a deposition reciting items in the record, excluded); 1887, Mercier v. Harnan, 39 La. An. 24, 1 So. 410 (abstract of record of copy of marriage-contract, excluded); 1899, Cary v. Cary, 189 Pa. 65, 43 Atl. 19 (copy of a mortgage containing also a copy of an entry of satisfaction; the latter held to be also in evidence); 1887, Atkins v. Lewis, 14 Gratt. 30, 34, *semble* (abstract of a land-patent, not receivable on objection made). *Contra*: N. Br. Consol. St. 1877, c. 46, § 8 ("in the proof of title from the Crown" by examined or certified copy, clauses "which may not be pertinent or relevant to the matter in question" need not be proved; and no copy shall be excluded for omissions which "do not prejudice the opposite party or affect the merits in question"); § 9 (yet plat or plans referred to must be copied, unless on proof that no such plat or plan is there entered); 1831, Robinson v. Gillman, 3 Vt. 163, 164 (extracts from a land-warrant, sufficient on the facts).

Compare the rule as to proving the substance of a lost deed (*ante*, § 2105). Whether a seal must be recited in the copy of the record, or in the record, is also there briefly noticed.

² Ark. Stats. 1894, § 2887 (extract or entry from tax-list or book or from auditor's records, admissible equally with the entire list, etc.); 1848, Job v. Tebbetta, 10 Ill. 378, 380 (extracts from tax-records, held sufficient); 1898, State v. Howard, 91 Me. 396, 40 Atl. 65 (U. S. collector's list of liquor taxpayers; entry relating to defendant alone, sufficient); Oh. Rev. St. 1898, § 5339 c (abstracts of certain lost records, etc., receivable); 1845, Farr v. Swan, 2 Pa. St. 245, 255 ("An extract is evidence, if it appears on its face to contain all that relates to the subject in controversy"; here, of a plot of lots).

³ 1875, American Life Ins. Co. v. Rosenagle, 77 Pa. 507, 515 (copy of parish-register entries by tabulating all material dates, etc., held sufficient); 1878, State v. Colby, 51 Vt. 291, 295 (clerk's certified copy of marriage record, omitting the certificate of the minister, not sufficient); 1879, State v. Potter, 53 Id. 33, 38 (copy of marriage record held sufficient on the facts); 1887, Blair v. Sayre, 29 W. Va. 604, 606, 2 S. E.

97 (official abstract of marriage certificates, etc., admitted under statute). Compare the statutes cited *ante*, § 1644, which often imply something on this point.

⁴ 1855, Banks v. Darden, 13 Ga. 318, 341 (corporation books, when offered, "are testimony before the jury as to all entries appertaining to the same transaction"; but the offeror may read what he chooses, leaving the opponent to read the rest); 1866, Vischer v. R. Co., 34 Ga. 536, 539 (corporation book of minutes; relevant parts not first read may be treated as "already before the jury"); 1900, Fouché v. Bank, 110 Id. 827, 36 S. E. 236 (corporation minutes; the whole relating to the transaction, not required); 1843, Woods v. Banks, 14 N. H. 101, 109 ("In admitting copies of records [here proprietary records], it would be absurd to require a copy of the whole book; copies of so much of the record as relates to the subject-matter of the suit are allowed; but there should generally be an entire copy of the proceedings of a particular meeting or anything else done and transacted at a particular time"); 1854, Whitehouse v. Bickford, 29 Id. 471, 481 (*semble* it must be merely "a full record of the entire matter which it embraces or to which it relates"); 1858, Sinking Fund Com'rs v. Bank, 1 Mete. Ky. 174, 185 (recital of corporation's proceedings as set forth in a mortgage, received as a copy).

⁵ 1839, Swift v. Fitzhugh, 9 Port. 39, 54 (only the material portion need be offered); 1845, Chamberlain v. Maitland, 5 B. Mour. 448 (deposition of a foreign notary verifying an extract from a law as to holidays, admitted); 1864, Blesenthall v. Williams, 1 Dav. 329 (similar; treated as a "sworn extract" of a record); 1859, Grant's Succession, 14 La. An. 795 (contents of a usury statute, sufficient on the facts); 1824, State v. Welsh, 3 Hawks 404, 407 (title of a statute not sufficient, in proving an incorporation); 1838, Adie v. Sherwood, 3 Whart. 481, 483 (so much only of a statute "as pertains to the matter in point" need be certified); 1876, Grant v. Coal Co., 66 Pa. 208, 216 (copy of a chapter of a foreign statute, held sufficient).

For proof of a foreign statute by expert testimony, see *ante*, §§ 1271, 1283.

representing the successive stages in the proceedings, is of all records the one which most requires the application of the principle of Completeness; and it is to this kind of record that the judicial utterances already quoted (*ante*, § 2108) chiefly refer. Without considering the plaintiff's statement of claim, the defendant's statement of defence, the intermediate motions and orders, the verdict, and the later doings, it is impossible to ascertain what are the terms of the judgment which is to be proved and acted on.

Only one distinction is to be noted, namely, that since a judgment may be invoked for varying purposes, the scope of the portion needing to be examined may not be the whole. Ordinarily, a judgment is invoked in order to obtain its enforcement in a later proceeding in the same or another court or in another jurisdiction, and thus the whole of the record must be consulted. But in many cases the *fact of the judgment* having been rendered is sufficient for the purpose in hand, and in this situation the final order of judgment is alone needed. It is therefore conceded on all hands that in cases where the fact of judgment rendered, irrespective of the full details of the precise matters in controversy, is alone material, a copy of the final order of judgment, with perhaps one or two other parts of the record, will suffice:

1828, *Mills, J.*, in *McGuire v. Kouns*, 7 T. B. Monr. 386: "It is a general rule that records, when used in evidence, must be produced entire. But this rule is laid down with some exceptions and limitations. The reason assigned for it is that the part of the record which is lacking may give the rest a different meaning. Where a record is used as evidence to prove the facts therein contained, the rule well applies. But where it is only used (as it is here) to show the fact that there was such a judgment, then so much of the record as is relevant is frequently permitted to be used. Here the fact to be shown [in an action for land bought at a sale on execution] was that there was such judgment to warrant the execution, and enough of the record is produced to establish that fact."¹

(2) Between these two extremes, therefore, lie an innumerable variety of cases. At one end are the cases in which the entire record is needed in order to enforce in detail the terms of the right vindicated by the judgment. At the other end are the cases in which merely the final order is needed as showing that in fact it was made. Naturally, then, the scope of the copy will depend upon the *nature of the issue in hand*. No fixed rule can be laid down; the substantive law applicable to the case in hand will have an important bearing.²

¹ 1892, *Gibson v. Robinson*, 90 Ga. 754, 763, 16 S. E. 969; 1900, *Little Rock C. Co. v. Hodge*, 112 id. 531, 37 S. E. 743; 1855, *Lee's Adm'x v. Lee*, 7 Mo. 531, 534; Md. Pub. Gen. L. 1888, Art. 35, § 59 ("short copies" of a judgment or decree are receivable to prove "the recovery of such judgment or decree"); 1897, *Rainey v. Hines*, 121 N. C. 318, 28 S. E. 410.

² The substantive law being usually the determining feature, it would be unprofitable to attempt a full collection of the precedents; the following will serve merely as illustrations of the principle: *Eng.* 1661, *Trowel v. Castle*, 1 Keb. 21, *semble* (chancery decrees must be ac-

companied by bill and answer); 1833, *Blower v. Hollis*, 1 Cr. & M. 393 (same question; undecided); 1841, *Leake v. Westmeath*, 2 Moo. & Rob. 394 (bill and answer required); *Can.*: N. Br. Consol. St. 1877, c. 46, § 6 ("such parts which may be so necessary" of specified kinds of records will suffice instead of the whole); N. Sc. Rev. St. 1900, c. 163, § 15 (certified copy of an order or entry of judgment suffices, without the record); *Ark.*: 1861, *Wilson v. Spring*, 38 Ark. 181, 186 (decree in chancery reciting former proceedings, the other records having been burned; decree alone sufficient on the facts, but also because it was effective in this case *proprio vigore* without the other proceed-

(3) The probate of a will is a judgment pronouncing the due execution of a will, and therefore a copy of the will alone will usually not suffice, where the offer assumes the execution of the will as a fact; the whole of the record of probate must on principle be offered. But the presumption of regularity of official proceedings (*post*, § 2534) may well suffice to dispense with certain parts of the record or to prove certain parts of the proceedings not contained in the record. The requirements, however, of the substantive law and of local procedure, as well as the general regulation of the subject in modern times by express statute of procedure, so complicate the subject that it would be unprofitable to attempt to disentangle the operation of the principle of evidence.³

ings); 1886, *Hallam v. Dickinson*, 47 id. 120, 124, 14 S. W. 477 (*not* *trial* record; parts set forth held insufficient); *Cal.*: 1857, *Nims v. Johnson*, 7 Cal. 110 (record, lacking judgment-book, held insufficient); 1861, *Goldstone v. Davidson*, 18 id. 41 (certification of each part of the record as a separate paper, sufficient, though not proper); C. C. P. 1872, § 1907 (certified copy of a foreign judicial record must contain "an exact transcript of the whole of it"); *Ga.*: 1857, *Doggett v. Sims*, 79 Ga. 253, 257, 4 S. E. 909 (record of conviction, not sufficient on the facts); 1893, *Ocean S. S. Co. v. Wilder*, 107 id. 220, 33 S. E. 179; *Ill.*: 1886, *McMillan v. Lovejoy*, 115 Ill. 498, 4 N. E. 773; 1902, *People v. Pike*, 197 id. 442, 64 N. E. 393 (county court records, held sufficiently proved on the facts); *Ind.*: 1861, *Phelps v. Tilton*, 17 Ind. 423; 1881, *Kusler v. Crofoot*, 78 id. 597, 600 (action on notes for a judgment; copy held incomplete on the facts); 1881, *Jenkins v. State*, ib. 133 (conviction; record sufficient on the facts); 1883, *Anderson v. Ackerman*, 80 id. 481, 490 (partnership; record held sufficiently complete); 1884, *Brown v. Eaton*, 86 id. 591, 595 (action on a judgment; record incomplete on the facts); 1889, *Winemiller v. Thrash*, 125 id. 353, 25 N. E. 350 (malicious prosecution; the indictment allowed to be read); *Ia.*: 1855, *Lattourett v. Cook*, 1 Ia. 1, 5 (whole not required on the facts); 1838, *Campbell v. Ayres*, 6 id. 339, 344 (judgment without pleadings, not sufficient on the facts); *Ky.*: 1806, *Walker v. Kendall*, *Hardin* 404, 409; 1819, *Grobbs v. Davis*, 2 A. K. Marsh. 17; *Md.*: 82, 1890, c. 318 (instead of a transcript of the record of a cause in a domestic court, the original papers with a transcript under seal of the docket entries will suffice); *Mass.*: 1842, *Eaton v. Hall*, 5 Metc. 287, 290 (an order of reference to arbitration; "proof of a copy, or of the contents so full and complete as to be substantially a copy," allowed); *Mich.*: 1897, *Drowsowski v. Chosen Friends*, 114 Mich. 169, 72 N. W. 169; *Miss.*: 1854, *Mandeville v. Stockett*, 23 Miss. 398, 406 (when the record itself is not producible, its disputed contents must be tried by complete transcripts, not by certified extracts or by depositions); 1857, *Shirley v. Fearn*, 33 id. 653, 667 (same); 1897, *Rule v. State*, — id. —, 22 So. 873 (perjury; to determine materiality the whole of the record or as much as is helpful should be produced;

here, the defendant was allowed to produce additional parts); *Mo.*: 1839, *Phillipson v. Bates*, 2 Mo. 116 [95]; *N. Y.*: 1807, *Wilson v. Conine*, 2 John. 280 (chancery decree awarding execution on a prior decree recited, offered to show the prior decree; held insufficient as a copy); 1830, *Winans v. Dunham*, 5 Wend. 47 (approving the proceeding); 1837, *Packard v. Hill*, 7 Cow. 434, 443, on app. 2 Wend. 411, 5 id. 375, 384 (foreign judgment; documents held sufficient); *Pa.*: 1823, *Hampton v. Spackenagle*, 9 S. & R. 312, 321 (record of partition, held insufficient); *Tenn.*: 1833, *Lowry v. M'Durmont*, 5 Yerg. 225 (decree of sale read, without producing bill and answer, to show land-title); 1842, *Lewis v. Bullard*, 3 Hump. 207 (action on a prosecution bond; execution not usable without the whole record); 1848, *McCully v. Malcom*, 9 id. 187, 192 (copy of indictment, without the rest of the record, excluded); 1849, *Whitmore v. Johnson*, 10 id. 610, 612 (decree divesting title to realty, sufficient without the whole record); 1865, *Carrick v. Armstrong*, 2 Coldw. 265 (champertous agreement to transfer judgment; deposition, etc., without the entire record, inadmissible); 1871, *Coffee v. Neely*, 2 Heisk. 304, 307 (clerk's certificate of record, held to import a copy of the whole); 1873, *Saint v. Taylor*, 12 Heisk. 488, 491 (insolvency in another State; decree sufficient, without the entire record); 1880, *Garner v. State*, 5 Lea 212, 217 (justice's judgment recovered on county warrants; whole of the record to be produced); 1880, *Willis v. Londerback*, ib. 561 (sale by decree of Court; whole record required); *Fla.*: 1797, *Richards v. Pearl*, D. Chip 113 (trespass for cattle taken from the plaintiff, who obtained them under an execution; judgment as well as execution required to be read); *Va.*: 1836, *White v. Clay*, 7 Leigh 68, 78 (injunction bond decree; extracts sufficient on the facts). Sometimes, though a prior decree is required, it may be sufficiently proved by a recital in the one offered (*ante*, § 1664).

³ The following cases may serve as illustrations: the statutes collected *ante*, § 1691, will guide to the local statutory provisions: 1880, *Bellamy v. Hawkins*, 17 Fla. 750, 755 (certified extracts of probate records, excluded); 1888, *Vail v. Rinehart*, 108 Ind. 6, 12, 4 N. E. 218 (probate proceedings, held sufficiently complete); 1830, *Müller v. Carothers*, 6 S. & R. 215, 228

(4) In discrediting a witness by proof of *conviction for crime*, a copy of the entire record was required at common law; but now, almost everywhere, by statute, it is allowed to prove the conviction by the cross-examination of the witness himself or by a brief certificate of the record's tenor (*ante*, § 1270).

(5) In proving title by the deed of a *sheriff* or *tax-collector* selling upon execution for a private debt or for taxes, the present principle requires at least the proof of the *judgment* and *execution* as well as the *deed*. But, since the sheriff's deed usually recites the former documents or one of them, the further question arises whether this hearsay recital is admissible evidence of the other documents. Over both these questions much controversy has occurred (*ante*, § 1664).

§ 2111. *Same: Application to Bill, Answer, and Deposition in Chancery.*

(1) It came to be generally accepted at common law that a *bill* in Chancery could not be used as an *admission* in another cause at law against the party filing the bill (*ante*, § 1065). So far, however, as it may nowadays be admissible, it is not to be considered as a judicial record, for it is offered without regard to what was determined in the suit or whether anything at all was determined. It is separable by itself, as a single connected statement, and it may of course be read without using the remaining parts of the record.¹ Whether it must be read as a whole, or may be read in parts only, depends upon the view taken of the controverted question already examined (*ante*, § 2102), namely, whether the whole of any single writing must be used; and the practice is apparently unsettled.²

(2) An *answer* in chancery — which was unquestionably receivable as an admission (*ante*, § 1065) — is for the same reason a separable document which may be treated as independent of the record; the *remainder of the record*, therefore, need not as such be proved. But an answer is at least, as its very name implies, a response to charges in the bill. On the principle,

(held sufficient, although here only one witness had sworn before the register; both being now dead); 1829, *Ripple v. Ripple*, 1 Rawle 386, 389 (admissible, where by the certificate on the copy the probate appears to have been in due form); 1841, *Loy v. Kennedy*, 1 W. & S. 396 (register's certificate of probate, with a copy of the will, sufficient, though it showed defective proof before the register); 1853, *Hankinson v. R. Co.*, 41 S. C. 1, 17, 19 S. R. 306 (statutory permission to prove the appointment of an executor by copy of the letters of administration dispenses with using the rest of record); 1849, *Harris v. Anderson*, 9 Humph. 779 (certified copy of a foreign registered will, omitting the probate, excluded); 1860, *Marr v. Gilliam*, 1 Coldw. 488, 512 (same); 1864, *Smith v. Neilson*, 13 Len 461, 467 (same); 1881, *Mosely v. Wingo*, 7 id. 145 (certified copy of a probate, held sufficient); 1897, *McNeely v. Pearson*, — Tenn. —, 42 S. W. 165 (a certified copy of a will in the probate court lacked signatures, etc., but the recitals of the record described the missing

elements of the will; the due execution presumed); 1831, *Ex parte Todd*, 2 Leigh 819 (whether the certificate must show foreign proof in detail, undecided); 1897, *Newman v. V. T. C. S. & I. Co.*, 25 C. C. A. 382, 80 Fed. 238 (probate presumed to have been made on due proof).

¹ See the cases cited *ante*, § 1065.

² 1859, *Davies v. Flawellen*, 29 Ga. 49 (opponent allowed to read "other parts of the same bill relating to the same issue"); 1878, *Sciple v. Northcutt*, 62 id. 42, 45 (amendment, in a separate document, to a bill in chancery, need not be read with the bill, but the opponent may read it); 1883, *Jones v. Grantham*, 80 id. 472, 476, 5 S. E. 764 (bill in chancery; "whatever the law may be, with regard to admitting a part only, . . . we are sure that if a part only be tendered, that part should be distinctly pointed out, and all of the instrument necessary to make that part fully and correctly understood should go to the jury").

therefore, of incorporated separate writings (*ante*, § 2104), the *bill* must in strictness be read *with the answer*; for how can an answer be intelligible without the question calling for it?

1836, *Pennell v. Meyer*, 8 C. & P. 470; Mr. Campbell, for the defendant, on the defendant's answer being offered by the plaintiff: "The bill must be read as well as the answer; it is like parts of a conversation"; Mr. Wilde, for the plaintiff: "It is not necessary; it is only the rignmarole of a draftsman." . . . It is not like a conversation, because one part takes place at one time, and another part at another. . . . It is the surmise of counsel only; it does not tell the real case"; Mr. Campbell, for the defendant: "An answer in chancery is an answer to specific questions put; first, it tells the story, and then divides the narrative into particular questions"; Tindal, C. J.: "What is the use of it, when I must tell the jury that it is only the imagination of a young man sitting in his chambers? It can only be to prejudice the jury. I never knew it done"; Mr. Campbell: "How can your lordship and the jury know what the answer is, unless you know the statement to which it is an answer?" Tindal, C. J.: "No doubt the questions are evidence,—the interrogatory parts of the bill"; Mr. Campbell: "I believe the defendant's answer would not be held sufficient, though he answered all the interrogatories, if he omitted to answer all the parts of the narrative"; Tindal, C. J.: "I think, if you insist upon it upon principle, I cannot object to it; though I never knew it done before."

In strictness, then, the bill must be put in with the answer;⁴ yet it is not likely that this would to-day be required, except so far as the former appears necessary to complete the sense of the latter.⁵ That the *whole of the answer* must at least be put in is elsewhere noticed (*ante*, § 2103, *post*, § 2121).

(3) A *deposition* is no part of the record, but is a separate statement by a person not a party to the cause; hence, there would ordinarily be no need of producing with it a copy of the record. But since a deposition in another cause cannot be used unless the parties and the issues were there the same (*ante*, § 1386), a copy of the record must, in strictness, be produced, that the identity of parties and issues may be seen. To avoid this cumbrous formality, it early became customary for the Chancellor, on authorizing an issue at law, to order the depositions to be there received without that formality. Accordingly, when the commission or other order adequately exhibits the necessary data, a copy of the record is unnecessary:

1813, L. C. Eldon, in *Corbett v. Corbett*, 1 Ves. & B. 335, 336: "There is a great mistake upon this subject of reading depositions at law. The interposition of this Court is not from absolute necessity. If the depositions are taken in a cause between the same parties, and proof is given at the trial that the witnesses are unable to attend, the depositions may be read without an order. But then the party must incur the expense and

⁴ For this peculiarity of it, see *ante*, § 1065.

⁵ 1726, Gilbert, Evidence, 55 ("because without the bill there does not appear to be a cause depending"); 1828, *Rowe v. Brenton*, 8 B. & C. 737, 765 (answer to interrogatories in an ancient proceeding, admitted, the interrogatories themselves being lost).

⁶ 1879, *Munroe v. Phillips*, 64 Ga. 22, 40 (action against an administratrix; after two returns to the probate court were admitted, the opponent was allowed to put in the re-

mainder made at the same time and sworn to in the same affidavit); 1884, *Dowling v. Feeler*, 72 id. 557, 567 (similar suit; a return of the defendant being offered by the plaintiff, held that he need not put in the vouchers referred to therein, the defendant being allowed to put in such as were connected); 1899, *Edwards v. Mattingly*, — Ky. —, 83 S. W. 1032 (original answer, without all the pleadings, may be read).

trouble of having the bill, answer, and all the proceedings. To prevent that inconvenience, therefore, where the trial is ancillary to a suit here, an order of this Court is obtained, directing the judge *ad nisi prius* to receive the deposition without more proof than that it is the deposition."¹

II. MAY THE WHOLE OF THE UTTERANCE BE AFTERWARDS PUT IN BY THE OPPONENT?

§ 2113. **General Principle; the Whole on the Same Subject, if Relevant, may be put in.** For the reasons already sufficiently examined (*ante*, § 2094), the opponent, against whom a part of an utterance has been put in, may, in his turn, complement it by putting in the remainder, in order to secure for the tribunal a complete understanding of the total tenor and effect of the utterance. It has been seen, in the foregoing sections, that there is much opportunity for difference of opinion whether the proponent in the first instance must put in the whole. But there is and could be no difference of opinion as to the opponent's right, if a part only has been put in, himself to put in the remainder. Indeed it is the very fact of this opportunity and right which (as already seen) has frequent bearing upon the question whether it is worth while to require it from the proponent in the first instance.

This right of the opponent is universally conceded, for every kind of utterance without distinction; and the only question can be as to the scope and limits of the right.¹ The ensuing controversies are in effect concerned merely

Accord: 1807, *Bayley v. Wylie*, 6 Esp. 85 (Ellenborough, L. C. J., said that "no state of things could make it necessary to produce the bill and answer, provided . . . the commission was produced"; and even this might be dispensed with where it was by lapse of time presumed lost); 1808, *Palmer v. Aylebury*, 13 Ves. Jr. 176 (by the Editor, an order is not necessary; but without it "the Court of law must go through the other preliminary proof of the bill, answer, and issue joined; and it is to exempt the judge who tries the question at law from the necessity of hearing the whole record read that an order is made as an authority for the reception of the evidence without that introductory matter."); 1818, *Gordon v. Gordon*, 1 Swanst. 165, 170.

Whether the whole of the deposition itself must be read has been considered *ante*, § 2103.

It is therefore one of the characteristic superfluities of Code legislation that this always conceded principle should frequently be found solemnly enacted, while the important controversies already considered are ignored and left without a settlement: *Cal. C. C. P.* 1873, § 1854 ("When part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence"); *Ga. Code* 1895, § 5241 ("Where either

party introduces part of a document or record, the opposite party may read so much of the balance as is relevant"); *Id.* § 5196, *Cr. C.* § 1004 ("When an admission is given in evidence, it is the right of the other party to have the whole admission and all the conversation connected therewith"); *Id.* *Code* 1897, § 4615 (like *Nebr. Comp. St.* § 5913); *Id.* *Code Pr.* 1894, § 356 (the opponent using a party's confessions "must not divide them; they must be taken entire"); *Mont. C. C. P.* 1895, § 3130 (like *Cal. C. C. P.* § 1854); *Nebr. Comp. St.* 1899, § 5913 ("When part of an act, declaration, conversation, or writing, is given in evidence by one party, the whole on the same subject may be inquired into by the other; thus, when a letter is read, all other letters on the same subject between the same parties may be given. And when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, or writing which is necessary to make it fully understood, or to explain the same, may be given in evidence"); *Or. C. C. P.* 1893, § 690 (like *Cal. C. C. P.* § 1854); *Tex. C. Cr. Pr.* 1895, § 791 ("When part of an act, declaration, or conversation or writing is given in evidence by one party, the whole on the same subject may be inquired into on the other, as when a letter is read all other letters on the same subject between the same parties may be given. And when a detailed act, declaration, conversation, or writing is given in evidence, any other act, declaration, or writing which is necessary to make it fully understood or to explain the same may also be given in evidence").

with drawing the line so that the opponent shall not, under cloak of this conceded right, put in utterances which do not come within its principle and would be otherwise irrelevant and inadmissible. In the definition of the limits of this right, there may be noted three general corollaries of the principle on which the right rests, namely: (a) *No utterance irrelevant to the issue is receivable*; (b) *No more of the remainder of the utterance than concerns the same subject, and is explanatory of the first part, is receivable*; (c) *The remainder thus received merely aids in the construction of the utterance as a whole, and is not in itself testimony.*

(a) First, then, *no utterance irrelevant to the issue is receivable.* This limitation is obvious enough; because the sole purpose in listening to the remainder is to obtain a correct understanding of the effect of the part first put in; and no remaining part, even if contained in the same breath or the same writing, can furnish such aid if it is wholly irrelevant to the issue. Practically, this limitation is often unenforceable where the remainder of the utterance is contained in the same single writing; but in theory of law, at any rate, the irrelevant portions are to be given no consideration for any purpose by the tribunal:

1862, *Wilde, B.*, in *Milne v. Leister*, 7 H. & N. 796, 808: "No doubt, there are cases where documents which are admissible are not proof of all the facts stated in them. For instance, if a notice to quit is given in evidence, and on its being read it appears that the landlord has drawn it up thus: 'In consequence of your not having paid your rent for the last year, and having ill-treated the farm, and allowed the premises to be out of repair, I hereby give you notice to quit on such a day,' . . . it is plain that a document may be admissible and yet not proof of all the facts stated in it."

1840, *Coven, J.*, in *Garey v. Nicholson*, 24 Wend. 350, 351: "[The rule about the whole being admissible] must obviously mean that the additional conversation called for should be relevant to the matter in issue. All evidence is received under that qualification; and, if not so restrained, might operate as a waste of time; other subjects might be introduced having no connection with the subject-matter of the suit."

1902, *Grant, J.*, in *Atherton v. Defreese*, 199 Mich. 304, 88 N. W. 896 (title to horses; a witness for the plaintiff testified to the defendant's admission that the horses were not his; on cross-examination by the defendant's attorney, the witness, in reply to the question, "What else did he say?" said: "He said he was so blind he couldn't see; and I asked him about how much the colts were worth, and he said about \$200, and if he didn't get them he would go to the poorhouse"): "Parts of a conversation, having no reference whatever to the issue upon trial, are not admissible under the rule that a party is entitled to the entire conversation. The rule means only that he is entitled to the entire conversation bearing upon the subject in controversy. Ten subjects may be talked about in one conversation. When one of the ten is the subject of litigation, it is not competent to put in evidence the conversation about the other nine. Defendant's blindness and poverty had nothing to do with the title to the property."²

(b) Secondly, *no more of the remainder of the utterance than concerns the same subject, and is explanatory of the first part, is receivable.* This limitation is the logical result of the principle on which the rule rests. But it has not been commonly observed in defining the rule. The usual phrase is that the

² Accord: 1898, *Hathaway v. Tinkham*, 148 Mass. 65, 67, 19 N. E. 18.

"whole" of the utterance — i. e. the remainder of the whole — may be put in; and this received distinct sanction in the following leading opinion:

1880, *Allen, C. J.*, in *The Queen's Case*, 3 B. & B. 307: "The conversations of a party to the suit, relative to the subject-matter of the suit, are in themselves evidence against him in the suit, and if a counsel chooses to ask a witness as to anything which may have been said by an adverse party, the counsel for that party has a right to lay before the Court the whole which was said by his client in the same conversation, — not only so much as may explain or qualify the matter introduced by the previous examination, but even matter not properly connected with the part introduced upon the previous examination, provided only that it relate to the subject-matter of the suit; because it would not be just to take part of a conversation as evidence against a party without giving to the party at the same time the benefit of the entire residue of what he said on the same occasion."

But this liberal allowance cannot, in theory at least, be defended. The single purpose of considering the utterance as a whole is to be able to put a correct construction upon the part which the first party relies upon, and to avoid the danger of mistaking the effect of a fragment whose meaning is modified by a later or prior part (*ante*, § 2094). It follows that the purpose is accomplished when the tribunal has had placed before it the remaining parts which may modify or explain the first part:

1888, *Denman, L. C. J.*, in *Prince v. Sams*, 7 A. & E. 637 (on cross-examination, in an action for falsely prosecuting a suit for debt, testimony was obtained of the plaintiff's admission on the stand in the former trial that he had been an insolvent; on re-examination, other parts of his former testimony, dealing with his present claim, were asked about): "My opinion was that the witness might be asked as to everything said by the plaintiff, when he appeared on the trial of the indictment, that could in any way qualify or explain the statement as to which he had been cross-examined, but that he had no right to add any independent history of transactions wholly unconnected with it. . . . Upon the whole, we think it must be taken as settled that proof of a detached statement made by a witness at a former time does not authorize proof by the party calling that witness of all that he said at the same time, but only of so much as can be in some way connected with the statement proved. . . . We cannot assent to [the above passage of the opinion in *The Queen's Case*]. We will merely observe that it was not introduced as an answer to any question proposed by the House of Lords, and may therefore be strictly regarded as extrajudicial; that it was not necessary as a reason for the answer to the question that was proposed; that it was not in terms adopted by Lord Eldon or any of the other judges who concurred; that it was expressly denied by Lords Redesdale and Wynford; and that it does not rest on any previous authority."

1858, *Merrick, J.*, in *Com. v. Keyes*, 11 Gray 323, 325: "There is an important limitation to the rule, in giving evidence of conversations or of oral statements and declarations. The proof in such case is to be confined to what was said upon or concerning those matters which are made subjects of inquiry or investigation. Every remark or observation made upon those topics is to be received as competent evidence, because they may essentially modify the character and purport of the whole conversation, and vitally affect what might otherwise appear to be explicitly asserted or denied. But if, during the same interview between the witness and the party, other subjects of conversation or discussion are introduced, remote and distinct from that which is the object of inquiry or investigation, it is obvious that whatever may be said concerning them can have no tendency to illustrate, vary or explain it. Everything pertaining to these additional and extraneous matters should therefore be rejected as irrelevant and useless. . . . It appears that Smith,

a witness produced in behalf of the government, testified on cross-examination to a conversation which he had with Walton, after they left the shop where the liquor, the sale of which constituted the offence alleged against the defendant, was procured, relative to the woman from whom they obtained it. Before re-examination the district attorney asked him by what name the woman was called by Walton; to which it was answered 'He called her Mrs. Keyes.' This inquiry was limited to what was said by Walton concerning the name of the woman, and necessarily restricted the reply to that matter alone. It did not in the least degree refer to anything which Walton might have said relative to the act of sale, or to what took place in the shop before they left it. The two things were entirely distinct and independent of each other. The first related merely to the identity of the woman; the other, to an act alleged to have been done in violation of law. It is easy to see what, in this position of the case, were the extent and limit of the right of the defendant in pursuing the examination in reference to the inquiry which had already been made. She was entitled to pursue it for the purpose of drawing out from the witness everything whatever which was said by Walton, directly or indirectly, concerning the name or identity of the woman; but having exhausted his knowledge on that subject, she could not proceed to bring in statements or declarations on another subject essentially distinct and different. She desired to ask what further was said about the transaction; which plainly must be understood to have been an inquiry what was said concerning the act of sale with which the defendant was charged in the complaint. The statement or declaration of Walton on that subject could be nothing more than mere hearsay, and was of course in itself inadmissible."³

Nevertheless, it is perhaps in practice undesirable to enforce such a limitation, if it is likely to lead to cumbersome definitions and to lend itself rather to quibbling objections than to substantial improvement in the investigation of truth. The simple rule, in the form to-day most commonly enforced, that "the whole of what was said at the same time on the same subject" may be put in, has proved easily workable, and has been attended by no technical refinements in its use.⁴ It may therefore be said that the above limitation, though sound enough in principle, should not be sanctioned unless Courts can trust themselves to leave its application wholly to the determination of the trial judge.⁵

(c) Thirdly, *the remainder thus received merely aids in the construction of the utterance as a whole, and is not in itself testimony.* This, also, is simply a necessary deduction from the general principle. The remainder of the utterance, regarded as an assertion of the facts contained in it, is merely a hearsay statement, and as such has no standing. It is considered by the tribunal merely in order to piece out and interpret the first fragment and ascertain whether as a whole the sense of the first becomes modified. For example, in Sidney's celebrated example, if a person is charged with saying "There is no God," he appeals to the preceding clause, "The fool hath said in his heart";

³ The following is also a good opinion: 1840, Cowen, J., in *Garay v. Nicholson*, 34 Wend. 350, 352.

⁴ The rulings will be found noted in the appropriate classes of precedents, *post*, § 2115.

⁵ The principle in question was given a ludicrous application and led to a quick passage of wit between eminent counsel on an occasion in the trial of *Tilton v. Beecher* (Abbott's Rep.

II. 548); Mr. Tilton having taken up a Bible in order to give Mr. Everts on cross-examination "a better answer than my own, sir," Mr. Everts objected. Judge Neilson: "Do you think it would be incongruous?" Mr. Everts: "It gives us a right to put in the whole book, if he reads a part." Mr. Fallerton: "Well, sir, that would bring on your own condemnation."

the total effect is to remove the first impression that the speaker has himself asserted atheism, and to show that he has merely attributed the atheistic utterance to a fool; but the prior clause is nevertheless not to be taken as testimony that some fool *has* made that statement. It may be immaterial whether he has or not; but if it were material, this prior clause could not serve to prove it; that clause is *functus officio* when it has removed the misleading effect of the last clause as being a statement of the speaker himself. All this is logically unquestionable. Nevertheless, it is not uncommon for Courts to treat the remaining utterance, thus put in, as having a legitimate assertive and testimonial value of its own,—as if, having once got in, it could be used for any purpose whatever.⁶

§ 2114. *Other Principles Discriminated (Res Gestæ, Witness' Explanation of Inconsistencies, Admissions by Reference or by Silence, Letters explaining Conduct).* In other parts of the system of evidence, there are rules which admit the use of utterances complementary or explanatory in their nature; and their difference in principle from the present principle must here be noticed:

(1) Under the *res gestæ*, or *Verbal Act* doctrine, it is allowable to ascertain the complete significance of a person's conduct by listening to what he said when doing the act (*ante*, §§ 1772-1786). For example, if adverse possession by Doe is relied upon to give prescriptive title, Doe's occupation of the land having been shown and his acts of ploughing or fencing having been put in evidence, it may further be shown that he said, when ploughing or fencing, "My father left me this land by will," or "I have a deed to this farm," because this gives to his acts the significance of an adverse claim.¹

(2) An opponent may be shown to have made an *admission by reference*, i. e. by expressly stating that whatever a certain third person has said or will say is true, or by *silent assent* to another person's statement. Here, in effect, he adopts the other person's statement as his own, and the statement of the other person is received on the footing of an admission (*ante*, §§ 1070-1075).²

(3) Again, when *conduct* is offered as *indicating a state of mind*, the inference from the conduct can often not be properly made unless the circum-

⁶ 1848, Church, C. J., in *Bristol v. Warner*, 19 Conn. 7, 19 (approving an instruction allowing the plaintiff to read the remainder of his own letter as evidence: "By 'substantive evidence' the judge did not mean conclusive evidence, nor even evidence which the jury was bound to believe, but only that it was, if true, relevant to the matter in dispute, to prove or disprove, as distinguished from mere explanatory evidence"). *Contra*: 1873, Com. v. Vosburg, 112 Mass. 420 (telegram containing a significant assertion of fact, admitted as explaining part of an admissible conversation in which it was referred to, but not allowed to be relied upon as to the assertion in it); 1832, *Rice v. Withers*, 9 Wend. 138, 141 ("If those declarations were proof of the facts asserted, every defendant could justify, and no recovery would be had against

him"). Compare the correct view as applied to a witness' self-contradictions (*ante*, § 1018).

¹ It may be noted here that this is genuinely a branch of the principle of Completeness; i. e. under the Verbal Act doctrine, the act as a whole consists of a conduct-part and a verbal part, and the verbal part may be put in as completing the conduct-part; while the principle as applied in the present Chapter deals with a verbal part complementing another verbal part. In both classes of cases it is done by virtue of the principle of Completeness; but the former class is more conveniently dealt with in the above-cited place in order to distinguish it from the Hearsay exceptions.

² Thus, where the separate statement is that of a third person, the two principles may overlap in their application; i. e. the separate statement is admissible equally under both principles.

stances leading up to and causing the conduct are considered, and these circumstances may consist in third persons' statements, which may therefore be evidenced. Thus, on an issue of sanity, the person's conduct acting upon letters received may show that his mind operated rationally upon the letters (*ante*, § 228).

(4) When a *witness* or a *party* has been *impeached by prior utterances* showing *bias* or *self-contradiction*, fairness requires that he be allowed to explain away their effect, if he can (*ante*, §§ 952, 1044, 1058). One way of explaining may be to give the remainder of what he said at the time. Here, then, the putting in of the explanatory parts is justifiable equally on two principles.³

(5) That the stage of *re-examination* or *cross-examination* is the proper time for putting in explanatory utterances is one of the rules for the Order of Evidence (*ante*, §§ 1884, 1896), and does not involve the tenor or limits of the utterance.

§ 2115. *Principle's Application to (1) Oral Admissions, Conversations, Confessions, Former Testimony, Depositions.* The general phrasing of the principle, then, is that when any part of an oral statement has been put in evidence by one party, the opponent may afterwards (on cross-examination or re-examination) put in the remainder of what was said on the same subject at the same time. This phrasing leaves something to be desired in definiteness, but it is practically applied without much difficulty and with little or no quibbling. Its most common application is to *conversations* in general, including the *admissions of an opponent* and to *inconsistent statements of a witness* used in impeachment;¹ here, it may be noted that a conversation in a party's

³ On this point a distinction was drawn by Abbott, C. J., in *The Queen's Case* (quoted *supra*, § 2113), in which he pronounced for admitting only the explanatory remainder in favor of a witness, but the whole in favor of a party. This distinction, however, already examined for the case of a witness (in § 1045), is unsound, and was repudiated in *Prince v. Samo* (quoted *supra*).

¹ In the following rulings it is not always certain whether the statements were oral or written; in some cases, they were the statements of a witness, not a party's admissions; furthermore, the rulings usually declare merely that the whole may be admitted, and where they expressly limit the utterance to the explanatory part (on the principle of § 2113, par. 2, *ante*) it is so noted; the rule is applied to a conversation, where not otherwise noted; compare also the statutes quoted *ante*, § 2113, and the cases cited *post*, §§ 2119, 2120: *Can.*: 1890, *Halifax Banking Co. v. Smith*, 29 N. Br. 462, 465, 18 Can. Sup. 710 (conversation between a solicitor and one of the officers of the plaintiff bank; in the Dominion Court a larger scope was allowed; in the Provincial Court *Prince v. Samo*, Eng., was followed); *Ala.*: 1849, *McLean v. State*, 16 Ala. 672, 677; 1896, *Drake v. State*, 110 id. 9, 20 So. 450 (threats by a defendant); 1903, *Hudson v. State*, 137 id. 60, 34 So. 834; *Conn.*: 1832, *Barnum v. Barnum*, 9 Conn. 243, 247; 1833, *Clark*

v. Smith, 10 id. 1, 5 (expressly following the opinion in *The Queen's Case*, *ante*, § 2113); 1848, *Bristol v. Warner*, 19 id. 7, 19; *Fla.*: 1896, *Thalheim v. State*, 39 Fla. 169, 20 So. 938; 1903, *Fields v. State*, — id. —, 55 So. 185; *Ga.*: 1851, *Rolfe v. Rolfe*, 10 Ga. 143, 145; 1874, *Hanson v. Crawley*, 51 id. 528, 534; 1879, *Cox v. State*, 64 id. 374, 382, 411, 414; *Ill.*: 1842, *Young v. Bennett*, 5 Ill. 43, 47 (the witness having stated some of his remarks drawing forth the defendant's answers, held that the rest of the witness' remarks were not admissible, "unless the answer would without them be unintelligible"); 1893, *Jamison v. People*, 145 id. 357, 378, 34 N. E. 486 (by an accused); *Ind.*: 1901, *Diehl v. State*, 157 Ind. 519, 62 N. E. 51 (the whole is admissible, "at least so far as it may materially tend to impeach, rebut, explain, or qualify, the portion introduced by his adversary"); *Ia.*: 1859, *Gaddis v. Lord*, 10 Ia. 141, 142 (whole of a conversation at the same time and on the same subject, admissible; under the Code, quoted *ante*, § 2113); 1863, *State v. Elliott*, 15 id. 72, 73 (rule not applicable to statements volunteered by the party not as a part of a conversation); 1882, *Hess v. Wilcox*, 58 id. 380, 382, 10 N. W. 847 (principle applied); 1897, *Hartman Steel Co. v. Hoag*, 104 id. 269, 73 N. W. 611 (conversation by opponent: what was said to him, admitted); *La.*: 1825, *Prati*

presence is in effect merely one form of an admission, because statements in a party's presence are usually equivalent to admissions by him (*ante*, § 1071). The principle also finds application to *confessions of an accused*² and to *testimony at a former trial* and to *depositions*.³

§ 2116. *Same*: (2) *Sundry Writings*. The principle as applied to writings permits the whole of the same document to be put in. But since for writings the whole is usually either required to be put in by the first party or is in effect before the Court, under the principles already examined (*ante*, §§ 2102-2111), there remains but little opportunity for the operation of the present principle; it finds occasional use for *miscellaneous documents*,¹ for *judicial records*,² and for *corporate records*.³

v. Fowler, 3 Mart. N. 2. 452, 454; 1844, Lewis v. Gibson, 9 Rob. 146, 148; 1854, Benn v. Evans, 9 La. An. 163; *Id.*: 1857, Turner v. Jenkins, 1 H. & G. 161, 163; *Mass.*: 1814, Whitwell v. Wyer, 11 Mass. 6, 10; 1856, Com. v. Keyes, 11 Gray 323 (only the explanatory part; quoted *ante*, § 2113); 1867, Straw v. Greene, 14 All. 206 (same); 1868, Farley v. Rodocanachi, 100 Mass. 427, 429 (here, by a slip, the rule is stated in the broader form); 1886, Dole v. Wouldre, 143 Id. 161, 164, 7 N. E. 532 (same as Com. v. Keyes); 1893, Com. v. Armstrong, 155 Id. 78, 32 N. E. 1082 (same); 1899, Cusick v. Whitcomb, 173 Id. 350, 53 N. E. 815 (same); *Mich.*: 1902, Atherton v. DeFreese, 129 Mich. 364, 38 N. W. 886 (only the part that relates to the subject is admissible; quoted *ante*, § 2113); *Mo.*: 1839, Howard v. Newsom, 5 Mo. 523; 1873, Barghart v. Brown, 51 Id. 600; *Nebr.*: 1901, Carlson v. Hohn, —, 95 N. W. 1125 (irrelevant parts, admissible in the trial Court's discretion); *N. H.*: 1844, Barker v. Barker, 16 N. H. 323, 338, *semble*; *N. J.*: 1850, Somerville & E. R. Co. v. Doughty, 23 N. J. L. 495, 500, *semble*; *N. Y.*: 1808, Carrer v. Tracy, 3 John. 437 (whole of an oral admission must be taken); 1840, Garey v. Nicholson, 24 Wend. 350, 352 (like Prince v. Samo, Eng.); 1842, Kelsey v. Bush, 4 Hill 440 (action on a note for a store; defendant's statement, when admitting execution, alleging a breach of warranty, held admissible; the rule stated in the old form, and the preceding case not cited); 1862, Rouse v. Whited, 25 N. Y. 170, 172 (Prince v. Samo, Eng., followed; good opinion by Sutherland, J.); 1879, Flatner v. Flatner, 78 Id. 90, 103 (preceding case approved); 1892, Fleischman v. Toplitz, 134 Id. 349, 355, 31 N. E. 1089 (similar); *R. I.*: 1902, Sherman v. Stafford Mfg. Co., 23 R. I. 529, 51 Atl. 26 (the rule "does not extend to matters distinct from the admissions"); *Tenn.*: 1901, Colquitt v. State, 107 Tenn. 391, 64 S. W. 713 (irrelevant opinion statements, held inadmissible in explanation); *Wis.*: 1903, Paulson v. State, 115 Wis. 99, 94 N. W. 771.

The rule equally admits a statement by a third person taking part in the conversation between the parties: 1866, Gillam v. Sigman, 29 Cal. 637, 641; this is on the principle of § 1071, *ante* (admissions by silent assent to statements made in one's presence). But the rule does not admit the remainder of the utterance when the

first part has come into evidence merely incidentally and has not been put in evidence for its own sake: 1827, Winchell v. Latham, 6 Cow. 682, 684 (a witness to a note was asked on cross-examination, to test his credit, whether he had mentioned seeing it to anybody, and to whom; he named the alleged maker as such a person; the alleged maker's reply not allowed to be evidenced on re-examination; otherwise, if the purpose and effect of the original question had been to show an admission by the maker's silence).

¹ The authorities have already for convenience been placed *ante*, § 2097.

² 1864, Auiger v. Smith, 34 Ill. 534 (former testimony of a party; the whole may be called for); 1895, Siberry v. State, 149 Ind. 684, 39 N. E. 937 (after a stenographer had given parts of testimony at a former trial, the stenographer was asked by the opponent to give other and qualifying parts of the testimony, and these parts were ruled to be not in effect qualifying); 1865, Whitman v. Morey, 43 N. H. 448, 454, 2 Atl. 899 (parts of a deposition having been used as a self-contradiction, the opponent was allowed to read as much "as pertained to the same subjects and tended to qualify, limit, or explain the answers read"); 1893, *Re Chamberlain*, 140 N. Y. 390, 393, 35 N. E. 603 (former examination used by opponent in part; in rebuttal, only the explanatory parts are to be used). Compare the cases *ante*, § 2098. The same is true for depositions, and is implied in the cases cited *ante*, § 2108; an opponent's own answers to interrogatories may stand on a different footing (*post*, § 2124).

³ 1882, State v. Hawkins, 81 Ind. 486, 487 (official bond); 1898, Robinson v. Cutter, 163 Mass. 377, 40 N. E. 112 (letter); 1815, Griffith v. Ketchum, 12 John. 379, 380 (sheriff's return); 1883, Grattan v. Life Ins. Co., 92 N. Y. 284 (letter); 1823, Trustee v. Hogg, 2 Hawks 370, 374 (petition to plaintiff).

⁴ 1855, Miles v. Wingate, 6 Ind. 456 (bill of exceptions as part of the record of a former suit, admitted; "a record is an entire thing, and if admissible for any purpose, all its parts are received"); 1871, Jones v. Hopkins, 32 Ia. 503, 504 (whole of a record introduced, to explain a claim leading to the judgment). Compare the cases cited *ante*, § 2108.

⁵ 1823, Pike v. Dyke, 2 Greenl. 213 (records of an adjourned meeting of town proprietors

§ 2117. *Same*: (3) *Charge and Discharge Statements*. When the admission offered consists of a statement that the claimed money, services, or the like, were in fact received, a statement made at the same time, that the claim was discharged in some way, should be admitted; because the statement thus on the whole becomes a statement of non-liability, not of liability, and the first part of it is materially modified. It is not that the second part is in itself testimony to the discharge, but rather that it destroys the *prima facie* quality of the first part as an admission of liability:

1818, *Mansfield, C. J.*, in *Randle v. Blackburn*, 5 Taunt. 245 (the defendant having made out an account of the plaintiff's claim for timber against a ship, figuring it at £807, and having written on the same paper a counter-claim for £764 demurrage, the plaintiff offered the paper as an admission of the whole claim, without offering other evidence, and insisted that the defendant should offer some evidence of the counter-claim): "The defendant never admitted this account as distinct from the demurrage. His statement was made all in one breath; and I cannot distinguish what he admitted to be due for the timber from what he claimed for the demurrage. The verdict therefore was only for the balance, and was perfectly right. . . . It would be doing monstrous injustice if we were not to hold this, that the whole of the declaration must be taken together. I always have thought that, if a man gave an account of a transaction, the whole of it must be taken together."

1808, *Carver v. Tracy*, 3 John. 427: "The defendant said that he received a dollar of the plaintiff, but it was his due; on this declaration [for one dollar had and received], the justice without further evidence decided that the plaintiff was entitled to recover, and that the defendant must prove the debt he claimed"; on appeal, *per Curiam*: "The justice was manifestly wrong. The whole conversation of the defendant must be taken together. The plaintiff could not take one part and reject the other. What was said by the defendant, taken together, was a denial of the demand of the plaintiff, who was bound to prove it."

This would seem to be to-day universally conceded.¹ That any doubt ever arose is probably due to the existence at one time of a controversy on a similar

three years later, excluded). Compare the cases cited *ante*, § 2109.

¹ *Ark.*: 1854, *Adkins v. Hershey*, 14 Ark. 423 (admission as to an account, asserting credits due, considered as a whole); *Md.*: 1827, *Oliver v. Gray*, 1 H. & G. 204, 219 (a debtor's acknowledgment, used to take a debt out of the statute; his statement of its discharge, made at the same time, must stand or fall with the acknowledgment; so that the creditor cannot disprove the discharge and still use the acknowledgment); *N. Y.*: 1808, *Carver v. Tracy*, 3 John. 427 (quoted *supra*); 1812, *Walling v. Toll*, 9 id. 141 (defendant's statement, admitting plaintiff's attendance as physician, but alleging that she was under age and had not employed him, taken as a whole); 1813, *Fenner v. Lewis*, 10 id. 38, 45; 1813, *Credit v. Brown*, ib. 365 (defendant's statement, that he shot the plaintiff's dog, but did it to defend himself from attack, taken as a whole); 1814, *Hopkins v. Smith*, 11 id. 161 (plaintiff's statement, that defendant signed a note with J. H., but claiming that J. H. signed as surety only, taken as a whole); 1817, *Methodist Ep. Church v. Jaques*, 2 John. Ch. 77, 116 (paper exhibited to charge may be used also in

discharge); 1818, *Smith v. Jones*, 15 id. 229 (statement admitting a purchase but alleging payment, taken as a whole); 1837, *Gough v. St. John*, 16 Wend. 646, 652 ("Prima facie an inculpatory admission must be viewed in connection with matter in exculpation which comes out in the same conversation"; here, admissions of knowledge of insolvency); *N. C.*: 1797, *Barnes v. Kelly*, 2 Hayw. 43; 1823, *Jacobs v. Farrall*, ib. 570, 571 (statement admitting an account but claiming another account in discharging, taken together); *Pa.*: 1788, *Newman v. Bradley*, 1 Dall. 240 (defendant's statement that he borrowed the money, but repaid it, taken as a whole; yet where the details mentioned in the favorable part of the statement are disproved by others, that part should be rejected); 1814, *Shaller v. Brand*, 6 Binn. 435, 438 (memorandum stating a right of dower and also its release, taken together); *S. C.*: 1818, *Arthur v. Wells*, 1 Mill Const. 314 (declaration, by one admitting a shooting, that he did not mean to kill, taken as a whole); 1821, *Smith v. Hunt*, 1 McC. 449. *Contra, semble*: 1830, *Barber v. Anderson*, 1 Bail. 358, 360 (trover, resting upon a demand and refusal; defendant on demand failed to

point as to the use of a statement of discharge in an answer in chancery, which rests on other grounds (*post*, § 2121).

§ 2118. *Same*: (4) *Account-Books*. The use of the whole of a ledger-account (or, in general, of all the items of account between the same parties in the same book or series of books) is open to the objection that the entries are not made at the same time but at different times, and that the case is therefore not precisely like a single oral statement or letter admitting a claim but asserting its discharge. In the latter instance it is easy to see that the intended tenor as a whole is a statement of non-liability, while in the former instance each entry admitting debit is usually at the time of making it a separate whole. Nevertheless, good sense has dictated that the whole of an account shall be taken together, whatever on strict principle might have been excluded; and the result has been thus defended:

1864, *Hogeboom, J.*, in *Dewey v. Hotchkiss*, 30 N. Y. 497, 502: "The books constituted one entire series of accounts between these parties, and, for the purposes of this case, may be regarded as if they contained nothing else whatever—indeed, as if they had all been presented in court by the plaintiffs on a single paper or account current. In such case could the defendant be permitted to cull particular entries from the account and exclude the residue? I think not. The rule that a party whose oral declarations, in a conversation, are improved in evidence by his adversary, is not thereby permitted to introduce in his own favor disconnected portions of the same conversation having reference to distinct and independent matters, has no close application to such a case; 1st, Because the account must be regarded as the single, entire, and continuous statement of the party offering it, presenting his version of the true state of the business transactions between the parties, — not necessarily entitled to credit in every part, if discredited by other evidence, but admissible for the consideration of the jury; 2d, Because the defendant, having adopted the whole statement by ranging through its entire scope and contents, has given currency to the whole, and has made it necessary to examine and take in the whole, in order to determine how far the portions rejected by him bear upon, affect, or qualify the portions selected. There is no evidence that the portions of the account introduced by the plaintiff, after those introduced by the defendant, do not materially qualify the effect of the latter items, and do not in fact relate to the same precise subject-matter."¹

return the slave, but said that he had sent her home; the latter statement held to be matter of defence, provable by defendant).

² *Accord*: *Eng.*: 1701, *Darston v. Oxford*, 1 Eq. Cas. Abr. 10 ("Where a man was charged only by an oath, or a book, the same should be his discharge"); 1842, *Rowland v. Blakely*, 1 Q. B. 403 (set-off; the defendant, putting in the plaintiff's bill of particulars to prove the items set off, held bound to take the whole document); *Ire.*: 1828, *L. C. Hart, in Kilbee v. Sneyd*, 2 Moll. 186, 193 ("If you use one side of an account produced by the adversary, you must take both; you must take it altogether, or reject it in toto"); *Can.*: 1849, *Palmer v. Gilbert*, 1 All. N. Br. 506 (account rendered); 1890, (*Brien v. O'Brien*, 27 N. Br. 145, 156, *Can. Sup.*, in *Cassels' Dig.* 1893, p. 297 (defendant's books of account having been offered by the plaintiff as showing admissions of knowledge of dissolution of a partnership, the defendant was allowed to offer other entries in the same books to explain away the apparent inference from the former entries); *U. S.*: 1900, *Bridge v. State*, 110 Ga.

246, 34 S. E. 1037 (a whole book, containing certain relevant entries, allowed to go to jury under instructions, the detaching of the irrelevant parts being impossible without mutilation); 1901, *Boudinot v. Winter*, 190 Ill. 394, 60 N. E. 553; 1859, *Veiths v. Hagge*, 8 Ia. 163, 169 (when charge items are offered, credit items to the same party in the same books are equally made evidence); 1826, *Wakeman v. Marquand*, 5 Mart. La. n. s. 265, 272; 1834, *King v. Maddux*, 7 H. & J. 467 (all the entries in the same book against the same party, admitted); 1818, *Walden v. Sherburne*, 15 John. 409, 424 (whole of an account admitted); 1836, *Pendleton v. Weed*, 17 N. Y. 72, 76 ("the whole relating to the same matter is admissible"); 1864, *Dewey v. Hotchkiss*, 30 Id. 497, 502 (quoted *supra*); 1826, *Turner v. Child*, 1 Dev. 133; 1821, *Withers v. Gillespy*, 7 S. & R. 10, 14 (admissible not for "matter impertinent to the issue," but "for all purposes of explanation; . . . everything necessarily connected with the entries relied on by the plaintiff which their books contained at the time the suit was brought"); 1824, *Thomson*

§ 2119. *Separate Utterances excluded*; (1) *Conversations, Oral Admissions and Confessions, Libels, etc.* It follows, from the general principle (*ante*, § 2113), that a *distinct or separate utterance* is not receivable under this principle. The boundary here is usually defined by saying that all that was uttered at the same time on the same subject is receivable; yet it is difficult to test the line of admissibility by any formula, and none seems to have been sanctioned by general acceptance:

1839, *Denman*, L. C. J., in *Sturje v. Buchanan*, 10 A. & E. 596 (assumpsit for the value of a cargo improperly sold by the defendant's agent; the plaintiff having read three letters of the defendant admitting parts of the plaintiff's case, the defendant was not allowed to read other letters of his in the same letter-book dealing with the same correspondence): "This is a series of copies of letters written from time to time, on principle exactly the same thing as if they had been kept in his counting-house on a file; it is like proving what a party said in one conversation; one of these letters or one of these conversations may be proved without authorizing the opposite party to bring forward for his own benefit what he himself said or wrote in another conversation or a different letter."

1824, *Hosmer*, C. J., in *Stewart v. Sherman*, 5 Conn. 244, 245 (rejecting a subsequent conversation concerning the ownership of a note): "It is a correct principle that the whole of a conversation must be taken together, in order to show distinctly the full meaning and sense of the party. . . . The question is merely this, whether a particular conversation is part of a preceding conversation because a negotiation begun was still pursued. . . . [Here] the conversation, in the manner above-mentioned, was not the same. The past and future cannot thus be brought together in order to form an artificial identity. The law never intends that a party may make evidence for himself from his own declarations, but merely that the meaning of a conversation shall not be perverted by proof of a part of it only."

The application of this principle to *conversations*, including *oral admissions and confessions*, depends almost entirely on the circumstances of each case;¹

v. Kalbach, 12 id. 238; 1806, *Morris v. Hurst*, 1 Wash. C. C. 435 (good opinion by Washington, J.); 1818, *Bell v. Davidson*, 3 id. 333, 335; 1846, *Mattocks v. Lyman*, 18 Vt. 94, 108 (payment allowed to be shown by the same books); 1900, *State v. Powers*, 72 id. 168, 47 Atl. 530 (entire page of a book bearing a certain entry, admitted to show the character of the book and the time of entries); 1808, *Waggoner v. Gray*, 1 Hen. & M. 603, 608; 1809, *Jones v. Jones*, 3 id. 447; 1901, *Rowan v. Chenoweth*, 49 W. Va. 287, 38 S. E. 544. *Contra, semble*: 1830, *Catt v. Howard*, 3 Stark. 6 (the whole of a single entry in an account-book read, but not "distinct entries in different parts of the book"). But it is a proper qualification to exclude entries made after suit begun: 1821, *Withers v. Gillespy*, 7 S. & R. 10, 15; and the following ruling seems sound: 1893, *Doolittle v. Stone*, 136 N. Y. 613, 616, 32 N. E. 639 (defendant's book of accounts having been put in by plaintiff as an admission, a "distinct and separate book [of the defendant], making no reference to any other, not even bringing down a balance of account," not admitted in his favor). The following case, making an exception to the general rule for executors and other fiduciaries, probably rests directly on the rule for chancery answers, *post*, § 2121, and should therefore be applied only to pleadings rendering

an account: 1827, *Robertson v. Archer*, 5 Rand. 319, 324 (excluded, because such persons are obliged "to furnish those to whom they are accountable the means of charging them to the full extent of their liabilities").

¹ With the following rulings should be compared those already cited under § 2115, admitting the remainder of the same admission or confession; the present principle is there constantly mentioned: 1842, *Lee v. Hamilton*, 3 Ala. 529, 533; 1824, *Stewart v. Sherman*, 5 Conn. 244; 1836, *Robinson v. Ferry*, 11 id. 460, 462; 1856, *Dougherty v. Posegate*, 3 Ia. 88, 90 (separate conversation or declaration, admissible only when it is necessary to explain the first or make it fully understood; under the Code); 1859, *Williams v. Donaldson*, 8 id. 108, 112 (principle applied); 1864, *State v. Vance*, 17 id. 138, 140 (principle applied); 1895, *State v. Jones*, 47 Ia. An. 1824, 18 So. 515; 1871, *Adam v. Eames*, 107 Mass. 275 (statement "at another interview," excluded); 1808, *Blight v. Ashley*, 1 Pet. C. C. 13, 20 (statement on another day, excluded). Whether the statement is a separate one is of course for the judge to determine (*post*, § 2550) before it is offered to the jury: 1836, *Robinson v. Ferry*, 11 Conn. 460, 463.

Distinguish the question whether a witness who has been discredited by inconsistent statements

what is a separate utterance can ordinarily not be the subject of fixed definition; so also for utterances charged as *libellous* or *seditious*.²

§ 2120. Same: (2) Utterances incorporated by Reference. Other Letters of a Correspondence, etc. (a) Where the utterance first offered includes by reference a *concurrent* or *prior* utterance, the one thus referred to (no matter by whom made) becomes a part of it. Nevertheless, what is thus incorporated may be only a portion of the prior utterance, *i. e.* the portion referred to; and thus that portion only should be put in which is useful as completing the sense of the later one:

1860, *Hear, J.*, in *Trichet v. Ins. Co.*, 14 Gray 457: "Where a letter is written in answer to another, it may often be unintelligible without referring to the previous one. By referring to the letter to which he is replying the writer to that extent makes it a part of his own communication. Suppose that the first letter contained a question; and the reply was, 'To the question contained in your letter, I answer "Yes."' How could the meaning of the answer be ascertained by the jury without knowing the question? We can perceive no just distinction between oral conversation and written correspondence in this respect. Where a statement is made in the course of a conversation or correspondence, which is itself admissible in evidence, the rest of the conversation or correspondence must be admitted, so far as it is connected with and necessary to a full understanding of what follows."

This principle applies to admit a prior *oral* utterance¹ as well as a prior *writing*.³ It should be noted, however, that in neither case is it essential

may be supported by evidence of other consistent statements (*ante*, § 1122), and whether a party whose inconsistent claims have been used against him as admissions may show that at other times he has made the same claim as now (*ante*, § 1133); both these things are generally forbidden; yet they might be received as corroborating, even though inadmissible under the present principle of Completeness.

² From the following rulings distinguish those already cited under §§ 195, 367, 403, where the object is, not to show the total sense of a specific utterance, but to show the general state of opinion or feeling of an accused as being loyal, revolutionary, malicious, or the like; under the latter principle the allowable range of utterances would obviously be greater than under the present one, but the rulings are sometimes difficult to classify; compare also the statements admissible under the Hearsay exception (*ante*, § 1752), and the citations under the present principle (*ante*, § 2099): 1810, *R. v. Lambert*, 2 Camp. 398, 400 (libel in a newspaper; passages "of the same paper upon the same topic with the libel, or fairly connected with it, although locally disjointed from it," entitled to be read by defendant, "to show the intention and mind of the defendant with respect to this specific paragraph"); 1832, *Pinney's Trial*, 3 State Tr. n. s. 11, 464 (riot and militia; after part of a speech, the other part may be shown, and after a speech having one tendency, another by the same person to the contrary may be shown); 1843, *R. v. O'Connell*, 5 id. 1, 369, *sensu* (seditious; a speech published in a certain newspaper being read by the prosecution as seditious, the

defence were allowed to read an article by the same person on "The morality of war"; good opinion by Crampton, J.); 1848, *R. v. Martin*, 6 id. 925, 926 (seditious article; another in the same paper, not received in his favor, because not explaining the one charged); 1856, *Darby v. Onseley*, 1 H. & N. 1, 7, 11 (libel in a newspaper; extract in another number, not having "a tendency to explain, exculpate, modify, or control the other paragraph," excluded); 1888, *Parnell Commission's Proceedings* (quoted *ante*, § 2095).

³ 1844, *Barker v. Barker*, 16 N. H. 333, 339 (former expressions referred to, "which imparted any significance to the remarks of either beyond their ordinary and obvious meaning," admissible); 1864, *Judd v. Brentwood*, 46 id. 430 (preceding case approved).

⁴ 1899, *Amos v. State*, 123 Ala. 50, 26 So. 524 (false pretences; defendant represented that M. had money of his; M. wrote to B. that he had not; B. handed the postal card to defendant, who read it and then said "I have lied to you about this"; the postal card admitted as a part of defendant's admission); 1903, *Morris v. Jamieson*, 205 Ill. 27, 68 N. E. 742 (letter accompanying a statement of account, received; *The Queen's Case*, quoted *ante*, § 2113, followed); 1871, *Brayley v. Rom*, 33 Ia. 505, 508; 1872, *Collins v. Bane*, 34 id. 385, 389; 1860, *Trichet v. Ins. Co.*, 14 Gray 457 (quoted *supra*); 1900, *Buffam v. York Mfg. Co.*, 175 Mass. 471, 56 N. E. 599; 1901, *Sturgis v. Baker*, 39 Or. 541, 65 Pac. 810 (cashier's indorsement on a note, held explainable by his account-entries, under Code, § 680, quoted *ante*, § 2113); 1812, *McGrath*

that the reference to the prior utterance be *express*; for, especially in a correspondence, the reference may be implied only. Perhaps, for letters, the rule should be that by an express reference the whole of the prior utterance becomes admissible, but otherwise, only that portion of a prior letter which tends to explain the later one; yet no definite rule seems to be judicially agreed upon.

(b) A *subsequent* utterance by another person can hardly be conceived as incorporated by reference. Hence, when B puts in A's admission, B cannot put in at the same time his own reply, since the sense of A's utterance can hardly be qualified by what B may later say of it.⁸ Nevertheless, when A's utterance has in some way referred to an utterance of B's, the latter's subsequent utterance may be useful to explain; as in the following case:

1836, *Ree v. Day*, 7 C. & P. 705; after several letters of each party had been put in by the defence, the last being a letter of the plaintiff, the defendant offered his reply to the plaintiff's last; Mr. *Theiger*, arguing *contra*: "It is a letter written by the defendant and not answered by the plaintiff. It frequently happens that a person may receive a letter from another, containing all sorts of absurd statements and assertions, and may throw it into the fire and take no further notice of it, and it is rather too much to say that all those statements and assertions may be given in evidence against him"; *Park, J.*: "I shall receive the letter in evidence; it is an immediate answer to the letter of the plaintiff"; the letter was read; *Park, J.*: "We now see the importance of this letter. In a former letter the defendant says to the plaintiff, in substance, 'You tried to entrap me into admissions,' and to this the plaintiff answered, 'I could not have so intended, because I could not be a witness to prove them'; and then the defendant explains that in the last letter by saying, 'I did not mean that, but I meant that you tried to entrap me into giving you a guarantee.'"

§ 2121. *Chancery Answer*: (1) *Used at Law as an Evidential Admission*. It was perfectly settled at common law that, when an answer obtained from a defendant in chancery proceedings was offered in evidence in a *trial at law*, as containing an admission, the *whole must be used*, and not merely such part as the proponent might choose:

Ante 1726, Chief Baron *Gilbert*, *Evidence*, 50: "When you read an answer [at law], the confession must be all taken together, and you shall not take only what makes against

v. Isaacs, 1 N. & McC. 543, 573 ("In all cases where papers are called for, which are in the possession of one party, by another, they ought not to be garbled, but the whole produced"; here, a letter called for referred to another, and the latter's production was held proper); 1874, *Insurance Co. v. Newton*, 22 Wall. 32, 35 (insurer's admission of sufficiency of proof of death, held not separable from his claim at the same time that the death was by suicide); 1877, *Mutual Benefit L. Ins. Co. v. Higginbotham*, 95 U. S. 386, 390 (preceding case approved).

For other rulings, sometimes hard to distinguish, see the citations under *admissions by reference*, *ante*, § 1070; the distinction of principle has already been explained in § 2114. A letter inadmissible under the present rule may

be made admissible by the receiver's silent assent, or *failure to answer* (*ante*, § 1073). For the question whether the prior letter must be offered by the party offering the later letter, see *ante*, § 2104.

Distinguish the question of the legal effect of the execution of document A referring to document B; 1850, *Ingoldsby v. Juan*, 15 Cal. 564, 577.

⁸ 1833, *Collins v. Todd*, 17 Mo. 537, 540. *Contra*: 1823, *Burlington C. R. & N. R. Co. v. Sherwood*, 62 Ia. 309, 314, 17 N. W. 564. Distinguish the following: 1858, *Bradley v. Garner*, 10 Cal. 371 (alander; the "reply made by the plaintiff when the defendant uttered the words," admitted; it "might have qualified or explained the words, or shown in what sense they were used, or even admitted their truth").

him, and leave out what makes for him; for the answer is to be read as the sense of the party himself, and if it is to be taken in this manner, you must take it entire and unbroken."

It did not become of practical importance to settle whether the proponent of it must at the outset read it all, or whether the opponent was to read later raised for writings in general (*ante*, § 2102), was apparently left here unsettled, or at least was stated indifferently in one way or the other. The important thing was that the opponent whose answer was thus used had the right to have the whole, or none, laid before the Court; and no doubt has ever existed on this point.¹

§ 2122. Same: (2) Used in Chancery as a Pleading; Charge and Discharge Clause. But an answer in chancery, when used in the same *chancery* cause, stands upon a radically different footing. When used at law, it is offered merely as his opponent's admission in writing, and goes in like any other informal admission offered in evidence; i. e. it is not conclusive, like a judicial admission (*post*, § 2590), but merely a piece of discrediting evidence, which may be explained away or otherwise overthrown (*ante*, § 1058). But in the chancery cause in which it is filed it has a double character; it is the defendant's pleading in defence, and it is also his evidential admission by way of compulsory discovery under oath as demanded by the plaintiff.¹ Consequently, it is subject to certain rules of pleading, as well as to rules of evidence, according as it is used by the plaintiff in one character or another.

1. Let us suppose now that it is to be used as a pleading. As such, it

¹ *Eng.*: 1695, *Bath v. Bathurst*, 5 Mod. 9; 1697, *Lynch v. Clarke*, 3 Salk. 184 (L. C. J. Holt "said that if the plaintiff will read the defendant's answer in chancery against him in evidence, the defendant may likewise take advantage thereof; for all is evidence, or none"); 1767, *Buller, Trials at Nisi Prius*, 237; 1781, *Bermon v. Woodbridge*, 2 Doug. 781, 788 (L. C. J. Mansfield: "Though the whole of an affidavit or answer must be read, if any part is, yet you need not believe all equally"); 1806, *Ormond v. Hutchinson*, 13 Ves. Jr. 47, 53 (the whole of an answer in discovery must be read at law); 1808, *Batterworth v. Bailey*, 15 id. 358, 362 (same); *U. S.*: 1793, *Benedict v. Nichols*, 1 Root 434 (account; the defendant's examination on citation before a probate court, required to be read as a whole); 1803, *Hoffman v. Smith*, 1 Cal. 157 (not decided); 1814, *Lawrence v. Ins. Co.*, 11 John. 241, 260 ("It is an invariable rule that where an answer is given in evidence in a court of law, the party is entitled to have the whole of his answer read"; here applied to a production under rule of Court "analogous to an answer in chancery").

The rule was equally applied to a document produced in the answer: 1836, *Brown v. Thornton*, 1 Myl. & Cr. 243, 246 (discovery, with document produced; L. C. Cottenham: "The rule stated to prevail at law [that a party shall not be at liberty to read a part only of an answer] does prevail there; and where a party produces

at law a document which he has obtained by means of a bill of discovery only, the judges at common law will not allow him to use it without using the answer also; . . . [unless] this Court has made an order for the production of the document").

The practice for separate answers seems to have been various: 1826, *Roberts v. Tennell*, 3 T. B. Monr. 247, 248 (after an answer in another suit, a second answer to an amended bill in the same suit, excluded); 1829, *Duncan v. Gibbs*, 1 Yerg. 256 (bill against D. and others; after a reading of the bill and one answer, the opponent was allowed to read D.'s answer).

² Langdell, *Summary of Equity Pleading*, § 68 ("In chancery, these two things, so different in their nature, are indiscriminately blended in the answer. . . . The answer has generally been treated as if it were homogeneous, and every part of it subject to the same rules. At one time, indeed, it has been assumed to contain the defendant's examination under oath [as an admission]; at another, to contain his defence; but the fact has seldom been intelligently recognized that it contained both of these; and the failure to do this, and to apply to it different rules, according as it was presented to the Court in the one aspect or the other, has caused infinite confusion in equity pleading"); and the authorities cited in note 119 of Mr. Gest's article cited *ante*, § 2032, note 1. Compare a similar ambiguity in common-law pleadings (*ante*, §§ 1063-1067).

might of course contain allegations both denying the plaintiff's charges and affirming new matter in avoidance, or allegations admitting the charges but affirming matter in avoidance. The answer might be met by the plaintiff in one of two ways; either he might demur to its sufficiency in law, or he might take issue of fact upon its allegations.

(a) The former object was accomplished in chancery, not by a demurrer so called, but by an analogous process called "setting the cause down for a hearing upon bill and answer."² This of course admitted the truth of the defendant's allegations, while claiming them insufficient in law; hence, on the hearing, the *whole of the answer* might be used by the defendant as being conceded true by the plaintiff. This much follows necessarily as a rule of pleading, and has not been questioned.³

(b) But suppose the plaintiff takes the other course, and *puts the answer in issue*. It is here that the controversy arises. Upon such an issue, there is no such clear separation of pleadings as at common law; i. e. in chancery, at the same hearing, the plaintiff must prove the allegations pertaining to his case, and the defendant must prove the allegations made in affirmative avoidance.⁴ But since the defendant (as above noted) is in chancery not obliged to separate his pleas into negative and affirmative ones (as he must at common law, by a traverse and a confession and avoidance), and may thus put into his single answer a denial as to part and a confession and avoidance as to part, it follows that the plaintiff may be able to find some part of his claim confessed in the defendant's pleading. This part he may therefore take as admitted, i. e. not in issue, and therefore not necessary to be evidenced by the plaintiff,—a consequence parallel to that which ensues at common law. But, on the other hand, there is no such allowance to the defendant; for, as to his mere affirmations in avoidance, they are but his pleading, and in his turn he must prove them. It would be absurd to say that, by merely alleging certain affirmative facts, and though these very facts have been put in issue by the plaintiff, the defendant could insist on having them taken for true in his own favor without evidence. They are mere pleading-statements of what he expects to prove, and he is bound to prove them,—precisely as the plaintiff is bound to prove whatever of his own case has been put in issue. The orthodox rule, then, has always been that, upon a hearing in chancery, the plaintiff may use as judicial admissions *whatever admissions he can find in the defendant's answer*, but the defendant may not use the remainder of the answer in his own favor:

1707, *Anon.*, reported in *Gilbert, Evidence*, 52; bill of account against an executor, who answered that £1100 was deposited with him by the testator, but that afterwards he settled by giving bond for £1000 and receiving the remaining £100 for his trouble and pains; the answer being put in issue, it was argued that the whole should be taken as true for the defendant; but the Court held that, "When an answer was put in issue, what was

² Langdell, *ubi supra*, § 82.

³ Professor Langdell, indeed (*ubi supra*, § 83), questions the soundness of this so far as concerns the statements not constituting defensive alle-

gations; but this is not material to the present controversy.

⁴ Langdell, *ubi supra*, § 90.

confessed and admitted need not be proved [by the defendant], but it behoved the defendant to make out by proofs what was insisted upon by way of avoidance; . . . where the defendant admitted a fact, and insisted on a distinct fact by way of avoidance, there he ought to prove the matter of his defence; . . . but if it had been one fact, as if the defendant had said the testator had given him £100, it ought to have been allowed, unless disproved [by the plaintiff], because nothing of the fact charged is admitted."

1808, Mr. W. D. Evans, Notes to Pothier, II, 125 (No. XVI, § 4): "The above decision [quoted in Gilbert] is principally referable to the course of proceeding in courts of equity. A bill is filed, an answer is put in, the plaintiff either sets down the cause for hearing upon bill and answer (which is an admission of the truth of the whole [of the answer]) and merely brings the sufficiency of it into contest; or he replies to the answer, putting the whole in issue generally, whereupon the defendant must substantiate by proof all the facts upon which he means to insist, whilst the plaintiff may rely upon every fact admitted which he conceives to be material, without being bound to the admission of any others. Upon this proceeding no questions of credit, no inferences of fact, can regularly occur; . . . if a real disputable question occurs respecting a matter of fact, it is referred to the examination of another tribunal. . . . If my ideas upon the general subject are correct, the distinction in this matter is not between courts of law and equity, but between pleadings and evidence; and that if an answer in chancery was introduced incidentally and merely by way of evidence [in another suit] in a court of equity, it ought to be treated precisely in the same manner as in a court of law; on the other hand, it is very clear that if in a court of law a plea confesses the matter in demand but avoids it by other circumstances, the proof of the avoidance is incumbent on the defendant."

1816, Kent, C., in *Hart v. Ten Eyck*, 2 John. Ch. 62, 90: "When the answer is put in issue [in chancery], the defendant must support by proof all the facts upon which he means to insist; while the plaintiff may rely upon every fact admitted which he conceives material, without being bound to the admission of any others. But when the answer is offered in evidence at law, no part of it is immediately in issue, [and therefore no question arises as to the defendant's having to prove it]; it is only parcel of the evidence, and if one side introduce it, the other may insist upon the whole being read; and if read, it does not necessarily follow that it must be wholly admitted [i. e. believed] as true or wholly rejected as false. . . . The distinction, therefore, as Evans says, is not between Courts of law and equity, but between *pleadings* and *evidence*. If an answer is introduced collaterally, and merely by way of evidence, in chancery, it ought to be treated precisely as in a Court of law."

But the present principle of Compulsory Completeness (*ante*, §§ 2094, 2103) here came into play. It created a requirement for a plaintiff reading a defendant's answer as a pleading in the same cause, namely, that he could not misrepresent the tenor of the admission, or could not represent as an admission that which was not really an admission when the sense of the immediate context was taken. In other words, the plaintiff was required to use, additionally, *whatever was grammatically connected* with the part he desired to offer; but this only; and it came in, according to the general principle (*ante*, § 2113, par. (c)), not as independent evidence for the defendant, but merely as explanatory of the tenor of his alleged admissions against himself:

1826, Eldon, L. C., in *Bartlett v. Gillard*, 3 Russ. 149, 157 (a passage read began, "Before such demand was made," and the preceding passage relating to the demand included other circumstances in the same sentence): "Where a plaintiff chooses to read a *passage* from a defendant's answer, he reads all the circumstances stated in the passage. If the

passage so read contains a reference to any other passage, or to a fact stated in any other passage, that other passage must be read also. But it is to be read only for the purpose of explaining, so far as explanation may be necessary, the passage previously read in which reference to it is made. If, in the passage thus referred to, new facts and circumstances are introduced in grammatical connection with that which must be read for the purpose of explaining the reference, the facts and circumstances so introduced are not to be considered as read."

The application of this restriction was attended with some controversy. In particular, it was long in dispute whether the plaintiff's use of a clause admitting (for example) the receipt of money required him to use also another clause in the same or ensuing sentence alleging a payment,—in other words, whether a *clause of discharge* must be read with a *clause of charge*. The liberal view prevailed in the end; but the question was merely as to the application of the general principle, and never as to the undoubted principle itself.⁵

2. But suppose, now, that, in a chancery cause, an answer is offered in the ordinary way of an *evidential admission*, not as a pleading defining the matters at issue; this would in effect be the case of an *answer in another chancery cause*. Here no rule of pleading would apply; the plaintiff cannot treat this answer as being in one aspect a pleading to his bill, admitting the truth of some of its allegations; he must use it as he uses any other written admission offered in evidence. In other words, it must be treated precisely

⁵ 1690, *Awdley v. Awdley*, 2 Vern. 184 (the Court said that *Howard v. Brown*, unreported, was the first case "where, because a man had charged himself by answer, that his answer should be allowed as a good discharge; and it ought to be the last"); 1693, *Hampton v. Spencer*, ib. 386 (bill for reconveyance under a mortgage agreement; the answer admitting that the conveyance was in trust for the plaintiff's family but denying the mortgage agreement, the Court decreed upon the trust without further proof); ante 1726, *Gilbert*, Evidence, 52 (quoted *supra*); 1748, *Kirkpatrick v. Love*, Ambl. 569 (account of merchandise; the plaintiffs in their examination admitted the receipt of one parcel and said that they had paid for it; held that the plaintiffs need not prove payment, as they "charged and discharged themselves in the same sentence; otherwise it had been, if the discharge or avoidance had been in a distinct sentence"); 1792, *Blount v. Barrow*, 1 Ves. Jr. 546 (defendant, charged with having four bonds of the testator, answered on examination that he had received them, but with a direction to keep them if the donor died; held sufficient; L. Com'r Eyre: "The examination is evidence in discharge of the party who is charged by it; the modern cases have gone that far, and rightly"); 1803, *Ridgeway v. Darwin*, 7 id. 404 (L. C. Eldon said that "the discharge following immediately in the same sentence, that would do," but not in a separate affidavit); 1803, *Thompson v. Lamb*, ib. 567 (L. C. Eldon ruled that an answer admitting receipt of money on one day and alleging payment on another day

could not suffice, as it was "a distinct transaction"); 1806, *Ormond v. Hutchinson*, 13 Ves. 47, 53 (L. C. Kekine; on reading in chancery an answer put in issue by replication, the plaintiff "cannot . . . stop at the end of a sentence, but must proceed to the completion of the immediate subject to which the defendant is answering; as at law a witness cannot be stopped where the party wishing to elicit from him particular facts finds it convenient to stop him, but must be allowed to finish the particular subject and to proceed to state anything with reference to it; . . . but that does not apply to distinct matter"); 1816, *Robinson v. Scotney*, 19 Ves. Jr. 362 (answer alleging a set-off diminishing a balance due, treated in the same way); 1829, *Davis v. Spurling*, 1 Russ. & M. 64, 68 (mere connection by "but" or "and," not sufficient, unless the subsequent matter was "explanatory"); 1830, *Rude v. Whitechurch*, 3 Sim. 568 (subsequent qualifying sentence, not referred to in the first, but connected in meaning, allowed to be read); 1832, *Narve v. Bunn*, 5 id. 225 (plaintiff compellable to read "all other passages . . . explanatory of the passages read"); 1841, *Coanop v. Hayward*, 1 Y. & C. 33, 34 ("such a connection between the passages as to render it necessary to read the latter with the former," here applied as the text); 1841, *Miller v. Gow*, 1 Y. & C. Ch. 54, 59, V. C. Bruce ("The practice at law is clearly established that when an answer [to a relief-bill] is used, the whole must be read; it is different in this Court; but the rule here is that you cannot in reading over parts that in substance are connected together").

as when read in a trial at law, and the whole must be read (*ante*, § 2121). This rule also was unquestioned; and it brings out clearly that the distinction is not between a rule in chancery and a rule at law, but between a rule of pleading and a rule of evidence:

1813, *Beardman v. Jackson*, 2 Ball & B. 392; bill for accounting; the plaintiff produced an old account furnished to him by the defendant, and the latter insisted on using the discharging items in evidence; arguing as follows: "The distinction is this: . . . Where a plaintiff refers to an answer [of the defendant] as constituting part of the pleadings in the cause, the defendant cannot by any separate passage of the answer discharge himself from any admission he may there have made; that he can do only by producing evidence. But when a plaintiff refers to an answer in another cause, by way of evidence, he makes the whole answer evidence, and the defendant may then read any part of it in his defence. The same distinction exists at law between pleadings and evidence; if a plea confesses a fact, but at the same time avoids it by other circumstances, the defendant must substantiate the avoidance by proof"; *L. C. Manners*: "The account which is the subject of this exception forms no part of the pleadings in this cause; . . . [then] the question is whether the same rule of evidence is to be adopted by this Court as would be by a Court of law, or whether there is anything to take it out of the rule of law? It is quite clear that, where a party produces a letter or other document, he cannot use it partially; he is not permitted to garble it; and if he by his own act makes that evidence which otherwise would not be, he makes the whole of it evidence and it must be taken together. I have not been able to find even a dictum that the rule of evidence in this Court in this respect differs from what it would be at law. . . . In this Court, as well as in a Court of law, where the answer of a party in another cause is resorted to as evidence, the whole of it becomes admissible; and so, I conceive, with respect to any other document made evidence in the cause."

§ 2123. Same: (3) Anomalous New York Rule; "Responsive" Parts may be Read. How then could any confusion or change of practice arise, these principles being so well settled? Partly because of a strong and constant pressure on the part of defendants to use their answers in their favor, partly because of the mixed and misleading nature of a chancery answer as to traverses and avoidances, and partly because of the rule requiring two witnesses for a responsive denial, and the misuse of the term "responsive" in applying it out of its proper sphere.

1. *The defendant's motive to use his answer.* Notice first that the importance of the question in a chancery hearing is far greater than at a common-law trial. In the latter case it is simply a question whether a certain additional piece of evidence shall or shall not go in with the rest to the jury. If the defendant succeeds in having read to the jury an additional sentence in his answer, he nevertheless goes on with his other evidence as before. By receiving it, the Court does not add to the allegations which the plaintiff must prove, nor by rejecting it does the Court add to the allegations which the defendant must prove. But in chancery, on the other hand, the

* *Accord*: 1806, *Ormond v. Hutchinson*, 13 Ves. 47, 53 (the Solicitor-General had argued: "The rules of evidence in equity and at law are not different; . . . upon a bill for discovery only, the answer being produced as evidence, the whole of it must be read, not a part only";

L. C. Erskine: "As to the answer, I agree to what has been stated by the Solicitor-General"; 1816, *Kent, Ch.*, in *Hart v. Ten Eyck*, 2 John. Ch. 62, 90 (quoted *supra*); 1823, *Taylor, C. J.*, in *Jacobs v. Farrell*, 3 Hawks 370.

whole state of the pleadings is involved. If, for example, the answer admits receiving one hundred dollars, but asserts its payment, the plaintiff, by appealing to the first statement in the defendant's pleading, relieves himself of that issue and needs no evidence upon it. If, now, the defendant can oblige the plaintiff either to take the two together or none at all, he changes the whole effect of the pleadings; for if the plaintiff accepts the first alternative and uses the whole, he has a pleading-admission that no money is due, i. e. he has no confession at all, and consequently he has obtained no profit from this pleading and must still prove his claim by other means. If he accepts the second alternative, and uses none of the statement, he is in the same position, and must prove as before. But if the defendant cannot put the plaintiff in this dilemma by forcing the two statements upon him together, the defendant must himself prove his affirmative fact of payment pleaded in discharge, and has relieved himself of no burden. It is thus apparent that the defendant had always the strongest motive to enlarge the scope of the passages which he could compel the plaintiff to use as an admission. In fact, the incidence of the whole burden of proof was at stake. A defendant ought not to be allowed to change, and to throw upon the plaintiff, the burden of proof of the facts forming an affirmative defence. But still, there was a motive for him to try to do so; and it was the striving after this improper advantage which finally led to the anomalous rule now under consideration.

2. *The mixed nature of a chancery answer as to traverses and avoidances.* An answer in chancery, as already noted, does not separate its pleas distinctly according to their negative or affirmative nature; i. e. there needs no separate count or plea for a traverse or denial as distinguished from a confession and avoidance; either of these follows the other indiscriminately, pursuant to the order in which the charges are made and replied to. Accordingly, the nature of a particular part of the answer, whether as being in denial or in affirmative avoidance, can only be ascertained by comparing its terms with that of the corresponding charge in the bill. Its form as an affirmation is immaterial, if in reality it is a traverse, and *vice versa*. Thus, in ascertaining the burden of proof, the form of the defendant's statement is not decisive; a source of inextricable confusion, and an opportunity for erroneously changing that burden, is amply furnished. If, then, any rule of evidence should exist, peculiar to the case of a plaintiff having the burden of proof, and not applicable to the defendant at all, it would be easy, by juggling with the really affirmative allegations of fact and by giving them a negative form, to make it appear that this rule of proof was applicable to the plaintiff on a point stated negatively by the defendant.

3. *The rule of two witnesses for responsive denials.* Such a rule did exist, namely, the rule already examined (*ante*, § 2047) that the plaintiff must prove by two witnesses every allegation explicitly denied on oath in the defendant's answer. In invoking this rule, defendants naturally tried to state in negative form every fact which they were able conscientiously to

assert. The Chancellor might rule that the fact was genuinely an affirmative defensive one; but still there was a constant effort to get whatever advantage might accrue in a doubtful case. Now the effect of this rule was to lead to a deceptive form of expression, historically unsound but empirically accurate, namely, that the *defendant's answer on oath was evidence*. Less erroneously expressed, it was said that the answer was "equivalent to" the oath of one witness,¹ i. e. on the theory that it nullified one witness for the plaintiff and thus required him to produce a second. The result indeed was that the answer on oath compelled the plaintiff to produce a second witness; yet this was far from making the defendant's answer evidence. It was not and never had been considered as testimony,² except for the purpose of the above rule,³ which could be more properly stated in another form. Nevertheless, the notion thus became common in some quarters, through the formula above, that a defendant's answer had some force of testimony receivable on his own behalf. Hence, when a defendant denied an allegation in a bill, and so far as he denied it, two thoughts would be associated with this fact, first (as above noted), that the plaintiff was put to his proof by two witnesses, and secondly, that the defendant's answer in denial was evidence for himself. Notice, however, that both of these notions have relation to evidence, and have nothing to do with the question of pleading or burden of proof; for the ignoring of this led to the later fallacy. The result (to sum up) of the above rule of two witnesses was that, for the purpose of enforcing it against the plaintiff, it became highly important to decide whether a given allegation of the answer, negative in form, was genuinely a denial or only a new affirmation, or whether, though apparently a denial, it was truly an argumentative admission. The inquiry thus came to be whether the answer was "responsive," i. e. whether it directly met and controverted some allegation essential to the bill;⁴ for if it did, the rule applied, otherwise not.

We are now prepared to understand the appearance of the main fallacy in question. (a) In the first place, the function of the "responsive" denial-answer as putting in force a rule of two witnesses for the plaintiff came to be given a *pleading-sense*. For example, Messrs. Cowen and Hill (both judges in New York), in their notes to Mr. Phillippe's treatise on Evidence,⁵ stated that "though the answer be affirmative, if it be responsive to an inquiry in the bill, it will *conclude*, unless overcome by more than one witness"; here the fallacy is apparent that the defendant by an affirmative answer can somehow relieve himself of the burden of making out his defence. (b) Again, this rule about two witnesses, forced upon the plaintiff by the answer, came to be misused as legitimately including the defendant's *matter in affirmation* and

¹ See the quotations under that rule (*ante*, § 2047).

² Langdell, *Summary of Equity Pleading*, § 36; and Lord Brougham's passage in *Attwood v. Small*, quoted *ante*, § 2047.

³ "In equity, by answer, he is a witness only to deny affirmative allegations" (*Lampton v. Lampton's Ex'rs*, 6 T. B. Monr. 616, 620).

⁴ No precedents for English usage have been found, but this sense of "responsive" occurs frequently in the United States from an early date: 1798, *Maupin v. Whiting*, 1 Call 224; 1810, *Paynes v. Coles*, 1 Munf. 373, 393, 395; 1812, *Russell v. Clark's Ex'rs*, 7 Cr. 69, 92; 1836, *Ringgold v. Ringgold*, 1 H. & G. 11, 81.

⁵ Ed. 1843, I, 184, note 292.

not merely *matter in denial*. Thus Mr. Justice Thompson, in *Clason v. Morris*,⁶ declared that "it is an undeniable rule in chancery that the answer to a bill for discovery, being under oath, must be taken as true, unless disproved by two witnesses." This ignoring of the vital difference between denial and affirmance, between putting in issue the plaintiff's allegations and setting up defensive affirmations, was here applied merely to the two-witness rule. But as the term "responsive" was used to express the test for that rule, "responsive" came to be understood as legitimately covering not merely ordinary denials, but also truly defensive affirmations answering questions of discovery on the defendant's own case.

The net consequence of these hazy confusions was as follows: (a) The effect of "responsive" answers was extended to the pleading rule about the plaintiff's use of the defendant's admissions in the answer, instead of being confined to the two-witness rule of evidence; and (b) the term "responsive" was enlarged to include affirmative, as well as negative matter. For example, if the plaintiff had brought a bill against a vendor, alleging a contract to convey and asking specific performance, and incidentally seeking discovery on the anticipated defence that the premises had been destroyed by fire, and the defendant had answered to the contract-charge, admitting the terms of the contract, and had also answered stating how the house was burned, the orthodox ruling would be that the plaintiff might make use of the defendant's pleading so far as it admitted the contract, but need use it no further than he chose, leaving the defendant with the burden of proving his affirmative defence. But under the erroneous notions now introduced, the answer would be held "responsive" to the bill, since it gave discovery to a question asked therein, and consequently the plaintiff, by using the admission of the contract, must also use the affirmation of the burning, set up in excuse, and must therefore either take it for true or disprove it by two witnesses. In other words, the plaintiff, to get the benefit of a pleading-confession, became obliged to assume to *disprove the very fact which the defendant set up in avoidance*. This singular and illogical rule, almost incredible in its twistings of principle, was nevertheless sought to be defended on grounds of policy, in a specious argument which in fact persuaded the Court of Errors of New York and led it to repudiate even Chancellor Kent's orthodox doctrine:

1816, Mr. Thomas Addie Emmet,⁷ arguing in *Hart v. Ten Eyck*, as reported in 1 Cow. 744, note: "We contend that where the answer is a direct and proper reply to the interrogatories of the bill, it is *prima facie* evidence for the defendant, if in his favor; and our adversaries contend that, where the answer affirms a matter in avoidance, the defendant must prove his affirmation. . . . [Their position] would be universally true if qualified by ours, that the defendant must prove his affirmation unless it be a direct and proper reply to an interrogation of the defendant. . . . [There is] justice in giving to the defendant the benefit of those parts of the answer which are mere evidence, because the extent to which they go must entirely depend on the complainant's election. Such responsive affirmations on the part of the defendant [as distinguished from *denials*, which

⁶ 10 John. 524, 542.

⁷ Then Attorney-General; brother to Robert

Emmet, the Irish leader; himself an exile from Ireland.

concededly put the plaintiff to proof by two witnesses), can only arise out of the charging part of the bill, which sets forth what are supposed to be the defendant's pretensions, or from the breadth of the interrogatories. Neither of these are necessary parts of a bill; . . . they are voluntary, and calculated only to elicit evidence; they are therefore often dangerous, and perhaps imprudently used; . . . [they] may undoubtedly be restricted by the pleader's prudence. Where the complainant has such entire control as to the extent of the defendant's answer, with what truth can it be said that to allow his answer, where it states an affirmative fact in precise reply to the complainant's bill, to be *prima facie* evidence 'would render it absolutely dangerous to employ the jurisdiction of the Court of chancery, inasmuch as it would enable a defendant to defeat the complainant's just demands by the testimony of his own oath setting up a discharge or matter of avoidance'? . . . It is the choice or ignorance of the complainant's pleader only, that can afford the defendant such an opportunity. If he does not choose to appeal to the defendant's oath, he may shape his bill for effectual relief without enabling him [the defendant] to make any affirmative averment which would be *evilsuam*. . . . A doctrine contrary to what we contend for would stretch the defendant's conscience on a moral rack, and receive nothing for proof but confessions of guilt."

Of this remarkable argument it need only be said, so far as its principle is concerned, that it is utterly irreconcilable with the fundamental principle of a bill of discovery in equity, namely, to give a plaintiff this very benefit of such admissions as he can extract from the defendant's conscience, without imposing any burden of using it unless and so far as the plaintiff sees fit; and, furthermore, that this principle could equally be availed of by the plaintiff even where seeking discovery to disprove the defendant's defence.⁹ However unfair the advantage may once have been¹⁰ (and modern statutes have dealt out a fairer justice by affording the opportunity equally to both parties), the principle was clear enough. Mr. Emmet's argument invited practically a repudiation of this fundamental principle. As for policy, the unsoundness of his claim seems even plainer. The notion that a fact which, by all rules of pleading and of good sense, constituted an affirmative defence could be, by the defendant's own unsupported affirmation of it, so twisted from its natural place as to fall within the plaintiff's sphere of proof, and that the plaintiff should be obliged, at the risk of failing, to disprove whatever the defendant has selected for assertion, is preposterous. The circumstance that the plaintiff has appealed for discovery on the point is no excuse for overturning rooted principles of pleading. The practical consequence would be that defences whose proof was chiefly in the power of the defendant could be made invulnerable by his mere assertion of them; and that, in particular, trustees and other persons having a fiduciary account to render could find absolute immunity by giving any explanation that a false imagination might suggest and then challenging the plaintiff to the impossible task of disproof. It seems entirely likely that the general modern disinclination in this country (otherwise difficult of explanation) to ask for chancery discovery on oath, is due mainly to the dilemma between the futility and the risk created for plaintiffs by the wide vogue of this rule. The practical injustice of the pro-

⁹ Quoted from the opinion of Chancellor Kent, *infra*.

¹⁰ Langdell, *ubi supra*, §§ 85, 87, 88.

¹¹ No doubt the use of cross-bills mitigated it.

posed innovation was foreseen by more than one judge repudiating it at the time of its inception :

1816, *Kent, C.*, in *Hart v. Ten Eyck*, 2 John. Ch. 62, 90: "I am satisfied that the [orthodox] rule is perfectly just, and that a contrary doctrine would be pernicious and render it absolutely dangerous to employ the jurisdiction of this Court, inasmuch as it would enable the defendant to defeat the plaintiff's just demands by the testimony of his own oath setting up a discharge or matter in avoidance."

1826, *Archer, J.*, in *Ringgold v. Ringgold*, 1 H. & G. 11, 83 (after declaring Chancellor Kent's opinion preferable to that of the Court of Errors): "The establishment of a contrary doctrine would lead to dangerous consequences, and would be calculated to render trusts valueless, by giving to trustees, executors, and guardians the power on their own oaths to exempt themselves from responsibility. The [orthodox] rule then may be stated . . . that in all cases where a complainant seeks a discovery and relief, and to make out his case applies himself to the conscience of the defendant, if in his answer the liability is once admitted, there can be no escape from it but by proof [by the defendant himself]."

This anomalous doctrine allowing the use of "responsive" affirmations of defence is not to be found in the earliest New York rulings,¹¹ and seems to have been introduced in 1816,¹² and to have thenceforth exercised wide influence elsewhere,¹³—chiefly, it may be supposed, through the approval of

¹¹ That the defendant must prove all matters of avoidance of the above sort had been clearly the early rule: 1806, *Bush v. Livingston*, 2 Cal. Cas. 66 (the bill alleged a security to have been given "on good and valuable consideration"; the answer alleged the consideration to have been usurious; counsel for defendant admitted that the answer could not be used to support matter of avoidance, but maintained that this was not avoidance but denial; the case was decided upon another point); 1806, *Green v. Hart*, 1 John. 580, 582, 590 (per Spencer, J., for the Court of Errors, "This is a well established principle in chancery proceedings, and will be found recognized in every treatise on that subject"; here usury was treated as an affirmative fact in avoidance of a note, "although in answer to the complainant's allegation of a pre-existing bona fide debt").

¹² 1816, *Hart v. Ten Eyck*, 2 John. Ch. 62, 87 (bill for account against administrators; discharging items in the answer, held not admissible, per Kent, Ch.; said, in 1 Cow. 743, 744, to have been reversed in the Court of Errors, in an opinion unreported; quoted *supra*); 1822, *Woodcock v. Bennet*, 1 Cow. 712, 743 (bill for specific performance; a part of the answer alleging cancellation by mutual consent was held "legal and competent evidence, because it is responsive to the bill and within the discovery sought; . . . whatever may be the rule in the English courts, this question is at rest with us"; following *Hart v. Ten Eyck*); 1834, *Bartlett v. Gale*, 4 Paige 503, 508 (mortgage bill; an unsworn answer held to be no evidence at all for the defendant; as to a sworn one, "except as to those parts of it which are responsive to the bill," the complainant need not take the whole "as evidence" nor is "bound" by the parts not used by him).

¹³ *Ge.*: 1877, *Heard v. Russell*, 59 Ga. 25, 51 (answer given not under oath; defendant may put in the remainder "as evidence," though not as having the effect of requiring two witnesses to overcome; no authority cited); 1878, *Armstrong v. Lewis*, 61 id. 680, 688 (similar, such other parts "as bear directly on the subject-matter of the admissions" may be read); *Oh.*: 1831, *Methodist Ep. Ch. v. Wood*, 5 Oh. 283, 285 (assumpsit; "the answer [in discovery] of the defendant is evidence for him so far as it is responsive to the call in the bill for discovery or connected necessarily with the responsive matter or explanatory of it; . . . [otherwise] it cannot be used in evidence by the party making it"; no authority cited); *Tenn.*: 1874, *Beech v. Haynes*, 1 Tenn. Ch. 569 (the rule of the N. Y. Court of Errors accepted; careful opinion by Cooper, C.); *Va.*: 1867, *Fant v. Miller*, 17 Gratt. 187, 206, 211, *semble* (New York rule followed); 1869, *Mayo's Ex'r v. Carrington's Ex'r*, 19 id. 74, 116, *semble*; 1873, *Morrison's Ex'r v. Grubb*, 23 id. 342, 349 (*Fant v. Miller* followed); 1874, *Statham v. Ferguson*, 25 id. 26, 29; 1895, *Clinch River M. Co. v. Harrison*, 91 Va. 122, 129, 21 S. E. 640 (preceding cases approved). *Contra*: 1850, *McCoy v. Rhodes*, 11 How. 131, 140 (admission of a liability, with averment of payment in discharge; "[the answer's statements] are not responsive to charges made by the bill, but set up an independent defence; . . . as the respondents cannot make evidence for themselves, . . . the defence must fail"; following Chancellor Kent); 1867, *Clements v. Moore*, 15 Wall. 299, 315 (similar; citing Chancellor Kent); the following would probably be interpreted by these rulings: Federal Equity Rules, No. 41, as amended 1871 (if answer under oath is waived, or is required for specific interrogatories only, "the answer

the fallacy in the learned editorial notes above cited.¹⁴ In the earlier rulings of other jurisdictions, the fallacy did not appear.¹⁵ How far it prevails to-day is a question which would require an examination of the contemporary chancery practice, not within the present purview.¹⁶

§ 2124. Same: (4) *Party's Answers to Statutory Interrogatories*. Keeping in mind the orthodox difference between the use of an answer as a pleading in chancery and its use in a trial at law as evidence (*ante*, §§ 2121, 2122), the proper treatment of an opponent's answers to interrogatories authorized by statute ought not to be difficult to determine.

(1) If, as in some jurisdictions, the statute authorizes these to be used as an answer to a bill of discovery could be used,¹ then the plaintiff who uses any part *must put in the whole*, and cannot stop with the parts grammatically connected; in other words, the rule applies for using answers as evidence at law (*ante*, § 2121), and not the rule for using them as pleadings in chancery (*ante*, § 2122).²

of the defendant, though under oath, except such part thereof as shall be directly responsive in such interrogatories, shall not be evidence in his favor, unless the cause be set down for hearing on bill and answer only").

Cases are often cited for this fallacious rule which do not countenance it; for example: 1837, *M'Caw v. Blowit*, 2 McC. 90, 100; 1837, *Branch Bank v. Black*, 1b. 344, 350. Distinguish also the occasional rule (*Fant v. Miller*, Va., *supra*) that the accounts of executors and trustees are taken as *prima facie* correct; this leads to the same consequences as the New York rule.

¹⁴ Their treatment of this whole subject is hopelessly confused and misleading; see, for example, their note 646, *ubi supra*.

¹⁵ *Ky.*: 1838, *Lampton v. Lampton's Ex'rs*, 6 T. B. Monr. 616, 620 ("In equity, by answer, he is a witness only to deny affirmative allegations; . . . [otherwise] it places a strong temptation of interest [to executors] to defeat all claims both of legatees and creditors, and by his own swearing, and thus shield not only his proper estate but also keep the estate of his testator in his hands"); *Md.*: 1836, *Ringgold v. Ringgold*, 1 H. & G. 11, 82 (quoted *supra*); *Mass.*: 1839, *New England Bank v. Lewis*, 8 Pick. 113, 120 ("If the defendants saw fit to go further, as they had a right to do, and aver additional matter on which they rely in their defence, they must prove the additional matter, it being traversed by the general replication"); *Va.*: 1793, *Beckwith v. Butler*, 1 Wash. 294 (bill for distribution; an executor may not use his answer to prove a gift to him by the deceased); 1810, *Paynes v. Coles*, 1 Munf. 373, 395 ("The rule is well-settled that the answer of a defendant in chancery is not evidence where it asserts a right affirmatively in opposition to the plaintiff's demand, but that in such case he is as much bound to establish it by independent testimony as the plaintiff is to sustain the bill").

¹⁶ A partial collection may be found in a note to *Hart v. Ten Eyck*, *supra*, 3 Johns. Ch. 62, ed. *Lawyer's Co-op. Pub. Co.*, Book I, and in *Bech v. Haynes*, Tenn., *supra*; *Rosch v. Glas*, 6 Am.

& Eng. Dec. in Eq. 65; and in Mr. Gost's interesting and learned article (cited *ante*, § 2032, n. 1) on *The Responsive Answer in Equity*.

¹ The statutes will be found cited without quotation, *ante*, § 1856 (discovery before trial), *post*, § 2318 (party's privilege abolished); they are strictly legislative adaptations of the equitable bill for discovery, and hence are without the present purview.

² In *Alabama*, the chancery-pleading rule was at first erroneously adopted, but the correct rule was afterwards substituted: 1845, *Lake v. Gilchrist*, 7 Ala. 988, 999 (ordinary Chancery rule for relief-answers, applied to an answer obtained by statutory discovery on interrogatories, so as to exclude a "totally distinct matter"); 1853, *Pritchett v. Manroe*, 22 id. 501, 507 (same); the answer "becomes evidence so far as it is responsive to the call for discovery or is necessarily connected with the responsive matter"; 1853, *Saltmarsh v. Bower*, 23 Ala. 221, 230 ("If he offers a portion of it [the discovery], he makes the whole evidence, and submits for the jury to determine what weight they will give it"; even though the answering party goes beyond the specific interrogatories and answers with affirmative matter as he could have done to a bill for discovery; repudiating *Lake v. Gilchrist*); 1859, *Crocker v. Clements*, 28 id. 296, 307 (answer in another chancery suit; "the whole answer, if pertinent, must be taken together"); 1897, *Southern R. Co. v. Hubbard*, 116 id. 367, 22 So. 541 (approving the preceding case, where the answers were offered to disprove the party's facts stated by him on the stand; whether the same would be required for answers offered merely as inconsistent with his testimony, undecided).

In *Louisiana*, the rule is peculiar. By what seems to have been the original ecclesiastical and later civil-law rule, each answer to each interrogatory was considered as a whole, not blended all into one document called an "answer" as in chancery; and to each answer the rule was applied that the whole must be taken: *Ante* 1636, *Mudson*, *Treatise of the Court of*

(2) If, however, the statute does not put such answers on the footing of an answer of discovery in chancery, but treats them merely as *depositions of a party-witness who has by statute been deprived of his privilege* (*post*, § 2218), the analogy of ordinary depositions (*ante*, § 2103) and of admissions in testimony (*ante*, § 2003, note 7) would seem to apply, and therefore the whole need not be put in, according to the better view; though there appears sometimes an inclination to adapt the chancery rule and require so much of the answers as is inseparably connected with the part offered.³ In any event, the decision is of little practical consequence, because not only may the opponent put in the remainder of the document (*ante*, § 2103) and no question of admission by pleading is involved, but he may also take the stand on his own behalf if he desires.

§ 2125. *Inspection of Opponent's Document, as making the Whole of it admissible.* An anomalous doctrine, requiring the whole of document to be treated as evidence, though no part of it had been offered, appears in some

Star Chamber, 281 ("If the plaintiff read a defendant's examination to convict any, the defendant may read at the same examination to all that interrogatory to excuse him, for perhaps he explaineth his own meaning in some other part of the interrogatory"); Pothier, Obligations, I, 537, Evans' ed. ("Observe, that a party who would take advantage of the confession made by the opposite party upon his interrogatories cannot divide the answer but must take it altogether"); Wood's Civil Law, ed. 1760, p. 325, b. IV, c. 2, cited by Mr. Gent; this principle has been followed in the Code: La. C. Pr. 1894, § 385 (a party in answering interrogatories "may state some other facts tending to his defence, provided they be closely linked to the fact on which he has been questioned and an appeal made to his conscience," such declarations to be evidence; see also *ib.* § 356, quoted *ante*, § 2113); the Code has been construed in the following cases: 1811, *Read v. Bailey*, 2 Mart. 60, 75, *semble* (interrogatory charging a letter admitting the receipt of money; answer admitting it but asserting a payment, received); 1833, *Crummen v. Cavenah*, 1 Mart. n. s. 532, 534, *semble* (qualifying parts must be considered); 1877, *McLear v. Hansicker*, 29 La. An. 540 (citing cases); 1879, *Auge v. Varlet*, 31 *id.* 983, 989 (citing cases).

³ *England*: 1863, *Rules of the Supreme Court, Order XXXI, rule 24* (a party may use "one or more of the answers or any part of an answer of the opposite party to interrogatories without putting in the others or the whole of such answer; provided always that in such case the judge may look at the whole of the answers, and if he shall be of opinion that any others of them are so connected with those put in that the last-mentioned answers ought not to be used without them, he may direct them to be put in"); *Canada*: Br. C.: 1896, *Lyon v. Marriott*, 5 Br. C. 187 (applying the rule of Court which lets the judge's discretion control in putting in the remainder of the opponent's examination); *Man. R. S.* 1902, c. 46, *Rules* 406-407

(like Ont. Rule 461); *Ont. Rules of Court* 1897, § 461, par. 1 (a party may use "any part" of his opponent's examination; but the judge, "if he is of opinion that any other part is so connected with the part to be so used that the last-mentioned part ought not to be used without such other part," may order it put in); par. 2 (similarly, the whole or a part of the examination of a corporate officer is used; but "the corporation may put in as explanatory any other part" which is so connected as above; "or may use the remainder of the examination of the officer as evidence on the part of the corporation"); par. 3 (where the examinee has been an officer of the corporation, the same rule applies, by leave of the judge; but "this clause shall not apply to the case of an officer who has been dismissed" before service of notice of examination); *Newf. Consol. St.* 1892, c. 59, *Rules of Court* 29, par. 18 (like Ont. Rules, § 461, par. 1); *N. W. Terr. Consol. Ord.* 1898, c. 21, *Rule* 284 (like Ont. Rules, § 461, par. 1); *St.* 1902, c. 5, § 1, *amending Rules of Court* 234 (special Rules prescribed when a part of the examination of a corporate officer is used); *N. Sc. Rules of Court* 1900, Ord. 30, R. 23 (substantially like Ont. Rule 461, par. 1); *United States*: 1862, *Van Horn v. Smith*, 50 Ia. 142, 148, 12 N. W. 789 (defendant reading plaintiff's deposition is not obliged to read the whole); 1847, *Hammett v. Emerson*, 27 Me. 308, 335 (deposition by plaintiff in a different suit, required to be read as a whole by defendant; on the theory that it was a "judicial document," like an answer in chancery, and could not be separated); *Mass. Pub. St.* 1882, c. 167, § 76 (the whole of a party's answers to interrogatories "upon any one subject-matter" must be read, if any is read); 1900, *Demelman v. Barton*, 176 Mass. 353, 57 N. E. 665 (statute construed); 1899, *Allend v. R. Co.*, 21 Wash. 324, 58 Pac. 944 (need not all be read, unless inseparable in regard to a particular matter); 1899, *Wunderlich v. Ins. Co.*, 104 Wis. 382, 80 N. W. 467 (whole need not be offered).

rulings of the early 1800s in England. The operation of the rule is to be seen in this colloquy:

1800, *Calvert v. Flower*, 7 C. & P. 386; Mr. Kelly, for the defendant, having called for the plaintiff's ledger, due notice to produce having been given, Mr. Campbell, for the plaintiff, said: "I will produce it, if it is called for as your evidence"; Mr. Kelly: "I call for it, but subscribe to no condition"; Denman, L. C. J.: "If it is produced and given to Mr. Kelly, it will be for me to decide whether Mr. Kelly makes such use of it as will compel him to use it as his evidence." The book was produced, and Mr. Kelly turned over several pages of it, so as to look at the contents of them. Denman, L. C. J.: "I ought now to say that if Mr. Kelly looks at the book, he will be bound to put it in as his evidence"; Mr. Kelly: "Certainly, I am fully aware that I must do so"; Denman, L. C. J.: "I have mentioned this because it has been supposed by some, that an opposite counsel may look at the papers or books called for under a notice to produce, and then not use them."¹

The motive for this peculiar rule seems not to have been any direct bearing of the present principle of Completeness; for that would only come into application (*ante*, §§ 2102, 2113) when some part, at least, of the document had been put in evidence. The real motive seems to have been a desire to penalize indirectly the attempted evasion of another fundamental doctrine of the common law, namely, that a party is not entitled to know beforehand the tenor of evidence in his opponent's possession (*ante*, § 1845). The opponent was privileged not to produce any document in his possession (*post*, § 2210); yet, if he did not do so upon notice, the party desiring to prove its contents would be allowed to do so by a copy or other secondary evidence (*ante*, § 1190). Hence, to evade allowing this, the opponent would usually have the document ready in court, in case the first party should desire to put it in as evidence. If the first party, however, should on coming to that stage of the evidence, call for the document with the supposed purpose of putting it in, and receive it in his hands for the purpose, he might on perusal find that it was not suitable and decline to put it in. Nevertheless he would thus have become aware of its contents, without the obligation of using it. This might not in itself be a serious matter; but obviously he might, on the mere pretext of intending to prove documents as a part of his case, give notice to produce sundry documents whose contents were unknown to him, on the chance that they might be useful to him or might at least reveal important parts of the opponent's case, and then on perusing them when produced, he might hand them back without putting them in, — having thus in effect conducted a fishing expedition under the cover of a notice to produce for proof. This neat evasion of the fixed principle that a party was to be kept entirely in the dark as to the tenor of evidence in his opponent's possession was thereupon struck at by this present rule. It obliged

¹ The rule was apparently invented by Lord Ellenborough: 1803, *Wharum v. Routledge*, 5 Esp. 235 (book produced by plaintiff; Ellenborough, L. C. J., ruled that if the defendant inspected it, it became evidence, whether he used it or not); 1808, *Wilson v. Bonis*, 1 C. &

P. 8, 10 ("If it is at all material to the case," but not otherwise).

Originally, it would seem, the rule applied only when the calling party "made use" of some part of it, and then on the present principle (*ante*, § 2115) the other party could use the remainder; 1798, *Sayer v. Kitchen*, 1 Esp. 209.

him to take the risk of putting all the document in evidence if he even perused it on production; for this would prevent him from perusing any documents except those of whose contents he was already fairly certain that they would be favorable and would be put in evidence by him:

1803, *Radcliff, J.*, in *Lawrence v. Van Horne*, 1 Caines 376, 386: "A party who gives notice to produce a paper in evidence must be supposed to know its contents. If he does not, he ought not to be permitted to speculate through the forms of law and obtain from his adversary the inspection of any paper or document he may choose to demand. Such a privilege would be liable to abuse."

1861, *Bigelow, C. J.*, in *Clark v. Fletcher*, 1 All. 53, 57: "A party cannot require his adversary to produce a document, and after inspecting it insist on excluding it from the case altogether. Such a course of proceeding would give one party an advantage over the other. He would gain the privilege of looking into the private documents of the other party, without any corresponding obligation or risk on his own part. It is therefore generally deemed a just and wise rule that in such cases the paper called for and produced, after it has been seen and examined by the party calling for it, becomes competent evidence in the case for both parties. It is manifest that this rule would be of little use if the paper can be excluded on the allegation that the party calling for it mistook the nature of its contents."

The answers to this plausible suggestion were plain. (1) The very principle whose evasion was thus penalized was itself unfair and reprehensible. Its vices have been already considered (*ante*, § 1847); it is enough here to repeat that the common-law notion of keeping a party entirely ignorant of the evidence possessed by his opponent was one to be discountenanced, not maintained. Moreover, by a bill of discovery in equity such documents could have been obtained even under the common-law system; and similar statutory proceedings at law now are authorized almost everywhere (*ante*, § 1859). Thus, by the judgment of posterity, and by the contemporary standards of equity, the penalty of the present rule was in truth imposed upon a party who was attempting to do no more than justice and good sense entitled him to do, namely, inform himself at the trial of the documentary evidence available against him. (2) Furthermore, the opponent in this kind of case was in no situation to complain, because he had only himself to thank for the disclosure of the evidence. The opponent was not compellable to produce the document; he did so voluntarily. The charge of speculative tactics with the rules of evidence was rather, under the supposed rule, to be laid to the opponent who produced; because, not being obliged to produce, he still did so, knowing that their contents were unfavorable to the first party, in the hope that the first party would have to risk their perusal and thus be compelled to put them in evidence.

There is, then, not only no sound reason for establishing such a penal rule, but it is itself open to abuse, and merely adds to the sportsmen's rules elsewhere noticeable in the common-law system. Moreover, it is totally out of harmony with the modern statutory procedure for discovery at law:

1803, *Thompson, J.*, in *Lawrence v. Van Horne*, 1 Caines 276, 286: "The practice of giving notice to produce papers, as in the present case, has been introduced to save the

expense of going into chancery for a discovery; and I can see no good reason why the party ought not to be entitled to all the advantages he would have, had he resorted to his bill in equity; in that case, after a discovery, he might exercise his discretion whether to use it as evidence or not. I do not think this right of inspection would be liable to the abuses suggested by the plaintiff's counsel, that it might lead to an impertinent inspection of papers having no relevancy to the controversy; . . . It would be competent for the party having the paper to object against the introduction, or the proof of its contents, as being illegal or irrelevant, in the same manner as if the party calling for the paper had been in possession of it, or as might be done with respect to every other piece of testimony."

1863, *Bartlett, J.*, in *Austin v. Thomson*, 45 N. H. 113, 117: "The only reason given for the supposed rule is [the unconscionable advantage of prying without responsibility]. . . . But as the party notified is not obliged to produce the papers, and as he may if he produce them decline to allow them to be examined except upon condition that if examined they shall be read in evidence, parties notified seem amply protected from any such unconscionable advantage, and the reason stated entirely fails; and we see no sufficient reason for a rule that is at variance with the general course of our practice and that can hardly facilitate the administration of justice, since, if it has any practical effect in addition to the rules for the admission of competent evidence, it must be to compel the Court to allow incompetent evidence to go to the jury."

The rule that the whole document must be put in, if merely perused or inspected by the party calling for it, even though he does not desire to use it, was clearly the orthodox English practice;² but it seems to have been properly abandoned in more recent times.³ In the United States, the earlier English rule was in a majority of jurisdictions followed;⁴ while in others it has been repudiated, sometimes by express statute.⁵

² Cases cited *supra*, note 1.

³ 1888, Parnell Commission's Proceedings, Times' Rep. pt. 26, p. 169 (President Hannen: "The important fact of their having called for it does not alter the matter at all. You produce it; if they do not put it in, you are not on that account entitled to put it in. You have met their challenge; that is what it comes to").

⁴ *Del.*: 1832, *Randel v. Chesap. & Del. Canal Co.*, 1 Harringt. 233, 284 (mere calling for papers does not make them evidence, but inspection does); 1837, *Hutchinson v. Gordon*, 2 id. 179, *semble* (same); 1839, *Read v. Ransel*, ib. 500 (same); *Ga.*: 1855, *Wooten v. Nall*, 18 Ga. 609, 614 ("With the wisdom of this rule, we have nothing to do"); 1893, *Cushman v. Coleman*, 92 id. 772, 19 S. E. 46; *Me.*: 1839, *Penobscot R. Co. v. Lamson*, 4 Shepl. 224, 233; 1831, *Blake v. Russ*, 23 Me. 360; *Mass.*: 1848, *Corn. v. Davidson*, 1 Cush. 33, 44 ("The result of the examination of the cases seems to be: 1. That all the authorities agree that mere calling for the books is not enough to make them evidence; 2. That whether calling for the books of the opposite party and inspecting them, and doing nothing more, makes the book evidence is a mooted point; 3. That the books, when produced upon notice, if inspected by the party calling for them and actually used as evidence by him, are thereby made evidence for the other party"; "all irrelevant matter would of course be properly excluded"); 1859, *Reed v. Anderson*, 12 Cush. 481 (the second question above, answered

affirmatively; but here not applied because the document produced was not the one called for); 1861, *Clark v. Fletcher*, 1 Ali. 53, 57; 1873, *Long v. Drew*, 114 Mass. 77, 80 (made evidence for both parties); *Miss.*: 1847, *Anderson v. Root*, 8 Sm. & M. 362, 364; *Pa.*: 1821, *Withers v. Gillespy*, 7 S. & R. 10, 14 (rule laid down, but doubted); *Tex.*: 1857, *Saunders v. Duval*, 19 Tex. 467, 472, *semble*; *U. S.*: 1811, *U. S. v. Mitchell*, 2 Wash. C. C. 479 (mere calling for the document does not make it evidence); 1811, *Jordan v. Wilkins*, ib. 492 (mere inspection requires the demandant to read in evidence); 1891, *Edison El. L. Co. v. U. S. El. L. Co.*, 46 Fed. 55, 59 (same).

The rule, however, ought not to extend to a second trial so as to admit documents inspected at the first: 1893, *Cushman v. Coleman*, 92 Ga. 772, 19 S. E. 46. *Contra*: 1855, *Wooten v. Nall*, 18 id. 609, 614. Nor does it apply where no formal demand for production has been made: 1820, *Farmers' & M. Bank v. Israel*, 6 S. & R. 293, 296 (rule not applicable where inspection is allowed merely as an act of courtesy).

⁵ *Cal.*: C. C. P. 1872, § 1939 ("Though a writing called for by one party is produced by the other and is thereupon inspected by the party calling for it, he is not obliged to produce it as evidence in the case"); Commissioners' amendment of 1901 (substitutes "introduce" for "produce" in the last clause; for the validity of this amendment, see *ante*, § 450); *Conn.*: 1897, *Laufer v. Traction Co.*, 66 Conn. 475, 37 Atl. 379

(reports made to the defendant by its employees as to an accident, called for by plaintiff but not used); *Ida. Rev. St.* 1867, § 2992 (like Cal. C. C. P. § 1939); *Ida. Code* 1897, § 4367 ("though a writing called for by one party is by the other produced," the party calling need not use it as evidence); *Mont. C. C. P.* 1898, § 3220 (like Cal. C. C. P. § 1939); *Nebr. Comp. St.* 1896, § 3970 (like Ia. Code, § 4367); *N. H.* 1863, *Austin v. Thomson*, 45 N. H. 112, 116 (repudiating the "supposed English rule"; quoted *supra*); *N. Y.* 1808, *Lawrence v. Van Horne*, 1 *Caines* 276, 277, 285, 287 (inspection does not oblige the inspecting party to read, per Thompson, J., and Lewis, C. J., against Radcliff, J.; though Lewis, C. J., seemed to think that there was no "essential difference" between the other two judges' opinions; quoted *supra*); 1806, *Kenny v. Clarkson*, 1 *John* 383, 395 (calling for and perusing a document does not oblige the party to read it); 1890, *Caradine v. Hotchkiss*, 120 N. Y. 608, 611, 24 N. E. 1020; *Or. C. C. P.* 1892, § 760 (like Cal. C. C. P. § 1939); *Utah Rev. St.* 1896, § 2422 (like Cal. C. C. P. § 1939).

So far, however, as a statute has not made production compulsory, it is obvious that the opponent may produce only upon an express stipulation that the document shall be read, and

this if accepted would be binding: 1855, *Huckins v. Ins. Co.*, 51 N. H. 238, 240, 247 ("The plaintiff was not obliged to produce his ledger, and could attach to it the condition which he did").

Distinguish two superficially related situations. (1) When on cross-examination a document is offered to a witness for authentication, to be put in later by the cross-examiner, the other counsel is entitled then and there to inspect it, so as to be prepared to re-examine upon it (*ante*, § 1859). Since he is entitled to do so, and since the document is not desired by him for his own case, and since his inspection is a mere precaution to protect him against the cross-examiner, he is of course not obliged, through this inspection, to put in the document: 1827, *R. v. Kamesden*, 2 C. & P. 608. (2) When a document is called for and the opponent produces it from his possession, the execution of it remains to be proved. This mere production by the opponent is not a waiver of proof of execution, and the party calling for it is still obliged to prove its execution (*ante* § 1298). There was, however, some controversy at one time on that question, and in the course of it the precedents were sometimes confused with those of the present rule; but there is no connection whatever of principle between them.

SUB-TITLE IV: AUTHENTICATION OF DOCUMENTS.

CHAPTER LXXII.

I. IN GENERAL.

- § 2129. Nature of these Rules.
- § 2130. General Principle of Authentication, for Chattels and Documents.
- § 2131. Modes of Authenticating Documents.
- § 2132. Authentication not necessary, when not in issue or when Admitted; Judicial Admission; Opponent's Spoliation.
- § 2133. Other Principles affecting Execution of Writings, discriminated (Rules as to Possession of Documents; Identity of Name; Order of Proof of Execution; Lost Will; Lost Grant; Attesting Witness; Number of Witnesses; Presumption of Delivery; Alterations).
- § 2134. Authentication as involving either Signature or Contents.
- § 2135. Authentication as a rule of Presumption.

II. SPECIFIC RULES OF SUFFICIENCY FOR CIRCUMSTANTIAL EVIDENCE.

1. Authentication by Age of Document.

- § 2137. Ancient Documents; General Principle.
- § 2138. Age; Thirty Years of Existence; Mode of Reasoning.
- § 2139. Natural Custody.
- § 2140. Unuspicious Appearance.
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- § 2142. Same: Doctrine of Inferred Possession under Losses, distinguished.
- § 2143. Old Recorded Deeds and Old Copies.
- § 2144. Authority to Execute.
- § 2145. Kinds of Documents covered by the Rule.
- § 2146. Presumption created; Statutory Declaration of Genuineness.

2. Authentication by Contents.

- § 2149. Authentication by Contents; in general.
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- § 2150. Printed Matter: (1) Newspapers.
- § 2151. Same: (2) Official Printer; Statute-book; Reports of Decisions.
- § 2152. Same: (3) Postmark; Brand.
- § 2153. Reply-Letter received by Mail.
- § 2154. Reply-Telegram.
- § 2155. Reply-Telephone.
- § 2156. Presumption of Identity of Person from Identity of Name.

3. Authentication by Official Custody.

- § 2159. General Principle, as applied to Judicial Records and Files.
- § 2160. Same: Application to Sundry Official Records.

4. Authentication by Purporting Official Seal or Signature.

- § 2161. General Principle.
- § 2162. Same: Mode of Authenticating when Genuineness is not Presumed; Certificates of Attestation Statutes presuming Genuineness.
- § 2163. Seal of State.
- § 2164. Seal of Court; Clerk's Signature; Justice of the Peace.
- § 2165. Seal of Notary.
- § 2166. Sundry Official Seals.
- § 2167. Official Signatures.
- § 2168. Official Character and Title to Office.
- § 2169. Corporate Seal.

§ 2129. Nature of these Rules. The control given to the judge over the jury appears usually in the form later examined (*post*, §§ 2494, 2551), namely, in his power to pass upon the sufficiency of a party's evidence, after all is offered, to go to the jury on the entire issue. This general power, being exercised in each case according to the whole mass of evidence as there presented, ordinarily does not result in abstract rules; each ruling stands by itself, and can form no precedent. But for many classes of issues, experience has dictated definite rules, which may be invoked to control all cases. Here there is a genuine rule of evidence, *i. e.* declaring that a certain group of data is or is not sufficient to send the case to the jury. It is not a rule of admis-

admissibility as to any one piece of the evidence, for each is at least admissible; but a rule of final admissibility as to the group of facts, *i. e.* that it is or is not, taken all together, sufficient to go to the jury. Such rules are therefore of the present type, Quantitative or Synthetic (*ante*, § 2030). In fact, all of the preceding rules of this type may be regarded as the concrete expressions of this general power of the Court to declare a quantity of evidence insufficient.

For certain sorts of these rules, it is often difficult to separate in them their character as rules of the present sort and their character as rules of presumption affecting the burden of proof (*post*, § 2490); for they often embody both. For example, when the rule is named that a man's absence, unheard of, for seven years, raises a presumption of his death, it is obvious that two rules are in effect involved, first, a rule that this fact of absence with these accompanying circumstances is *sufficient* to go to the jury on the issue of death, and, secondly, that it also raises a presumption of death, *i. e.* requires a verdict of death unless the opponent offers evidence in explanation. In one and the same formula, two steps are accomplished with reference to the duty of proof as between the parties, namely, relieving one's self of the duty and also shifting it to the opponent (*post*, § 2494). Yet there may be rules of sufficiency which remain merely such, and are not given the added force of rules of presumption. Such are those which have preceded in this Title. For example, the rule that two witnesses are necessary for certain facts admits the evidence by two witnesses to go to the jury; but it does not declare that two witnesses raise a presumption and shift the duty of proof. No one has ever contended that it should go so far. There, then, the emphasis is solely on the insufficiency of certain evidence, and the rule marks the line where the evidence becomes sufficient, but does not attempt to declare that it passes the further line where it would raise a presumption. It is perfectly apparent that most of the other preceding rules have the one character only.

But we now come to a particular class of rules in which the emphasis on the one or the other character is doubtful. They are neither clearly rules of sufficiency alone, nor clearly rules of presumption. The emphasis seems to be sometimes on the one, sometimes on the other character, according to the particular facts of the litigation. For example, that identity of name is some evidence of identity of person is general and unquestioned; but is it a rule of sufficiency, *i. e.* that identity of name, with nothing more, is sufficient to go to the jury and thus needs no other evidence first to be coupled with it; or is it a rule that identity of name raises a presumption of identity of person, so as to require a verdict unless the opponent takes up the duty of disproof? This question, when discriminated at all, is variously answered (*post*, § 2529). Wherever there has been any claim for this double character to such a rule, it is more practicable to consider it with Presumptions. But one particular sort of such rules may more suitably be considered here, because the emphasis has generally been upon their character as rules of sufficiency, namely, the rules relating to the authentication of documents, *i. e.* proving their genuine-

ness or execution. This has probably been due to the tangibility of the line marking sufficiency from insufficiency, as compared with the line marking a presumption. The stage when the counsel desiring to introduce a document has accumulated sufficient evidence of its execution to be allowed to read it or hand it to the jury is dramatically marked and apparent; and thus the emphasis of the rule of evidence has come to be placed on the question whether the proof has reached that stage, *i. e.* on the question of sufficiency. The struggle centres about this point; what happens afterwards is less tangible and less worth arguing over; and thus the question of a presumption has received comparatively little emphasis. It will be proper, therefore, to treat the rules for authenticating documents as having the essential character of rules of sufficiency, although they may sometimes be accorded also the quality of rules of presumption.

§ 2130. *General Principle of Authentication, for Chattels and Documents.* The foundation on which rests the necessity of authentication is not any general principle of Evidence, but an inherent logical necessity. For example, when Doe is charged with the murder of Roe, and it is evidenced that some one murdered Roe, but the person killing is not shown, the failure of the prosecution is not due to any rule of evidence, but to the absence of a fact logically inherent in its claim, namely, Doe's identity with the murderer. So, when a knife is offered as J. S.'s knife with which he did the killing, the proof of the knife's use, and of its finding, leaves unsupplied an essential element in the assertion, namely, J. S.'s use or ownership. In short, when a claim or offer involves impliedly or expressly any element of *personal connection with a corporal object*, that connection must be made to appear, like the other elements, else the whole fails in effect; just as a chain binds no prisoner if any link is missing. Thus, then, if as a part of some facts asserted Doe's letter is offered, what is involved in the assumption of the offer is (a) a letter written (b) by Doe; and a letter alone, without the fact that it is Doe's, is not receivable, simply because it is not the thing offered. By one of the many rules of evidence, Doe's letter may be admissible; but, whatever the particular rule of evidence may be, the element of Doe's connection with the letter is logically assumed in all.

This logical element exists wherever any personal connection with a corporal object is assumed in the offer. The necessity of authentication, therefore, applies equally well to a knife, a horse, a coat, or a machine, as to a letter or other writing, whenever it is asserted to be connected with a person; and this authentication of objects other than writings is a common necessity of every day's trial practice.¹ Nevertheless, no specific rules have grown up about the authentication of such objects. How, then, have such rules come to exist particularly for documents? Chiefly through two reasons:

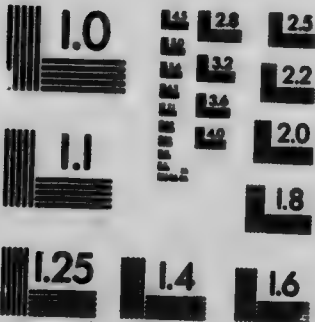
¹ 1902, *State v. Hosack*, 116 Ia. 194, 89 N. W. 1077 (hairs on an axe); 1867, *Com. v. Bentley*, 97 Mass. 551, 554 (samples of liquor analyzed by a witness and said to be that kept by the defendant); 1894, *State v. Cadotte*, 17

Mont. 315, 42 Pac. 857 (knife introduced as accused's); 1901, *State v. Hill*, 65 N. J. L. 620, 47 Atl. 514 (cartridges found in a coat); 1866, *People v. Gonzalez*, 35 N. Y. 40 (clothes worn by the accused).



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(1) Most documents bear a signature, or otherwise purport on their face to be of a certain person's authorship. Hence, a special necessity exists for separating the external evidence of authorship from the mere existence of a purporting document. A horse or a coat contains upon itself no indication of ownership; when it is claimed that Doe wore it or rode it, all can appreciate that this element is missing and must be supplied by evidence. But a document purports in itself to indicate its authorship; and the perception that this element is nevertheless missing, and must still be supplied, is likely to occur. There is a natural tendency to forget it. Thus it has constantly been emphasized by the judicial requirement of evidence to that effect.

(2) Beyond all this, there is a general mental tendency, when a copy of an object is produced as proving something, to assume, on sight of the object, that else that is asserted about it. The sight of it seems to prove all the rest. Thus, it is easy for a jury, when witnesses speak of a horse being stolen from Doe by Roe, to understand, when Doe is proved to have lost the horse, that it still remains to be proved that Roe took it; the missing element must clearly be kept separate as an additional requirement. But if the witness who testifies the theft were to have the horse brought into the court-room, and to point out triumphantly, "If you doubt me, there is the very horse!", this would go a great way to persuade the jury of the rest of his assertion and to ignore the weaknesses of his evidence of Doe's connection. The sight of the horse corroborating in the flesh, as it were, a part of the witness' testimony, tends to verify the remainder. This tendency, illogical though it be, is deeply rooted among all persons, even the most intelligent and reflective; and it has already been specially noticed with reference to the propriety of using authentication (or, real evidence) as a source of proof (*ante*, §§ 1157, 1158). The great dramatist² has satirized it in his scene with Jack Cade's mob, when their leader proclaims himself, to the questioning magistrate, as the descendant of Earl Mortimer, whose son

"Was by a beggar woman stol'n away,
And, ignorant of his birth and parentage,
Became a bricklayer when he came to age.
His son am I; deny it if you can";

to which his follower, Smith the Weaver, adds vehemently the following strong confirmation:

"Sir, he made a chimney in my father's house; and the bricks are alive at this time; testify it; therefore, deny it not!"

Now this tendency is especially forcible and misleading when the execution of documents is involved. The original of a writing is usually presented to the tribunal *in specie*, while other material objects are not required to be produced; seldom are brought into court (except such articles as the tools of a criminal, or the clothes of a victim); so that, in practice, the most common opportunity for the operation of this aberrant tendency occurs for writings, viz.

² Henry VI, pt. II, Act IV, Sc. 2.
2890

existence and mutely suggesting that they *are* all that they purport to be. For this second reason, then, it has happened that the specific rules that have grown up concerning modes of authentication have come to relate to writings alone.

Thus it is that in the traditions of the common law a wise emphasis has been placed upon the necessity of supplying the logical element of authenticity for writings. The general principle has been enforced that a writing purporting to be of a certain authorship cannot go to the jury as possibly genuine, merely on the strength of this purport; *there must be some evidence of the genuineness* (or execution) of it:

1794, *Horne Took's Trial*, 25 How. St. Tr. 78; Mr. (later L. C.) *Erskine*, arguing against the reading of a treasonable paper not authenticated: "Would it be said that this should be read as evidence against the prisoner before his connexion with it is proved to have had an existence? I take the reason of that to be this — and I take the reason of it to be founded in great wisdom, in that which in my opinion forms the glory of the English law in all its parts, in an acquaintance with the human character, in the recognition of all that belongs to the principles of the human mind, in the recollection of our wise ancestors that man are not angels, that they carry about them (and your lordships even carry about you) all the infirmities of humanity, and that it therefore shall not be permitted to make a strong impression upon the minds of men by reading matters at which . . . the mind of man revolts, and so in the course of a long trial the jury afterwards cannot discharge from their recollection what they have heard. They do not remember with precision whether that which was read was brought home to the prisoner; and then they mix up in their imagination and recollection matters which they may disapprove with disapprobation of the person who is on trial before them. I take that, with humility, to be the principle. . . . It must first of all be brought home to the person who is to be affected by it, before it is suffered to be read; for after it is read, the effect is had, and that is the danger I complain of"; L. C. J. *Eyre*: "If the question is whether it is now to be read, I think the objection is good. If the question is whether it is evidence admissible, not yet to be read, but to be read or not as other evidence shall bring the matter of it sufficiently home to the prisoner, then the objection is ill-founded."

1847, *Bronson, C. J.*, in *Wilson v. Betts*, 4 Den. 201, 213: "In the ordinary affairs of men, it is very often assumed, without proof, that he whose name has been affixed to a written instrument placed it there himself. But when the signing becomes a matter of legal controversy, it must be established by proof."

1856, *Benning, J.*, in *Stamper v. Griffin*, 20 Ga. 312, 320: "No writing can be received in evidence as a genuine writing until it has been proved to be a genuine one, and none as a forgery until it has been proved to be a forgery. A writing, of itself, is not evidence of the one thing, or of the other. A writing, of itself, is evidence of nothing, and therefore is not, unless accompanied by proof of some sort, admissible as evidence."

§ 2131. **Modes of Authenticating Documents.** Some of the various possible modes of evidencing a document's genuineness are, of course, never questioned

* 1810, *Pfial v. Vanbatenberg*, 3 Camp. 439 (the mere possession by defendant of a receipt, in unproved handwriting — here on a bill of exchange — not evidential; *Ellenborough L. C. J.*: "A man cannot be allowed to manufacture evidence for himself at the risk of being convicted of forgery; . . . [moreover,] these receipts may have been fraudulently indorsed without the plaintiff's privity"); 1794, *Nell v. Miller*, 2 Root 117 (receipt; "if the defendant

had produced any evidence, though ever so small, of its being the plaintiff's signature, it would have been proper to have left it to the jury to weigh; but there being no evidence at all of its being genuine, it would be improper to let it go to the jury"); 1875, *McHugh v. Brown*, 33 Mich. 3 (note and mortgage not shown executed, excluded); 1881, *State v. Albert*, 73 Mo. 347, 360 (letter found on A, purporting to be from B). Compare § 2506, *post*.

to be sufficient to entitle it to go to the jury. Those about which questions arise are only certain kinds of circumstantial evidence. It will be necessary therefore to eliminate at the outset the kinds of evidence as to which there is no dispute from the present point of view.

Evidence may be of three different sorts (*ante*, § 24); namely, autoptic preference (or, real evidence), testimonial evidence, and circumstantial evidence. (1) Autoptic preference (or, real evidence), occurs, for the execution of writings, when the act of writing is done in the presence of the tribunal. The sufficiency of this is plain.¹

(2) *Testimonial evidence* is always regarded as sufficient; the only questions being the ordinary ones as to the qualifications of the witness by knowledge. Ordinary admissions of a party are a sort of evidence always regarded as sufficient to admit a document to the jury;² but they are to be distinguished from judicial admissions (*post*, § 2132).

(3) *Circumstantial evidence* is of various sorts; and first, of those not involving:

(a) *Style of handwriting*, i. e. similarity between that of the document and that of the person alleged as its maker, is a sort of circumstantial evidence (*ante*, § 383) undisputed in its sufficiency; the controversies have arisen over the proper modes of proving the fact of similarity.⁴

(b) *Sundry circumstances* preceding or following the act of writing may be appealed to as evidence.⁵ For example, if an unsigned writing is left in a room with pen and ink, and Doe goes alone into the room, then comes out with fresh ink-marks on his hand, and the writing is then found to bear his name in signature, this would be regarded, no doubt, as sufficient evidence to go to the jury; it is the same sort of evidence that might be used to prove

¹ It is ordinarily available only when a person is required to write his name as a specimen for comparison; its genuineness is then beyond dispute, and the only question that arises concerns entirely different principles, and has been already examined (*ante*, § 2015, *post*, § 2264). The other possible case is that of a recognisance entered into before the Court, and this becomes unimpeachable as a part of the record (*post*, § 2450).

² Note that in strictness the only kind of direct testimonial evidence to execution is that of a witness who saw the very act of writing; for testimony based on the style of handwriting is in strictness testimony to a circumstantial fact. An attesting witness is one of the two chief instances of those who in practice speak directly to the act of execution; the use of his hearsay attestation has been already examined (*ante*, §§ 1505, 1511); it is generally held that the signature of attestation implies testimony to the act of execution. The use of official certificates or records of acknowledgment or execution is the other chief class; these have been already considered (*ante*, §§ 1043, 1076); but their relation to the present subject is briefly noted *post*, § 2162.

³ Such admissions may not suffice to dispense with the production of the original (*ante*, §§ 1255-

1259), nor with the calling of an attesting witness (*ante*, § 1300); but, supposing the rules not to stand in the way, an admission suffices as evidence of execution, though there may be a question as to its sufficiency (*post*, § 2156). Furthermore, a judicial admission, or formal waiver of proof, suffices, as for every other issue, to dispense entirely with evidence (*post*, §§ 2132, 2595).

⁴ The type of handwriting may be proved by persons familiar with it (*ante*, §§ 693, 694) or it may be evidenced by specimens produced by the witness, or by the tribunal directly (*ante*, § 383). With this subject we are not here concerned.

⁵ The following are instances: 1841, *James v. Cox*, 90 (at 6 p. m. the defendant had a bill without an indorsement; at 6 p. m. he presented it with a forged indorsement; evidence of forgery); 1902, *Woodruff v. 133 Ala. 395, 32 So. 570* (analogous to 1886, *Smith v. State*, 77 Ga. 705, 710 (a letter handed to the witness by the defendant purporting to have written it); 1830, *Thomas v. J. J. Marsh*, 47 (lost part payment on a note; the fact of payment on that date, together with the fact of an indorsement on the note, held sufficient evidence the receipt's genuineness).

murder or any other act done in that room. For evidence of this sort there seem to be no specific rules of sufficiency.⁶

It is the remaining sorts of circumstantial evidence which give rise to rulings of sufficiency. They consist of groups of circumstances, each by itself perhaps insufficient, but all combined amounting in common experience to a sufficiency. They fall, roughly, under four heads: (c) age; (d) contents; (e) custody; (f) signature or seal.

(c) An *ancient document*, i. e. one having existed for a generation or more, coming from a natural place of custody, and not bearing a suspicious appearance, may on these circumstances, with perhaps others combined, be taken to be sufficiently evidenced as to its genuineness (*post*, §§ 2137-2146).

(d) A *letter*, coming in *answer by mail*, and corresponding in time and contents to a prior letter sent to the purporting writer, may be regarded as sufficiently evidenced; and in other ways a document's contents may serve the purpose (*post*, §§ 2148-2156).

(e) A document purporting to be *official*, and found in its natural place of *official custody*, may be regarded as sufficiently evidenced (*post*, §§ 2158, 2159).

(f) A document purporting to be *official*, and bearing a *signature or seal* or *other mark* purporting to be that of the purporting official, may be regarded as sufficiently evidenced (*post*, §§ 2161-2169).⁷

§ 2132. *Authentication not Necessary, when not in Issue or when Admitted; Judicial Admission; Opponent's Spoliation.* (1) When the execution of a document is *not in issue*, but *only the contents* or the fact of the existence of a document of such a tenor, no authentication is necessary.¹ This occurs chiefly where a deed is used as constituting *color of title*, i. e. as being by implication a part of the act of adverse occupation and thus exhibiting the boundaries or quality of the occupier's estate; for there it is immaterial by whom the deed was executed.² The same principle, dispensing altogether

⁶ There are, however, rulings of admissibility as to certain kinds of facts; for example, whether a *plan or design* to execute a contract (*ante*, §§ 104, 376) or a *habit* of executing a certain kind of contract (*ante*, §§ 94, 95, 96, 377, 380) is receivable, — the question, however, being the same whether the alleged contract is written or oral; whether a *motive* existed for executing a certain kind of contract (*ante*, §§ 391, 392); whether the subsequent *possession or use* of a document is admissible to show its execution (*ante*, § 167). In some of these rulings, particularly of the last sort, a question of sufficiency may be involved; but ordinarily the question is merely one of the admissibility of the specific evidence to add to other evidence; and it does not appear whether it would by itself have been regarded as sufficient to go to the jury. With this sort of evidence, therefore, the present class of rules is practically not concerned.

⁷ All these modes, so far as the relevancy, or logical course of inference, is concerned, rest on the principle of circumstantial evidence treated *ante*, §§ 148-160. But the question there was merely of the relevancy of specific facts; here it

is of the sufficiency and necessity of groups of facts.

¹ 1864, *Hicks v. Coleman*, 25 Cal. 122, 129 (a deed conveyed "all my right, etc., in the property described in the foregoing instrument"; proof of the execution of the other deed, held unnecessary; "the only office the H. deed performs is to furnish a description of the land, and for that purpose it is not a matter of the slightest consequence whether it was a genuine conveyance or not"); 1869, *Neuval v. Cowell*, 36 id. 648 (so for a contract referred to for specifications in another contract); 1893, *Barber's Appeal*, 63 Conn. 393, 411, 415, 27 Atl. 973 (letters to a testator, admitted without proof of genuineness, because his use of them under the rule of § 234, *ante*, bore on the question of sanity); 1879, *Skinner v. Brigham*, 126 Mass. 132 (conversion of goods, exchanged for a void deed; deed admitted without proof of execution, as being the document actually exchanged).

² 1892, *Alabama State L. Co. v. Kyle*, 99 Ala. 474, 479, 13 So. 43 (certificate of entry used as color of title); 1881, *Alexander v. Campbell*, 74 Mo. 142, 147 (existence of power of

with evidence of execution, dispenses with calling the attesting witness (*ante* § 1293).³

(2) When the execution of a document, though claimed by one party, is *judicially admitted* by the other, and thus the issue is waived, there is no necessity for evidence of the execution. Such a judicial admission may be of the ordinary sort, *i. e.* by a *stipulation* for the purposes of the trial in hand. Or it may consist in a *failure to plead in denial* of execution; the range of this sort of admission has been much enlarged by modern statutes declaring that execution need not be evidenced unless by affidavit or other sworn declaration. (equivalent in effect to a pleading) the opponent raises an issue of genuineness.⁴ Where the *opponent claims under the instrument*, or where he merely *produces the instrument on notice*, this would equally suffice, so far as it amounts to a judicial admission.⁵

(3) An ordinary *informal* or *extrajudicial admission* differs wholly in nature from a formal or judicial admission of the above sort; it is merely a piece of circumstantial evidence impeaching the party (*ante*, § 1048). It is regarded by some Courts as insufficient for certain purposes, — in particular for dispensing with the attesting-witness rule (*ante*, § 1300) and for dispensing with the production of the original of the document (*ante*, §§ 1255–1257). But for the purpose of evidencing execution, where no requirement as to the attesting witness is involved, an extrajudicial admission of the party is always been regarded as sufficient;⁷ the only question could be whether

attorney to execute deed); 1828, *Forrest v. Trammell*, 1 Bail. 77 (where the extent of possession only is to be shown, as in a claim for dower, and the deed to the husband is offered only as coloring such possession, execution need not be proved, and therefore copies are receivable without any evidence of execution); 1872, *Stewart v. Blossie*, 4 S. C. 37, 40, 44 (same; copies receivable without the statutory notice); 1892, *Turner v. Poston*, 63 Md. 244, 41 S. E. 296 (deed not properly authenticated, admitted for defendant in mitigation of damages in an action for trespass). Some Courts, however, seem to require proof of execution: 1869, *Hightower v. Williams*, 38 Ga. 597, 601. The matter obviously depends much on the substantive law as to the requisites of adverse possession, and cannot be further examined here; see *Sedgwick & Wait, Trial of Title to Land*, § 761.

The use of deeds in color of title has also to be considered from other points of view in the rules of evidence, namely, the Hearsay rule, as admitting *verbal acts* (*ante*, § 1778), and *possession of a part* as circumstantial evidence of *possession of the whole* (*ante*, § 378).

³ The instances cited there under § 1293 are equally applicable here.

In certain parts of the substantive law or of the law of pleading may be found rules declaring the execution of documents *not to be in issue* on a certain state of facts, — for example, the rule that a plaintiff in ejectment or the like need not prove the prior deeds forming his *chain of title*: 1794, *Thompson v. Miles*, 1 Esp. 184 (action for

refusing to complete the purchase of premises as to showing the plaintiff's title, Kenyon C. J., said "he would never allow it, where the question was respecting a title, that the plaintiff should be called upon to prove the execution of all the deeds, deducing a long title"); or the rule that a *common source of title* may suffice unless the opponent denies on oath: 1841, *Thatcher v. Olmstead*, 110 Ill. 26.

⁴ 1881, *Jones v. Henry*, 84 N. C. 320; 1891, *Miller v. Hale*, 26 Pa. 432, 435. For this rule of admission in general, see *post*, § 2588.

⁵ These are noticed *post*, § 2596. The same principles exempt from calling the attesting-witness (*ante*, §§ 1294–1296), and cases cited under that head are here applicable.

⁶ The cases are collected *ante*, §§ 1297, under the attesting-witness rule.

⁷ 1863, *Hilborn v. Alford*, 23 Cal. 482 (ormissions, sufficient; here, a note); 1863, *W. v. Carillo*, ib. 595, 606 (same, for a deed); O. C. P. 1872, § 1942 (confused language quoted *post*, § 2137); 1879, *Smith v. W.* 69 Mo. 458, 460; 1882, *Kingwood v. Bethel*, 13 N. J. L. 221, 227 (pauper settlement deceased pauper's acknowledgment of an interest of apprenticeship, sufficient); 1878, *H. v. Stevenson*, 75 N. Y. 164, 166 (an admission of the genuineness of a document of that description does not suffice); 1890, *Dakota v. O.* 1 N. D. 42 (the defendant handed an uncommunicated to the witness; sufficient); *Krise v. Neason*, 66 Pa. 253, 255 ("party . . . should himself hand the paper

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sufficient); 1870,
3, 259 ("If the
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the party's words or conduct under the circumstances amounted to an admission (*ante*, §§ 1060-1067).⁵ It is upon this principle that the *acknowledgment of a deed*, being an admission of genuineness, may always be used as against the party acknowledging, even where the record is not regarded as an admissible official statement to prove the execution (*ante*, §§ 1650, 1653, 1676).

(4) A circumstance sometimes treated as an extrajudicial admission, though in theory distinct in nature, is the *opponent's destruction or suppression of the instrument* in question. This is one sort of circumstantial evidence, already examined (*ante*, § 291) in its use to evidence a document's contents. It remains only to note here that this circumstance is uniformly treated also as sufficient evidence of execution to go to the jury.⁶ The mode in which this doctrine is to be applied in connection with other principles affecting execution is sufficiently illustrated in the following opinion:

1837, *Gibson, C. J.*, in *M'Reynolds v. M'Cord*, 6 Watts 288, 290: "Preliminary to proof of contents [of a lost document], and involving proof of execution, stands proof of the preëxistence in the state of a valid instrument. This is a rudimental principle, which is not contested. Now there was no specific proof of execution; and what was there also? [The other party to the alleged agreement had burnt the paper.] Everything is to be presumed in *odium spoliatoris*; and had it certainly appeared that the destroyed paper purported to be an agreement such as is attempted to be established, it would have sufficed for the admission of subsequent evidence of its contents. . . . It seems clear on principle that, if there be no subscribing witness, the act of destruction is itself the best evidence of which such a case is susceptible, because it has put it out of the party's power to submit the paper to witnesses of the handwriting; and the act of a spoiler is in its nature equipollent to a confession. But, before he can be fixed with the character of a spoiler, the purport of the paper must be proved to have been what it is surmised to have been; . . . there are few men who have not papers which it would be not only innocent but prudent to destroy. . . . If the paper destroyed were shown to have been an agreement for the land, it would raise a presumption of identity, sufficient to dispense with the ordinary proof of execution, and let in the contents of the paper [as proved by

genuine to a copyist, that certainly would be such an unequivocal acknowledgment of its genuineness as to dispense with any other evidence"; here, the written acknowledgment of the party's agent was sufficient); 1895, *Dunbar v. U. S.*, 156 U. S. 191, 15 Sup. 325 (defendant's oral admission of the genuineness of a telegram, sufficient; "an admission as to a writing is like an admission of any other fact"). On the principle that proof of loss does not exempt from proof of execution (*ante*, § 1188), an admission of the loss or of the correctness of a copy may not be an admission of execution: 1840, *Sharpe v. Lamh*, 3 Perry & Dav. 454 (copy of a letter, admitted by the opponent to be a true copy; held, that proof of the sending of the letter was necessary; Patteeon, J.: "It has been often objected before me at chambers that an admission could not safely be made that such a paper is a copy, because it would admit that there was an original; I have always said that there is no danger in that, because the copy cannot be read unless the party were entitled to read the original").

⁵ There may, however, be the further question, when the admission did not relate to a specific piece of paper, whether the paper offered is the one thus admitted to be genuine; here it would seem that an inference from identity of tenor might usually suffice, in analogy to other principles (*post*, § 2148); but the Courts seem inclined to be strict: 1897, *Mann v. Forein*, 166 Ill. 446, 46 N. E. 1119 (admission of "a note for \$5,000" not sufficient to prove execution of a note dated April 6, 1882, due at death); 1895, *People v. Corey*, 148 N. Y. 476, 42 N. E. 1066 (the defendant had admitted writing a letter not otherwise identified as the one offered; excluded, by a divided Court).

⁶ 1893, *Lambie's Estate*, 97 Mich. 49, 55, 56 N. W. 223 (destruction of a second testamentary paper by the parties benefited by the first, held evidence of due statutory execution); 1837, *M'Reynolds v. M'Cord*, 6 Watts 288, 290 (quoted *supra*); 1852, *Chatham v. Riddle*, 3 Tex. 162, 166 (defendant's principal had fraudulently absconded with plaintiff's title-document; direct proof of execution not required).

another witness]. . . [But the witness to destruction appeared not to have read the destroyed, and thus to be unable to identify it.] It would seem, therefore, that the plaintiff, in making out a circumstance to stand for proof of execution, ought to have a competent degree of knowledge [of identity] in the witness, drawn from the declarations of him who destroyed the paper or from some other source equally satisfactory, such there were. Had that been done, it would have produced a presumption of identity and consequent execution."

§ 2133. *Other Principles affecting Execution of Writings, discriminating between them* (Rules as to Possession of Documents; Identity of Name; Order of Production; Execution; Lost Will; Attesting Witness; Number of Witnesses; Production of Delivery; Alterations; Lost Grant). (1) It may be desired to know a person's privity to or *knowledge of the contents* of a document, with regard to its authorship; and for this purpose his *possession* of it may be offered as evidence (*ante*, § 260). So, also, whether *possession* of a document — such as a matured note — is evidence of its payment, or justifies other such inferences, is a different question (*ante*, § 156). (2) The execution of a document by one J. S. being sufficiently evidenced, it may remain to be shown whether that J. S. is identical with the J. S. in the case at issue; for this purpose the presumption from *identity of name* to *identity of person* may be appealed to (*post*, §§ 2156, 2529); the question is the same whether the execution of a document or any other issue is involved. (3) Whether the *order of evidence* should be, in the case of a document produced, first to prove *execution* and then to prove *contents*, has been elsewhere considered (*ante*, § 1189). (4) Whether the execution of a *lost will* or other document is required to be proved by *one who has read it* is a question as to qualifications of witnesses (*ante*, §§ 1278, 2090). (5) Whether *more than one witness* is required to prove the execution of a *will*, involves the general rule as to a required number of witnesses (*ante*, §§ 2048–2051). (6) Whether an *attesting witness* is required to be called to prove execution involves the general rule of preference (*ante*, § 1287). (7) What *degree of proof* of execution of a *lost will* — whether it is to be "clear and satisfactory" — has already been noticed in dealing with proof of a lost will's contents (*ante*, § 2106); the two questions are seldom discriminated. (8) Whether proof of *signing* raises a presumption of *sealing and delivery* is a question of the presumption of delivery (*post*, § 2520). (9) That proof of *loss*, allowing the use of a copy, does not dispense with proof of *execution* of the lost original is an important rule already noticed (*ante*, § 1188). (10) That the witness to execution must *have the document before him* involves the rule for production of originals (*ante*, §§ 1185, 1248). (11) Whether an *alteration* is to be treated as made *before* or *after execution* is a question of the presumption as to alterations (*post*, § 2525). (12) Whether a *recital* in an *antecedent deed* is admissible to prove the execution of a *lost deed* thus recited, involves the question of an exception to the Hearsay rule (*ante*, § 1573). (14) The presumption of a *lost grant* involves a rule affecting both execution and contents (*post*, § 2522).

§ 2134. Authentication as involving either Signature or Contents. (1) When a person is charged with executing a *signed document*, for the purposes of affecting him with certain legal consequences, the act which suffices to charge him is any act by which he adopts and makes his own the terms of the writing. It is therefore, in general, immaterial whether he has himself written the body of the document or not, if he has signed it. It is even immaterial whether he has signed it, if he has otherwise acknowledged or adopted it. Hence, *proof of the signature of the document is sufficient* to charge him;¹ precisely as proof of the oral acknowledgment would suffice (*ante*, § 2132, par. 3).

But this is a consequence of the substantive law, not of a rule of evidence. Thus, so far as there are any exceptions to the general rule — as, for example, in the question whether one may be charged on a contract which he has signed but not read — they are doctrines of the substantive law, not rules of evidence (*post*, § 2415). In the field of evidence, they receive frequent application — as where a party writing a letter referring to another letter may be charged with its contents, which become by adoption part of his admission (*ante*, §§ 1070, 2120). But it is by some act of adoption — such as signing or acknowledging the writing of another — that he becomes thus chargeable; and hence it is this act of adoption which constitutes the execution. Hence, proof of execution involves merely proof of signature or of *whatever else constitutes the act of adoption*.²

(2) Conversely, where the document *lacks a signature*, no rule of evidence prevents the proof of its execution in some other way. Some rule of the substantive law may require a signature; for example, it may be required that a will shall be signed at the end and not merely bear the name in the midst or at the beginning or on a superscription (*post*, § 2456); or a corporate or judicial record may be required to be signed;³ or a deed may be required to be not merely signed but also acknowledged (*ante*, § 1653). With such rules the law of evidence is not concerned. It accepts them as otherwise determined. Accordingly, if there is no signature, and the substantive law makes no requirement as to a signature, the execution may be established by evidencing the *handwriting of the contents*,⁴ as in the case of records (*post*, § 2164), or by evidencing some oral act of acknowledgment or assent.⁵

¹ 1845, Pullen v. Hutchinson, 12 Shepl. 249, 254 (note and letter; signature sufficient, where there are no indications of falsity as to date). Hence the question may arise what constitutes, in the substantive law, the document in question; e. g. whether a will written on separate sheets and signed on the last is a single document (*post*, § 2452); or as in the following case: 1862, Turrell v. Morgan, 7 Minn. 372, 375 (note offered, containing indorsements of payment; proof of the note does not raise a presumption of the genuineness of the indorsements).

² If an *alteration* appears in the body of document, the question whether it affects the

liability of the signer is a question of substantive law; the question whether the alteration was made before or after signing is a mere question of fact, upon which however there may be a further question as to the burden of proof (*post*, § 2525).

³ 1874, People v. E. L. & Y. Co., 48 Cal. 143, 146 (under a statute requiring a public board's proceedings to be signed by chairman and clerk, these signatures are not essential to validity, but mere aids to authentication).

⁴ 1834, Nichols v. Alsop, 10 Conn. 263, 268.

⁵ For example, an assent by silence, under the principle of § 1071, *ante*. That it is es-

§ 2135. *Authentication as a Rule of Presumption.* We are now in a position, after this survey of the various modes of authentication and its incidental questions, to consider whether, for authentication in general, rules are properly rules of presumption or merely rules of sufficiency. It has been noticed (*ante*, § 2129) that they may partake of the double character, but that the emphasis has in general been thrown on the latter aspect. Remembering, however, the variety of modes in which authentication properly be evidenced, it would seem that the situation does not, as a whole, admit of a clear-cut rule of presumption easily defined and applied. The possible combinations of evidence are too many to make such a rule practicable. It is better to treat the question, in general, merely as one of sufficiency (*post*, §§ 2487, 2494), i. e. to allow the writing, upon the evidence, question, to go to the jury, without any rule of law strictly binding them to presume its execution:

1820, *Duncan, J.*, in *Siegfried v. Levan*, 6 S. & R. 303, 311: "All that is done by the Court, in admitting the deed in evidence, is this, that if the execution of the deed is proved by the subscribing witness, the party has made out a *prima facie* case, not a conclusive one, or, in cases where recourse is had to the secondary evidence, the collateral proof, such that a jury might presume [*i. e.* infer] the execution; and then these facts are committed to the jury to exercise their own judgment, to draw their own conclusion of sealing and delivery. . . . If the bond is proved by the subscribing witness, it is *prima facie* evidence; why? Not because the Court pronounces, by admitting it in evidence, that it is the deed of the party; but because the party has given evidence of its execution. Where the execution is to be made out by facts and circumstances, it is admitted because the Court draw any conclusion of the fact in issue, but because some evidence is offered from which the jury might presume [*i. e.* infer] the fact in issue, the sealing and delivery of the bond. If there be no evidence of the execution, the Court will not permit the bond to be read in evidence; but if there be any fact or circumstance tending to prove the execution or from which the execution might be presumed, then like other presumptive evidence it is open for the decision of the jury."

This seems to be the view generally taken.¹ It follows, that, after a ruling in favor of the sufficiency of the evidence by the party offering the document, it goes to the jury, before the opponent can offer evidence in denial;² the opponent's evidence in denial, when it comes, is to be addressed to the jury, not to the judge, for the judge has ruled as matter of law upon the sufficiency of the evidence, and the question rests now with the jury.³ Conversely, if the opponent offers no evidence in denial, nevertheless there is no rule of law requiring the jury to presume execution; they are to weigh the evidence without any compulsory rule of law.⁴

Yet, though this may be so for authentication in general, as provable by sundry sorts of evidence, there may conceivably occur a specific rule of presumption for specific kinds of evidence, — for example, for ancient documents (*post*, § 2146), or for officially sealed documents (*post*, § 2161).

essentially a question of the substantive law is illustrated in the statutes forbidding any acknowledgment of a debt to suffice to take the case out of the statute of limitations unless made in writing signed by the debtor.

¹ 1849, *Hicks v. Chouveau*, 12 Mo. 341.

² 1863, *Verzan v. McGregor*, 23 Cal.

1853, *Flournoy v. Warden*, 17 Mo. 435, 44.

³ *Verzan v. McGregor*, *supra*.

⁴ 1877, *Scott v. Delany*, 87 Ill. 146, 15.

II. SPECIFIC RULES OF SUFFICIENCY FOR CIRCUMSTANTIAL EVIDENCE.

1. Authentication by Age of Document.

§ 2137. *Ancient Documents; General Principle.* For three centuries the rule has existed, unquestioned in its general validity, that an ancient document, under certain conditions, is to be taken as sufficiently evidenced, in regard to its genuineness of execution, to be submitted to the jury.¹ The reasons for this specific and simple rule are twofold. First, after a long lapse of time, ordinary testimonial evidence from those who saw the document's execution or knew the style of handwriting or heard the party admit the execution, is practically unavailable, and a necessity always exists for resorting to circumstantial evidence. Secondly, the circumstance of age — or long existence — of the document, together with its place of custody, its unsuspicious appearance, and perhaps other circumstances, suffice, in combination, as evidence to be submitted to the jury. Whether the mere age is itself an evidential circumstance at all has been judicially doubted; though it may be argued that men would hardly undertake the risk of forgery for the sole use of posterity, and thus the circumstance of age alone is some evidence; but it has never been suggested to be sufficient of itself.

The reasons judicially advanced may be gathered from the following passages:

1806, *Ellenborough, L. C. J.*, in *Ree v. Rawlings*, 7 East 291: "Ancient deeds proved to have been found amongst deeds and evidences of land may be given in evidence, although the execution of them cannot be proved; and the reason given is, 'that it is hard to prove ancient things, and the finding them in such a place is a presumption that they were fairly and honestly obtained and reserved for use, and are free from suspicion of dishonesty.'"

1840, *Cowen, J.*, in *Northrop v. Wright*, 24 Wend. 221, 228: "When the primary evidence is gone, you resort to what good fortune enables you to lay hold of as a substitute. This is often merely circumstantial."

1847, *Bronson, C. J.*, in *Willson v. Betts*, 4 Den. 201, 213: "The mere fact that the instrument has existed for more than thirty years, unaided by other proofs, cannot be enough to establish it in a Court of justice. . . . Showing that the instrument is thirty years old has no greater tendency to prove it genuine than would the fact that it had existed for a single day. The mere fact of existence, whether the time be long or short, has no tendency whatever, in a legal point of view, to prove the due execution of the instrument. . . . Indeed, when nothing has ever been done [by way of possession] under the deed, the lapse of time tends to discredit it. Courts have not relaxed the rules of evidence in relation to ancient deeds because time alone furnishes any presumption in their favor, but because the lapse of time renders it difficult, and sometimes impossible, to give the usual proof of execution."

The rule itself is simple enough, although the legislative attempts to

¹ 1648, *Anon.*, in *Styles' Pract. Reg.* 175 ("An ancient writing, that is proved to have been found amongst deeds and evidences of land, may be given in evidence to a jury, though the execution of it cannot be proved"); 1666, *Wright v. Sherrard*, 1 Keb. 677 ("An ancient

deed is good evidence, without proving, or seal on it, as [in a case in] 44 Eliz. [1602]"); 1696, *Lynch v. Clerke*, 3 Salk. 154, *Holt, C. J.* ("An old deed is good evidence, without any witness to swear it was executed").

re-declare it have sometimes disfigured its native simplicity.⁹ But there have been controversies over some of its details; and these may now be considered.

§ 2138. *Age; Thirty Years of Existence; Mode of Reckoning.* (1) Since the chief reason for the rule is the impossibility of obtaining living testimony to the signing or to the handwriting, the necessity does not arise until time has made such testimony unavailable. At first, this requirement was satisfied by the simple and indefinite notion that the deed must be "ancient."¹ But a more definite standard naturally became desirable. Since the lack of living witnesses to the document was the justifying fact, since such witnesses might be assumed to have been at least of age at time of execution, they would presumably have disappeared from the scene of life after the lapse of forty or at most fifty years.² Accordingly, the period of forty years came, by the 1700s, to be taken as the time within which a document was treated as "ancient" under this rule.³ But this reckoning was too strict, because the witnesses were more likely to have been mature persons, and therefore at least thirty years of age; and another thirty years would suffice to bring them near the end of their span. It was, since the second half of the 1700s, therefore, the period of thirty years⁴

⁹ Cal. C. C. P. 1872, § 1963, par. 34 (there is a presumption "that a document or writing more than thirty years old is genuine, when the same has been since generally acted upon as genuine by persons having an interest in the question, and its custody has been satisfactorily explained"); § 1942 ("Where, however, evidence is given that the party against whom the writing is offered has at any time admitted its genuineness, no other evidence of execution need be given when the instrument is one mentioned in § 1945, or one produced from the custody of the adverse party and has been acted upon by him as genuine"); § 1945 ("Where a writing is more than thirty years old, the comparisons [of handwriting, allowed under C. C. P. § 1944] may be made with writings purporting to be genuine, and generally respected and acted upon as such by persons having an interest in knowing the fact"); Ga. Code 1895, § 3610 (a deed "more than thirty years old, having the appearance of genuineness on inspection, and coming from the proper custody, if possession has been consistent therewith," is admissible without proof of execution); § 5160 ("conclusive presumptions" are stated to include that of "ancient deeds, and other instruments more than thirty years old, when they come from the proper custody, and possession has been held in accordance with them"; § 5184 ("ancient documents, purporting to be a part of the transaction to which they relate," are admissible); *Mass. C. C. P. 1895*, § 3266, par. 34 (like Cal. C. C. P. § 1963); *N. M. Comp. L. 1897*, § 3030 ("all church records," admissible to show dates of marriage, etc., provided they are, "first, more than thirty years old; second, shall come from the proper custody; and third, shall be examined and inspected by

the Court, and upon such examination and inspection shall be found by the Court to be free from all suspicion of fabrication, alteration, or fraud of any kind"); *N. D. St. 1897*, c. § 3, par. 34 (it is presumed "that a deed or writing more than thirty years old is genuine when the same has been since generally acted upon as genuine by persons having an interest in the question and its custody has been satisfactorily explained"); *Or. C. C. P. 1902*, par. 35 (like Cal. C. C. P. § 1963).

¹ The quotations *ante*, § 2137, note 1, this for the 1600s.

² 1730, Gilbert, *Evidence*, 100 ("for witnesses cannot be supposed to live above twenty years; . . . for the age of a man is not than sixty years, and a man is supposed to be dead twenty years before he is of age sufficient; and therefore since no person living can be supposed to be coeval with such deeds, they may be offered in evidence without proof of execution").

³ 1730, *Benson v. Olive*, Bunbury 2 (supposed deed of 1694 was offered; but "it is sometimes thirty-five or even thirty years been thought sufficient, yet not where it is objected to; but the usual rule is forty years"); 1782, *Clarkson v. Woodhouse*, 3 Doug. 16 (latest of some alleged leases received was 1702 or 1703; one dated 1730 was excluded).

⁴ 1740, *Dean of Ely v. Stewart*, 2 A. (document of copyhold, of thirty years received); 1744, *Omychund v. Barker*, 21, 49, *Hardwick v. L. C.*; 1789, *Buller v. Farrington*, 3 T. R. 466, 471 ("It is an established rule, which holds in the case of every deed, that if it be above thirty years standing, it proves itself"); 1793, *R. v. E. 5 id. 559* (certificate of pauper settlement 1795, *Chelsea Waterworks v. Cowper*, 1 Es.

But there may now be

(1) Since living testimony not arise until requirement was must be "an- nable. Since ing fact, and of age at the om the stage ording, the a time when this reckon- o have been and another span. Ever ty years⁴ has

mination and in- Court to be free on, alteration, or St. 1897, c. 110, that a document is old is genuine is generally acted aying an interest has been satis- C. P. 1892, § 776, 438).

87, note 1, show

100 ("for the o live above forty man is no more supposed to be efficient; . . . living can be sup- deeda, therefore without proof"). Bunbury 280 (a ed; but "though thirty years has ot where it is ob- is forty years"); S Doug. 169 (he received was dated was excluded).

oward, 2 Atk. 44 thirty years ago, v. Barker, 1 id. 89, Buller, J., in 471 ("It is an in the case of ve thirty years' 793, R. v. Byton, per settlement); pper, 1 Esp. 275

sufficed to constitute an "ancient" document; except under some special statutory rules.⁴

(2) It is immaterial that an *attesting witness* is *in fact alive* at the time of trial, or even that he is in court. The rule is for convenience' sake a rule of thumb. Neither the attesting witness need be called nor other usual testi- monial evidence be offered.⁵

(3) The period of thirty years signifies of course the period in which the specific document has been *in existence*. The purporting date is of itself nothing; for anybody may have forged the written date but yesterday. Accordingly this existence of the document thirty years ago must be some- how shown.⁷

(4) The period is to be reckoned backwards from the *time of offering* the deed, not from the time of suit begun or any earlier period;⁸ and, forwards, from the time of existence or purporting *execution* of the document, and not from the time of its taking effect in law (as, in a will, from the death of the testator).⁹

§ 2139. *Natural Custody*. The document, at the time of its original dis- covery, must have been in some place where it would be natural to find a

(bond; Kenyon, L. C. J., "said that all deeds above thirty years' date proved themselves"); 1798, *Marsh v. Collutt*, 3 id. 665 (Yates, J., *ex rel.* Kenyon, L. C. J.).

This period has been accepted in almost every American ruling: 1829, *Waldron v. Tuttle*, 4 N. H. 371, 377; 1848, *Homer v. Cilley*, 14 id. 85, 96; 1868, *Jackson v. Blanshan*, 3 John. 292. Occasionally, traces are seen of the earlier English rule: 1839, *Crane v. Marshall*, 4 Shepl. 37, 29 (a deed more than forty years old, admitted); 1800, *Gittings v. Hall*, 1 H. & J. 14, 18, *semble* ("upwards of thirty-nine or forty years"). Occasionally, also, Courts have inti- mated that they would be satisfied with a shorter period, but these rulings are anomalous: 1858, *Boykin v. Wright*, 11 La. An. 531, 533 (deed twenty-seven years old, admitted on the facts); 1784, *Burke v. Ryan*, 1 Dall. 94 (twenty years, *semble*, but here said of possession accompanying a sheriff's deed); 1814, *Shaller v. Brand*, 6 Binn. 435, 439 (thirty years; here applied to a will); 1823, *McGennis v. Allison*, 10 S. & R. 197, 199 (Duncan, J.: "Thirty years seems the fixed time; a shorter period, twenty-five, perhaps twenty-one, the period of limitation, might be sufficient; but of this I give no opinion").

⁴ These are collected *post*, § 2148.

⁵ The authorities have been considered under the attesting-witness rule, *ante*, § 1511.

⁷ 1764, *Forbes v. Wale*, 1 W. Bl. 582 (a bond bearing the date 1732; objected that "if the length of the date was alone sufficient to estab- lish it, a knave has nothing to do but to forge a bond with a very ancient date"; whereupon Mansfield, L. C. J., "directed the bond to be proved"); 1814, *Yates, J.*, in *Shaller v. Brand*, 6 Binn. 435, 444 ("A paper cannot be read be- cause it is dated back thirty or forty years, or because it carries with it the appearance of

time"). *Accord*: 1853, *Jones v. Morgan*, 13 Ga. 518, 523; 1888, *Pridgen v. Green*, 80 id. 787, 789, 7 S. E. 97 (deed bearing affidavit of the subscribing witness before a justice; age sufficiently shown); 1874, *Whitman v. Hen- derry*, 78 Ill. 109 (kind of evidence sufficient, examined); 1883, *Quinn v. Eagleston*, 108 id. 248, 253 (age of deeds sufficiently proved); 1859, *Fairly v. Fairly*, 38 Miss. 280, 290 (thirty years' existence required; unless thirty years' possession of the property is shown; anomalous doctrine); 1833, *Robinson v. Craig*, 1 Hill S. C. 389 ("I think a jury ought always to be satisfied in some way that it has been in existence for the length of time required").

⁸ 1844, *Man v. Ricketts*, 7 Beav. 93, 101; 1876, *Gardner v. Grannis*, 57 Ga. 539, 554 ("A witness once incompetent may become compe- tent; a document not well authenticated may become better authenticated"); 1899, *Reuter v. Stuckart*, 181 Ill. 529, 54 N. E. 1014; 1883, *Bass v. Sevier*, 58 Tex. 567, 569.

⁹ 1803, *McKenire v. Fraser*, 9 Ves. Jr. 5 (a will thirty years old, the testator dead twenty years ago; Sir W. Grant, V. C.: "I do not see how a will can be distinguished from a deed," yet seemed doubtful; but here, after proof of two witnesses' handwriting, the paper was ad- mitted); 1826, *Doe v. Deakin*, 3 C. & P. 402 (will dated more than thirty years ago, the tes- tator dead less than thirty years, admitted); 1823, *Doe v. Wolley*, 8 B. & C. 22 (will); 1844, *Man v. Ricketts*, 7 Beav. 93, 101 (will). *Contra*: 1808, *Jackson v. Blanshan*, 3 John. 292, 298 (will; but here the doctrine was applied as a part of the rule about possession; *Savage, J.*, *diss.*); 1814, *Shaller v. Brand*, 6 Binn. 435, 439, per *Tilghman, C. J.* (will; holding that the period can begin only after death, because possession is also required).

genuine document of such a tenor as the one in question.¹ A forger can usually not secure the placing of the document in such a custody; and hence the naturalness of its custody, being relevant circumstantially (*ante*, §§ 14, 157), is required in combination with the document's age:

1850, *Eastman, J.*, in *Gibson v. Poor*, 21 N. H. 440, 446: "The reason why it is required that an ancient document shall be produced from the proper depository is thereby credit is given to its genuineness. Were it not for its antiquity, and the presumption that consequently arises that evidence of its execution cannot be obtained, would have to be proved. It is not that any one particular place of deposit can have more virtue in it than another, or make true that which is false; but the fact of its coming from the natural and proper place tends to remove presumptions of fraud and strengthen the belief in its genuineness."

The important feature of this requirement is that *no one custody* is to be esteemed *the* necessary one. All that is required is that it be a natural one:

1836, *Tindal, C. J.*, in *Meath v. Winchester*, 3 Bing. N. C. 183, 200: "It is not necessary that they should be found in the best and most proper place of deposit. If documents continue in such custody, there never would be any question as to their authenticity. But it is when documents are found in other than the proper place of deposit that the investigation commences whether it was reasonable and natural under the circumstances of the particular case to expect that they should have been in the place where they are actually found. For it is obvious that whilst there can be only one place of deposit strictly and absolutely proper, there may be various and many that are reasonable and probable though differing in degree, some being more so, some less. And in those cases the proposition to be determined is whether the actual custody is so reasonably and probably to be accounted for that it impresses the mind with the conviction that the instrument found in such custody must be genuine."

1839, *Coleridge, J.*, in *Doe v. Pearce*, 2 Moo. & Rob. 240: "It is not necessary that the custody from which an ancient document comes should be strictly according to the legal right; it is enough if it be brought from a place of deposit where in the ordinary course of things such a document, if genuine, might reasonably be expected to be found."²

The question is therefore especially one to be left to the determination of the trial Court on the circumstances of the particular case.³ Various phrasings and definitions have been suggested by way of guidance;⁴ but none can be

¹ This requirement seems to have been originally not insisted upon: 1780, *Benson v. Olive*, Bunbury 280 (an alleged deed was old enough, but "Baron Carter objected that the plaintiff should give some account how he came by it; but the Lord Chief Baron said he could not see the use of that, and it would be very inconvenient; . . . the rest of the Barons seemed to be of opinion with the Lord Chief Baron").

² *Accord*: 1843, *Croughton v. Blake*, 12 M. & W. 205, 208 (Parke, B.: "It is not necessary to show that it has come from the most proper custody; it is sufficient if it come from a place where it might reasonably be expected to be found"; admitting ancient tenures); 1845, *Denman, L. C. J.*, in *Doe v. Phillips*, 8 Q. B. 158; 1848, *Wightman, J.*, in *Doe v. Keeling*, 11 id. 884, 889; 1847, *Collier, C. J.*, in *Doe v.*

Elava, 11 Ala. 1023, 1040; 1850, *Eastman, J.*, in *Gibson v. Poor*, 21 N. H. 440, 446.

³ 1848, *Denman, L. C. J.*, in *Doe v. Keeling*, 11 Q. B. 884 ("The [trial] judge is in the situation of a jury; . . . Courts ought to be liberal in this respect. . . . [The question is] whether the learned judge was here so far wrong that he ought to set aside his ruling").

⁴ 1838, *Doe v. Samples*, 3 Nev. & P. 254; A. & E. 161, 164 (whether "the custody was not so improper or improbable as to require proof of the execution of the deed"; "proper custody means . . . the custody of any person so connected with the deed as that his possession of it does not excite any suspicion of fraud"; 1881, *Harlan v. Howard*, 70 Ky. 373 ("produced by those whose custody affords a reasonable presumption of their genuineness").

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garded as fixed.⁵ The general principle is conceded on all hands, and has received varied application according to the facts of each case.⁶

§ 2140. *Unsuspecting Appearance.* A third requirement is that the document must in appearance be unsuspecting. No clear definition of the marks of suspicion which will exclude its use seems to have been agreed upon; but the general notion is conceded:

1877, *Jackson, J.*, in *Hill v. Nisbet*, 58 Ga. 586, 589: "On inspection it must exhibit an honest face; otherwise it is not such an ancient document that its countenance will pass muster. Age will not sanctify ear-marks of fraud."¹

§ 2141. *Possession of the Land for Deeds and Wills.* Whether a fourth requirement is to be made for deeds and wills of land, namely, that the party claiming under the instrument should have been (by himself or his predecessors) in *occupation of the land since the time of the document's purporting execution*, has been the subject of one of the longest and most widespread controversies in the law of evidence. The case in favor of such a requirement has rested partly, it is true, upon misunderstanding of the precedents for a totally different doctrine about possession (*post*, § 2142). But, in the course

⁵ From the present requirement for ancient documents should be distinguished the use of *custody of official records* as evidence of genuineness, *post*, § 2158.

⁶ *England*: 1753, *Jones v. Waller*, 2 E. & Y. 141 (collector of tithes); 1783, *Clarkson v. Woodhouse*, 5 T. R. 412; 1794, *Atkins v. Hatton*, 2 Anstr. 386 (parish terrier); *Miller v. Foster*, ib. 387, note (same); 1795, *Lygon v. Stuart*, ib. 601 (list of a monastery's possessions); 1801, *Earl v. Lewis*, 4 Esp. 1 (documents possessed by a parish rector); 1810, *Swinerton v. Stafford*, 3 Taunt. 91 (a grant of common); 1816, *Bertie v. Beaumont*, 2 Price 303, 307 (receipt for tithe-payments); 1816, *Bullen v. Michel*, 4 Dow 297 (chartularies of abbey-lands); 1817, *Armstrong v. Hewitt*, 4 Price 216, 218 (vicar's books of tithes); 1818, *Randolph v. Gordon*, 5 id. 312, 315 (book of tithe-payments); 1823, *Pulley v. Hilton*, 12 id. 625, 626, 630, 637 (sequestrator's tithe-account); 1828, *Rowe v. Brenton*, 8 B. & C. 737, 747 (extent of a manor); 1829, *Brett v. Beales*, M. & M. 416, 419 (town tax-table); 1836, *Meath v. Winchester*, 3 Bing. N. C. 183, 197, 202 (case stated by a former Bishop for the opinion of counsel, found in a family mansion); 1838, *Doe v. Samples*, 8 A. & E. 151, 3 Nev. & P. 254 (deed of settlement); 1839, *Rees v. Walters*, 3 M. & W. 527, 531 (lease); 1839, *Doe v. Pearce*, 2 Moo. & Rob. 240 (will); 1842, *Doe v. Fulman*, 3 Q. B. 622 (counterpart of a lease, found in the lessor's possession); 1845, *Doe v. Phillips*, 8 id. 158 (deed creating an attendant term, in an attorney's custody); 1846, *Slater v. Hodgson*, 9 id. 727 (bond to indemnify parish officers); 1848, *Doe v. Keeling*, 11 id. 884 (lease); *Canada*: 1835, *R. v. Wilson*, Ber. N. Br. 1 (old plan annexed to a grant); 1873, *Walker v. Bayers*, 9 N. Sc. 270 (old plans in the Crown land-office, rejected on the facts); 1872, *Thompson v. Bennett*, 23 U. C. C. P. 393, 401; *United*

States: 1846, *M'Cleakey v. Leadbetter*, 1 Ga. 551, 558; 1857, *Adams v. Dickson*, 23 id. 406, 410 (marriage settlement); 1817, *Stockbridge v. W. Stockbridge*, 14 Mass. 257, 261 ("in the possession of the party claiming under it"); 1826, *Tolman v. Emerson*, 4 Pick. 160, 163 (book of records of proprietors of common lands); 1896, *Whitman v. Shaw*, 166 Mass. 451, 44 N. E. 333 (old plan); 1850, *Gibson v. Poor*, 21 N. H. 440, 445 (old plan in the town-clerk's records); 1854, *Whitehouse v. Bickford*, 29 id. 471, 480 (old plan in the custody of a corporation's agent, admitted as part of its records); 1892, *Martin v. Bowie*, 37 S. C. 102, 110, 117, 15 S. E. 736; 1886, *Applegate v. Lexington & C. C. M. Co.*, 117 U. S. 255, 261, 6 Sup. 742 (deeds in the county record-office; custody held proper); 1889, *Baeder v. Jennings*, 40 Fed. 199 (deeds); 1896, *Templeton v. Lockett*, 21 C. C. A. 325, 75 Fed. 254 (following *Applegate v. Mini Co.*, and receiving a deed, found in the Texas general land-office, of land in Texas issued on military scrip).

¹ 1726, *Gilbert*, Evidence, 100 ("any blemish in the deed, by rasure or interlineation," makes proof necessary; also, "if the deed imports a fraud; as where a man conveys a reversion to one, and after conveys it to another, and the second purchaser proves his title, there the first deed must be proved"); 1838, *Mayor v. Craven*, 2 Moo. & Rob. 140 (the absence of a seal, on a document purporting to need a seal—here an exemplification—will not be fatal); 1895, *Wisdom v. Reeves*, 110 Ala. 418, 18 So. 13 (discretion of trial Court); 1876, *Gardner v. Grannis*, 57 Ga. 539, 554 ("fair on its face"); 1881, *Harlan v. Howard*, 79 Ky. 373 ("unblemished by any alterations"); 1847, *Green v. Chelsea*, 24 Pick. 71, 76 ("unaccompanied by any circumstances of suspicion").

of speculation, genuine arguments of policy were found for requiring possession under the present principle. The process of thought has thus been somewhat vacillating and elusive.

(1) In *England*, the original foundation for requiring possession seems not to have rested on any element of execution at all. The age and custody of the deed sufficed for the genuineness of execution; but there remained, as necessary elements to give legal effect, either seisin of the land or (in its place) delivery of the deed; and, unless the delivery of the deed could be shown, of course the seisin must be shown.¹ This was intelligible; and it clearly did not look upon possession as having anything to do with genuineness. In the course of time, however, doubts arose, and Chief Baron Gilbert's reasoning was lost sight of. Nevertheless, the doubts seem not to have prevailed; and the English rulings, though they served to introduce the controversy into American courts, appear to have repudiated the necessity of a possession.²

(2) In the *United States*, the controversy appears in the rulings of almost all the older States, and long vacillation is sometimes found, especially in New York. The greater number of Courts seem to have settled, with full certainty, upon the proposition that possession is not necessary as an absolute requirement; but that either this or some other circumstance giving an equivalent inference of genuineness must appear as additional to those of age, appearance, and custody. There are further minor variations in some of the jurisdictions;³ but the general result is represented by these three

¹ 1622, Coke upon Littleton, 6, 8 ("In the case of a charter of feoffment, if all the witnesses to the deed be dead (as no man can keep his witnesses alive, and time weareth out all men), then violent presumption, which stands for a proof, is continually and quiet possession. . . . In ancient charters of feoffment, there was never mention made of the delivery of the deed, or any livery of seisin indorsed, for certainly the witnesses named in the deed were witnesses of both"; it appears from the above that the "violent presumption" raised by possession was of the livery); 1726, Gilbert, Evidence, 101, 102 ("If a deed of feoffment be proved, and the possession has gone along with the deed, there the livery shall be presumed, though it be not proved; . . . but if possession hath not gone along with the deed, then the livery must be proved upon the feoffment; . . . [the Court] cannot conclude there was a lawful conveyance, unless the jury find the delivery of the deed").

² 1764, *Forbes v. Wall*, 1 Esp. 278 (Mansfield, L. C. J., approved an objection to an old bond that "possession or something equivalent" was necessary; afterwards he said that "if proof had been made that the bond had been found among the papers of the deceased," he would have received it; here his "possession" seems to be the "proper custody" of other judges); 1795, *Chelsea Waterworks v. Cowper*, 16. 275 (objection being made to an old bond produced, it was said that as to deeds of land, "there, possession, having gone with the deed, confirmed it"; but Kenyon, L. C. J., "said that all deeds

above thirty years' date proved themselves particularly when, as here, coming from proper custody"); 1817, *Randcliffe v. Parkyn*, 8 Dow 149, 202 (Eldon, L. C., said that the court of law "a will thirty years old, if possession has gone under it, and sometimes without the possession, but always with possession, if the signing is sufficiently recorded, proves itself; but if the signing is not sufficiently recorded, it would be a question whether the age proves its validity; and then possession under the will, and claiming and dealing with the property as if it had passed under the will, would be cogent evidence to prove the will signed, though it should not be recorded"); 1826, *Doe v. Passingham*, 2 C. & P. 440 (the counsel agreed that according to *Randcliffe v. Parkyn*, a will thirty years old, and from proper repository, and accompanied by possession under it, "proves itself"; but the necessity of the latter requirement was denied by *side*, and Burrough, J., approved this denial on the ground that "after the will is read, it can be seen whether the possession of the estate followed the will, but that can hardly be known till it is read"); 1845, *Lord Gosford v. Robtson*, 12 L. R. 217, 219, per Pennycuik, C. (possession necessary).

³ For example: the possession need not be continuous during the whole time since alleged execution: 1871, *Matthews v. Cambridge*, 43 Ga. 346, 351, and other cases; compare 1806, *Jackson v. Blanshan*, 3 John. 292; and the possession of a part of the land suffices: 1

tinot forms, namely, requiring possession absolutely, requiring it alternatively, and not requiring it at all.⁴ The effect of a recording of the deed would serve sometimes to supplant other requirements (*post*, § 2143).

Jackson v. Davis, 5 Cow. 123, 127; 1825, *Jackson v. Laquere*, ib. 221, 227 (by each devise under a will, not necessary); the non-possession of the land by any other person suffices; *Turner v. Tynon*, and other Georgia cases; the possession need not be shown if no evidence about it is attainable; *Harlan v. Howard*, Ky., and other cases; the requirement applies to deeds only, not to wills; *Duncan v. Beard*, and other South Carolina cases.

⁴ *Alabama*: 1847, *Doe v. Elava*, 11 Ala. 1028, 1040 ("If proof of possession cannot be had, the deed may be read, if its genuineness is satisfactorily established by other circumstances"); 1852, *Carter v. Doe*, 21 id. 72, 91 (requiring "enjoyment under it, or other equivalent explanatory proof"); 1853, *Bernstein v. Humes*, 75 id. 241, 244 (ancient deeds received on the facts; no principle laid down); 1854, *Beard v. Ryan*, 78 id. 37, 43, *semble* (required); 1900, *White v. Farris*, 124 id. 461, 27 So. 259 (not required on the facts); *Arkansas*: 1871, *Pay v. Capps*, 27 Ark. 160, 162, 165 (not required); *Connecticut*: 1806, *Mallory v. Aspinwall*, 2 Day 280, 287, 290, 293 (not required); *Georgia*: 1846, *McClekey v. Leadbetter*, 1 Ga. 551, 553 ("early possession and enjoyment" or "modern possession and user" are "desirable"; but if they cannot be had, other circumstances may suffice); 1851, *Beverly v. Burke*, 9 id. 440, 443 (acting on the deed, or taking possession of land by grantees, said to be necessary); 1852, *Jordan v. Cameron*, 12 id. 267, 269 (not clear); 1853, *Jones v. Morgan*, 13 id. 515, 523 (some possession apparently required); 1859, *Bell v. McCawley*, 29 id. 355, 360 (possession assumed necessary); 1860, *Doe v. Roe*, 31 id. 593, 599 (assumed not necessary); 1863, *Webb v. Wilcher*, 33 id. 565, 568 (same); Code 1860, § 2658, Code 1895, § 2610 (admissible, "if possession has been consistent therewith"); 1871, *Mathews v. Castleberry*, 43 Ga. 346, 350 (under the Code, possession need not be continuous); 1871, *Payne v. Ormond*, 44 id. 514, 523 (payment of taxes, and other circumstances, held sufficient on the facts); 1873, *Turner v. Tyson*, 49 id. 165, 168 (suffices if there has been no inconsistent adverse possession); 1876, *Gardner v. Granniss*, 57 id. 559, 555 (necessary perhaps "if the good appearance, the date, and the custody of the paper were all"; but here other circumstances sufficed); 1876, *Thurby v. Myers*, ib. 155, 157 (similar); 1879, *Weitman v. Thiot*, 64 id. 11, 17 (possession apparently not necessary); 1888, *Pridgen v. Green*, 30 id. 737, 739, 7 S. E. 97 (deed bearing affidavit of a witness, received, though without possession, the land having been wild); 1893, *King v. Sears*, 91 id. 577, 586, 18 S. E. 830 (deed of 1852, with possession, received); 1900, *Williamson v. Mosley*, 110 id. 53, 35 S. E. 301 (Code § 2610 applied); *Illinois*: 1858, *Smith v. Rankin*, 30 Ill. 14 (possession probably not necessary; circumstances here not

sufficient); 1899, *Renter v. Stuckart*, 181 id. 529, 54 N. E. 1014 (not necessary for the entire period, if other circumstances exist); *Indiana*: 1822, *Henthorn v. Doe*, 1 Blackf. 157, 162 (possession assumed not necessary); *Kentucky*: 1835, *Ross v. Clore*, 3 Dana Ky. 189, 196 (not clear); 1836, *Bennett v. Runyon*, 4 id. 422, 424 (possession assumed necessary); 1838, *Cook v. Totton*, 6 id. 108 (document admissible, "especially when it has accompanied the possession"); 1839, *Thruston v. Masteron*, 9 id. 228, 233 (possession assumed necessary); 1842, *Taylor v. Cox*, 3 B. Monr. 429, 434 (not clear); 1847, *Winston v. Gwathmey*, 8 id. 19, 20 (clear); 1848, *Bargin v. Chenault*, 9 id. 2 (expressly not decided); 1853, *Dickerson v. Talbot*, 14 id. 60, 69 (not clear); 1854, *Helger v. Ward*, 15 id. 106, 114 (insufficiently recorded deed, received, without possession); 1881, *Harlan v. Howard*, 79 Ky. 373 (not required, at least when not available; since "until the Court is made acquainted with the tenor of the instrument, the natural order of introducing the evidence would be reversed by requiring proof of corresponding possession"); 1901, *Thompson v. R. Co.*, 110 id. 973, 63 S. W. 42 (deed forty years old, accompanied by possession, admitted); *Maryland*: 1800, *Gittings v. Hall*, 1 H. & J. 14, 18, *semble* (possession necessary); 1801, *Carroll v. Norwood*, ib. 167, 174 (same); *Massachusetts*: 1817, *Stockbridge v. W. Stockbridge*, 14 Mass. 257, 261 (admissible, "when the possession of the thing conveyed has followed the conveyance"); 1826, *Tolman v. Emerson*, 4 Pick. 160, 162, *semble* (same); 1847, *Green v. Chelsea*, 24 id. 71, 76 (same); 1900, *Cunningham v. Davis*, 175 Mass. 213, 56 N. E. 2 (not necessary); *Mississippi*: 1858, *Nixon v. Porter*, 34 Miss. 697, 706 (possession, with other things, here held sufficient); 1859, *Fairly v. Fairly*, 38 id. 280, 290 (possession not necessary, if the deed is shown to have existed for thirty years; a peculiar doctrine, apparently based on a misunderstanding of the precedents); *Missouri*: 1872, *Crispen v. Hannavan*, 50 Mo. 415, 418 (age not sufficient; it must "be otherwise accounted for" or proper custody shown); 1872, *Ryder v. Fash*, ib. 476 (possession of document for thirty years, and payment of taxes, here held sufficient); 1873, *Wheeler v. Standley*, ib. 508 (similar); 1874, *Shaw v. Pershing*, 57 id. 416, 421 (custody of deed and payment of taxes, sufficient, no one being in possession of the land); 1885, *Long v. McDow*, 87 id. 197, 201 (possession not necessary, if evidence of it is unavailable); *New Hampshire*: 1828, *Waldron v. Tuttle*, 4 N. H. 371, 377 (possession necessary); 1843, *Homer v. Alley*, 14 id. 85, 93 (same); *New Jersey*: 1856, *Osborne v. Tunis*, 25 N. J. L. 633, 663 (possession "or other collateral proof," required); *New York*: 1803, *Jackson v. Laroway*, 3 John. Cas. 283, 286 (admissible "where no possession has accompanied

The policy of thus requiring possession as a fourth circumstance (additional to age, appearance, and custody), and the probative importance of that circum-

it, if such account be given of the deed as may be reasonably expected under all the circumstances of the case and will afford the presumption that it is genuine"; Kent, J., *dis.*; 1804, Jackson v. Bradt, 2 Cal. 169, 174 (possession assumed necessary, per Kent, J.); 1808, Jackson v. Blanshan, 3 John. 292, 296 (possession necessary; Kent, C. J.; "It is the accompanying possession alone which establishes the presumption of authenticity in an ancient deed"; Savage, J., dissented as to the time of possession only); 1812, Doe v. Phelps, 9 id. 169 (possession assumed necessary); 1813, Doe v. Henry, 10 id. 475, 477 (preceding case approved); 1825, Jackson v. Davis, 5 Cow. 123, 127 (possession necessary); 1825, Jackson v. Luquere, *ib.* 221, 225 (same; applied to a will; yet "where no possession appears, other circumstances are admitted to account for it"; Jackson v. Laroway approved); 1827, Jackson v. Lamb, 7 id. 431, *semble* (possession required); 1830, Jackson v. Christman, 4 Wend. 278, 282, *semble* (same); 1831, Hewlett v. Cock, 7 id. 371 (going back to Laroway's case; "either possession or other circumstances, i. e. proper custody and fair appearance, must be shown"); 1832, Jackson v. Chamberlain, 8 id. 620, 621, *semble* (same); 1834, Fetherly v. Waggoner, 11 id. 599, 602 (custody and regular appearance sufficient; here of a will); 1840, Northrop v. Wright, 24 id. 221, 223 (a will from the proper registry received; possession not necessary); on app. s. c. 7 Hill 476, 485 (possession apparently held necessary; the same will held not receivable); 1847, Willson v. Betts, 4 Den. 201, 213 ("It now seems to be settled that other facts besides possession may be sufficient to raise the presumption that the deed is genuine"; approving Jackson v. Luquere); 1855, Clark v. Owens, 18 N. Y. 434, 438 (either possession or "other circumstances" suffice; here a deed); 1859, Hunt v. Johnson, 19 id. 279, 285 (ancient field-notes, produced from the town records, received); 1864, Enders v. Sternbergh, 40 id. (Keyes) 264, 268 (possession not necessary, if "such an account of it be given as may under the circumstances be reasonably expected and will afford the presumption that it is genuine"; here said of a will); 1869, Enders v. Sternbergh, 2 Abb. App. Civ. 31 ("possession or other circumstances" suffice; "it was never absolutely indispensable that possession . . . should be shown"); 1890, Singer v. Merritt, 120 N. Y. 109, 114, 24 N. E. 393 (town records of 1792, granting land, admitted as genuine, the custody being proper and no suspicion of non-genuineness being raised; none of the preceding cases are cited; perhaps decided on the principle of § 2158, *post*); *Pennsylvania*: 1811, Garwood v. Dennis, 4 Binn. 314, 326 ("possession is a circumstance of great importance"); 1814, Shaller v. Brand, 6 id. 455, 459, 444 (Tilghman, C. J.; "Although the antiquity of the writing affords some evidence in its favor, yet the main ingredient is possession. Both, however, are necessary"; here, of

a will); 1833, McGennis v. Allison, 10 S. & R. 197, 199 (Duncan, J.; "It is the accompanying possession which establishes the authenticity of an ancient deed"); 1829, Arnold v. Gorr, Rawle 223, 226 (same); St. 1841, Pub. L. 104 § 2, P. & L. Dig. Deeds 93 (certain old unrecorded deeds, to be provable if "the actual possession of the land has accompanied the deed"); 1846, Williams v. Hillegas, 5 Pa. 8 492, 494 ("In Pennsylvania the leaning of the determinations is in favor of the more rigid rule [requiring possession] . . . still I think the precise point has never been expressly decided with us in a case necessarily calling for it"; left undecided, but payment of taxes upon wild land held equivalent to possession); 1867, Bower v. Cravener, 56 id. 182, 142 (it "in some circumstances proves itself; certainly it does so where there is possession under it"); 1870, Walker v. Walker, 67 id. 185, 193 ("Where proof of possession cannot be had, the deed may be read as evidence if its genuineness is satisfactorily established by other circumstances"; here the living on the land with the owner as manager for him, the partial evidence of signatures, etc., was held sufficient); *South Carolina*: 1791, Thompson v. Bullock, 1 Bay 364 ("some reasonable proof of possession" required); 1819, Middleton v. Mass, 1 N. & McC. 56 (possession necessary; but intimating that the rule applied to deeds only); 1820, Duncan v. Beard, 2 400, 406 (possession necessary; but, *semble*, held applicable to deeds only, and doubted as to wills; where not applicable, it is enough "they be found in the place in which they should be deposited in pursuance of their object"); 1827, Sims v. DeGraffenreid, 4 McC. 253 (possession required, for a deed); 1833, Robinson v. Craig, 1 Hill 339 ("If there are other circumstances which exempt it from suspicion, . . . with no inconsistent possession in the meantime, . . . slight evidence of possession, of recent date, might be sufficient"); 1838, Wagner v. Aiton, Rice 100, 106, *semble* (possession necessary, but not for the whole of time); 1840, Edmonston v. Hughes, Cheves 83 (possession "or other circumstances accompanying them and showing their authenticity" required; here, recording, and the written handwriting thus sufficed); 1842, Eubank v. Harris, 1 Speer 183, 191, *semble* (possession necessary); 1844, Swygert v. Taylor, 1 Rich. 54, 56 (possession "not indispensably necessary"; proper custody in a registry would suffice; the opinion is useless, however, because it treats these facts as simply evidence to show the document's age, — a fallacy pointed out by Wardlaw, J., *dis.*); 1853, Brown v. Wood, Rich. Eq. 155, 164 (old deed received, the not from natural custody and not accompanied by possession; but one of the witnesses swore it before the Recorder, and the hands of all proved); 1880, Thompson v. Brannon, 14 542, 550 (possession apparently held unnecessary, citing four of the above cases); *Texas*

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stance, may be indicated by a single question: If this document can be shown to have been in existence for thirty years, and therefore presumably to have been known to the parties benefiting by its provisions, why have they not acted upon its provisions during all this time, either by taking possession of the land granted or at least by bringing suit to dispossess the usurpers if any? The argument from the implied answer to this question has been the chief persuading one for those judges who have attempted to establish the rule upon a basis of reason:

1811, *Tilghman, C. J.*, in *Garwood v. Dennis*, 4 Blinn. 314, 327: "If the deed had not been executed, it is to be presumed that the persons entitled to the land would not have suffered the possession to remain out of them. But where possession has not gone along with the deed, the presumption is against it; because, if the deed is genuine, it is difficult to account for the want of possession."

1819, *Johnson, J.*, in *Middleton v. Mass*, 1 N. & McC. 56: "The only reason which I have seen in opposition to it . . . is because old things are hard to be proved. Now, if this be a good reason, it operates with a twofold force on the opposite side of the question; for it is certainly more difficult, to say the least of it, to disprove an old thing than to prove it, especially when in most cases the party would be called on to do so without notice of its antiquity or the necessity of doing it. . . . No such indulgence [as to presume due execution] is due to him who, as in the present case, neglects for almost a century to assert his claim by one single act of ownership. The doctrine contended for on the part of the motion might in its consequences be productive of incalculable mischiefs; for, although it is not now usual to enter upon a course of villainy the fruits of which are not to be reaped for thirty years to come, yet establish the rule contended for, and it opens the door, and many will no doubt find an easy entry."

But there is a weakness in this argument. In the first place, it is in its nature an argument in rebuttal; it ought to come from the opponent of the deed. An inference is sought to be drawn from non-possession by the claim-

1806, *Stroud v. Springfield*, 23 Tex. 649, 663 (when possession cannot be had, other circumstances may suffice); 1878, *Gainer v. Cotton*, 49 A. 101, 118 (not decided); 1878, *Johnson v. Simmons*, 50 id. 521, 534, *semble* (possession not necessary); 1879, *Hollis v. Dashiell*, 53 id. 187, 194 (not decided); 1883, *Holmes v. Coryell*, 58 id. 680, 688 (possession not required); *United States*: 1819, *Barr v. Gratz*, 3 Wheat. 213, 221 (possession not required); 1830, *Watson v. Coulson*, 1 McLean 120, 124 (assertion of s claim, without possession, here held sufficient); 1831, *Clarke v. Courtney*, 5 Pet. 319, 344 (possession assumed necessary); 1886, *Applegate v. Lexington & C. C. M. Co.*, 117 U. S. 255, 263, 6 Sup. 742 (admissible "if either possession under it is shown, or some other corroborative evidence of its authenticity, freeing it from all just grounds of suspicion"; deed-record in the proper office, with other circumstances, held sufficient); 1902, *Hodge v. Palma*, 54 C. C. A. 570, 117 Fed. 396 (possession not indispensable); *Vermont*: 1850, *Williams v. Hans*, 22 Vt. 353, 355 ("At the present time the balance of authority seems to be the other way [against requiring possession], and that the presumption may be raised when sufficiently corroborated by other circum-

stances"; here nothing else appeared, the question being whether a missing seal could be presumed); 1856, *Colchester v. Culver*, 29 id. 111, 113 (preceding case approved; but here in a similar case the fact of a preceding contract to convey sufficed to admit); 1859, *Townsend v. Downer*, 32 id. 183, 199, 213 (necessity of possession, not clear); *Virginia*: 1811, *Roberts v. Stanton*, 2 Munf. 129, 135, *semble* (possession necessary); 1824, *Ben v. Peete*, 2 Rand. 589, 543 (same); 1842, *Dishazer v. Maitland*, 12 Leigh 524, 529 (same); 1848, *Shanks v. Lancaster*, 5 Gratt. 110, 116, *semble* (same); 1855, *Caruthers v. Eldridge*, 12 id. 670, 686 (possession not essential; "other evidences . . . equally capable of producing the same degree of belief," sufficient; careful examination of authorities and final settlement); 1831, *Nowlin v. Burwell*, 75 Va. 551, 553 (possession not indispensable; preceding case followed; several other circumstances here held sufficient on the facts); the following statute should perhaps be classed here: Code 1887, § 3377 (certain papers required to be filed in certain public offices before April 10, 1865; on probable destruction shown, actual exercise of right or franchise to be *prima facie* evidence of filing of papers).

ant; and it would therefore seem to be more properly a part of the opponent's case to show that non-possession as the foundation for his inference. This is especially true where (as often happens) no evidence one way or the other as to the possession is available; for then the burden of not being able to prove would fall justly on the opponent. In the next place, the inference is not always a legitimate one; the deed or will may have been in existence but its contents unknown to the beneficiaries under it; or circumstances may have prevented their acting upon it; or some other explanation may be available. Instead of making possession, therefore, an invariable requirement, it would seem better to lay down no fixed rule, but to let the circumstances of each case indicate whether there is any additional corroboration of genuineness:

1855, *Daniel, J., in Caruthers v. Eldridge*, 12 Gratt. 670, 687: "A presumption may be the result of a single circumstance or of many circumstances. Why say that in the case of an ancient deed there must be a departure from the general rule in respect to presumptions, and that its authenticity may be presumed from the single circumstance of possession, but may not be presumed from other circumstances the existence of which is equally inconsistent with any other hypothesis than that of the genuineness of the instrument? The direct evidences, the positive proofs by which the execution of a deed is established, being no longer attainable, and the rule which requires their production being dispensed with, it seems to me wholly at war with the spirit of the law, which under such exigency allows a resort to circumstantial or presumptive evidence, to hold that a corresponding possession shall be the only evidence from which the authenticity of the deed may be presumed."

This result, accepted by the greater number of Courts, seems to avoid rigid technicality, while amply protecting against fraud.

§ 2142. *Same: Doctrine of Inferred Possession under Leases, distinguished.* It so happens that there is a doctrine of Relevancy by which an inference is drawn precisely the reverse of the present one may under certain circumstances be drawn. Instead of inferring, as here, the execution of a document from possession of the land, the possession of land may be inferred from the execution of the document (*ante*, § 157). Naturally enough, the precedents under the latter principle (which are almost exclusively English ones) have sometimes been misused by our own Courts in dealing with the present principle. The superficial features and the terms of discussion have much in common, but the principles are wholly unconnected, and it is necessary to note the practical distinctions.

(a) When Doe claims title by prescription against J. S., Doe may rest on long possession under claim of title, and, for showing this, may prove actual occupation under claim by ancestors or other predecessors. In so doing he may produce a lease or a license to the land in question by the ancestors. The question then arises whether the mere act of execution of the lease suffices, with nothing more, to evidence that occupation. Such an act is clearly a claim of title, but that is not enough in the substantive law; there must be accompanying possession. Now, may not possession be inferred from the

of execution? Or must there be, additionally, express evidence of possession of the land by the lessor or lessee? For ancient matters this would be often impossible. Hence, it has been settled, by a long line of decisions in England, that an ancient lease or license, otherwise proved genuine, may serve as an act of exercise of possession under claim, the possession being supplied by inference from the act of execution; since (in the words of Lord Blackburn) "men do not generally execute leases unless they are in possession" (*ante*, § 157).

(b) Under the present principle, on the contrary, the whole situation of the parties, the nature of the documents, and the inference to be drawn, are different. Suppose, as before, Doe to be claiming by prescription against J. S.; and suppose J. S. to set up a title by grant. J. S. produces an ancient deed or will from Roe to J. S.'s ancestor; the question arises whether the document is genuine. J. S. proves its age, custody, and fair appearance; must he also prove possession by his ancestor under J.'s grant? That is the question just examined (*ante*, § 2141).

It is obvious that the two principles are so distinct that they cannot come up for application in the same connection, the marks of difference being as follows: (1) In (a), the genuineness of execution of the document is assumed somehow to be settled, in (b), that is the question at issue; (2) in (a), the document is supposed to be made by the offeror's predecessor, granting out a temporary part of his estate; in (b) it is supposed to have been made to the predecessor, by which he receives an estate; (3) in (a), the document purports to be a lease or license, in (b), a deed or will; (4) in (a), the predecessor does not claim title under the document, but only under prescriptive possession, in (b), he does claim title under it as grantee; (5), in (a) the possession which it is objected ought to be proved is the lessor's possession, by himself or by his lessee, in (b) it is the grantee's possession. It is apparent, therefore, that there is no connection between the principles, and that the precedents cannot be used in any way interchangeably. It may also be added, not only that the lines of precedents have been kept separate in England, but furthermore that the English rulings under (a) *supra* assume in effect the negative of the possession-doctrine under (b); since if the ancient leases were allowed to be used as themselves evidence of possession by the lessor, obviously the Court could not have required proof of possession as a preliminary (additional to age and custody) to presume them genuine; for if it had, the very question decided by the Court could never have arisen.

§ 2143. *Old Recorded Deeds and Old Copies.* The use of a copy of an old deed, instead of the original, raises two or three questions somewhat different in their bearings; the significance, moreover, of the circumstance that an old original deed offered has been recorded is connected with the question of record-copies; and the two sets of questions may best be considered together. It may be assumed at the outset, that the general principle (*ante*, § 1192) requiring the original to be produced or else accounted for as lost or the like, has been satisfied; because, if it is not, a copy is of

course inadmissible on grounds irrespective of the present question.¹ It is further to be kept in mind that, by statute or otherwise, the official record (a copy therefrom) of a lawfully recorded deed, the original having been counted for or dispensed with (*ante*, §§ 1224-1226), is receivable to prove the execution and contents of the original (*ante*, §§ 1648-1649), but that the rule does not enable us to use an unauthorized record. Thus, when the record is unauthorized, some other mode of proving the deed must be resorted to; and the question will arise how far the present ancient-document rule can serve the purpose. With these principles in mind, the various situations may be distinguished into four: (1) an alleged ancient original lost; contents testified to orally, or copy proved, by a competent witness on oath; (2) an alleged ancient original lost; an alleged ancient non-official copy offered; (3) an alleged ancient original lost; an alleged official record copy offered, though not made in pursuance of law; (4) an ancient original produced; the official record, not made in pursuance of law, offered in corroboration.

(1) Where the alleged ancient *original* is lost, and proof of its contents (including the purporting signatures) is offered to be made by one who, having seen it before its loss, recollects its contents or took a copy, the difficulty in assuming genuineness is that the third element, of unsuspicious appearance (*ante*, § 2140), can never be furnished, since the original is lacking; perhaps also the second, that of natural custody (*ante*, § 2139), will usually also be lacking. It may be said to be doubtful, therefore, whether a Court would consider the rule as satisfied.² Nevertheless, this of course is not because the general rule (*ante*, § 1192) requiring an original's production (for the rule excuses production of a lost original), but only because an important circumstance (namely, unsuspicious appearance) evidencing genuineness cannot be furnished. The lack of it might perhaps be dispensed with, by reason of necessity; but at any rate, if in place of this circumstance some other confirming circumstance can be furnished, it would seem that the absence of the original need be no fatal defect. Such a circumstance seems to be presented in the following two situations.

(2) Where the alleged ancient *original* is lost, and an *ancient purporting copy* is offered, made by a private hand, and the purporting maker being

¹ 1882, *Dotson v. Moss*, 53 Tex. 152, 154 (excluding a land-office copy of an old grant there belonging). Distinguish the odd rule of the following case, which is apparently designed merely to exempt from accounting for the original under the peculiar New England rule (*ante*, § 1224): 1897, *New York, N. H. & H. R. R. Co. v. Benedict*, 169 Mass. 262, 47 N. E. 1027 ("an office copy of an ancient [lawfully] recorded deed" is admissible).

² 1841 *Doe v. Stiles*, 1 Kerr N. Br. 328, 246 (doubted whether the presumption applies unless the document itself is produced); 1853, *Bryan v. Walton*, 14 Ga. 186, 188, 196 (lost will dated 1812, offered by testimony to contents; an objection that "it must itself be

present to establish its presumed proper execution and probate," sustained on the authority of *Jones v. Morgan*, 4 N. H. 4, and also because the copy ought to be established by a special proceeding to establish lost documents).

Of course where the witness to contents is competent to verify the lost signatures and does this furnishes ample proof of the ordinary rule to execution, and the copy can be used independent of the deed's antiquity: 1874, *Shaw v. Perahing*, 57 Mo. 416, 421 (examined copy allowed, the witnesses' handwriting being proved); 1835, *Winn v. Patterson*, 9 Pet. 663, 675 (power of attorney, now lost, proved by a witness who had seen the signature; record of it admitted).

known or deceased, it seems to have been long accepted that this suffices, and that the copy may be received under the ancient-document rule:

1736, Chief Baron *Gilbert*, Evidence, 97: "Where the possession has gone along with any deed for many years, there a very old copy of the deed may be given in evidence, with proof also that the original is lost; and that is according to the rule of the civil law, *et vetustate temporis et judicialis cognitione sint roborata*; for possession could not be supposed to go along in the same manner unless there had been originally such a deed and so executed as the copy mentions." :

(3) Where the alleged ancient *original* is lost (or otherwise unavailable), and a purporting *official record* is offered, made more than thirty years before, and certifying the deed's contents and execution, but inadmissible as an official record (*ante*, §§ 1643-1649), because not made in accordance with statutory provisions, may not this ancient record-copy serve as sufficient evidence of genuineness? It is apparent that the case is not only as strong as the preceding one, but is stronger in two respects, namely, the defects of the record are in a measure technical only and it still is entitled to some consideration as an official statement, and the long publicity of it has given ample opportunity for correction and opposition if any just ground existed for doubting the original's authenticity. Accordingly, there has been a general disposition, on one ground or another, to accept such an ancient record, though otherwise inadmissible, as sufficient, after the lapse of time:

1736, Chief Baron *Gilbert*, Evidence, 99 (after stating that an unauthorized enrolment or *inspeximus* is in general not receivable): "But the *inspeximus* on an ancient deed may be given in evidence, though the deed needs no enrolment; for an ancient deed may be easily supposed to be worn out or lost, and the offering the *inspeximus* in evidence induces no suspicion that the deed is doubtful, for it hath a sanction from antiquity, and if it had been ill executed, it must be supposed to be detected when it was newly made."

1850, *Eastman, J.*, in *Gibson v. Poor*, 3 N. H. 440, 447 (holding admissible a copy of an ancient official survey): "Ancient plans must at some time become worn out by age and use, and the necessity of the case seems to require that their place be supplied by copies. After these copies have been kept among the records, and used by the inhabitants a

³ *Accord*: 1705, *Anon.*, 6 Mod. 335 ("All the Court held that the counterpart of an ancient deed which might be lost was good evidence with other circumstances, but not of itself without other circumstances," except for a deed accompanying a fine); 1726, *Gilbert*, Evidence, 23 ("Where a record is lost, . . . the copy must be admitted without swearing any examination concerning it; since there is nothing with which the copy can be compared, and therefore it must be presumed true without examination. But . . . they must be *vetustate temporis judicialis cognitione roborata*"); 1867, *Buller*, *Trials at Nisi Prius*, 254 (like *Gilbert*, as quoted in the text); 1816, *Bullen v. Michel*, 4 Dow 297, 321, 333 (transcriptions in ancient abbey-books of instruments affecting land, admitted, the originals being lost; Lord Redesdale: "This appears to be the best evidence after the originals"; L. C. Eldon: "The entry appears to be a transcript of the original instrument, and within the scope and principle of all

the authorities ought to be received as evidence"); 1858, *Songster v. Payzant*, 3 N. Sc. 408 (certain copies of plans, acted on, held admissible on proof of loss of the original). *Contra*: 1901, *Hamilton v. Smith*, 74 Conn. 374, 50 Atl. 834 (map by one H., dated 1836, copied in 1891, and destroyed in 1892; the copy held not admissible under the rule of ancient documents).

This result might be justified on the following grounds: The purporting copy, being ancient, may be presumed genuine, i. e. to be a correct copy of a once existing original; since, then, the ancient correct copy has been treated and acted upon precisely as the original would have been, it should have the benefit of the rule which would have applied to the original; the elements of unsuspicious appearance and the like, being duly supplied.

Compare here the general doctrine excluding ordinary *hearsay copies* (*ante*, § 1281); and the doctrine admitting *recitals in an ancient deed* of the contents of a prior deed (*ante*, § 1573).

sufficient number of years to raise the ordinary presumption of genuineness, can not be used as substitutes for the originals, without resorting to proof of being true scripts, if the originals cannot be found or have become defaced and unintelligible by age. If the originals should be lost, there would be no doubt of the competency of the copies as secondary evidence; and the reason would seem to be quite as cogent for the admission of copies after the originals had become defaced by age and use."

1863, *Stayton, J.*, in *Holmes v. Coryell*, 58 Tex. 680, 686 (admitting a copy of a record of 1843, the record not being usable as an official registry under the terms of the statute): "The fact that it was recorded raises a presumption that it was delivered. The record made in 1843 evidences with more certainty than the original deed would if produced that the deed was more than thirty years old; for skilful indeed would be the detection of a record book which could not be detected. It comes free from suspicion on any just ground, with strong facts corroborative of its genuineness. . . . [After mentioning in detail the facts of payment of taxes, etc., as corroborating.] the certified copy of the deed, coming surrounded with such facts, was properly admitted in evidence, for under the common-law rules of evidence the deed would prove itself."

This conclusion has been usually accepted. The rulings to the contrary seem rarely, if ever, to have gone upon any supposition that the ancient document rule was in itself impossible to apply to a copy, but rather upon the lack of confirming circumstances in the case in hand. Moreover, the fact of possession of the land, as a confirming circumstance, seems often to have been insisted upon, irrespective of its general requirement (*ante*, § 2142). It may be added that the analogies of the presumption of regularity in official transactions (*post*, § 2534), as well as of the presumption of a lost grant (*post*, § 2522), may be traced in some of the rulings.⁴ In a few jurisdictions

⁴ *England*: 1675, *Green v. Proude*, 1 Mod. 117 (an exemplification of a recovery being offered, the original being ancient and burned in the wars, no proof of authenticity was required); 1773, *Ludlam's Will*, Loft 362 (will of land of an ancestor of the previous century, now lost, and offered by copy of the spiritual Court's record, objected to because "the hand and seal of that Court is not the proper evidence to prove the authenticity of a will by copy"; but admitted as the best evidence); 1843, *Doe v. Turnbull*, 5 W. C. Q. B. 129, 131 (a "memorial," or recorded-copy, of a lost ancient deed, admitted; the acknowledgment for record suffices as against the party acknowledging, without other proof of execution; but this limitation, as to using it against the party only, is unsound, as may be seen *ante*, § 1650); *United States: Ala.*: 1844, *Beall v. Doering*, 7 Ala. 124, 127 (unlawfully recorded old deed, lost; record held, on the facts, to be sufficient evidence of deed's existence to go to the jury); 1866, *White v. Hutchings*, 40 id. 253, 257 (record more than 20 years old in the proper office, but not showing due probate, admissible on the presumption that execution was legally proved for record, if the original is lost; no possession need be shown); 1885, *England v. Hatch*, 80 id. 247, 249 (preceding principle affirmed; but here a record less than 20 years old was excluded); 1888, *Allison v. Little*, 85 id. 512, 516, 5 So. 221 (principle affirmed);

Ark.: 1856, *Trammell v. Thurnmond*, 17 Ark. 219 (certified copy of an old unauthorized record of deed; the original deed was lost, though each a record might with corroborative circumstances have been used "as a link in the chain," it was here excluded, such circumstances being lacking); *Ga.*: 1853, *Jones v. M.*, 13 Ga. 515, 523 (defective record in 1823 deed dated 1820; insufficient on the facts, chiefly because the old deed could not be proved to exist until 1827, less than 30 years before); 1865, *Patterson v. Collier*, 75 id. 426 (old record, if not usable as statutory evidence of execution of the lost original, but of affidavit of forgery, is not usable as evidence of execution); *Ill.*: 1847, *Bradley v. Lightcap*, 201 Ill. 511, 66 N. 447 (certified copy of a deed, recorded more than thirty years, but not duly acknowledged, admitted); *La.*: 1866, *Boykin v. Wright*, 18 La. 531, 533 (ancient record-copy of a lost deed, apparently not legally registered, admitted); *N. H.*: 1850, *Gibson v. Poor*, 21 N. H. 447 (quoted *supra*); *Oh.*: 1827, *Allen v. Allen*, 8 Oh. 107, 112 (old unauthorized notarial record of lost deed, admitted, "after a sufficient foundation had been laid from which to infer its genuineness"); 1847, *Webster v. Harris*, 10 id. 499 (certified copy of a record of 1805, of a deed purporting to be of 1804, admitted on the facts, in good opinion by Birchard, C. J.); *Tex.*: 1863, *Holmes v. Coryell*, 58 Tex. 680, 686 (

the problem has been solved by statutes, applicable to specific kinds of deeds and defining various shorter periods of anti-quity.⁸

supra; old record-copy admitted); 1822, *Belcher v. Fox*, 60 id. 527, 530 (similar; but only with strong corroborative evidence); 1827, *Brown v. Simpson*, 67 id. 325, 331, 3 S. W. 644 (similar; provided the recording is shown to have been ancient); 1827, *Shifflet v. Moralle*, 68 id. 382, 385, 390, 4 S. W. 843 (bond for title; unauthorized record-copy of 1827, excluded; "it stands like any other unauthorized copy"; yet "if the clerk had been living and had made the record, he could have testified to it"; preceding cases not cited, and ancient-document rule not considered); 1830, *Hill v. Taylor*, 77 id. 235, 239, 14 S. W. 366 (unauthorized record-copy of 1842, the original deed being lost; excluded because the original was not sufficiently shown to be lost; preceding cases not cited); *U. S.*: 1826, *Stokes v. Dawes*, 4 Mason 263, *Story*, J. (office copy of deed recorded in 1765, admitted without other proof of execution); 1829, *Header v. Jennings*, 40 Fed. 199 (old unauthorized record, admitted); 1892, *Van Gunden v. V. C. & I. Co.*, 3 C. C. A. 394, 53 Fed. 333, 8 U. S. App. 239, 251 (certified copy of old record of deed, recorded too late and in the wrong county, received in corroboration of other evidence); *Pt.*: 1859, *Townsend v. Downer*, 32 Vt. 183, 211 (old record copy of a deed, the record not being lawful and therefore not sufficient *per se*; possession, together with this recorded copy, sufficient).

It must be remembered that, although what is actually offered is a copy recently taken from the record, yet this copy merely proves the record (*ante*, § 1655), so that the real question is, after all, whether the record is sufficient evidence.

Some of these statutes seem equally to sanction the use of the record when the original is produced, thus covering also the case of the next paragraph of the text above; comparison should also be made with the respective recording-statutes (*ante*, §§ 1225, 1651): *Ont. Rev. St.* 1897, c. 124, § 2 (contracts for sale of land; grantor's recorded memorial twenty years old, admissible; quoted *ante*, § 1225); 1877, *R. v. Guthrie*, 41 U. C. Q. B. 148 (memorial over thirty years old, executed by the grantor, held admissible); 1881, *Allan v. McTavish*, 28 Grant U. C. 539, 546, 8 Ont. App. 440, 444 (mortgage more than twenty years old, presumed genuine under the statute); 1883, *Van Velsor v. Hughson*, 9 Ont. App. 390, 397 (memorial over sixty years old, but executed by the grantee, and without proper possession, not admitted; *Gough v. McBride* approved); 1884, *Mulholland v. Harman*, 6 Ont. 546, 561 (memorial by the grantee, not admitted where possession had not followed the deed); 1888, *McDonald v. McDonnell*, 16 id. 401 (memorial of a will, twenty years old, executed by a devisee, with consistent possession, held sufficient); *Ind. Rev. St.* 1897, § 3435 (a certified record-copy of certain deeds executed more than twenty years before the date of this act [Feb. 23, 1857] and recorded in the

wrong county, is receivable); *Miss. St.* 1901, c. 116 (document purporting to be a certified copy of a record in another State of a deed of land in this State, when "actually recorded" for twenty years before this act in this State; the record or a certified copy shall be evidence "of the contents of the original deed," and have such force as a record of the original in this State would have had); *N. J. Gen. St.* 1896, *Conveyances*, § 3 (where a deed has stood on record for thirty years, the record, if corroborated, before or after reading in evidence, by "ancient or modern corresponding enjoyment or other equivalent or explanatory proof," shall "be as good evidence and have the same force and effect" as the original if produced); § 102 (copy of a deed recorded for twenty years elsewhere in U. S. may be recorded, and a certified copy used as if an original had been recorded); *St.* 1898, c. 232, §§ 57, 58 (deeds recorded more than ten years after date of acknowledgment, and certain ancient deeds; a certified copy may be used if the original "has been destroyed, lost, or taken out of the office" of the proper clerk); § 64 (deeds defectively acknowledged, if recorded more than six years, may be received in evidence, either by original or by certified copy, without other proof, if "corroborated by evidence of corresponding enjoyment or other equivalent or explanatory proof"); § 68 (certified copy of record of exemplified copy of deed recorded out of the State more than twenty years, admissible though defectively acknowledged); *Pn. St.* 1851, *Pub. L.* 661, § 1, *St.* 1852, *Pub. L.* 645, § 4 (deeds of lands within the State, purporting to be executed, etc., but not as required by law, and recorded; record receivable if recorded for thirty years before the act's date and accompanied by possession); *Tenn. Code* 1896, § 3761 ("Whenever a deed has been registered twenty years or more, the same shall be presumed to have been upon lawful authority"); 1899, *Perry v. Clift*, — *Tenn. Ch.* —, 54 S. W. 121 (statute applied); *Wis. St.* 1891, c. 228, *Stats.* 1898, § 2216 b (certain specified documents, otherwise defectively acknowledged, etc., to be admissible if recorded for twenty years, and to be provable by the record or a certified copy); 1897, *Gratz v. Land & R. I. Co.*, 27 C. C. A. 305, 52 Fed. 351 (*Wisconsin* statute applied to a bill to quiet an action begun before its enactment).

In *Missouri*, a series of statutes must be collated in order to ascertain the law: *Rev. St.* 1899, § 3113, formerly § 4559 (a deed duly acknowledged or proved and recorded according to the law then in force, "though not declared by such law to be evidence," shall be received if appearing to have been duly recorded within one year after date and more than twenty years before the time of offering); § 3114, formerly § 4860 (such a recorded deed, though "not recorded within one year after date nor twenty years before it is offered, may be read in evidence upon proof of such facts and circumstances as, to-

(4) When the *original* is produced, and also an official record of it, more than thirty years before, but inadmissible of itself as an official record of execution because it was not made in accordance with statutory provisions (*ante*, § 1648), the record may nevertheless be treated as a corroborative circumstance in lieu of possession of the land.⁹

§ 2144. *Authority to Execute.* Whether the circumstances of age, time, and the like will suffice as evidence not only of genuineness of execution by the person purporting to execute, but also, when he purports only as agent for another, of the existence of due *authority to execute* given by that other, has been a matter of some difference of judicial opinion. The general consensus is that a mere authority as agent or attorney will be presumed to have existed.¹ Any other result would practically nullify the utility of the whole doctrine in its application to such instruments,

together with the certificate of acknowledgment or proof, shall satisfy the Court that the person who executed the instrument is the person therein named as grantor"; § 2115, formerly § 4861 (when the original of such a deed "has been lost or destroyed, or is not in the power of the party who wishes to use it," a certified copy of the record and certificate is admissible); § 2119, formerly § 4865 (certified copy of a record, made one year before this law's taking effect, of a deed, will, etc., not duly acknowledged or proved, to be admissible only when the execution of the original is proved, "except where such record shall have been made thirty years or more prior to the time of offering it in evidence"); § 2123 (when in a county recorder's office the record exists of a writing affecting realty, and the interest was claimed or enjoyed under the writing for ten consecutive years, the writing, "and a certified copy thereof, and of the time of its record, shall be *prima facie* evidence of the execution of such writing," provided the record was made ten years before the offering in evidence); § 2146, formerly § 4892 (an instrument purporting to convey or affect land, "executed and acknowledged in conformity with the provisions of any law in force" at the time in this State, Louisiana, or Missouri, and duly recorded for more than thirty years before March 28, 1874, is admissible "without further proof of the execution thereof"); § 2147 (on proof that the original is lost or out of the party's power, a certified copy is admissible); 1842, *Moss v. Anderson*, 7 Mo. 337, 341 (certified copy of record of lost original, defectively recorded thirty-three years before, admitted under statute); 1872, *Briggs v. Henderson*, 49 id. 531, 534 (record-copy of deed more than thirty years old, not being admissible as a lawfully recorded copy; the age, record, and other circumstances, together with the death of the parties and witnesses, held sufficient); 1878, *Smith v. Madison*, 67 id. 694 (by statute a certified copy of a deed recorded thirty years is receivable, whether defectively acknowledged or not); 1880, *Crispen v. Hannavon*, 79 id. 548, 552 (same; but the original must be shown lost or destroyed); 1898, *Rigney v. Plaster*, — C. C. A.

—, 33 Fed. 633 (applying R. S. § 4865, § 2119, to a deed corresponding to R. S. now § 2112, *i. e.* acknowledged under a new law); 1899, *Plaster v. Rigney*, 36 C. C. 97 Fed. 12 (Mo. Rev. St. § 4865, now § 2119, admits a certified copy of a deed proved when taken but not when recorded).

In Georgia the rule about proving execution by an affidavit of *seignior* is filed by the grantor (*post*, § 2146) should be consulted.

⁹ A few cases of this sort have been cited under § 2141, *ante*; the statutes are in *supra*.

¹ 1890, *Reuter v. Stuckart*, 181 Ill. 111. W. R. 1014 (existence of a power of attorney will be presumed; distinguishing the case of an administrator's power of sale); 1891, *v. Phelps*, 9 John. 166, 171 (a power of attorney will be equally embraced by the presumption); 1818, *Doe v. Campbell*, 10 id. 4 (same); 1823, *Robinson v. Craig*, 1 Hill 339 ("Antiquity and other circumstances, together with the necessity of any proof of the genuineness of handwriting, when the deed purports to be executed by the grantor personally, there seems to be no good reason why it should not have the same effect when it purports to be executed by attorney; the power would be only one of the many which make out a due execution"); 1856, *V. McGrew*, 16 Tex. 506, 513 (the rule "in most cases" the authentication of a deed under which it purports to be made); *Johnson v. Shaw*, 41 id. 426, 436 (power in a deed, presumed on the facts); 1878, *son v. Timmons*, 50 id. 521, 524 ("in most cases," the power's execution will be presumed); 1882, *Storey v. Flanagan*, 57 id. 654 (power's execution presumed); 1890, *nell v. Johns*, 76 id. 302, 304, 13 S. V. (power of attorney presumed on the facts); *Contra*: 1866, *Jones v. McMullen*, 25 Q. B. 542 (ancient deed purporting to be executed under a power of attorney, held not to prove the power).

Compare the use of *recitals* in ancient deeds to prove the contents of a prior deed § 1878.

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the same lapse of time that has removed the evidence of execution will equally have removed (in the usual case) the evidence of authority to execute.³ But when the missing element is anything beyond an agent's authority there is in some Courts a hesitation; it may be said that they distinguish, in effect, between a matter of mere authority and a matter of title in the estate.⁴ Nevertheless, the other Courts seem to set no definite limits, and to be liberal in assuming all the elements necessary to authenticate and to constitute a due execution.⁵

§ 2145. *Kinds of Documents covered by the Rule.* The probative value of the circumstances of age, custody, and the like, as evidence of genuineness, exists equally for all sorts of documents, as does also the necessity for being satisfied with such evidence (*ante*, § 2137). For grants of land, the additional circumstance of possession of the land may be required (*ante*, § 2141). Apart from that requirement, however, it is universally conceded that the rule applies alike to all sorts of documents whatever, — in particular, to wills,¹ as well as to letters, records, contracts, maps, certificates, and whatever other writings may need authentication.²

³ Consequently, when the document of authority has in fact survived, it must be proved: 1828, Tolman v. Emerson, 4 Pick. 180, 183 (a deed executed by a legislative committee under a power in 1744; the power being of record, the deed was not admitted without it).

⁴ 1897, Airey v. Stapleton, 1 Ch. 164 (authority as attorney to exercise a special power of appointment, not presumed); 1872, Fell v. Young, 63 Ill. 106, 109 (an ancient deed still requires evidence of power to convey of an administrator making it); 1826, Innman v. Jackson, 4 Greenl. 237, 238 (certain assessors' deeds, under a "special mode of divesting a proprietor of his property; statutory directions not presumed to have been followed); 1856, Osborne v. Tunis, 25 N. J. L. 333, 335 (deed of commissioners of loan office; due statutory advertisement, etc., not presumed unless possession "or other collateral proof" appears); 1873, State v. Jersey City, 36 id. 185, 195 (same).

⁵ 1808, Doe v. Thynne, 10 East 206, 210 (books alleged to be those of rent-collecting agents; to show the character of the author as collector, other similar books, duly authenticated, held not sufficient, but the internal evidence of the books held sufficient to consider); 1866, Monk v. Farlinger, 17 U. C. O. P. 41, 51 (regularity of certificate of married woman's acknowledgment, presumed); 1829, Battles v. Holley, 6 Greenl. 145 (administrator's authority, etc., to make an inventory and schedule of claims, presumed on the facts); 1843, King v. Little, 1 Cush. 436, 440 (records of "the Lower House-tonic Propriety," admitted without showing the organization of that body); 1, 66, Barry v. Rad- din, 11 All. 577, 578 (ancient copies of depositions in *perpetuum memoriam*; the antiquity held to presume due taking, etc.); 1852, Adams v. Stanyan, 24 N. H. 405, 416 (the due holding of a corporation meeting whose minutes were offered in an ancient book of records); 1858,

Little v. Downing, 37 id. 365, 365 (corporation record; the due holding of the meeting).

For instances of old documents used as con- taining statements against interest (receipt of money, etc.), under an exception to the Hear- any rule, see *ante*, § 1472.

¹ Eng.: 1808, M'Kenire v. Fraser, 9 Ves. Jr. 5 (cited *ante*, § 2138); 1817, Ranciliffe v. Parkyna, 6 Dow 149, 202 (quoted *ante*, § 2141); 1826, Doe v. Passingham, 2 C. & P. 440 (quoted *ante*, § 2141); 1826, Doe v. Leakin, 2 C. & P. 472; 1827, Holton v. Lloyd, 1 Moll. 30, 32; U. S.: 1852, Jordan v. Cameron, 12 Ga. 367, 369; 1803, Jackson v. Larway, 3 John. Cas. 285, 286; 1808, Jackson v. Blanshan, 3 John. 292, 295; 1814, Shaller v. Brand, 6 Binn. 435, 439, 447; 1842, Eubanks v. Harris, 1 Speer 183, 191; 1843, Giddings v. Smith, 16 Vt. 344, 346, *ante*; and additional instances cited *ante*, §§ 2138, 2141.

² Besides the following, the cases cited *ante*, §§ 2139, 2141, exhibit still other kinds of docu- ments: England: 1814, R. v. Netherthong, 2 M. & S. 337 (certificate of pauper settlement); 1816, Bertie v. Beaumont, 2 Price 308, 308 (re- ceipt for tithe-money); 1821, Wynne v. Tyr- whit, 4 B. & Ald. 376 ("The rule is not confined to deed or wills, but extends to letters and other written documents coming from the proper custody"; here applied to the books of a manor-steward); 1831, R. v. Bathwick, 2 B. & Ald. 639 (papers of ordination, sealed by the archbishop, admitted under the rule; whether a document sealed by a corporation or court would in general not be included in it, because of the presumable extancy of proof, undecided); 1835, Doe v. Burdett, 4 A. & E. 1, 19 ("any in- strument of that age, whether deed or will or other instrument, proves itself"); 1840, Doe v. Benyon, 4 P. & Dav. 193, 193, 196 (letters); 1869, Blandy-Jenkins v. Dunraven, 3 Ch. 121 (agreement in settlement of litigation); Canada:

§ 2146. **Presumption created; Statutory Denial of Genuineness.** (1) this rule about ancient documents is not merely a rule of sufficiency, but a *rule of presumption* (*ante*, § 2135) is often implied in judicial language, has sometimes been distinctly decided.¹ There seems no reason against giving it this additional quality, at any rate wherever the requirement of session (*ante*, § 2241) is exacted.

(2) In a few jurisdictions, a statute provides that, upon *affidavit* of opponent *denying the genuineness* of a deed pleaded, the proponent of deed cannot evidence its execution by a record-copy or cannot raise a presumption thereby. The effect of such a statute upon the presumption mainly raised by the ancient-document rule depends chiefly on the terms of the local statute.²

2. Authentication by Contents.

§ 2148. **Authentication by Contents; in general.** If Doe is the sole person who knows the circumstances of a certain event, and if a letter purporting to be from Doe and stating those circumstances, and the statement appears by subsequent developments to be accurate, it would be a simple matter, for the law as well as for common sense, to deem that sufficient evidence (*ante*, § 171) of Doe's authorship had been furnished. But as there can seldom be a sole person knowing the circumstances of events, and as it could seldom be proved (if it were the case) that no other person had such knowledge, it is obvious that there are here multiple opportunities for a different authorship. Moreover, the other persons knowing the same facts are often persons hostilely interested, who thus have a motive for fabrication

1848, Robinson, C. J., *re Doe v. Turnbull*, 5 U. C. Q. B. 129, 131 ("the principle . . . is not confined to the deeds themselves . . . , but extends to any written documents whatever, even to letters"); *United States*: 1896, *Enfield v. Ellington*, 67 Conn. 459, 34 Atl. 818 (lists and books of election found among the records of a town, purporting to be 29 years old and upwards, held admissible if the circumstances indicated authenticity); 1894, *Sullivan v. Richardson*, 33 Fla. 1, 18, 31, 111 (certain old Spanish documents admitted on the facts); 1897, *Cooney v. Packing Co.*, 169 Ill. 370, 48 N. E. 406 (abstract of title, in vogue in a certain office, and 30 years old, received; compare the statute *ante*, § 1705); 1828, *Eust v. B. M. Co.*, 6 Pick. 158 (records of the town of Boston, preserved in the archives); 1849, *Boston v. Weymouth*, 4 Cush. 538, 542 (selectmen's book of accounts with the town, found in the town's custody); 1866, *Berry v. Raddin*, 11 All. 577, 578 (ancient copies of depositions *in perpetuum memoriam*, recorded); 1857, *Bell v. Brewster*, 44 Oh. St. 690, 694, 10 N. E. 679 (letter and payroll); 1898, *Smucker v. Penna. R. Co.*, 188 Pa. 40, 41 Atl. 457 (old official map in proper custody); 1893, *Almy v. Church*, 13 R. I. 182, 30 Atl. 58 (ancient proprietary and public records); 1899, *Smith v. New Orleans C. & B. Co.*, 35 C. C. A. 648, 98 Fed. 899 (certain ancient Spanish and French

archives); 1893, *Aldrich v. Griffith*, 66 Vt. 404, 29 Atl. 376 (ancient field book, kept by town clerk).

² 1868, *Chamberlain v. Torrance*, 14 Ch. U. C. 181, 182; 1895, *Wisdom v. R.*, 110 Ala. 418, 428, 434, 18 So. 13 (treated as strict presumption, shifting the duty of proof forward. Of course the presumption cannot be conclusive, as the Georgia Code declares it § 2187; this error probably arose from Senator Greenleaf's unaccountable lapse in applying the rule under that head (Evidence, § 2187). But distinguish the effect of a statute declaring a defective ancient certificate "conclusive" as presumed regular (the theory of these cases *ante*, § 1845): 1857, *Mathews v. Spencer*, 4 Sneed 263 ("after the lapse of twenty years, . . . all inquiry upon that subject [regularity of probate] is cut off").

³ The statutes affecting the question have been collected *ante*, § 1651; for their judicial interpretation applying them to ancient documents see the following cases: *Ga.*: 1871, *Matthias v. Castleberry*, 43 Ga. 346, 351, 525; 1877, *H. Nisbet*, 58 id. 556, 567; 1888, *Parker v. Cross & F. R. Co.*, 81 id. 387, 393, 8 S. E. 1898, *Albright v. Jones*, 106 id. 302, 317, 761; 1899, *McArthur v. Morrison*, 107 id. 34 S. E. 205 (explaining preceding cases); 1883, *Holmes v. Coryell*, 58 Tex. 680, 688.

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and, if it were once laid down, as a general rule of law, that the contents of a letter might be taken as evidencing its authenticity, too many would be found to take fraudulent advantage of this rule. It is true that, in the vast majority of transactions in everyday life, persons do act upon just such evidence of authenticity and no more; and it might be supposed that the law could well follow this practice.¹ But, in the first place, it is also true that frauds are constantly perpetrated in this very manner (as in obtaining goods by forging the name and letter-heads of reputable merchants); and, secondly, there is little necessity for relying upon such evidence, in view of the ample opportunities of proof afforded by witnesses to handwriting. Accordingly, it seems generally conceded that the mere contents of a written communication, purporting to be a particular person's, are of themselves not sufficient evidence of genuineness.²

But where the necessity above-mentioned does in fact exist, namely, the impossibility of obtaining handwriting-testimony, it would seem to follow that resort must be had to the evidence from contents,—at any rate, in some circumstances or upon the facts of a particular case. Such an impossibility may exist for three sorts of writing, (a) an illiterate's writing by amanuensis, (b) a type-written letter, (c) printed matter.

§ 2149. *Illiterate's Letter; Typewriting.* It ought to be conceded that, where there is no direct testimony to the act of execution or sending by an illiterate, the evidence to be drawn from the contents should, in some situations, be allowed to suffice to go to the jury:

1824, *Noti, J.*, in *Singleton v. Bremer*, Harp. 201, 209: "The usual method of proving an instrument of writing, where there is no subscribing witness, is by proof of handwriting. But that could not be expected in this case, as the party cannot write. Even if her name had been subscribed to the letters, the difficulty would not have been lessened. Some other method must therefore be resorted to, and why may not the letters be looked into? If they furnish internal evidence of the source from whence they were derived, I can see no reason why we may not avail ourselves of that evidence. Thus, for instance, if they relate to facts which cannot be known to any other person, it will be presumed that they were written by her authority. If they embrace a number of facts which relate to her and her situation, and which cannot apply to any other person, each of those facts

¹ 1827, Bentham, *Rationale of Judicial Evidence*, b. VII, c. III, Bowring's ed., vol. VII, p. 179 ("When from an individual more or less known to me in person or by reputation, I receive a letter, bearing his signature—that is, when I receive a letter with a signature purporting to be that of a person known to me as above,—on what supposition can such a letter have emanated from any other hand than his? On no other than that of forgery,—a crime not to be presumed, or so much as suspected, without special ground, in any single instance: much less, in a number of unconnected instances").

² 1895, *Freeman v. Brewster*, 93 Ga. 648, 31 S. E. 165. The following case has special reasons: 1834, *Truelove v. Burton*, 9 Moore 64 (signature of an attorney's agent to a judicial admission need not be proved). In a few other rulings, some force has been allowed for such

evidence: 1805, *R. v. Johnson*, 7 East 65 (a publisher in M. received an anonymous letter notifying him that the writer would send to him a paper of a certain description; subsequently such papers, in the same hand, came to him by mail, and were published; the question being whether this publication in M. was authorized by the defendant, the correspondence of the papers with the description, the correspondence of the handwriting's similarity to that of the libels, and the similarity of the handwriting of the libels and the original letter, was held sufficient); 1896, *Thalheim v. State*, 38 Fla. 169, 20 So. 938 (mere possession of a letter, not enough; but here other facts, such as the letter's references to acts of his, sufficed to authenticate; perhaps, as mere knowledge of contents was involved, the case belongs rather under § 260, *ante*). Compare also the Minnesota statute quoted *post*, § 2596.

constitutes a link in the chain of circumstances which go to strengthen the presumption. In ordinary cases such evidence will not be allowed, because the writing is always assumed to be by the person by whom it purports to be written, and proof of the handwriting therefore is higher evidence. But in the present case the evidence offered was just what the nature of the case could afford."

The case of an amanuensis, using a *typewriting-machine*, presents a similar impossibility, whenever the signature (as sometimes happens) is also typewritten or stamped; and it would seem that a similar necessity justifies resort to evidence from contents.¹

§ 2150. *Printed Matter; (1) Newspapers.* Printed matter in general bears upon itself no marks of authorship other than contents. But there is ordinarily no necessity for resting upon such evidence, since the responsibility for printed matter, under the substantive law, usually arises from the act causing publication, not merely of writing, and hence there is usually available as much evidence of the act of printing or of handing to a printer as there would be of any other act, such as chopping a tree or building a fence. There is therefore no judicial sanction for considering the contents alone as sufficient evidence.

For newspapers and the like, special questions arise. Suppose, for example, that the publication of a libel is to be proved, and that the libel is alleged to have been communicated to J. S. It is simple enough to prove that J. S. read a copy of the paper containing the libel; but how shall the defendant's publication of that copy be proved? Here the process would be to bring home to him the issuance on that day of a certain copy (either by the testimony of one who bought at an office proved to be the defendant's¹ or by some statutory method); then the identity between that copy and the one read by J. S. will suffice as evidence that the two issued from the same press, *i. e.* the defendant's:

1846, *Alderson, B., in Gathercole v. Miall*, 15 M. & W. 310, 396: "The question is whether there is reasonable evidence that this is a copy of the individual paper which has been produced and which has been shown to have been published by the defendant. . . . We must use our own common sense, and remember that, with respect to newspapers, not one, but a great variety of copies, are published for general circulation among the public at large. If you compare an instrument in one or two parts, and find the one is an exact copy of the other, you would have no difficulty in saying it was printed from the same materials and from the same type. . . . So I say here with respect to a newspaper. If you find it in general corresponds, it is evidence from which the jury may infer that the paper is printed from the same type as the paper which is produced, and if so, it is printed by the defendant."

¹ 1900, *Re Deep River Nat'l Bank*, 73 Conn. 341, 47 Atl. 675 (letters typewritten, and signed by a rubber stamp, held sufficiently proved by the person's custom as to authorizing a stenographer to stamp, etc.). If there were a serious possibility of abuse, this step would not be advisable. But in fact there is also a danger of abuse in the opposite direction; for the difficulty of authenticating such a document is sometimes taken advantage of by those who wish to be able to disavow their authorship. It is,

no doubt, a question of experience, *i. e.* which danger is actually the greater. On the whole it would seem safe to authorize the trial Court, in discretion, to allow to go to the jury a typewritten communication bearing sufficient indication of authenticity in its contents and letter head.

² This could not be used as the basis of the libel, because its publication is invited by the plaintiff's agent; *volenti non fit injuria*.

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This is but one of the various questions that arise,² and their solution depends chiefly on the application of ordinary principles of evidence to the varying substantive law.³

§ 2151. *Same*: (2) *Official Printer*; *Statute-book*; *Reports of Decisions*. The intolerable inconvenience of having to prove the genuineness of printed matter purporting to be published by the Government has led to a general concession, by judicial decision or by statute, that such purporting publications, at least when in the form of the standard official documents constantly issued and referred to, are to be assumed genuine. Two principles, however, are in fact usually involved, first, the admissibility of a copy, proved to be printed by official authority, as hearsay evidence of the contents of the original, and, secondly, the presumption of genuineness of a particular printed document purporting to be of such official origin. The two questions are seldom separated, either in decisions¹ or in statutes; a sanction of the former principle has usually been regarded as carrying with it a sanction of the latter also.²

§ 2152. *Same*: (3) *Postmark*; *Brand*. The use of a *postmark* in evidence may involve at least three distinct principles, only one of which concerns the principle of Authentication. (1) In the first place, the question arises, May it be inferred from the presence of the purporting official mark that the mark was *genuinely affixed* by the purporting official? This is a question of Authentication, and may well enough be answered in the affirmative. This may be regarded on the whole, as to-day conceded, though there was some fluctuation in the English rulings.¹ But assuming it not to be conceded, the

² Distinguish the following: 1902, *State v. Dixon*, 131 N. C. 308, 42 S. E. 944 (murder; the gun-wadding was a piece of paper from a printed periodical; a duplicate of the same periodical was admitted to identify the piece, without other evidence of genuineness).

³ Statutory facilitation has sometimes been given: *Eng.*: 1793, St. 33 Geo. III, c. 78, re-enacted in 6 & 7 Wm. IV, c. 76 (requires a daily deposit of a newspaper copy at the Stamp-Office, with an affidavit of authenticity, and on production of the affidavit and any newspaper corresponding with this copy, the defendant's responsibility for its publication need be no further proved); 1835, *Watts v. Fraser*, 7 A. & E. 223, 232 (deposit of a copy of newspaper at the Stamp Office as required by statute is not sufficient evidence that others of that issue were circulated; this is absurd); 1843, *R. v. O'Connell*, 5 State Tr. N. S. 1, 538 (copy of newspaper signed by printer and filed at Stamp Office under statute, admitted in favor of the registered proprietor); *P. E. I. St.* 1889, § 54 (in libel trials, the production of a printed copy purporting to be published by the defendant shall suffice, on certain conditions). In the United States no similar statutes appear to exist, though they are much needed; but the following may be noted: Ala. Code 1897, § 3051 (newspapers containing advertisement of notices "shall be received as evidence of publication"); the same

purpose is generally accomplished by statutory affidavit; *ante*, § 1710.

Whether one or another copy of a newspaper is the *original* required to be produced has been elsewhere considered (*ante*, §§ 1234, 1237), as also the question of *identification by contents* (*ante*, §§ 415, 440).

¹ In the following case the distinction was recognized: 1814, *R. v. Forsyth, R. & E. 274* (to prove the publication of a notice in the Gazette, "a printed paper purporting to be the Gazette was put in," no evidence of its authenticity being offered; "the Judges seemed to think that the production of the Gazette would be sufficient, without proof of its being bought of the Gazette printer, or where it came from").

² The statutes and cases are collected *ante*, § 1684.

³ *Eng.*: 1805, *R. v. Johnson*, 7 East 65, 66, 70 (an objection to the use of an Irish postmark as evidence of a posting in Ireland, that "there was no evidence that either of the papers was received from the Post-office, which might have been ascertained by persons employed in that office," was not sanctioned); 1808, *R. v. Watson*, 1 Comp. 215 (postmark not sufficient to show posting at the place named); 1811, *Arcangelo v. Thompson*, 2 Id. 620, 623 (postmark assumed genuine, in proving receipt of a letter in a certain year); 1814, *R. v. Plumer, R. & E. 264* (post-office marks, and other customs, used to

question may arise, Who is qualified to testify to its genuineness? On general principles (*ante*, §§ 699, 705) it would seem that any official of the post-office, or any person familiar with the mark of the particular post-office, would be sufficient.³ (2) If the postmark be taken as genuine, it is evidence of the letter bearing it was stamped on the purporting date.⁴ This signification that the post-officer need not be called to make proof, and that his postmark being an implied assertion that the date of the mark is the date of affixing it, is receivable under the Hearsay exception (*ante*, § 1874) for statements made under official duty. (3) Upon the same principle, the postmark is evidence that the purporting place or office is the one at which it was actually affixed.⁵

The use of brands, on cattle or on timber, is somewhat different, because it is usually desired to infer from the presence of the brand, not merely that it was affixed by the person commonly using or legally entitled to use it, but also that he was the owner of the cattle or logs.⁶

§ 2153. *Reply-Letter received by Mail.* When a letter is received by the course of mail, purporting to come in answer from the person to whom the prior letter has been sent, there are furnished thereby, over and above the contents showing knowledge of facts in general (*ante*, § 2148), three circumstances evidencing the letter's genuineness: First, the tenor of the letter is a reply to the first indicates a knowledge of the tenor of the first. Secondly, the habitual accuracy of the mails, in delivering a letter to the person addressed and to no other person (*ante*, § 95), indicates that no other person was likely to have received the first letter and to have known its contents. Thirdly, the time of the arrival, in due course, lessens the possibility that the letter, having been received by the right person but left unanswered, came from

show that the letter came to that office); 1819, *Hitchon v. Best*, 2 B. & B. 299, *semble* (postmark presumed genuine); 1821, *Fletcher v. Braddyll*, 3 Stark. 64, *semble* (postmistress called to identify); 1829, *Abbey v. Lill*, 5 Bing. 299 (not decided; Gaselee, J., said: "Where it is disputed, it ought perhaps to be proved, though what might be deemed to amount to proof is not clear"); 1834, *Warren v. Warren*, 1 C. M. & R. 250 (here the postmaster of one of the offices was called); 1836, *Shipley v. Todhunter*, 7 C. & P. 680, 686 (postmark presumed genuine); 1841, *Stocken v. Collin*, 7 M. & W. 515 (same); 1846, *Woodcock v. Houldsworth*, 16 M. & W. 124, *ante* (postmark not sufficient; some witnesses must prove it; citing *R. v. Watson* and *Abbey v. Lill*, but no other cases); *U. S.*: 1842, *New Haven Co. Bank v. Mitchell*, 15 Conn. 306, 225 (postmark presumed genuine); 1851, *Burgess v. Clark*, 3 Ind. 250 (postmark presumed genuine).

* 1821, *Fletcher v. Braddyll*, 3 Stark. 64 (postmistress at L., called to prove a mark purporting to be at W.); 1829, *Abbey v. Lill*, 5 Bing. 299, 308 (Best, C. J., thought that the officer making it should be called; Gaselee, J., thought that persons "who live in London and

see the mark every day" were at least as competent as an officer not making it).

* 1754, *Canning's Trial*, 19 How. St. 870 (postmark, verified as authentic by clerk, admitted to show that the letter passed through the office on the date of the mark); 1821, *Fletcher v. Braddyll*, 3 Stark. 64 (show that the letter existed at that date); 1829, *Abbey v. Lill*, 5 Bing. 298, *semble* (show that the enclosed letter was misdated); 1841, *Stocken v. Collin*, 7 M. & W. 515 (to show the hour of posting a notice); 1842, *New Haven Co. Bank v. Mitchell*, 15 Conn. 306, 225 (in cases that the letter was mailed and sent, merely put into the office, on that date); 1851, *Burgess v. Clark*, 3 Ind. 250, *semble*. *Contr.* 1846, *Woodcock v. Houldsworth*, 16 M. & W. 124, *semble*.

* *Canning's Trial*, and most of the other cases *supra*, note 3; 1805, *R. v. Johnson*, 7 E. 65, 66 (Irish postmark, admitted to show posting in Ireland). *Contr.*: 1846, *Woodcock v. Houldsworth*, *supra*, *semble*.

* The cases are placed *ante*, § 150; to which add the following; *Ariz. St.* 1897, c. 6, § 5; 1901, *Brill v. Christy*, — *Ariz.* —, 63 P. 757 (statute held not to make the record brand evidence of ownership).

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§ 2154. *Reply-Telegram.* That a telegram not following a previous one calling for a reply should sufficiently authenticate itself by its contents, any more than any other communication (*ante*, § 2148), seems never to have been contended.¹ But may not a *reply-telegram* thus authenticate itself, as well as a reply-letter received by mail, on the conceded principle of the preceding section? This question has usually been answered in the negative, for the following reasons:

¹ *England*: 1824, *Harrington v. Fry*, 1 C. & P. 290 (that letters purporting to be signed by S. F. were received in answer to letters sent to S. F., and that there was only one person of that name in the place, sufficient); 1845, *Ovenston v. Wilson*, 2 C. & K. 1 (letter coming in answer to a letter addressed to the defendant at his residence and put into the post, admitted as the defendant's, by Pollock, C. B.); 1875, *R. v. Saunders*, L. R. 1 Q. B. D. 19 (false pretences by advertising to give work by mail and requesting stamps in the answer; to show repeated acceptances of this advertisement, evidence was received of 261 letters, answering the advertisement, having been received at the post-office addressed to the defendant, no other evidence authenticating their genuineness being offered); *Canada*: 1859, *McDonald v. Gilbert*, 16 Can. Sup. 700 (whether M. and K. constituted a partnership; letters admitted, bearing on them the printed names of M. and K., and received in answer to letters addressed to that firm); *United States*: 1899, *White v. Tolliver*, 110 Ala. 300, 20 So. 57 (letter received, in answer to another, properly postmarked and in due course of mail, referring to the first, admitted); 1897, *Ragan v. Smith*, 103 Ga. 556, 29 S. E. 759; 1877, *Lyon v. Am. Co.*, 46 Ia. 631, 637 (letters received in reply, assumed genuine); 1885, *Davis v. Robinson*, 67 id. 355, 363, 25 N. W. 280 (letters purporting to be in answer to an offeror's, assumed genuine; here typewritten letters); 1893, *Norwegian Plow Co. v. Munger*, 52 Kan. 371, 373, 35 Pac. 11 (letters by mail from a non-resident corporation, presumed genuine); 1898, *Boykin v. State*, — La. An. —, 24 So. 141 (receiving an answer in due course to a letter duly addressed, sufficient); 1817, *Connecticut v. Bradish*, 14 Mass. 296, 300 (that the letter in question had been received by mail in answer to one addressed to the signer, held sufficient for admission); 1885, *Melby v. Osborne*, 33 Minn. 492, 24 N. W. 253; 1882, *Gartrell v. Stafford*, 12 Nebr. 645, 554; 1898,

People's Nat'l Bank v. Geisthardt, 55 id. 232, 75 N. W. 582 (receipt by mail in answer, sufficient); 1901, *Whitwell v. Johnson*, — id. —, 96 N. W. 272 (letter not received in response to another, excluded); 1903, *Peycke v. Shinn*, — id. —, 94 N. W. 135 (letters received not in answer to others, excluded); 1894, *Armstrong v. Advance T. Co.*, 5 S. D. 12, 17, 67 N. W. 1181 (letter received by mail in due course in answer to a mailed letter, presumed genuine; here from a corporation manager); 1894, *Scofield v. Farlin & O. Co.*, 10 C. C. A. 83, 61 Fed. 804 ("a letter received in due course of mail, and especially if it be in response to a letter sent by the receiver, is presumptively the letter of the one whose name is signed to it"); 1897, *National Acc. Soc. v. Spiro*, 24 C. C. A. 334, 78 Fed. 775 (letter on letter heads of the defendant and stamped with a fac-simile signature of its officers, received in the mail in reply to one addressed to the defendant, held sufficiently proved).

For the qualifications of a handwriting-witness, based upon correspondence by mail, see *ante*, § 702.

For the rule that the arrival of a letter in the hands of the addressee is sufficiently evidenced by its due mailing, see *ante*, § 95.

Distinguish the use of a party's admissions to evidence merely the sending or the receipt of a letter: 1839, *Sturge v. Buchanan*, 10 A. & E. 598, 604 (the copying of letters in a letter-book "clearly shows that they were sent," as an admission by the party keeping the book); 1845, *Ovenston v. Wilson*, 2 C. & K. 1, 3 (letter to which defendant had answered, held sufficiently proved, as to delivery to him, by his answering it).

² 1902, *Distad v. Shanklin*, 15 S. D. 507, 90 N. W. 151 ("Undoubtedly, there should be some evidence" of authenticity; here held sufficient on the facts); 1903, *Reynolds v. Hinrichs*, — id. —, 94 N. W. 694 (telegram merely found in an office, not assumed genuine).

1866, *Sargent, J.*, in *Hewley v. Whipple*, 46 N. H. 487, 488: "It is claimed that, in the case of a letter, so in case of a telegraphic despatch, the person who answers a dispatch is so generally and uniformly the person to whom the communication was addressed that it may be safely acted upon, and that it is thus acted upon in all the business arrangements of the country. But there is a difference in principle between the two cases. . . . There is nothing about the handwriting here that could indicate that the message came from Gould, nor is there anything in the case to make this message evidence more than there would be if Gould had sent a verbal message by one man who had communicated it to another, and the latter had at length conveyed the message to the party to whom it was designed and to whom it was originally sent. This message might be received as it was sent, and would ordinarily be acted on in the business of life; but the way to prove such a message in a court of law would be to summon both the intermediate agents or bearers of the message and in that way trace the message from the lips of one party until it was received in the ear of the other party. Anything short of this would be to rely upon hearsay evidence of the very loosest character."

1885, *Mr. Morris Gray*, *Communication by Telegraph*, § 135: "It is true that the person who answers a telegram is usually the person to whom it is addressed. It is true, however, that while it is unnecessary to disclose the intelligence contained in a letter to anyone to effect its transportation by mail, it is absolutely necessary to disclose intelligence to at least two operators to effect its transmission by telegraph. Consequently telegraph offers far greater opportunity to deliver fraudulent answers to inquiries than the mail does. This distinction renders the principle at present under consideration applicable to communications by telegraph, however sound its application to communications by mail may be deemed to be."

The only valid objection here advanced seems to be that the opportunity furnished to the operators to learn the contents may enable a forger to return a purporting reply. Even this objection does not apply to a cipher-telegram. But in any case, regard being had to the busy routine of a telegraph-office, slight motives for fraud, the penal liability for disclosure, and the small contingency of acquaintance or co-operation between operator and interested forger, it would seem that too much stress is laid on this circumstance and this distinction. The empirical argument, that telegraphic answers are in fact commonly genuine, also deserves here great weight. Moreover, the handwriting of the original of the reply would usually afford sufficient means of defence against forgery. There seems to be no sound reason why the same rule as for mail-replies should not obtain.²

² *Accord*: N. Br. St. 1861, c. 14, § 1 (ten days' notice and a copy of the message having been served, a telegraphic message shall be received as being "dated, directed, written, and signed" as it purports); § 2 (a message produced on notice by the opponent shall be similarly received); N. So. Rev. St. 1900, c. 163, § 30 (quoted *ante*, § 1236); 1903, *People v. Hammond*, — Mich. —, 43 N. W. 1085 (telegraphic answer, admitted without other authentication); 1855, *Taylor v. Steamer Robert Campbell*, 20 Mo. 254 (plaintiff sent a telegram to the defendant steamer, and received an answer apparently sent by the captain; testimony that the former was delivered by the telegraph-officer to the steamer and that an answer was next day left at his office, held sufficient; carefully reasoned

opinion); Nev. Gen. St. 1866, §§ 935, 936, 937 (certain instruments, when sent by telegraph, presumed to be genuine on certain conditions); 1899, *Western Twine Co. v. Wright*, 11 S. 521, 78 N. W. 942 (telegraphic answer, presumed genuine); Utah, Rev. St. 1898, §§ 2699, 2700 (similar to the Nevada statute); Wash. C. Stats. 1897, §§ 4364-4366 (similar). *Contrary*: 1887, *R. v. Regan*, 16 Cox Cr. 203, *semble* (receipt of telegram purporting to be from the defendant, no evidence of his authorship); 1871, *Lewis v. Havens*, 40 Conn. 363, 369 (telegram not sufficiently authenticated on the facts); 1861, *Matteson v. Noyes*, 25 Ill. 591 (said *obiter* that the original's "execution must be proved precisely as any other instrument"); 1885, *Smith v. Easton*, 54 Md. 123, 146 (telegram un-

§ 2155. *Reply-Telephone.* In proving the receipt of a communication by telephone, any one of several distinct principles of evidence may be involved and give rise to distinct objections, whose validity may rest on different considerations.

(1) B asserts that certain words (assumed to be receivable as admissions or the like) were uttered to him by A over the telephone; how can B testify that the antiphonal speaker was A? This involves genuinely the principle of Authentication;¹ and three situations are to be distinguished:

(a) It is generally conceded that a person may be recognized and identified by his voice, if the hearer is acquainted with the speaker's voice.² Assuming, then, that B is thus acquainted with A's voice, and that voices can sometimes be distinguished on the telephone, and that B did in this instance distinguish A's voice, then B's belief that A was the speaker is founded on sufficient evidence. This much seems to be generally accepted.³

(b) But if there is no recognition of voice, what can supply sufficient evidence to authenticate the antiphonal speaker? In a given case, no doubt, sundry circumstances (including other admissions, and the like) may suffice.⁴ But, apart from special circumstances, can any rule be laid down? No one has ever contended that if the person first calling up is the very one to be identified, his mere purporting to be A is sufficient, any more than the mere purporting signature of A to a letter would be sufficient (*ante*, § 2148). The only case practically presented therefore is that of B's calling up A and being answered by a person purporting to be A. There is much to be said for the circumstantial trustworthiness of mercantile custom (*ante*, § 95), by which, in average experience, the numbers in the telephone-directory do correspond to the stated names and addresses, and the operators do call up the correct number, and the person called does in fact answer. These circumstances suffice for some reliance in mercantile affairs; and it would seem safe enough to treat them in law as at least sufficient evidence to go to the jury, just as testimony based on prices-current is received (*ante*, § 719). This view has received some judicial support:

presumed to have been sent by defendant or by his authority, though received in reply to one addressed to him dealing with the same subject; *Howley v. Whipple* N. H., followed; 1884, *Burt v. R. Co.*, 31 Minn. 472, 18 N. W. 285, 289 (unauthenticated telegram-copy, excluded); 1884, *Adams v. Lumber Co.*, 32 id. 216, 19 N. W. 735 (same); 1869, *Howley v. Whipple*, 48 N. H. 487 (quoted *supra*); 1877, *State v. Hopkins*, 50 Vt. 316, 332 (obscure).

For the question whether the original is the writing received or the one sent, see *ante*, § 1236.

¹ It may also be stated as a question of testimonial qualification, i. e. whether B is qualified (*ante*, § 659) to testify to A's identity; but this in the end also resolves itself into the question whether the data observed by B were sufficient evidence of identity.

² *Ante*, §§ 222, 413, 600.

³ 1900, *Shawyer v. Chamberlain*, 113 Ia. 742,

84 N. W. 661 (testimony to a conversation, held admissible; "identity may be established by means of the hearing or other circumstances"); 1901, *Lord Electric Co. v. Morrill*, 178 Mass. 304, 59 N. E. 807; 1897, *Deering v. Shumpik*, 67 Minn. 348, 69 N. W. 1088 (conversation admitted, the speaker's voice being identified as that of the person in question); 1892, *Stepp v. State*, 31 Tex. Cr. 349, 352, 20 S. E. 753 (defendant's admissions; identity of voice sufficient).

⁴ 1886, *Davis v. Walter*, 70 Ia. 466, 30 N. W. 804 (receiving admissions, where identity appeared by testimony of the other defendant); 1894, *People v. McKane*, 148 N. Y. 455, 38 N. E. 950 (admitting a conversational admission over the telephone where the speaker's voice was not known to the witness but the latter had since heard read an affidavit of the former admitting his identity as the person conversing).

1888, *Thompson, J.*, in *Globe Printing Co. v. Stahl*, 33 Mo. App. 481, 488 (the plaintiff's agent called up the defendant in the ordinary way, and asked "if that was S," the defendant, and was answered "Yes"; then he asked why the defendant did not put the bill in question, and was answered that the defendant would attend to it soon; the plaintiff did not know the defendant personally and was not acquainted with his voice); these decisions [concerning identity] proceed upon the principle that those evidences of matters upon which men are compelled to act in the ordinary affairs of life and in usual transactions of business ought to be allowed to go to the jury in cases where they become material to the issues on trial. . . . The use of this instrument facilitates business to such an extent that it would be very prejudicial to the interests of the business community if the Courts were to hold that business men are not entitled to act upon the basis of being able to give in evidence to juries replies which they receive to communications made by them to persons at their usual places of business in this way."⁵

(c) An additional element enters where the antiphonal speaker does not purport to be a particular person, but merely some member of the office or establishment authorized to make a contract or an admission. Here the question is whether there is sufficient evidence that he was really a person acting in the office of the plaintiff's office and authorized for such transactions, or was a mere intruder, a stranger, or unauthorized clerk. On the principle above suggested (though not with the same force) mercantile experience may well suffice, by which it is customarily the person who is in fact summoned to the telephone and who proceeds to conduct the negotiation is *prima facie* a person authorized to do so, precisely as a person receiving money at the cashier's desk is presumed to be authorized to do so. Upon this point there is little judicial inclination to take the liberal view.⁶

In any event, particular additional circumstances may always suffice to complete the gap.⁷

⁵ The rulings are variant: 1901, *Vaughn v. State*, 130 Mo. 18, 30 So. 669 (telephone message to a physician, who did not identify the voice, excluded, the sender not being otherwise identified); 1888, *Wolfe v. R. Co.*, 97 Mo. 481, 11 S. W. 49 (like *Globe P. Co. v. Stahl*, *supra*); 1902, *Deluglio v. Barney*, 23 R. I. 626, 51 Atl. 425 (whether a telephonic communication was admissible, "without evidence of the identification of the defendant or his agent," not decided); 1903, *Lincoln Mill Co. v. Wisler*, — Nebr. —, 95 N. W. 357 (not decided).

Distinguish the following cases, not concerned strictly with testimony to a jury; the standard of certainty or sufficiency may well be a different one: 1889, *Banning v. Banning*, 80 Cal. 373, 22 Pac. 210 (acknowledgment of deed received by notary over telephone; question expressly reserved); 1894, *Murphy v. Jack*, 142 N. Y. 217, 36 N. E. 833, 31 Abb. N. C. 307 (information as the basis of an affidavit; there must be some evidence of identity besides the mere assertion of the informant); 1896, *State v. Nelson*, 19 E. L. 467, 34 Atl. 990 (information received by an officer of the court, on the telephone, that a juror was ill, held insufficient).

⁶ 1890, *Obermann Brewing Co. v. Adams*, 35 Ill. App. 540 (supposed admissions of the authority of O. as agent were rejected, the only

evidence of identity being that a telephone answer was received, to the inquiry about authority, from what purported to be the defendant's office, but the voice of no employee or firm-member of the defendant being recognized by the plaintiff; the reason was that some person not having authority to answer might have answered); 1896, *Rock Island & P. R. Co. v. Potter*, 36 Mo. App. 386 (admitting a telephonic admission, as to the value of stock, purporting to come from some person in the defendant's office).

Where the person answering from the telephone gives no name, it will usually be sufficient to identify him with some employee authorized to make such admissions. But where the person gives a name, and the name is that of a person having no authority to make admissions, it is useless to offer evidence of identity or to insist on that question at all, because the statement of that person, even if made as alleged, will be irrelevant; an instance of this is in *Morrell v. Lumber Co.*, 51 Mo. App. 386 (1892).

⁷ 1901, *Herendseon Mfg. Co. v. McCall*, N. J. L. 74, 48 Atl. 525 (conversations with the defendant's agent received, where the agent admitted that he heard and authorized the plaintiff's agent's reply); 1891, *Missouri P. R.*

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(2) The matter of identity or authority not being in dispute, there may still be a question of the Hearsay rule. If B, for example, instead of speak- ing directly to A, *converses with a clerk or telephone-operator* at the other end of the line, and the latter reports to B the alleged statements of A just com- municated to him, then B is no longer in any view a witness to A's remarks, but only to the operator's or clerk's assertion of what A said to him (*ante*, § 659), and we are in truth asked to receive the hearsay (i. e. extrajudicial) testimony of the operator or clerk. This situation has elsewhere been ex- amined (*ante*, § 669).¹

§ 2156. *Presumption of Identity of Person from Identity of Name.* The case of a telephone-reply, examined in the preceding section, brings us to the point where the question ceases to be one of authenticating a document and begins to be one of authenticating any parol act purporting to have been done by a given person; and here the presumption of *identity of person* from *identity of name* (*post*, § 2529) plays a most important part. It may always come in question for the general authenticating of documents (*ante*, § 2133, par. 2); but it is of most frequent application to oral admissions and to grantees and grantors in deeds. The rulings may be of equal service in proving a telephone-answer or a document seen to be signed by one calling himself by a certain name.¹

3. Authentication by Official Custody.

§ 2158. *General Principles, as applied to Judicial Records and Files.* When in a government office are kept permanent records under the custody of an officer appointed to that duty, there is commonly little danger in as- suming that records found there existing are genuine. It would be difficult as well as criminal to substitute or insert false records. Moreover, the usual mode of authenticating such documents (as by proving the clerk's or officer's handwriting) would be both highly inconvenient, on account of its repeated necessity, but also often impossible, on account of the change of officials as well as the antiquity of many portions of the records. It seems therefore, never to have been doubted that the existence of an official docu-

Heidenheimer, 53 Tex. 201, 17 S. W. 608, (here the opponent's admissions were received, the witness having recognized the voice as that of an employee, not known name, of the opponent, and the details of the conversation further indicated that the answering person was at the opponent's office and familiar with the matter).

The exact nature of the thing to be proved is not always kept in mind. Thus, in *Wolfe v. R. Co.*, *supra*, n. 5, Barclay, J., says, of a supposed admission purporting to come from the plaintiff's office: "When a person places him- self in connection with the telephone system through an instrument in his office, he thereby invites communication in relation to his busi- ness through that channel. Conversations so held are as admissible in evidence as personal

interviews by a customer with an unknown clerk in charge of an ordinary shop would be in relation to the business there carried on." Here the learned judge is assuming the very fact in controversy, viz., whether the communication did in fact come from a clerk in the plaintiff's office.

¹ Occasionally still other principles may be involved, — for example, whether a person may corroborate himself by telling what he stated at the time to be a message received by him, as in an instance elsewhere cited (*ante*, § 1124).

² For the question whether an opponent's ad- mission of the execution of a writing named is sufficient, see *ante*, § 2152, par. 3; the missing element might there be supplied by an inference from identity of contents.

ment in the appropriate official custody is sufficient evidence of its genuineness to go to the jury.¹

The forms in which the testimony to this fact may be presented are according as the witness is the official custodian himself or some other person, namely, (a) the official custodian bringing the record into court and identifying it, (aa) the official custodian certifying a copy from it, (b) a private person bringing the record into court and identifying it, (bb) a private person proving a sworn or examined copy of it.

(a) As to the first method, the identifying of the original by its official custodian bringing it into court, the only question here arising is based on the impolicy of allowing official records to be taken out of the office (see § 2182).

(aa) When the official custodian certifies a copy to be used in evidence, such a copy is admissible under the Hearsay Exception for Official Statements, the certificate also testifies, expressly or by implication, to the genuineness of the original in his custody from which the copy is made (see §§ 1677, 1680).

(b) When a private person identifies the original, brought into court by him, there arise two difficulties. The first is analogous to that already noticed ((a) *supra*), namely, that, even though the production of the original by the official custodian himself may be allowable, yet the taking of it from official custody by a private person exceeds all bounds of propriety and safety, and no testimony obtained in that way can be received. This consideration has weighed with some Courts; but there is no generally accepted distinction of the sort.² The second difficulty arises from the necessity of the witness testifying to finding the records in the appropriate custody; he must clearly know and show that its place of origin was the proper one. This question is identical with that arising under the next mode.

(bb) When a private person testifies to a sworn or examined copy of a public record, i. e. a record examined by him for the purpose of making the copy,

¹ Compare the doctrine allowing an officer to testify to a predecessor's official handwriting from acquaintance with the records of the office (*ante*, § 704).

² With the following compare the cases cited *ante*, §§ 1186, 1244, 1677, and *post*, § 2182: *Inadmissible*: 1840, Devling v. Williamson, 9 Watts 311, 317 (a paper found in the Court files of another county and brought away by a member of the bar, excluded; such papers should be authenticated by production by the custodian or by his certificate); 1841, Hockenbury v. Carlisle, 1 W. & S. 282 (good opinion); 1851, Garrigue v. Harris, 16 Pa. 344, 351, *semble* (records brought from the Court by the custodian-clerk; admitted); 1856, Miller v. Hale, 26 id. 432, 435 (if the opponent admits genuineness, the official custodian need not attend to authenticate); 1883, Perry v. Mays, 1 Hill S. C. 76 (a schedule and assignment offered as a record of the court; there

being no intrinsic evidence, such as the seal of the court, it must be authenticated by being produced in court by the keeper of the records, or by his official certificate). *Admissible*: 1897, Columbus v. Ogletree, 102 Ga. 29 S. E. 749 *semble* (city council minutes sufficiently authenticated by an officer, other than the clerk, having temporary custody); 1901, Hathaway v. Addison, 48 Me. 440, 443 (records identified by another than the clerk "we know of no rule of law which requires identification of such a record by any officer of the town; it is sufficient if it be proved by competent witness who knows the fact"); 1901, Bullard v. Thomas, 19 Gratt. 14, 18 (record book from another Court is sufficiently proved by one who knows it to be such, whether correct or not); and the cases cited *infra*, note 3, *post*, § 2159, note 1, where the present difficulty was not raised.

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it is obvious that proving the copy includes not only proof that its contents are a correct transcription of the original, but also that the original was the genuine one it purported to be. A witness to a copy must of course speak from personal knowledge (*ante*, § 1278), and the witness' personal knowledge can here extend only to the fact of official custody. This fact (as above noted) suffices to authenticate, but it must be clearly made to appear. Accordingly, some strictness is shown in testing the proof of this fact:

1816, *Ellenderough, L. C. J.*, in *Adamthwaite v. Syngé*, 4 Camp. 372, 1 Stark. 183 (rejecting a witness to a copy of an Irish judgment, who was taken by an attorney to the court-record room, and shown a parchment; but he did not see whence it was obtained nor know who produced it for him). . . . "It must in the first place be proved by the witness that the original came out of the proper custody; this cannot be shown by any light reflected from the record itself, which may have been improperly placed where it was found. . . . If the witness had stated that the record came out of the hands of the proper officer, it would have been sufficient. The evidence must be launched by proving that the document came either from the proper person or proper place." *

The case of papers purporting to be executed by another person than the official, but filed with the record as a part of it, is a difficult one to resolve, and

* The principle has been applied to judicial records in the following cases, which include instances of the production of the original: 1844, *Williams v. Jarrot*, 6 Ill. 120, 127 (judicial records in the proper custody; authentication not required); 1828, *Modest v. Governor*, 2 Blackf. 135, 137 (receipts in the reputed docket of a justice, which was in the possession of another justice, not assumed genuine); 1841, *Voas v. Manly*, 1 Appl. 331, 332 (original record of a court-martial; admitted, being produced from the Adjutant-General's office); 1901, *McLeod v. Crosby*, 128 Mich. 641, 87 N. W. 883 (filed sufficiently authenticated); 1896, *Eisenhart v. Slaymaker*, 14 S. & R. 153, 155 (an original record of a judgment formerly rendered in the same court, identified as coming from the Supreme Court, received); 1831, *Browning v. Huff*, 2 Bail. 174, 180 (proof of signature of the Ordinary in a probate book, and that the book was his original record, sufficient). Where one part of a record is sufficiently authenticated, the remainder may sometimes be received when it is referred to in the authenticated part and its identity can be ascertained by inspection: 1800, *Jackson v. Burleigh*, 3 Esp. 34 (malicious arrest; the writ was produced by a witness who said "it had been sent up to him in a letter"; it was excluded; but on proving the warrant founded on it, the writ was admitted); 1807, *Stevell v. Lowry*, 2 Brev. 135 (original execution with a copy of the judgment, in another court-district; execution objected to as "only admissible when offered to a court of which it is of record, and can only legally be known to form a part of the record exemplified when certified" by the proper keeper; received, when found by inspection to be a part of the proceedings under the judgment).

By statute, an express form is often laid down

for an examined copy of a judicial record and sometimes it is required anomalously to bear the Court seal: *Cal. C. C. P.* 1872, § 1907 (a copy of a judicial record of a foreign country is admissible on proof, "1, that the copy offered has been compared by the witness with the original and is an exact transcript of the whole of it; 2, that such original was in the custody of the clerk of the court or other legal keeper of the same; 3, that the copy is duly attested by a seal which is proved to be the seal of the court where the record remains, if it be a court of record, or, if there be no such seal or if it be not a record of a court, by the signature of the legal keeper of the original"); *Calo. C. C. P.* 1891, § 360 (a copy of a foreign judicial record is provable by a witness who testifies that he has compared the original, that the original "was in custody of the clerk of court or other legal keeper," and that the copy is duly attested by a seal proved to be the court seal, if any, or by signature of the legal keeper); *Ida. Rev. St.* 1887, § 5970 (like *Cal. C. C. P.* § 1907); *Mich. Comp. L.* 1897, § 10146 (record of a court in a foreign country, provable by sworn copy by one who compared the copy with the original in custody of the clerk or legal custodian, the copy being attested by seal proved to be that of the court); *Mont. C. C. P.* 1895, § 3195 (like *Cal. C. C. P.* § 1907); *Nev. Gen. St.* 1885, § 3454 (like *Cal. C. C. P.* § 1907); *N. Y. C. C. P.* 1877, § 953 (an attested copy of a foreign judicial record is provable by an examined copy, with the examiner's testimony to the legal custody of the original and the genuineness of its attestation); *Or. C. C. P.* 1892, § 732 (like *Cal. C. C. P.* § 1907, but not requiring a seal where the record is not of a court); *Utah Rev. St.* 1898, § 3386 (like *Cal. C. C. P.* § 1907).

there seems to be little authority regarding it;⁴ but it may be suggested the test should be whether it is made the duty of the custodian to satisfy himself of the genuineness of the document before filing it, or whether subsequent part of the judicial proceedings the document in question has been treated as genuine by the Court or by the party now charged. A document satisfying either of these tests should be received as sufficiently evidence if it is found filed in the appropriate place.⁵ The case of a *bill* or *answer* or *affidavit* in chancery has often been passed upon in rulings which seem to justify some such generalization.⁶

§ 2150. **Same: Application to Sundry Official Records.** The same general principles apply to official records of all sorts.⁷ The fact of the document

⁴ 1821, *Wood v. Fitz*, 10 Mart. 106, 361 ("the bonds taken by the officers of the court, in pursuance to law, are matters of record, when put on the files of the court, and need no proof of the officer's signature"); 1903, *Craw v. Abrams*, — Neb. —, 94 N. W. 639 (official bond, in the proper custody and recorded as approved, held not sufficiently authenticated); 1835, *Kello v. Magot*, 1 Dev. & B. 414, 423 (guardian's bond taken by a Court and preserved among its records; authenticity presumed); 1860, *Boyd v. Com.*, 36 Pa. 383, 389 (trustee's bond approved and filed in Court, admitted; "it might and ought to be inferred in such a case that its genuineness had been inquired of and passed on by the Court").

⁵ Compare the precedents on a similar question, *ante*, § 1877, where the effect of a certified copy, as evidence of the genuineness of filed documents, is considered.

⁶ *Eng.*: 1659, *R. v. James*, 1 Show. 297 (perjury upon an affidavit in Chancery; held in answer to an objection that there was no proof that it was really the defendant's, that the affidavit being of the defendant in the cause and used by him upon motion in Court, it's enough; "... a copy of an affidavit only, produced against a man, without proof that he made it, used it, or was concerned in the cause, that would be insufficient"); 1726, *Gilbert*, Evidence, 49 (chancery papers filed, admissible; unless there have been no proceedings on the bill; for such a bill "is of no use to the party, and therefore must be supposed rather to be filed by a stranger to do him an injury"); 1777, *Cameron v. Lightfoot*, 2 Wm. Bl. 1191 (affidavit in the same court in a former suit now the subject of an action for malicious prosecution, admitted without proving signature, "being filed in the very court where the action was tried"); 1817, *Hennell v. Lyon*, 1 B. & Ald. 182, 185 (admitting a copy of a bill and answer in Chancery; "the answer, being a proceeding in a court of justice, must have been received there in the usual course, and verified by the person putting it in, as the answer of the person sustaining the character which it imports him to bear"); 1824, *Dartnall v. Howard*, Ry. & Mo. 169 (examined copy of answer in Chancery, admitted); 1825, *Rees v. Bowen*, 1 McCl. & Y. 383, 389, 391 (affidavit in another suit, offered as an admis-

sion, without evidence that it had ever been in the other suit; excluded; "it appears to have been found in the office, but there is no proof by whom it was put there, or that it was used"); 1827, *Highfield v. Peake*, M. & M. 109 (deposition, admitted by examined copy; especially the trial was on an issue out of Chancery); 1849, *R. v. Turner*, 2 C. & K. 782, 796 (affidavit; proof of handwriting of the witness of an officer signing "By the Court"; proper swearing, and presence of the officer of Court, held sufficiently shown); *U. S.*: 1840, *Doughton v. Tillay*, 4 Blackf. 433 (purporting answer in chancery, not shown to be a copy, excluded).

For the question whether on proof of answer's genuineness, identity of name suffices to show the identity with the party charged, see *post*, § 2629.

⁷ *Conn.*: 1850, *Wiggins v. McLean*, 1 N. H. 671 (surveyor's return, admitted; is filed in a public office and purports to be official return); *Ark.*: 1903, *Miller v. Johnston*, — Ark. —, 72 S. W. 871 (deposition stating that "a copy is attached" of the record of a cotton exchange, held insufficient, for lack of any statement as to the place of custody or other circumstance indicating the genuineness of the original); *Fla. Rev. St.* 1892, § 1871 (a record in the appropriate book of an instrument required or authorized to be recorded; "presumed to have been made by the officer whose duty it was to make it"); *Ill.*: 1870, *Rockford v. Hildebrand*, 61 Ill. 155, 159 (records from clerk's office, admitted on facts); *La.*: 1881, *Hebert's Succession*, 33 La. An. 1099, 1105 (entry in a marriage register in official custody, assumed genuine); *Me.*: 1870, *Sumner v. Sebce*, 3 Greenl. 223 (town record of marriages, received from former town clerk, admitted); *Mass.*: 1886, *Com. v. Richardson*, 1 Mass. 71, 72, 7 N. E. 36 (lease of a pond purporting to be executed by public commissioners with authority, not received without proof of authenticity; here the commissioners were not in custody of leases so granted, and this document came from other custody); *Minn.*: 1860, *Saunders v. School District*, 12 Minn. 17, 18 (book of school-records in clerk's custody, sufficiently proved on the facts); 1875, *Board v. Smith*, 23 N. 97, 102, 115 (entries "paid

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§ 2159

purporting to be an official document and being found in the appropriate custody suffices to evidence its genuineness. An occasional apparent opposition of rulings indicates that perhaps the rule is one which is and ought to be more or less affected in its application by the circumstances of each case and the customs of official care and strictness in each locality. The rule may even be applied to admit entries made or documents filed by third persons in official records,³ within the limits already suggested (*ante*, § 2158, par. 8b). But a purporting official record, *lacking the signature* or other verifying attestation, will usually be treated with strictness, so that the appropriate custody alone will not suffice to authenticate it.⁴

with defendant's signature, on town assessment-books, the existence of the entries when the books were in the defendant's custody as treasurer not being shown; genuineness not presumed); *Mo.*: 1831, *Alexander v. Campbell*, 74 Mo. 142, 147 (book of deed records, custody not shown, excluded); *N. H.*: 1858, *Ferguson v. Clifford*, 37 N. H. 86, 95; 1858, *Little v. Downing*, ib. 385, 384 ("official books, or books kept by persons in public office, in which they are required to write down the proceedings of some public body or corporation, . . . where the books themselves are adduced, and it is proved or admitted that they come from the proper depository, are received as evidence without further attestation"); *N. J.*: 1897, *Schubert Lodge v. Schubert*, 56 N. J. Eq. 78, 35 Atl. 347 (printed copy, of the constitution of a secret order, the State-lodge secretary receiving it from the supreme lodge secretary; genuineness of the original presumed); *N. Y.*: *Laws* 1884, c. 376, § 1 (municipal corporation's receipt for money is provable by the fact of production from official files, if purporting to be given six years before commencement of proceedings); *Pa.*: 1830, *Miller v. Carothers*, 6 S. & R. 315, 221 (survey-draft found in the office among the official papers of a deputy-surveyor, presumed genuine, if the official had received orders on that matter); 1831, *Leasure v. Hillegas*, 7 id. 313, 317 (survey in the handwriting of a deputy-surveyor, though not found among official papers, admitted); 1835, *Snyder v. Bowman*, 4 Watts 132 (survey in the handwriting of a deputy-surveyor, found among official papers, excluded); 1838, *Com. v. Alburger*, 1 Whart. 469, 473 (ancient official plan of Philadelphia, found in the surveyor-general's office, accredited by the officers as authentic, received); 1841, *Maskenbury v. Carlisle*, 1 W. & S. 282 (tax-books provable by exemplified copies, but if not, then by one who has the keeping of them officially; here, not by an ex-clerk of the office); 1869, *Baird v. Rice*, 63 Pa. 469, 497 (like *Com. v. Alburger*); *S. C.*: 1901, *Steen, ex parte*, 59 S. C. 220, 37 S. E. 829 (books conceded to be those of the sheriff's office, admitted as made by his authority); *Tex.*: 1849, *Houston v. Perry*, 5 Tex. 462, 465 (land-office book, proved genuine by custody).

For the peculiar case of a Spanish *testimonio*, see the following rulings: 1851, *Paschal v. Perez*,

7 Tex. 348; 1880, *Word v. McKinney*, 25 id. 363, 368.

§ 1866, *Rice v. Cunningham*, 30 Cal. 493 498 (entry of release or discharge on the margin of a mortgage record, to be assumed genuine; "the presumption of law is that the discharge has been regularly and honestly entered"); 1846, *Bourchand v. Dias*, 3 Den. 238, 241 (release of a Government claim by the secretary of the treasury, deposited in the department, not assumed genuine as a public document).

§ 1870, *Hall v. People*, 21 Mich. 454, 460 (alleged records of township officers, not assumed official from the recitals merely); 1878, *Wilt v. Cutler*, 28 id. 189, 195 (record of a deed; presence in the proper office, though unsigned, may suffice); 1860, *Hall v. Manchester*, 40 N. H. 410, 413 (a deceased town-clerk's supposed copy of a record of the selectmen, not attested by him; the genuineness of the entry being shown, the place of the copy in the clerk's book was held sufficient evidence of its being intended as a true copy); 1795, *Penn. v. Hartman*, 3 Dall. 230 (old survey, in the surveyor-general's office, but not signed or otherwise authenticable, not received as official); 1830, *Booge v. Parsons*, 3 Vt. 456, 459 (record of a lost deed nearly 40 years old, received; the clerk's attestation of record being lacking, but his handwriting being proved); 1852, *Johnson v. McGuire*, 4 id. 327 (clerk's certificate of a record, unsigned in part, proved by handwriting); 1848, *Northfield v. Plymouth*, 20 id. 582, 585 (old record of marriage in town records; no attestation appearing, proof of handwriting of the clerk sufficient).

The case of a *marriage certificate* handed over by the celebrant official to the parties is generally treated as sufficiently authenticated by that circumstance (though it may perhaps better be justified on the principle noted *ante*, § 2181, par. 3 (c)): 1855, *Northrop v. Knowles*, 52 Conn. 522, 525 (marriage certificate; that it was given by the officiating magistrate, sufficient); 1894, *Frutini v. Casiani*, 66 Vt. 273, 274, 29 Atl. 252 (certificate of marriage; authenticity evidenced by fact that it was given to parties at time by celebrant priest).

For *corporate records*, which raise certain complications of the substantive law, see *Thompson on Corporations*, § 7737.

4. Authentication by Official Seal or Signature.

§ 2161. **General Principle.** The history of the seal is the history of epoch in our law. It is the history of doctrines distinguishing the German system of law from its predecessors. Out of the use of the seal grew two great doctrines of the authenticity and the indisputability of written instruments. It is with the former that we are here concerned.¹

The various stages of development, in more primitive times, need not here rehearsed.² As the doctrine survives to us to-day, it is in the shape of a settled rule that the genuineness of certain purporting official seal-impressions need not be evidenced otherwise than by the production and inspection of the document bearing them. It is necessary only (in these days of the tinct vogue of private seals) to notice enough of the history to appreciate how this doctrine, impregnably fixed in our law, once rested upon reasons practical and so convincing that its living force was apparent to all:

1867, Mr. J. C. Jeaffreson, *A Book about Lawyers*, I, 21 ("The Great Seal"): "In the days when writing was an art almost entirely confined to religious persons, sealing was far more important and efficacious means of testifying the genuineness of documents than it is at present. . . . In the feudal ages any needy clerk who had turned his attention to calligraphy could have perpetrated forgeries in perfect confidence that they would escape the scrutiny of the most accurate and skilful of living readers. But the necessity for sealing placed almost insuperable obstacles in the way of those who were best qualified to do so. . . . The most desirous to triumph over right by fictitious deeds. It was no easy matter to procure seals of any kind; it was very difficult to obtain for dishonest ends the temporary possession of well-known seals. . . . Great barons, ecclesiastical dignitaries, secular and religious corporations, had distinctive seals at an early date; but they were confided to the care of trusty keepers, and were guarded with jealousy. When an official seal was used, its keeper brought it with reverential care from its customary place of concealment, and it was not applied to any document without satisfactory cause shown why its sanction was required. An obscure tamperer with parchments could not hope to lay his hands on one of these important seals. If he procured an impression of a respected seal, he could not obtain a fac-simile of the original. Seal-engraving was an art in which there were but few adepts; and the artists were for the most part men to whom no rogue would dare propose the hazardous task of counterfeiting an official device. . . . The forger of deeds in older time had not overcome all difficulties, when he had surreptitiously obtained an official seal. The mere act of sealing was by no means the simple matter that it is now-a-days. To place the seal on fit labels rightly placed, and in all respects to make the fictitious document an accurate imitation of the intended deeds to which the particular seal of a particular great man was applied, were no trifling feats of dexterity, ere scribes had congregated into fraternities and law-stationers had been called into existence. To get a supply of suitable wax was an undertaking by no means easy in accomplishment. Sealing-wax was not to be bought by the pound or stick in every street of feudal London. *Cire d'armes*—sealing-wax akin to the bright vermilion compound now in use—was not invented till the middle of the sixteenth century. William Howe assures his readers that the earliest letter known to have been sealed with it was written from London August 3, 1554, to Heingrave Philip Francis von Daun, by his agent in England, Gerrard H.

¹ The history of the letter is examined post, § 2426.

² The following works contain the history of the seal on the Continent: 1877, Ficker, *Beiträge zur Urkundenlehre*, I, §§ 57-59; 1887, Posse, *Die Lehre von Privaturkunden*; 1889, Breslau,

Handbuch der Urkundenlehre, 501-555, especially 517-520, 539-544 ("the law was expressed by the Zurich writing-master Konrad Mure in 1275, that 'the whole credibility of a document rests upon an authentic, well-known and notorious seal'").

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man, and long after that date the manufacture of sealing-wax was a secret known to comparatively few persons. In feudal England there were divers adhesive compounds used for sealing. Every keeper of an official seal had his own recipe for wax. Sometimes the wax was white; sometimes it was yellow; occasionally it was tinged with vegetable dyes; most frequently it was a mess bearing much resemblance to the dirt-pies of little children. But its combination was a mystery to the vulgar; and no man could safely counterfeit a sealing-impression who had not at command a stock of a particular sealing-earth or paste or wax. Eyes powerless to detect the falsity of a forger's handwriting could see at a glance whether his wax was of the right colour. Moreover, this practice of attesting private deeds by public or well-known seals gave to transactions a publicity which was the most valuable sort of attestation. A simple knight could not obtain the impression of his feudal chieftain's seal without a formal request, and a full statement of the business in hand. The wealthy burgher, who obtained permission to affix a municipal seal to a private parchment, proclaimed the transaction which occasioned the request. The thriving freeholder who was allowed the use of his lord's graven device had first sought for the privilege openly. 'Quia sigillum meum plurimis est incognitum' were the words introduced into the clause of attestation; and the words show that publicity was his object. And to attain that object the seal was pressed in open court, in the presence of many witnesses."

The rule has been phrased in various terms of evidential principle. But the same policy, in modern times, has always served as the foundation of it, namely, the great inconvenience, amounting sometimes to practical impossibility, of furnishing any further evidence, as well as the slight danger of forgery in such cases. The kinds of seals to which this rule applies have never been the subject of uniform judicial enumeration; but the general principle has been universally accepted:

1726, Chief Baron *Gilbert*, Evidence, 19: "Here the distinction is to be made between seals of public and seals of private credit; for seals of public credit are full evidence in themselves, without any oath made; but seals of private credit are no evidence but by an oath concurring to their credibility. Seals of public credit are the seals of the King, and of the public courts of justice, time out of mind."

1816, *Gould, J.*, in *Griswold v. Picaire*, 2 Conn. 85, 90: "In the proof of foreign documents, there must from the nature and necessity of the case be some ultimate limit, beyond which no solemnity of authentication can be required. And the public national seal of a Kingdom or sovereign State is, by the common consent and usage of civilized communities, the highest evidence and the most solemn sanction of authenticity, in relation to proceedings either diplomatic or judicial, that is known in the intercourse of nations. . . . But there is no evidence, it is said, that the seal was affixed by a proper officer. Assuming the seal to be genuine, that fact must of course be presumed, unless the contrary is shown. For any higher evidence of the fact, appearing upon the face of the record, than the seal itself imports, is impossible, and to require extrinsic evidence of it would be to subvert the rule itself that a national seal is the highest proof of authenticity."

What, then, is the precise significance of this rule? What is it that Courts actually do, evidentially, when they accept such seals with no further evidence? The theory of the matter has been so overlaid with customary phrases about "judicial notice" and "presumptions," and is so closely related in practice to the Hearsay exception admitting official statements (*ante*, §§ 1630-1638), that it is necessary at the outset to analyze the precise nature of the process.

When a document bearing a purporting official seal — a notary's certificate of protest, for example — is offered in court, the acceptance of it for its offered purpose involves the assumption of four things, namely, (1) that it is an official of that name, (2) that this is genuinely his seal's impression, (3) that this seal-impression was affixed by him; and, furthermore, (4) that it is allowable to receive his hearsay official statement as testimony to the fact stated by him. The first three of these elements go to the matter of genuineness of the document; that is to say, the document purports to be that of J. S., a notary, asserting a certain fact, and the net result of the three elements is that we accept as a fact that J. S., a notary, did make the written assertion. If there were a signature only, with no seal, and the document was similarly accepted, the second and third elements would merge (*i. e.* the purporting J. S.'s signature is accepted as written by him); it is only in the case of a seal that they are distinct (for it might be the seal's impression and yet another person might have affixed it). Thus the assumption that the second and third elements are always judicially united, *i. e.* any assumption of genuineness, whenever made, covers both elements; there is no case presuming the seal's impression to have been of his seal but not affixed by him, nor *vice versa*. Hence, in effect, the situation, for seal or signature alike, is reducible to the following elements and is so in practice treated: (1) that there is an *official of that name*; (2) (3) that this document is genuinely *executed by him*. Now the remaining element (4), that this hearsay statement of his is admissible, is obviously concerned with the Hearsay rule only, and may therefore be dismissed as having no present relation with the principle of Authentication. There remain therefore to be considered the first three (or two) elements above noted.

Of these, the elements (2) (3) are obviously pure questions of Authentication; *i. e.* the acceptance of the document signifies that we have some reason for assuming that this document was genuinely executed by one J. S. What is the true nature of this process? Is it the process of Judicial Notice? Sometimes dealt with in these terms.⁸ But this seems clearly unsound. In the first place, the principle of judicial notice, *i. e.* of assuming the truth of an allegation without any evidence (*post*, § 2565), rests on the common notoriety of the fact alleged, as being too well known to need evidence; obviously this can never be the case with the specific act of executing a particular document. In the next place, the doctrine of judicial notice applies as soon as the allegation is made, without any evidence whatsoever in support (*post*, § 2565); it would follow that, as soon as the party alleges that J. S. had executed an alleged document, the Court must not only accept that as a fact, and no production of a purporting seal or signature would be necessary; but this is obviously not the practice. Furthermore, it is conceivable that a Court might judicially know what the design of a certain public seal was, but this would not of itself enable the judge to declare

⁸ For example: "The seal of a notary public is judicially taken notice of" (Greenleaf, *evidence*, § 5).

the specific impression offered in court was genuine or forged. It would seem, then, that what is actually done is not done by virtue of any doctrine of judicial notice. It is, on the contrary, a simple instance of declaring that sufficient evidence of genuineness exists, on the general principle of Authentication (*ante*, § 2130). The fact constituting this sufficient evidence is the existence upon the document of an impression or writing purporting to be the official seal or signature; and this may well serve as sufficient evidence, because the forgery of the seal or signature would be a crime, and detection would be fairly easy and certain.⁴

On the other hand, the element (1) noted above, namely, that the J. S. who has thus genuinely executed this document is the official that he purports to be, is a real result of the principle of Judicial Notice. This element is wholly separable from that of the authenticity of the paper. Whether by witnesses or otherwise we prove the paper genuine, we arrive simply at the fact that a certain J. S. executed this as an official paper. It is thus genuinely all that it purports to be, and its authentication is complete. But that J. S. is the officer that he claims to be is still a fact external to the document, and must be reached by some other principle than that of authentication. That principle is here judicial notice. So far as the incumbent of any office is judicially noticed, when his acts are in question, this notice of him when he executes a document is merely an application of the general principle to a particular variety of act; the same thing would have been done had his act not been a documentary one. It seems clear, then, that the satisfaction of this element (1) — namely, that J. S., the purporting notary, is actually the lawful incumbent of that office — is reached by a true application of the principle of judicial notice.⁵

What we find, then, is this general rule: *So far as a particular seal or signature is held to admit a document, the seal or signature evidences the document as genuinely executed by the purporting person, and his official character is assumed without evidence.*

§ 2162. *Same: Mode of Authenticating when Genuineness is not Presumed; Certificates of Attestation; Statutes presuming Genuineness.* Suppose, now, that the seal or signature is one of a kind which does not sufficiently evidence its own genuineness, — a tax-collector in another State, for example. Its genuineness therefore remains to be proved by testimony. The inconvenience of producing a witness who of his knowledge can testify to the genuineness of the seal or signature would be intolerable, and a resort to hearsay testimony in the shape of official statements has long been accepted as proper. But who is the appropriate officer to make such statements? Naturally, at common law, that chief officer at the source of executive power, who knows what persons have been appointed and what are their seals or

⁴ This true process is seen in the forms of expression of the statutes cited *post*, § 2162, from England, Colorado, Florida, United States, West Virginia, and Wisconsin.

⁵ It follows that a Court might presume the document genuine, and still decline to notice the official character of the writer, — as in some of the cases cited *post*, § 2165.

signatures. He must also know their duties, and be authorized to certify these, because the document, being usually offered as a hearsay statement, must appear to have been made under an official duty (*ante*, § 163). Finally, the certifying officer must himself have such a seal as is presumed genuine, because otherwise the process of certifying would only have to be repeated anew. Such a seal, at common law, would practically be the seal of State only (*post*, § 2163), for foreign officers at least, though for domestic officers it might be one of a lower grade. It will thus be seen that at common law, whenever a seal not itself presumed genuine is to be authenticated otherwise than by testimony on the stand, *two distinct rules are always involved* in practice, namely, the *admissibility of the hearsay certifying officer's statement*, and the *genuineness of his own purporting certificate*. In other words, two questions must be answered: (1) *What higher officer is authorized to certify to the authority of the lower office, the official incumbency of the person exercising it, and the genuineness of the document purporting to be executed by him*; and (2) *Is this higher officer's purporting certificate to be presumed genuine?*¹ The one requirement might be satisfied without the other; for example, (1) a judge of court might be a proper officer to certify to a clerk's authority to copy the records and to the genuineness of a copy purporting to be by the clerk; but (2) the judge's own purporting certificate might not be sufficiently authenticated by his seal if from a foreign State, though it might be if from the domestic jurisdiction; and resort might further be required to the seal of State, which would be presumed genuine. Now it is the Authentication principle which answers the second question, and the Hearsay exception which answers the first question. Practically, it is natural to answer the second one first, because this narrows the scope of the search for the answer to the first; for example, in the above instance, if the law declines to presume genuine any foreign seal less than the seal of State, it is at once obvious that such a seal must ultimately be obtained, and the remaining question is merely as to the proper intervening certifying officers.

In dealing, therefore, with the principle of Authentication by official seal, it is impossible to treat of all the elements practically required to exist for the admissibility of a hearsay official document, because the Authentication principle merely tells what seals will be presumed genuine; and if the seal in question is of an inferior grade, resort must be had to the Hearsay exception to determine what officer has authority to certify to it; and the rules of that exception are so distinct and detailed that it would be impracticable to deal with them apart from their general principle.

The matter is further complicated by the circumstance that most statutes dealing with the subject provide in the same section for both sets of rules, i. e. they not only declare the higher officers authorized to certify to the genuineness of official documents, but also declare how far up the process must be continued before reaching a seal which will be presumed genuine. For example, the

¹ This distinction has already been examined, *ante*, § 1679; but it seems desirable to note it again here.

may provide that a city tax-collector's certified copy may be authenticated by the mayor's certificate under city seal, and this in turn by the seal of the governor, or chancellor, or secretary of State under seal of State. Every such statute includes a declaration of the Authentication rule as well as of the rule of the Hearsay exception.²

² For convenience, all statutes of this composite character have been placed under the Hearsay exception (*ante*, §§ 1680-1682), classified according as they deal with judicial records, or other kinds of official documents. Under the present head are placed only such statutes as deal exclusively with the principle of Authentication, *i. e.* expressly and merely declaring that certain kinds of seals shall be presumed genuine, and therefore shall need no further certifying of genuineness. Besides the following statutes, which deal with seals only, or seals and signatures, may be consulted those dealing with signatures only, collected *post*, § 2167; ENGLAND: 1845, St. 8 & 9 Vict. c. 113, § 1 ("Whereas it is provided by many statutes . . . [that various official documents, corporation proceedings, certified copies, etc., shall be admissible when duly authenticated], and whereas the beneficial effect of these provisions has been found by experience to be greatly diminished by the difficulty of proving that the said documents are genuine, and it is expedient to facilitate the admission in evidence of such and the like documents," it is enacted that whenever any certificate, official document, etc., is receivable in evidence, it shall be admitted if it "purport to be sealed or impressed with a stamp, or sealed and signed, or signed alone, as required, or impressed with a stamp and signed, as directed by the respective Acts . . . without any proof of the seal or stamp, where a seal or stamp is necessary, or of the signature of the official character of the person appearing to have signed the same, and without any further proof thereof, in every case in which the original record could have been received in evidence"); § 2 (judicial notices to be taken of the signatures of the judges of the superior courts at Westminster); 1851, St. 14 & 15 Vict. c. 99, § 7 (presuming genuine the purporting seal or signature and official character of a person certifying a copy of a foreign statute, judgment, etc.); § 11 (every document admissible in England, Wales, or Ireland, "without proof of the seal or stamp or signature authenticating the same," or of the official character of the signer, shall equally be received in the colonies).

CANADA: Dom. Rev. St. 1886, c. 125, § 94 (affidavits, etc., before the Exchequer Court; purporting seal and signature of commissioner, notary public, judge or court, etc., is presumed genuine); B. C. St. 1899, c. 62, § 43 (like Man. St. 1902, c. 148, § 73); § 59 (similar to *ib.* § 82); Man. Rev. St. 1902, c. 57, § 53 (documents certifying the making of an affidavit, and purporting to bear the signature or seal of the commissioner, judge, notary, consul, or other authorized officer as specified, shall be received without proof of signature, seal, or official character); c. 148, § 82 (title-registrar's certificate of registration, admitted "without proof of the signature or seal"); § 73 (purporting certificate of registered land-title, presumed genuine, "without proof of signature or seal"); c. 41, § 5 (purporting Surrogate Court's seal need not be proved); N. Br. Consol. St. 1877, c. 36, § 7 (commissioners to administer oaths, etc., out of the Province; affidavit, etc., admissible without proof of signature or seal); § 4 (commissioner's acts in taking affidavits must be authenticated in the same manner as for conveyances); c. 46, § 13 (all documents admissible by the law of England without proof of seal, stamp, signature, or official character, are here also thus admissible); Newf. Consol. St. 1892, c. 50, Rules of Court 84, par. 6 (judicial notice is to be taken of the seal or signature of any judge, notary, consul, etc., authorized to take examinations, etc., in other British possessions or in foreign States); c. 57, § 7 (like N. Br. Consol. St. 1877, c. 46, § 13, substituting "British" for "England"); N. Sc. Rev. St. 1900, c. 163, § 13 (like N. Br. Consol. St. 1877, c. 46, § 13, adding Ireland); § 48 (any document purporting to bear the seal or signature of one of the specified officials authorized to administer and certify to oaths in or out of the Province shall be admitted without proof of the seal, signature, or official character); Rules of Court 1900, Ord. 59, R. 2 ("all copies, certificates and other documents, appearing to be sealed with a seal of the Court, used by the prothonotary, shall be presumed to be authenticated"); Ont. Rev. St. 1897, c. 73, § 38 (signature and seal of a foreign notary, corporation, mayor, chief magistrate, governor, judge, consul, vice-consul, or consular agent, appended to a certificate of administration of an oath, etc., shall be admitted "without proof of such signature or seal and signature" or official character); St. 1900, c. 27, § 14 (seal of the registrar of a loan corporation, presumed genuine); P. E. I. St. 1889, § 25 (the seal of any foreign State and the certificate of a Secretary thereof, when offered to prove "the existence and competency" of any court, officer, or clergyman, "shall be deemed authentic without proof thereof," whether it be an independent State or one of a federation); § 38 (affidavits taken without the province; the officer's "signature and official character" must be certified by a notary public under seal or a judge or clerk of a court of record or superior or county court under court seal, or the mayor of a city or town and the corporate seal, or a British consul under seal; the certifier's signature and seal taken for genuine without other proof).

UNITED STATES: Ark. Stats. 1894, § 4496 (seal of commissioner of State lands, to be sufficient authentication); §§ 2984-2986 (official

§ 2163. *Seal of State.* The purporting seal of State of a foreign nation, by universal concession, is presumed genuine;¹ though it is difficult to

character of a judicial officer in a State or Territory of U. S., to be authenticated by certificate under seal of clerk of a court of record in county; of officer without the U. S., by seal of State of the government; within this State, need not be authenticated); *Cal. C. C. P.* 1872, § 1875 ("Courts take judicial notice of . . . the seals of all the Courts of this State and of the United States; the accession to office and the official signatures and seals of office of the principal officers of government in the legislative, executive, and judicial departments of this State and of the United States; the existence, title, national flag, and seal of every State or Sovereign recognized by the executive power of the United States; the seals of Courts of admiralty and maritime jurisdiction, and of notaries public"); § 2015 (Judge's certificate of affidavit in a foreign country or domestic State, attested by clerk of Court under its seal, to be admissible); *Colo. Annot. State.* 1891, § 3741 ("the impression of such seal [of a railroad commissioner:] upon any instrument purporting to be the act or deed of such commissioner shall be *prima facie* evidence of the execution and delivery of any such instrument"); *Fla. Rev. St.* 1892, § 1114 ("the impression of the seal" of a commissioner of agriculture on a deed or contract purporting to have been made by trustees of an internal improvement fund, or members of a board of education, or a commissioner of agriculture, "shall entitle the same to be received in evidence"); *Ga. Code.* 1895, § 5143 (seals of admiralty and maritime Courts "of the world" and of States of the Union and departments of the U. S. Government, are noticed without proof); *Haw. Civil Laws* 1897, § 1398 (quoted *ante*, § 1680); § 1402 ("Whenever by any law now or hereafter to be in force, any certificate, official or public document or documents, or proceeding of any corporation, or joint stock, or other company, or any certified copy of any document or by-laws, entry in any register or other book, or of any other proceeding shall be receivable in evidence of any particulars, the same shall respectively be admitted in evidence in any court, and by any person having by law or by consent of parties authority to hear, receive and examine evidence, provided they respectively purport to be sealed or impressed with a stamp, or sealed and signed, or signed alone as required, or impressed with a stamp, and signed as directed by the respective acts made or to be hereafter made, without any proof of the seal or stamp where a seal or stamp is necessary, or of the signature or of the official character of the person appearing to have signed the same, and without any further proof thereof in every case in which the original record or document could have been received in evidence"); *Ida. Rev. St.* 1887, § 5950 (like *Cal. C. C. P.*, § 1875); *Ill. Rev. St.* 1874, c. 101, § 6 (certificate under official seal of an officer out of the State is *prima facie* evidence of his authority to administer oaths); *Ida. Code* 1897, § 4679 (signature and seal of an officer authorized to take

depositions and affidavits are presumed genuine compare *ib.* § 4703); *La. Rev. L.* 1897, (attestation and seal of an American consul-general, vice-consul, or commercial agent be proof "that it emanated from said etc."); *Mich. Comp. L.* 1897, § 1405 (land seal, to be "*prima facie* evidence of the execution" of a certificate of purchase, *Minn. Gen. St.* 1894, § 3877 (railroad warehouse commissioner's seal, to be judicially noticed); § 3963 (seal of land-office on document issued by commissioner, to be *prima facie* evidence of due execution); *Miss. Annot.* 1892, § 1796 ("any certificate, attestation, authentication purporting to have been given or given by any person as an officer of any State or of the United States, shall be *prima facie* evidence of the official character of such person"); § 589 (same for certificate of official administering oath out of the State); *N. H. Pub. St.* 1891, c. 167, § 8 (insurance commissioner; no further proof than his seal "shall be required to authenticate official certificates, etc."); *N. Y. C. C. P.* § 957 (certified copies by officers having must bear the seal, except for use in the Court or an inferior Court); *Or. C. C. P.* § 706 (like *Cal. C. C. P.* § 1875); *Pu. L.* 1893, § 1, P. & L. Dig. Evid. 51 (certificate under seal of an acknowledgment of a deed, etc., is receivable "without need of proof of the said seal," whether made within or without the State); *St.* 1869, *Pu. L.* 2, P. & L. Dig. Just. Peace 25 (public seal of certain aldermen, presumed genuine); *S. May* 21, *Pu. L.* 271, § 1 (official character of an officer taking an acknowledgment in Porto Rico, or the Philippines, to be established by his official seal, and if he has none, certificate of a U. S. officer there who has); *U. S. Rev. St.* 1878, § 1750 (on a proof for perjury, any document "purporting to be signed, or subscribed, or attested, or sealed, or signed thereon the seal and signature of the administering or taking the same in testimony thereof, shall be admitted in evidence as proof of any such seal or signature being genuine or of the official character of such person"); *Utah Rev. St.* 1898, § 3574 (like *Cal.* § 1875); *Va. Code* 1887, § 3334-5 (copy or certificate purporting to be by a judge of court and certain public officers in the State and in West Virginia, receivable without seal or signature or official character); *Code* 1891, c. 130, § 5 (certified copy of a deed purporting to be signed or sealed by a clerk, Secretary of State, treasurer, or county surveyor, need not be proved genuine); *Wis. Stats.* 1898, § 4149 (quoted *ante*, § 1724, *Anon.*, 9 *Mod.* 66 (exemplification of a judgment "under the common seal

foreign nation,
difficult to say

how far the rule would apply to a colony or other dependency having a seal of its own.²

The principle is in the United States conceded to apply to the purporting seal of the United States and of any one of the States,³ and presumably also to that of a Territory organized by Congress. But whether the Court, for the purposes of substantive law, will treat as an independent State any community not already so treated or recognized by the Executive is a different question (*post*, § 2566).⁴

§ 2164. *Seal of Court; Clerk's Signature; Justice of the Peace.* (1) At common law, it would seem that the purporting seal of *no court of a foreign State* would be presumed genuine,¹ except that of a court of *admiralty*;² the distinction depending, not perhaps upon any greater ease of detecting a forgery of the latter, but rather upon the general and peculiar position of an admiralty

States" of Holland, admitted); 1825, *Yrisarri v. Clement*, 2 C. & P. 223, 225 (foreign State seal will be assumed genuine, if the State is one recognized); 1816, *Griswold v. Pitcairn*, 2 Conn. 85, 89 (foreign judgment under great seal of Denmark, received); 1851, *Watson v. Walker*, 23 N. H. 471, 496 (seal of England, presumed genuine).

¹ 1803, *Henry v. Adey*, 3 East 221 (seal of the island of Grenada, not accepted); 1807, *Buchanan v. Rucker*, 1 Camp. 63 (judgment sealed with the seal of the island of Tobago; the judge's handwriting proved).

² Besides the following rulings, many statutes, cited *ante*, §§ 2162, 1680-1682, expressly recognize this rule: 1859, *Yount v. Howell*, 14 Cal. 465, 467 (U. S. land-patent, with signature of President and seal of U. S., received as genuine); 1897, *Heppard v. Warren*, 108 Ga. 198, 29 S. E. 817 (an original grant and plat from a State, authenticated by the State seal; unless the seal is in such a condition that its genuineness cannot be determined); 1894, *Chicago & A. R. Co. v. Keegan*, 152 Ill. 413, 416, 39 N. E. 33 (Governor's deed, under seal of State; genuineness presumed); 1841, *Robinson v. Gilman*, 7 Shepl. 299 (seal of Massachusetts, affixed to the exemplification of a law, presumed genuine); 1831, *State v. Carr*, 5 N. H. 367, 370 (seal of Connecticut); 1826, *U. S. v. Amedy*, 11 Wheat. 392, 407 (exemplification of incorporation-act of Massachusetts, under purporting signature of Secretary of State and seal of State, received, as under Fed. St. 1790, quoted *ante*, § 1680; the seal of State suffices under the statute, and "the annexation [of it] must, in the absence of all contrary evidence, always be presumed to be by a person having the custody thereof and competent authority to do the act"); 1831, *Ex parte Povall*, 2 Leigh 816, 817 (record of a domestic State, sealed by a judge of probate, attested by the Governor under State seal, received).

³ 1825, *Yrisarri v. Clement*, 2 C. & P. 223 (cited *supra*); 1818, *U. S. v. Palmer*, 3 Wheat. 610, 635, 642 (seal of a foreign government not acknowledged by our Executive does not prove itself).

⁴ 1803, *Henry v. Adey*, 3 East 221 (judgment of the island of Grenada; "the Court held the nonsuit proper for defect of the proof of the seal; they said that they could not take judicial notice that the seal affixed was the seal of the island, which was necessary to be shown"); 1807, *De Sobry v. De Laistre*, 3 H. & J. 191, 218 (seal of a foreign court does not prove itself); 1852, *Pickard v. Bailey*, 26 N. H. 152, 167 (seal of a Canadian Court required to be proved); 1808, *Delafield v. Hand*, 8 Johr. 310, 314 (exemplification of a French judgment not assumed authentic; "Of what notoriety can such a seal be in this country? The extension of the rule insisted on by the plaintiff would open the avenues of fraud and imposition"). *Contra, semble*: 1853, *Cyr v. Sarfacon*, 2 All. N. Br. 641 (purporting seal of Supreme Court of Maine, shown to be used by the District Court, received); 1863, *Junkin v. Davis*, 22 U. C. Q. B. 269 (judgment in the tenth judicial district of California; exemplification under seal purporting to be of the fourteenth district, excluded).

If the court is proved to have *no seal*, then some other seal that can be presumed genuine is necessary: 1827, *Packard v. Hill*, 7 Cow. 434, 443, app. 2 Wend. 411, 5 id. 375, 384 (copy of a Spanish judgment at Havana, signed by the clerk who kept the records, the seal of the Royal College of Notaries being used and the Court having no seal, held sufficiently authenticated).

⁵ 1713, *Stennil v. Brown*, 10 Mod. 108 (copy of a sentence of a French admiralty court, "subscribed by the officer of the court," excluded; the seal of the court required); 1819, *Thompson v. Stewart*, 3 Conn. 171, 181 (seal of any Admiralty Court, but not an ordinary foreign Court, presumed genuine); *Not decided*: 1811, *Gardere v. Ina Co.*, 7 John. 514, 519 (certified copy of a British Vice-Admiralty judgment, with Court seal; whether assumed authentic, left undecided); *Contra*: 1826, *Catlett v. Ina Co.*, 1 Paine C. C. 594, 613 (judgment of Vice-Admiralty Court of Isle of France; seal does not prove itself).

court as applying the common law of nations and therefore as partaking the comity of the nature of a domestic court. Statutes have, however, in some jurisdictions amplified the scope of the common-law rule (*ante*, §§ 2162, 1681).

(2) The purporting seal of any court *within the jurisdiction* is presumed to be genuine.³ Under this principle, in the United States, would be included the seal of a *Federal* court,⁴ as well as that of the court of *another State* in the United States.⁵ That this was the accepted common-law rule is of particular importance in view of the varying forms of authentication sanctioned by many statutes, especially the Federal statute (*ante*, §§ 2162, 1681); but, of course, since such statutes merely sanction the form specified therein and do not forbid the use of any form otherwise receivable (*ante*, § 1681), a document may be sufficiently authenticated by judicial seal on common-law principles, though it may not satisfy the statute.

(3) The *signature of the clerk alone*, without the court seal, has been in most Courts regarded as sufficient and to be presumed genuine, for any certified copy of the records of a court *within the jurisdiction*,⁶ though not

³ 1658, *Olive v. Gwin*, 2 Sid. 145 ("We ought to take notice of a seal created generally by act of Parliament"; noticing the seal of a Welsh court); 1702, *Green v. Waller*, 3 Ld. Raym. 891, 893 (judgment of an admiralty court, proved by exemplification under its seal); 1844, *Bailey v. Bidwell*, 13 M. & W. 73 (petition in bankruptcy, sealed by the Court, sufficiently authenticated); 1881, *Com. v. Phillips*, 11 Pick. 28, 30 (to a certified copy of a record in Middlesex Co. under the purporting clerk's hand and court seal, it was objected that the judges of another court had "no means of knowing whether he is the clerk lawfully appointed or a usurper of the office, and that the seal of the court without a clerk's signature is insufficient, for a stranger might get possession of the seal"; held, that a certified copy "by the clerk of such court [of record] under the seal thereof" was sufficient "in every other judicial tribunal of the Commonwealth"); 1869, *Kingman v. Cowles*, 103 Mass. 253 ("The clerk is the proper custodian of the records; and the seal of the Court attached to his certificate attests the possession of the record in the person who certifies; records so certified are always received as true *prima facie*, without proof in the first instance of their genuineness or of the official character of the person who assumes to act in such official capacity").

⁴ 1838, *Womack v. Dearman*, 7 Port. 512, 516 (seal of a Federal court in a Territory, presumed genuine); 1850, *Williams v. Wilkes*, 14 Pa. St. 228 (seal of U. S. circuit court proves itself, as that of a domestic court).

⁵ 1868, *Adams v. Way*, 23 Conn. 419, 420 (seals of another State Court assumed genuine, and not treated as if of foreign courts); 1903, *Ford v. Nesmith*, 117 Ga. 210, 43 S. E. 483 (but here under statute); 1833, *Dunlap v. Waldo*, 6 N. H. 480 (signature of a county clerk under county seal in New York, assumed genuine, as being the seal of the county court); 1841, *Steam-*

boat Thames v. Erskine, 7 Mo. 218, 217 (certificate of clerk under court seal to deposit without the State, sufficient). *Contra, ante*, 1857, *Behn v. Young*, 21 Ga. 207, 213 (jurat affidavit by purporting judge of probate in Florida, not recognised without proof of official character).

It may be added that the effect of a judicial seal, with respect to raising the presumption of genuineness for the document, is to be distinguished from its effect as importing also an order by the Court to the clerk to make the *certified copy* sealed; for only by such a special order, in the English rule, does a certified copy of a judicial record become admissible as a hearsay statement (*ante*, § 1681). The distinction is neatly brought out in the case of *Henry Adey, supra*, note 2, where a judgment of the island of Grenada was offered; the judge's signature to a certified copy of the clerk was proved by testimony on the stand, so that the document was sufficiently authenticated; but the clerk's copy was inadmissible unless he had authority to make it, and the order to do so could be supplied only from the seal; thus, a seal was necessary, and the purporting seal of a foreign court does not authenticate itself (*post*, § 2164); hence had to be otherwise proved.

⁶ 1888, *Ponder v. Shumana*, 80 Ga. 505, 506, 5 S. E. 502 (signature of a probate clerk, assumed genuine); 1816, *Rowland v. M'Gehee*, 1 Bibb 439 (certified copy of a will by a clerk of a court without seal, receivable because of general authority in clerks to certify copies); 1901, *Marses v. Middlesborough T. Co.*, — Ky. —, 65 S. W. 118 (county clerk's signature and name will be noticed as genuine; "though generally Courts will require some evidence of identification, — whenever this inconsistent pronouncement may meet"); 1897, *Com. v. Kennedy*, 170 Mass. 18, 49 N. E. 782 (certified copy of a domestic record need not be under seal); 1854, *Major v. State*

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a court *without* the jurisdiction.⁷ This question could not arise at common law in England, because it was there maintained that the clerk had no authority, merely from his office, to certify copies, and the court seal was necessary as importing a specific order to him (*ante*, § 1681); but in the United States it was early conceded that the clerk had by his office an implied authority to furnish copies, and thus the only question remaining was that of presuming his signature genuine, and this was not a difficult step to take for clerks of domestic courts. By statute, however, this rule has been sometimes amplified (*ante*, §§ 1681, 2162, *post*, § 2167).

(4) The case of a *judge's signature* alone seems rarely to have arisen for express decision at common law.⁸ It may be supposed that, wherever it could have any legal force, it would be presumed genuine for the judge of a domestic court.

(5) A *justice of the peace's court* is not at common law a court of record, nor does it possess a seal. It has therefore generally been held that a purporting signature of a justice of the peace, even within the jurisdiction, is not presumed genuine; though the practice is not uniform.⁹ A justice's authority to take a *deposition* is always a creature of statute (*ante*, §§ 1376, 1380-1382), and hence the mode of authenticating his certificate must be sought thereunder.¹⁰

§ 2165. *Seal of Notary.* (1) Other than a foreign seal of State (*ante*, § 2163), the only foreign official seal presumed at common law to be genuine,

Sneed 11, 15, *semble* (certified transcript by a clerk of a domestic court, authenticated without official or court seal, admissible). *Contra,semble*: 1853, Thomasson v. Driskell, 13 Ga. 253 (clerk's certificate from a local court, not under court or private seal, excluded); 1843, Chambers v. People, 5 Ill. 351, 355 (clerk of another court's signature without seal, but the signature proved; official character must be shown; same for a justice of the peace of another county). *Not clear*: 1830, Burton v. Pettibone, 5 Yerg. 443 (copy of a record; the clerk's name need not be signed at the end, if it appears somewhere, at least when the Court seal is added). Compare the cases cited *post*, § 2578 (judicial notice).

⁷ 1825, Allen v. Thaxter, 1 Blackf. 399 (clerk of probate court of another State; certificate without court seal, not presumed genuine).

⁸ 1796, Alston v. Taylor, 1 Hayw. 381, 395 (Virginia record-copy certified by clerk and presiding justice without seal; excluded; "where there is no seal it should be certified there was none").

⁹ 1874, Holleman v. De Nye, 51 Ala. 95, 100 (one signing as J. P. during a rebel occupation, presumed to have held over in office); 1876, Jenkins v. Tobin, 31 Ark. 306, 308 (justice of the peace in another State; certificate of deposition does not prove itself); 1883, Moore v. State, 51 id. 130, 10 S. W. 23 (justice's docket entry does not prove itself); 1860, Eds v. Johnson, 15 Cal. 53, 57 (justice of the peace's certificate of acknowledgment, assumed genuine);

1837, Doughton v. Tillay, 4 Blackf. 433, 434 (signature of justice's jurat in adjoining State, not assumed genuine; nor his authority to administer oaths assumed); 1892, Bridges v. Branham, 133 Ind. 486, 496, 33 N. E. 271 (justice's record not presumed genuine); 1811, Talbot v. Bradford, 2 Ribb 316 (justice of the peace within the Commonwealth; office presumed); 1815, Geohegan v. Eckles, 4 id. 5 (copy of a record attested by a justice, not admissible except under seal of court, or except when acting under statutory authority to give copies); 1847, Winston v. Gwathmey, 8 B. Monr. 19, 20 (justice of the peace of another State, authenticable by the clerk of the county court or of the city hustings court); 1855, Com. v. Dowling, 4 Gray 29, 30 (no seal required, for a copy of a record coming up from a justice of the peace); 1826, Hamilton v. Wright, 4 Hawks 283, 285 (official character and signature must be authenticated). Compare the cases cited *post*, § 2578 (judicial notice).

¹⁰ On these points the statutes are referred to in dealing with the authentication of the taking of depositions (*ante*, § 1676), and with the admissibility of copies of judicial records in general (*ante*, § 1681) and official signatures (*post*, § 2167). The presumption of *official character* (as where the certificate is merely signed "J. P.") is elsewhere noticed (*post*, § 2168); and the authentication of a justice's *docket* by proving its *custody* has already been considered (*ante*, § 2158).

by universal concession, was that of a notary. The notary's hearsay certificate was at common law not admissible except for the single purpose of evidencing the fact of demand and non-payment (protest) of a foreign bill of exchange (*ante*, §§ 1675, 1676); but, so far as it was thus receivable, the purpose of the notary's seal sufficiently evidenced its genuineness. The reason for the exceptional recognition of this officer's seal was undoubtedly the necessity of prompt action in fixing the liabilities accruing on commercial paper, and the consequent impossibility of securing further certification of the document under the seal of State; this consideration sufficing to override the risk of forgery:

1009, *Anon.*, 12 Mod. 345: "Plaintiff, to show a protest, produced an instrument attested by a notary public; and though it was insisted on that he should prove this instrument, or at least give some account how he came by it, *Holt*, [L. C. J.] ruled it to be necessary; for that, he said, would destroy commerce and public transactions of nature."

1821, *Tilghman*, C. J., in *Brown v. Philadelphia Bank*, 6 S. & H. 434: "Public convenience requires that a certificate under a seal of this kind shall be *prima facie* evidence without proving that the person who used it and signed the certificate was a notary commissioned by the governor. It ought to be presumed, till the contrary be proved, that a man would dare to assume the office without proper authority."

1840, *Morphy*, J., in *Waldron v. Turpin*, 16 La. 562, 565: "The Courts of one State can have or be presumed to have no more knowledge of the signature and capacity of public officers of another State than of any other foreign country. To the above there exists an exception as regards notarial protests of foreign bills of exchange, which has been introduced in aid of commerce, founded wholly upon the custom of merchants and public convenience; it has been acknowledged and maintained by the Courts of this State, and such protests receive credit everywhere without any auxiliary evidence. . . . The importance and almost universal use of bills of exchange as the means of remitting money from one country to another; the great commercial facilities they have been found to offer; and the delay and trouble of procuring evidence from distant places are among the grounds upon which this exception has grown up."

This rule seems never to have been disputed, and its universal concession has caused the precedents to be few in number.¹ The only question that has been as to the *form* of the seal; and this was properly held to depend upon the law of the place of purporting execution.²

¹ *Eng.*: 1725, *Walrond v. Van Moese*, 8 Mod. 323 (notary in Holland); 1802, *Hutchinson v. Mannington*, 6 Ves. Jr. 823 (certificates of a notary public and a magistrate in an East Indian colony; Eldon, L. C., observed "that a notary public by the law of nations has credit everywhere; the Court therefore will give credit to him; but that it was necessary to prove that the other person was a magistrate"); 1816, *Kinnaird v. Saltoun*, 1 Madd. 237 (French notarial seal, without magisterial authentication, but certified by a London notary, received); *U. S.*: 1840, *Dunn v. Adams*, 1 Ala. 527, 530; 1877, *Hart v. Ross*, 57 id. 518, 520; 1795, *Spegall v. Perkins*, 3 Root 274; 1901, *Barber v. International Co.*, 73 Conn. 537, 48 Atl. 758 (a foreign notary's seal is judicially noticed,

"whenever it is used to attest a document which by the usages of nations may be attested"; yet the opinion afterwards consistently refers to a consular certificate as denoting the notary's official character); Rev. St. 1897, § 469 (a certificate purporting to be under seal of a notary in the U. S. is presumptive evidence of official character); Code 1897, § 4624; 1903, *Metcalf v. Mich.* —, 94 N. W. 734 (sworn petition; notary's seal is presumed genuine negotiable instruments only); 1846, *McLloyd*, 3 Pa. St. 474, 482. Compare the *notes cited ante*, §§ 1675, 1680, dealing with admissibility of notaries' certificates.

² 1837, *Tickner v. Roberts*, 11 La. 1 (Alabama notary, not in the form the

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(2) It followed that the purporting notary's certificate, *lacking the seal*, could not be presumed genuine, and his signature and official character must be otherwise evidenced;² except that, by local statute or practice, a domestic notary's signature alone has sometimes been presumed genuine.⁴ The lack of the seal, therefore, merely deprives the offering party of the advantage of thereby evidencing genuineness. The purporting seal is not essential, as a matter of technical form (unless by some doctrine of substantive law or by express statute⁵), to the acceptance of the certificate as a hearsay official statement; it is merely a circumstance which enables the document's genuineness to be presumed:

1850, *Treat, C. J.*, in *Stout v. Slattery*, 12 Ill. 162 (admitting a notarial jurat to a petition for *certiorari*, the seal lacking): "The failure of the notary to annex his official seal to the jurat does not vitiate the proceedings based on the petition. Within the county of Adams the addition of the seal was not necessary [even to evidence genuineness]. If the petition was to be used in another county, the seal of the notary, or some other evidence of his official character, would be indispensable. . . . The power to administer oaths is expressly conferred by statute and is not one of the incidents of office. The affixing of the notarial seal is not essential to the validity of his acts, except in cases where it is required by some rule of the common law or some provision of the statute. In all other cases his official acts, at least within the State, are none the less valid because they are not authenticated by his notarial seal. The only difference relates to the proof of his authority. If the act is not evidenced by the seal of the notary, his signature and official character must be established by some other legitimate evidence. . . . It is only when it becomes necessary to *prove* the making of the oath that the seal of the offic: or some competent evidence of his authority must be produced." *

scribed, held insufficient to authenticate); 1838, *Carter v. Bailey*, 9 N. H. 558, 566; 1842, *Bank of Rochester v. Gray*, 2 Hill N. Y. 237, 230.

² 1894, *Alabama Nat'l Bank v. Chattanooga D. & S. Co.*, 106 Ala. 663, 665, 18 So. 74 (Tennessee notary's certificate of affidavit, lacking seal, rejected); 1894, *Bayonne K. Co. v. Umbenhauer*, 107 id. 494, 499, 18 So. 175 (same, for Georgia affidavit); 1903, *Hayes v. Bank*, 132 id. 354, 31 So. 464 (certificate of acknowledgment by a "chancery clerk" in another State, styling himself "*ex officio* notary public," but lacking a notarial seal, excluded); 1871, *Ashcraft v. Chapman*, 38 Conn. 230 (notary's appointment and signature, proved by certificate of Secretary of State, the seal not being attached to the notarial certificate); 1859, *Rindakoff v. Malone*, 9 La. 540 (seal necessary); 1838, *Carter v. Bailey*, 9 N. H. 558, 567 (if a foreign certificate of protest lacks the notarial seal, the official character of the notary, and the law stating the due manner of making, must be expressly evidenced); 1842, *Bank of Rochester v. Gray*, 2 Hill N. Y. 237, 230 (foreign notary's protest without seal, not receivable "as evidence *per se*").

The modes of certifying to it by some other official may be ascertained from the common-law principle (*ante*, § 2163), and from the statutes collected *ante*, §§ 1675, 1680.

⁴ *Ala.*; 1876, *Harrison v. Simons*, 55 Ala. 510, 516 (notary acting under local statute as justice of the peace; presumed genuine without

seal); *Ill.*; 1850, *Stout v. Slattery*, 12 Ill. 102, 164 (domestic notary's jurat to an affidavit, bearing the signature only; genuineness and official character presumed, within the same county); 1850, *Rowley v. Barrian*, ib. 198, 200 (similar; *semble* otherwise for a notary out of the State, by statute); 1859, *Dyer v. Flint*, 31 id. 80, 82 (similar); 1896, *Schaefer v. Kienzel*, 123 id. 430, 434, 15 N. E. 164 (*Stout v. Slattery* "still applies," in spite of the subsequent statutes about notaries' seals, c. 101, § 6, and c. 99, § 7, relating to oaths and notaries; here, a jurat of an affidavit of non-residence); 1896, *Hertig v. People*, 159 id. 237, 42 N. E. 879 (preceding case approved; here, a jurat to an affidavit of publication). For the statute in this State as to the mode of certifying a foreign notary's seal, see *ante*, § 1676.

⁵ See examples in the following cases: 1872, *Donagan v. Wood*, 49 Ala. 242; 1848, *Fund Com'rs v. Glass*, 17 Oh. 543 (certificate of a deed's acknowledgment).

⁶ 1841, *Lambeth v. Caldwell*, 1 Rob. La. 61 (domestic notary's protest without seal, received; "we are acquainted with no law requiring notaries to furnish themselves with seals; . . . this practice [of using them] is certainly laudable, but nothing authorizes us to say that the absence of a seal on the certificate of a notary can prevent its admission when offered in evidence"); 1842, *Bank of Rochester v. Gray*, 2 Hill N. Y. 237, 239 ("There is considerable doubt whether any seal is strictly

(3) But by statute the power of a notary has been everywhere enlarged not only as to certifying other kinds of commercial paper and other acts relating to it (*ante*, § 1675), but also as to certifying acknowledgments of debt, swearing of oaths, taking of depositions, and the like (*ante*, § 1676). Suppose now that a notary's certificate is offered, purporting to represent his act under this broader statutory authority, and to bear his seal, does the purporting sufficiently evidence the genuineness of such a document and of his official character as notary? It has been by some Courts contended that, so soon as the common-law scope of his functions is exceeded, his seal loses the benefit of the common-law presumption:

1816, *Matthews, J.*, in *Las Cuygas v. Larienda's Syndics*, 4 Mart. La. 288 (admitting a power of attorney executed before a Trinidad notary, bearing a seal, and certified as to his character by three other officers): "In cases of protested bills of exchange, the certificate of a notary public, authenticated by his seal of office, is received in courts of the United States as proof of the drawer's refusal to accept or pay the bill. . . . This is perhaps allowed for the benefit of commerce, as the delay necessary to obtain authenticity to the protest under the great seal of the nation may be considered as incompatible with the dispatch required for the aid of fair and profitable commerce. . . . Whatever may be the reason for it, it is in this case an established rule of evidence; but we believe it does not extend further. And in the present case bound to require other testimony of the truth and genuineness of the instrument under consideration than that which it bears on its face? . . . We are of opinion that the only thing necessary to give the certified copy of the power of attorney (the subject of the present contestation) the same credit in our courts of judicature which it would have in those of Spain, is proof that the person who certifies it is a notary public of the place from whence it comes, and that the certificate attached to it is really his. This evidence might be had by a certificate under the national seal, attesting that the person certifying the instrument is a notary public for Trinidad by the king's appointment; and if the dispute had any relation to his right to fulfil the duties of the office claimed by him, it would be the best evidence admissible in the case. But in all other purports it appears to us that proof of his being a notary *de facto* is sufficient. This may be proved by witnesses, as well as by a certificate under the national seal. Therefore, if the witness offered by the plaintiff knows and will prove the person who authenticates the power of attorney to be a notary public in the city of Trinidad, that from a knowledge of his handwriting it is he who certifies and signs it, he ought to be received to verify these facts."

This reasoning is supported by the consideration that the peculiar necessity for speedy informality in commercial matters does not apply to certificates of oaths, acknowledgments, and the like; and a few Courts have accepted this result.⁷ But even the argument just named does not apply to a notary's certificates of notice to indorsers or of protest of promissory notes or inland bills, each of which has been made receivable by statute (*ante*, § 1675) and en-

requisite, — whether the notary's signature alone, that being proved in the ordinary way, would not be enough anywhere."

⁷ 1854, *Haggitt v. Iniff*, 5 DeG. M. & G. 910 (affidavit with a jurat of a New York notary, certified to be a notary by the British consul under seal, received); 1856, *Re Earl's Trust*, 4 K. & J. 300 (affidavit with a jurat of a notary of Ohio under seal; not allowed to be filed

as genuinely made by a person who was not public); 1869, *Re Davis' Trusts*, L. R. 8 Eq. (jurat of affidavit, purporting to be by a notary of West Virginia, with seal and signature; nature required to be otherwise evidenced); 1816, *Las Cuygas v. Larienda's Syndics*, 4 Mart. La. 288 (quoted *supra*); 1831, *Ferris v. Boesl*, 10 Id. 85.

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of which equally needs speedy informality. Moreover, it is notable that the common law raised the presumption of genuineness to the full extent that the notary's certificate was admissible at all; and it might be argued that in the same way the presumption should be kept parallel with the statutory extension of authority. This view has apparently been favored by the majority of Courts;⁸ and, though it creates an anomaly, in contrast to other official certificates, it is perhaps preferable as maintaining uniformity for notaries' certificates in general.

(4) In such a case — the notary purporting to act under an enlarged statutory authority — may we go even further, and from the purporting seal presume not only the document's genuineness and the notary's incumbency, but also his *authority to do the act* in question and to certify it? To presume this would be apparently to transgress the general principle of the common law that no official, merely from his office, has an implied authority to furnish certificates (*ante*, § 1674), and that somehow a specific duty must first appear (*ante*, § 1632). If a foreign statute creates such a specific enlarged duty, it would seem that the statute must be expressly shown, not presumed; and it has been already noted (*ante*, § 2161) that the elements of genuineness and of official character are distinct from that of authority to make official statements. No doubt a statute may expressly create a presumption of such authority from the purporting seal; but otherwise it could not be conceded.⁹

§ 2166. *Sundry Official Seals.* Other than the seal of State, of an admiralty court, and a notary, and, by extension in the United States, as already seen (*ante*, § 2164), the seal of a Federal court or that of a State of the Union, no purporting seal of a *foreign officer* will be apparently presumed genuine at common law; though occasionally the purporting seal of the Secretary of State or of Foreign Affairs seems to have been treated on the same footing as the seal of State.¹ But the purporting seals of *local State officers* and,

⁸ 1876, *Denmead v. Maack*, 3 McArth. 475 (affidavit's jurat, by a purporting Maryland notary, presumed genuine, the law of Maryland authorizing notaries to administer oaths); 1846, *Barry v. Crowley*, 4 Gill 194, 203 (by statute the notary's certificate was made evidence of demand and notice, thus enlarging the common law; held, that "no proof is necessary that the seal attached is the notary's seal or that the handwriting signed thereto is the proper signature of the notary"); 1821, *Brown v. Phila. Bank*, 6 B. & R. 484 (certificate of notice to indorser, under statute, with notarial seal; presumed genuine); 1882, *Hayes v. Frey*, 54 Wis. 503, 521, 11 N. W. 695 (deposition certified by a notary out of the State; by statute, no other certificate to his official character is needed); 1883, *Sloop v. Heymann*, 57 id. 496, 504, 16 N. W. 17 (same).

⁹ Ill. St. 1861, p. 79, Rev. St. 1874, c. 101 § 6 (oath required to be taken out of the State may be administered by any officer there authorized; and "his certificate under his official seal shall be received as *prima facie* evidence without further proof of his authority to administer

oaths"); 1895, *Ferris v. Commercial Nat'l Bank*, 158 Ill. 237, 241, 41 N. E. 1118 (Canadian notary's jurat to an affidavit; excluded because no recital of authority was included); 1899, *Trevor v. Colgate*, 181 id. 129, 54 N. E. 909 (notary's seal out of the State, under this statute, does not raise a presumption of authority to administer oath; the jurat must recite expressly the possession of such authority); 1900, *Deanoyers Shoe Co. v. First Nat'l Bank*, 188 id. 312, 53 N. E. 994 (jurat of affidavit of proof of execution of warrants of attorney, by a Missouri notary; foregoing cases approved); 1901, *Bell v. Farwell*, 189 id. 414, 59 N. E. 955 (foregoing cases approved).

¹ 1820, *Garvey v. Hibbert*, 1 Jac. & W. 180 (a paper made at Washington, authenticated by a notary with his seal and signature, with a certificate from the clerk of the circuit court and the court seal, and a certificate of the secretary of State with his official seal, received; an affidavit verified by a mayor of Georgetown, D. C., with nothing further, rejected); 1850, *Beach v. Workman*, 20 N. H. 379 (Canadian customs officer's commission; purporting private seal of

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within a county, of local county officers, would probably always be presumed genuine;² and the seal of a municipal corporation should probably receive similar treatment. The purporting seals of Federal officers, or at least, where the office is subdivided into districts (as the land-office), the officer of a Federal district lying within the State jurisdiction, will be treated like the seals of domestic officers.³ Apparently the purporting seals of officers of another State of the Union would not be assimilated to those of domestic officers. The precise state of the law in a given jurisdiction, however, will depend greatly on the statutory enlargements (*ante*, §§ 2162, 1680).

§ 2167. *Official Signatures.* The seal is an emblem more difficult to forge and more likely to be generally known than the signature. Hence, so far as affects the presumption of genuineness, it would seem that, for officers possessing a seal (and this circumstance can be ascertained from statute), nothing less than the seal should ordinarily suffice, even for a domestic officer.¹ Nevertheless, there has been no steady adherence to such a rule, if there is one; and by statute so many express sanctions have been given to the presumption of genuineness based on signature alone that it seems impossible to venture any generalizations as to the state of the law. The cases of a judge's signature, a court-clerk's, a justice-of-the-peace's, and a notary's, have been already noticed (*ante*, §§ 2164, 2165). It may also be supposed, as a matter of principle, that if any purporting signatures of domestic officers are to be presumed genuine, such recognition should properly include also those of commissioners of deeds appointed by the local Executive to act abroad,² and of the officers of a prior sovereignty in the same territory.³ The express stat-

the Governor, not presumed genuine); 1876, Evans v. Lea, 11 Nev. 194, 197 (sealed certificate of acknowledgment by vice-consul-general in London, assumed genuine); 1867, Stanglein v. State, 17 Oh. St. 453, 462 (certificate of marriage-record copy, under the Bavarian seal of foreign affairs, admitted as genuine).

¹ This may at any rate be implied from some of the rulings cited *post*, § 2167, and from most of the statutes cited *ante*, § 1680, and is expressly covered by many of the statutes cited *ante*, § 2162.

When such a statute gives authority for admitting official certificates under seal, the implication is that they will not be presumed genuine without it: 1896, Noanes v. State, 143 Ind. 299, 42 N. E. 609 (the custodian of a record was authorized by statute to certify to copies by affixing his seal, and the seal was omitted; excluded).

² 1842, Nicka v. Rector, 4 Ark. 251, 277 (seal of U. S. land-office commissioner proves itself); 1850, McNamee v. U. S., 11 id. 148, 150 (U. S. treasury auditor's seal proves itself); 1863, Gallup v. Armstrong, 23 Cal. 480 (Government patent, authenticated by official seal, admitted); 1883, Wilcox v. Jackson, 100 Ill. 261, 264, *semble* (exemplification, under land-office seal, of its records, assumed genuine); 1897, Cooney v. Packing Co., 169 id. 370, 43 N. E. 406 (certified copy of a government plat

under land-office seal and commissioner's certificate, received); 1837, Harris v. Doe, 4 Blackf. 369, 373 (seal of U. S. land-office presumed genuine); 1898, Davis v. Watkins, 56 Nebr. 288, 76 N. W. 575 (U. S. acting comptroller's sealed certificate, assumed genuine).

³ Distinguish the question of the formal validity, under statute, of a document lacking seal: 1896, Hertig v. People, 159 Ill. 237, 42 N. E. 879 (like the next case); 1896, Kimball v. People, 160 id. 653, 43 N. E. 710 (certificate of publication of notices by the president of a newspaper-company, under Revenue Act, § 186); 1897, Fisk v. Hopping, 169 id. 105, 43 N. E. 323 (under statute, the certificate of acknowledgment of a commissioner of deeds does not need a seal for its validity, nor to be certified by the secretary of State; the statute is intended merely to cure otherwise defective acknowledgments).

² 1897, Fisk v. Hopping, 169 Ill. 105, 43 N. E. 323, *semble* (commissioner of deeds for Illinois in another State; his signature to certificate will be presumed genuine, and also his official character will be noticed; so far as no statute requires more).

³ 1812, Hays v. Berwick, 2 Mart. La. 13 (prior Spanish governor's signature, presumed genuine without seal); 1817, Jones v. Gale, id. 635 (same).

utes allowing recognition of signatures, of officers both within and without the jurisdiction, are now numerous.⁴ The judicial rulings are not in harmony, and many of them rest, either explicitly or silently, upon local statutes.⁵

⁴ Not all of the ensuing statutes clearly recognize the signatures alone, but they may be so construed; to these should be added those cited *ante*, § 2162, which sometimes recognize either seal or signature; and with them should be compared the statutes cited *ante*, §§ 1676, 1680, 1681, 1683, which sanction specific modes of proving certain classes of documents: CANADA: *Dom. Crim. Code* 1893, §§ 691, 694 (certificates of trial and of conviction; in certain cases no proof of signature or official character is needed); *St. 1893*, c. 31, § 15 (like *Ont. R. S. c. 73, § 24*, for orders signed by the secretary of State of Canada); *B. C. Rev. St. 1897*, c. 71, § 16 (like *Ont. R. S. c. 73, § 24*); *St. 1900*, c. 18, § 82, *St. 1899*, c. 39, § 78 (similar to *Ont. Rev. St. c. 245, § 114*); *Man. Rev. St. 1902*, c. 101, § 213 (like *Ont. Rev. St. c. 245, § 114*); c. 163, § 10 (like *Dom. St. 1893, c. 31, § 15*, applying to Manitoba only); *N. Br. Consol. St. 1877*, c. 46, § 16 (a contract entered into by a foreign corporation within the Province is sufficiently authenticated by proof that it was "duly signed or issued by the accredited agent or officer" of the corporation in the Province); § 20 (an act done "by any mayor or chief magistrate of a city, under the corporate seal" may be authenticated by the seal of the mayor or chief magistrate, "unless the act done be a corporate act"); *N. S. Rev. St. 1900*, c. 163, § 7 (like *Dom. St. 1893, c. 31, § 15*); § 8 (similar, applying it to the provincial secretary of Nova Scotia); *Ont. Rev. St. 1897*, c. 73, § 24 (order signed by the secretary of State of Canada and "purporting to be written by command of the Governor-General shall be received in evidence as the order of the Governor-General"; so also for the provincial secretary and the Lieutenant Governor); § 30 (judicial notice is to be taken of the signature of "any of the judges of the Supreme Court of Canada, the Court of Appeal, the High Court of Justice, the county courts of Ontario, or the superior or circuit courts in Quebec"); § 40 (copies of depositions shall be received "without proof of the signature" of the officer); c. 245, § 114 (a document purporting to be a valid liquor license; its signature "shall *prima facie* be taken to be genuine"); *St. 1902*, c. 27, § 14 (documents purporting to be signed by the chairman or secretary of the railway committee, presumed genuine); *P. E. I. St. 1889*, § 32 (like *Ont. R. S. c. 73, § 24*); § 53 (contracts of foreign corporations; like *N. Br. Consol. St. c. 46, § 16*).

UNITED STATES: *Ala. Code 1897*, § 1811 (patents issued by the U. S. or any U. S. State "must be received in evidence without further proof"); *Colo. Annot. Stats. 1891*, § 1756 ("any patent" may be admitted "without further proof of its execution"); *Haw. Civil Laws 1897*, § 1402 (quoted *ante*, § 2162); § 1424 ("All Courts . . . shall henceforth take judicial notice of the

signature of every person who is, or shall be, or shall have been, cabinet minister, judge of the supreme court or of any circuit court, clerk or deputy clerk of the supreme court or of any circuit court, the commissioners of the board to quiet land titles, or masters in chancery, provided such signature shall be attached or appended to any decree, order, certificate, affidavit or other judicial or official document"); *Ind. Rev. St. 1897*, § 8027 (auditor's certified copy of an officer's account, in an action against the latter, presumed genuine); *La. Code 1897*, § 4642 (signature of an officer to certificates of certified copies authorized by preceding sections of statutes, presumed genuine); *Kan. Gen. St. 1897*, c. 97, § 11 ("the signature of the officer to any certificate or document" admissible as a certified copy or record, presumed genuine); *Ky. Stats. 1899*, § 1625 (official signature of any officer of this State, the U. S., or any U. S. State or Territory, to be noticed); *Nebr. Comp. St. 1899*, § 5986 (signature of an officer certifying a copy or giving a certificate of the tenor of office records, presumed genuine); *Okla. Stats. 1893*, § 4276 (signature of any officer to a certificate or document made admissible by foregoing sections, to be presumed genuine); *Va. Code 1887*, § 3332 (notice to be taken of the signature of the Governor or a domestic judge to any official or judicial document); §§ 3359, 3360 (certification of deposition in the State by the officer taking it; no proof of signature is necessary; certification of a deposition taken out of the State is receivable if authenticated by the officer's seal if he has one, and if not, by "some officer of the same State or country" under seal, except when taken by a justice in another domestic State or by an agreed person, when no seal or proof of signature is necessary); *W. Va. Code 1891*, c. 130, § 33 (signature of the officer taking a deposition in or out of the State need not be proved genuine); § 34 (signature, without seal, of the officer taking a deposition out of the State must be authenticated by "some officer of the same State or country" under official seal).

⁵ It is not clear in all of these cases whether the document bore the signature alone, without the seal: *Eng. : 1855*, *Bruce v. Nicolopulo*, 11 *Exch.* 139, 133 (on a wall in a town in Turkey in the military occupation of the Russians was a proclamation, bearing the printed signature "Gortschakoff"; held sufficient authentication); *Ala. : 1858*, *Carhart v. Clark*, 31 *Ala.* 396 (certificate of insolvency-claimant's oath, in another State, by a notary, judge of a court of record, or commissioner, proves itself, under statute); 1873, *Stewart v. Trenier*, 49 *id.* 492 (land-office register's copy of a document in his office, under statute, received without seal); 1889, *Hawes v. State*, 88 *id.* 37, 43, 69, 7 *So.* 302 (the statute for marriage registers applies to registers kept out of the State; *semble*, a certificate of purport-

§ 2168. **Official Character and Title to Office.** It has already been noted (*ante*, § 2161) that the acceptance of a purporting official document necessarily assumes, not only that the document was genuinely executed by the person named, but that the person thus claiming to act officially was in fact the lawful official having that character. The latter element is a fact external to the document, and is not included in the process of authentication in the narrow sense; nevertheless it may be equally supplied or assumed, by the principle of judicial notice or otherwise. Certain questions that concern this element, where a document's authentication is involved, may now be examined.

ing custodian proves itself); *Ark.*: 1853, *Floyd v. Hicks*, 14 Ark. 286, 293 (U. S. land-register's certificate of location proves itself); 1878, *Ferguson v. Peden*, 33 id. 180, 182 (certificate of acknowledgment by a clerk of court of another State proves itself, under statute); *Cal.*: 1867, *Wetherbee v. Dunn*, 32 Cal. 106, 108 (signature of county tax-collector, presumed genuine); 1872, *Himmelman v. Hoadley*, 44 id. 213, 226 (city deputy-superintendent's signature assumed genuine; the title need not be added where the official character of the document appears); *Conn.*: 1873, *State v. Dooris*, 40 Conn. 145 (certificate of an Irish marriage registrar, not assumed genuine); 1892, *Erwin v. English*, 61 id. 502, 509, 23 Atl. 753 (same); 1885, *Northrop v. Knowles*, 52 id. 522, 525 (marriage certificate signed by the officiating magistrate; signature treated as genuine without further proof); 1889, *State v. Schweitzer*, 57 id. 533, 537, 18 Atl. 787 (same); 1892, *Erwin v. English*, 61 id. 502, 507, 23 Atl. 753 (same); *Fla.*: 1895, *Yellow River R. Co. v. Harris*, 35 Fla. 385, 17 So. 563 (certificates of title from the land-office receiver); *Ga.*: 1855, *Dobbs v. Justices*, 17 Ga. 624, 629 (attachment; official attestation presumed genuine); *Ill.*: 1853, *Buckmaster v. Job*, 15 Ill. 323 (governor's certificate of justice's official character in another State or Territory must be authenticated by the State seal); 1880, *Walcott v. Gibbs*, 97 id. 118 (tax-collector's receipts; whether presumed genuine, undecided); 1902, *Morrison v. People*, 196 id. 454, 63 N. E. 969 (stamped signatures of the county civil service commissioners on a certificate, presumed genuine on the facts); *Ky.*: 1823, *Wickliffe v. Hill*, 3 Litt. 490 (U. S. Treasury auditor's certified copy, not presumed genuine without seal); 1823, *Bernard v. Lewis*, 4 id. 148, 151 (jailer's receipt, not presumed genuine); 1878, *Loving v. Warren Co.*, 14 Bush 316, 322 (county bonds, bearing signatures of the county clerk and the judge and seal of the county; proof of the first and third, with evidence of part payment, held sufficient to show the genuineness of the second); *La.*: 1859, *Grant's Succession*, 14 La. An. 795 (justice's certificate subscribed by the secretary of State, excluded); *Mich.*: 1876, *Boyce v. Stambaugh*, 34 Mich. 343 (U. S. land-patent transcript, admitted); *Miss.*: 1846, *Sessions v. Reynolds*, 7 Sm. & M. 180, 185 (foreign mayor's certificate, assumed genuine); *Mo.*: 1835, *Bryan v.*

Wear, 4 Mo. 106, 110 (U. S. land-surveyor's certificate, assumed genuine without proof of signature); *N. H.*: 1858, *Ferguson v. Clifford*, 37 N. H. 86, 96 (certificate of city-clerk to copy of record, not assumed genuine); *N. Y.*: 1840, *Thurman v. Cameron*, 24 Wend. 87, 91 (certificate by a statutory officer of a certificate of acknowledgment of a deed; the official character, signature, and jurisdiction, are to be presumed, as in the case of a notary); *N. C.*: 1894, *State v. Behrman*, 114 N. C. 797, 805, 19 S. E. 220 (Russian rabbi's certificate, not presumed genuine); *Pa.*: 1875, *American Life Insurance Co. v. Rosenagle*, 77 Pa. 507, 516 (certificates of a copy of a Baden law; the signer not authenticated on the facts); *Tenn.*: 1825, *Wilson v. Smith*, 5 Yerg. 379, 407 (certificate of a deposition-commissioner will be assumed genuine and lawful only where he appears in it to have that character, etc.); 1827, *Bennett v. State*, Mart. & Y. 123 (the signature of an officer of government appointed by the Legislature proves itself, though not signed officially; here, an attorney-general); 1858, *Fancher v. DeMontagne*, 1 Head 40 (deed register's signature, presumed genuine); 1899, *State v. Cooper*, — Tenn. Ch. —, 53 S. W. 391 (land-register's certificate, presumed genuine); *U. S.*: 1900, *Apache Co. v. Barth*, 177 U. S. 533, 30 Sup. 718 (papers purporting to be county warrants, and to be signed by certain county officers, not presumed genuine); *Vt.*: 1870, *State v. Horn*, 43 Vt. 20, 23 (marriage certificate by a justice in another domestic State; signature and office must be proved); 1878, *State v. Colby*, 51 id. 291, 294 (certificate of marriage by a minister; signature must be proved); 1879, *State v. Potter*, 53 id. 33, 38 (town clerk's copy of a record including a minister's certificate, received, without authenticating the latter); *Va.*: 1858, *Ushers v. Pride*, 15 Gratt. 190, 195 (auditor's certificate of delinquent tax-land, admitted without proof of execution or official character, though made before the statute). For the peculiar case of a *testimonio* in Texas, see the following cases: 1851, *Paschal v. Perez*, 7 Tex. 345; 1862, *Andrews v. Marshall*, 26 id. 212, 216; 1864, *Lambert v. Weir*, 27 id. 350, 363; 1867, *Hatchett v. Conner*, 30 id. 104, 109.

Questions of *validity* under rules of substantive law or of procedure — such as the nullity of an indictment by reason of informality in the signing — are not within the present purview.

Suppose that a purporting official document by J. S. under seal of office is presumed genuine; there remains to be accounted for the element of J. S. being the officer that he purports in the document to be. This element can be supplied by the principle of judicial notice. On turning to that principle, however, we find (*post*, § 2576) that in strictness it does not always extend below certain supreme or central officers; i. e. to accept as true, without any evidence whatever, the allegation that J. S. is the incumbent of a certain office, is a step that may be sanctioned for the President, the Governor, the judges of the highest Court, and a few other officers, but not always for officers below these. For the inferior officers, then, may be required *some* evidence. Upon slight evidence a presumption may be built — for example, so as to dispense with proof of the document of appointment; but there must be at least some evidence, as a foundation for a presumption. Accordingly, for such officers there is a *presumption of office* (*post*, § 2535). This presumption may not be raised in all kinds of issues — for example, not in a direct proceeding to try the title to the office, and perhaps not in some criminal proceedings; but in general it suffices. The official character of the person, then, is reached, either by accepting it without any evidence (judicial notice), or by raising a presumption upon certain evidence. This presumption is usually raised whenever the person is shown to be *acting in the office* under claim of incumbency (*post*, § 2535).

Now, as applied to purporting official documents, this requirement is satisfied by the *document's purporting to be executed by him as an officer*; for this is an acting in the office. By the rule of authentication we have presumed that J. S. did actually sign and seal, purporting to do so as officer of the sort named; upon this act then, the presumption of office may be raised. Thus, for official documents the presumption of authentication is usually found followed by the presumption of office, though the latter presumption has an independent and larger existence of its own, and is also applied to official acts other than documentary ones. It merely follows naturally when the genuineness of the document is reached by the presumption of genuineness. It is convenient to note here the application of the general presumption to purporting officers executing documents. Its rules may be summarized as follows:

(1) Where a document *purports to be executed by an officer*, and the genuineness of the seal or signature can be presumed, the official character (or incumbency of office) of the person thus purporting to act as officer will also be presumed. This rule is amply illustrated by implication in the precedents already considered (§§ 2162-2168),¹ and is also expressly involved in some of the foregoing statutes dealing with authentication (*ante*, §§ 2162, 2167). Less frequently, but apparently without any difference of judicial opinion, it has been expressly laid down, whenever the question has been raised.²

¹ See, for example, the language of the Court in *Kingman v. Cowles*, cited *ante*, § 2164, and in *Brown v. Phila. Bank*, cited *ante*, § 2165.

² *Eng.*: 1812, *R. v. Verelst*, 3 Camp. 432 (Ellenborough, L. C. J.): "It is a general presumption of law that a person acting in a pub-

(2) Where the document does *not sufficiently purport* to be executed as officer, the presumption cannot be raised, because (as above noted) it rests upon the fact of an acting in office; hence, if the maker of the document does not clearly purport so to act, the required basis for the presumption is lacking.³ This question is presented most frequently by documents signed by *initials only* or by some other imperfect designation of the office; here a liberal view of the principle would accept as sufficient any symbol plainly intelligible and unmistakably intended to indicate an official act; yet the tendency to follow statutory words literally, and the necessity of fulfilling forms prescribed by the substantive law, leads often to rejection on technical grounds.⁴

(3) If by seal or signature the *presumption of genuineness is not raised*, then, it has been said, the presumption of official character cannot be raised merely by proving otherwise (through handwriting-witnesses, or the like) the genuineness of the document. In other words, the testimony must be to the

His capacity is duly authorized to do so"; here, the appointment of a surrogate administering an oath under which perjury was charged); 1832, *R. v. Howard*, 1 Moo. & Rob. 187 (commissioner to take affidavits); 1844, *Bunbury v. Matthews*, 1 C. & K. 380 (sheriff); *R. v. Newton*, ib. 469, 430 (commissioner for taking affidavits); *Ala.*: 1837, *Bullock v. Wilson*, 5 Port. 338, 339, 342 (receipt of U. S. receiver of public monies); 1837, *Kennedy v. Dear*, 6 Port. 90, 96 (slander by charging perjury; in proving the trial proceedings, the justice's office is provable by this presumption); 1895, *Jinwright v. Nelson*, 105 Ala. 269, 17 So. 91 (consular certificate of corporation-papers); *Cal.*: 1867, *Wetherbee v. Dunn*, 33 Cal. 106, 108 (tax-collectors' deed); 1896, *Galvin v. Palmer*, 113 id. 46, 45 Pac. 172 (official character of one certifying to a copy of a map); *Ill.*: 1843, *Shattuck v. People*, 5 Ill. 477, 481 (same as the next case); 1844, *Livingston v. Kettelle*, 5 id. 116, 119 (domestic justice of the peace certifying an acknowledgment); 1844, *Vance v. Schuyler*, ib. 160, 163 (commissioner of deeds for a domestic State in a foreign State); 1845, *Thompson v. Schuyler*, 7 id. 271, 280 (same); *Me.*: 1835, *Cottrill v. Myrick*, 3 Fairf. 223, 224 (persons making up records as town clerks); *Mich.*: 1871, *People v. Johr*, 23 Mich. 461, 464 (official bond indorsed by S. D. B. as deputy attorney-general); *N. H.*: 1866, *Wells v. J. J. Mfg. Co.*, 47 N. H. 235, 254 (commissioner or notary); *U. S.*: 1817, *Willink v. Miles*, 1 Pet. C. C. 429 (justice of the peace taking acknowledgment); 1824, *Ruggles v. Bucknor*, 1 Paine C. C. 353, 363 (officer taking a deposition); *Vt.*: 1819, *Brush v. Cook*, Brayt. 89 (deed recorded by a clerk of the town); 1879, *State v. Potter*, 53 Vt. 33, 38 (town clerk's certified copy of a marriage-record; the signer presumed to be clerk of the town where the marriage purported to be solemnized).

³ 1821, *Short v. Lea*, 2 Jac. & W. 464, 466 (book of a tithe-collector, seventy years before; the character of the person as collector, not presumed from his acting as such, because he was acting merely as a private person).

⁴ The following rulings may serve as illus-

trations: 1850, *Rowley v. Berrian*, 12 Ill. 198, 200 (certificate signed "N. P." presumed that of a notary); 1881, *Bixby v. Carnkaddon*, 55 Ia. 533, 538, 8 N. W. 354 (certificate signed A. B. "Recorder"; office presumed); 1895, *Miller v. Miller*, 48 S. C. 306, 21 S. E. 254 (certificate of marriage, signed "Michael Naughton, J. P., C. Co., Ga.," excluded); 1893, *Donohoe v. Brannon*, 1 Overt. 327 (certificate of acknowledgment before "J. M." received, as made by a lawful judge; "an officer ought to state the character in which he does the act; when this is done, the law will presume he possesses the character he assumes"; but express statement is not necessary if the character appears from the document; and as this certificate could not be given except by an official, his official character may be presumed; but an undated certificate by "N. M.," who was temporarily an officer, was rejected); 1899, *State v. Manley*, ib. 423 (warrant signed by A. B. "J. P.," not received); 1899, *Stinson v. Russell*, 2 id. 40 (certificate of deed by A. B., "C. G. Co.," for "Clerk of Green Co.," received; "if from the caption and of the writing it appears to be a copy of a record or clearly intended as a certificate of an official act, and there is no reason to believe the person giving the certificate does not possess the character that would enable him to give it, it [the Court] will receive it in evidence"); 1895, *Sexton v. Pickering*, 1 Rand. 473 (deed purporting to be by T. deputy of J. S. sheriff; proof of office required); 1845, *Pollard v. Lively*, 2 Gratt. 216, 218 (justice's attestation of a deposition, signed "J. P.," admitted); 1846, *M'Neale v. Clarke*, 3 id. 299, 306 (constable's receipts signed "C. P. C.," presumed official); 1848, *Wynn v. Harman*, 5 id. 157, 165 (certified copy of a probated will, signed by J. H., "C. L. C.," sufficient).

Compare the cases cited *ante*, § 2159, as to authentication by official custody of documents, lacking a purporting official signature, and *ante* § 2133, as to authentication by proving the handwriting of an unsigned private document; and the Illinois cases *ante*, § 2165, notes 4, 9, as to a foreign notary's *jurat*.

effect both "that the person who certifies it is really an officer of the place whence it comes" and that "the certificate is really his."⁶ But this consequence is to be regarded as artificial; for there is apparently no reason of policy against raising the presumption of official character as soon as the genuineness of the document is sufficiently evidenced in any way whatever, — whether from the seal by presumption, or otherwise.⁷ Yet the usual practice seems clear, from the precedents in the foregoing sections; and the reason is probably that the two presumptions were often not distinctly separated in theory, so that it was unnatural to recognize the one without the other; moreover, a person who could testify to the handwriting of the maker of the document could practically always testify to his official character, so that no real hardship was involved. In such cases, then, a witness should testify to the general acting of the person as such officer, according to the requirements of the presumption of office as ordinarily enforced (*post*, § 2535).⁷

(4) The presumption of genuineness from *official custody* will equally serve to raise the presumption of official character, if the document purports to be official (*ante*, §§ 2158, 2159).

§ 2169. *Corporate Seal.* A document bearing a purporting corporate seal usually raises two distinct questions, somewhat different from those which arise for a purporting official document. The latter is usually offered as a hearsay statement, admissible under a special exception (*ante*, § 1630), either as a register, a report, or a certificate, to prove some act done or occurrence investigated by the officer; the former is usually a written transaction material as a part of the issue, such as a deed. Accordingly, the two questions for the former are: (1) Is the purporting seal genuine? (2) Was it affixed (i. e. the execution of the document) an act duly authorized by the corporation through its members or through its empowered officers? There will thus be incidentally involved some questions of substantive law affecting the validity of corporate acts (such as the implied authority of directors, the capacity of a *de facto* corporation, and the like); so that a complete examination of the subject would be beyond the present purview. It will be enough here to note the general application of the present presumption to this class of documents.

(1) It seems clear that at common law in England the *purporting seal* of an ordinary private corporation was *not presumed genuine*,¹ although an occasional exception was made for quasi-public corporations:

¹ In the language of Mathews, J., in *Las Cuyas v. Larienda's Syndics*, *ante*, § 2165; compare also *Stout v. Slaterry*, there quoted.

² *Accord*: 1900, *State v. Clough*, 111 Ia. 714, 83 N. W. 727 (on proof of the officer's signature, his official character will be presumed).

³ Where the office is one whose incumbent will be *judicially noticed* without any evidence, the presumption of genuineness will be of no avail to raise the presumption of office if the purporting incumbent is judicially known not to be in fact the incumbent of the office; 1842, *Follain v. Lefevre*, 3 Rob. La. 13 (judge's signature to a bill of exceptions, "N. Jackson"; excluded, because the fact that no such judge existed was noticed); compare § 2578, *post*.

⁴ 1799, *Moises v. Thornton*, 8 T. R. 303 (corporate seal of the Scotch University of St. Andrews, not accepted without proof; per Lawrence, J., the act of affixing need not be evidenced, but only the authenticity of the seal); 1825, *Chadwick v. Bunning*, Ry. & Mo. 306 (common seal of the Apothecaries' Company, not presumed genuine; even though a statute had provided that their seal should be "sufficient proof of the authenticity" of a certificate).

1800, *Kinscy, C. J.*, in *Den v. Froelich*, 7 N. J. L. 302, 338 (distinguishing the question whether the corporate seal implies a duly authorized corporate act): "It has been usual to allow deeds and other instruments relating to real estate to go to the jury when authenticated under the seals of the cities of London, Edinburgh, or Dublin; . . . this may be owing to the recognition of these corporations by the Legislature, or to the difficulty of making out the proof of the fact with the necessary precision, or perhaps to the almost utter impossibility of imposing a false or counterfeit for the genuine seal. . . . [But since the reason for recognizing public seals, as given by Gilbert, is their immemorial use and general familiarity,] the seals of private Courts or of private persons are not evidence of themselves; there must be proof of their credibility. It cannot be presumed that they are universally known, and consequently they must be attested by the oath of some one acquainted with them"; and so the seal of a church corporation was treated as requiring evidence.

(2) But, the genuineness of the seal once evidenced, the presumption was raised that *due consent and authority* had been given to affix the seal to the document as a corporate act:

1682, *Brounker v. Athys*, *Skinner* 2; ejectment against a corporation: "Where there is a common seal put to a deed, that is title enough of itself, without witness to prove it or that the major part of the college be agreed; and if it be said that it was put to by the hand of a stranger, that shall be proved on the side that says so."

With this simple and safe solution, the rulings of the Courts in this country have not always agreed; and as their agreement has sometimes been in part with one or in part with the other of the two answers to the above questions, a variety of rules have come to be recognized in different jurisdictions. Sometimes the English rule is accepted in both respects, i. e. there is a presumption of authority, but not of genuineness; sometimes it is reversed, and there is a presumption of genuineness but not of authority; sometimes both presumptions are recognized, and sometimes neither. Not uncommonly one or the other presumption is raised, or both, only when the document bears a particular officer's purporting signature; or, again, only when such a signature has been proved genuine; and this effect is given or refused to certain signatures by some Courts and not by others. In some instances, moreover, a signature alone is presumed genuine. That any general consensus exists on any proposition is not apparent.³

³ Besides the following cases, compare the citations in *Cook on Corporations*, 1898, 4th ed., § 722; *Thompson on Corporations*, 1898, §§ 5070-5084; and some of the Canadian statutes quoted *ante*, § 2162: 1839, *Roberts v. Bank*, 9 Port. 212, 317 (signature of the president of Alabama State Bank, and official character, presumed, without corporate seal); 1890, *Robinson v. Cahalan*, 91 id. 479, 481, 8 So. 415 (deed by the president under corporate seal, reciting authority; authority presumed); 1892, *Gutzell v. Pennie*, 95 Cal. 508, 30 Pac. 896 (by the vice-president and secretary with corporate seal; authority presumed); 1886, *Hunter v. Blount*, 27 Ga. 76 (diploma of a medical college in another State; existence of the college must be shown); 1877, *Parkerson v. Burke*, 59 id.

100, 101 (medical diploma; same ruling); 1872, *Sawyer v. Cox*, 68 Ill. 180, 184 (corporate seal presumed genuine); 1894, *Consolidated Coal Co. v. Peers*, 150 id. 344, 358, 37 N. E. 937 (signed by the president or vice-president, with a seal; the seal presumed corporate, and authority presumed); 1899, *Ellison v. Branstator*, 155 Ind. 144, 54 N. E. 483 (corporate seal affixed by the secretary; authority presumed); 1874, *Cooper v. Nelson*, 38 Ia. 440, 445 (book admitted to be corporate records; secretary's signature of minutes presumed genuine); 1880, *Chicago B. & Q. R. Co. v. Lewis*, 53 id. 101, 4 N. W. 843 (seal presumed genuine, and authority presumed after proof of the officer's signature); 1902, *State v. Phillips*, — id. —, 92 N. W. 879; 1908, *Gould v. Gould & Co.*, —

Mich. —, 96 N. W. 575 (mortgage); 1893, *Gordon v. Canning Co.*, 36 Nebr. 548, 552, 54 N. W. 830 (by the president and secretary with corporate seal; authority presumed); 1900, *Don v. Vreelandt*, 3 N. J. L. 353 (quoted *supra*); 1893, *Raub v. B. C. Ass.*, 56 Md. 262, 35 Atl. 364 (cognovit executed by the president; seal not shown to be corporate; no presumption of authority or of seal's genuineness); 1900, *Re West Jersey T. Co.*, 50 N. J. Eq. 63, 45 Atl. 222 (corporate seal and secretary's signature raises presumption of authority); 1882, *Trustees Canandaigua Academy v. McKeehn*, 30 N. Y.

612, 626, *seville* (corporate seal raises presumption of authority); 1867, *Sherman v. Davis*, 17 Oh. St. 571, 590 (corporate seal raises presumption of authority); 1821, *Foster v. Hall*, 7 S. & R. 156, 164 (seal of the public corporation of Belfast, not presumed genuine; but genuineness raises a presumption of due affixing by authority); 1821, *Leasure v. Hillagee*, ib. 315, 318 (same rule applied to a seal of the Bank of North America); 1859, *Joary v. R. Co.*, 12 Rich. 124, 137 (seal presumed genuine after proof of the officer's signature).

PART III: RULES OF EXTRINSIC POLICY.

CHAPTER LXXIII.

§ 2175. General Nature of the Rules.

TITLE I: RULES OF ABSOLUTE EXCLUSION.

§ 2180. Indecency.

§ 2181. Impropriety (Judge, Counsel, Juror).

§ 2182. Inconvenience (Public Records).
 § 2183. Illegality (1) Documents, Chattels, Testimony, obtained by Illegal Search, Removal, or Compulsion.
 § 2184. Same: (2) Documents violating Stamp-Tax Laws.

§ 2175. *General Nature of these Rules.* The rules of admissibility of evidence, as already pointed out (*ante*, § 11), fall into three general groups: first, those which determine the probative value, or Relevancy, of circumstantial and testimonial evidence, — that is, the fundamental quality without which no evidential data are to be allowed to be considered by the jury (*ante*, §§ 24-1168); secondly, those Auxiliary Rules of Probative Policy which impose artificially some added conditions of admissibility, but are directed solely to improving the quality of proof and strengthening the probabilities of ascertaining the truth as the result of the investigation (*ante*, §§ 1171-2169); and, thirdly, the present group, — those rules which rest on no purpose of improving the search after truth, but on the desire to consider the requirements of Extrinsic Policy. They forbid the admission of various sorts of evidence because some consideration extrinsic to the investigation of truth is regarded as more important and overpowering. The rules of this last class thus differ from those of the second class, in that their effect is to obstruct, not to facilitate, the search for truth, and that this effect is consciously accepted as less harmful, on the whole, than the extrinsic disadvantages which would ensue to other interests of society if no such limitations existed. It ought to follow that no limitation of the present nature ought to be recognized unless it is clearly demanded by some specific important extrinsic policy, and that every intendment should be made against such a demand.

The most natural grouping of these rules of Extrinsic Policy is that which regards them according as they are *absolute* or *conditional*. The former class of prohibitions are enforced by the Court like other rules of evidence; the latter are applied only on demand of the person who is supposed to be affected in his interests by the extrinsic policy in question and to be protected by the rule from an injury to that interest. The latter class of rules — the rules of Privilege — have features in common, which sharply distinguish them from the former. The former class is small in number; indeed, it can hardly be said that there are any definite and well-established rules of exclusion of this type; they have usually been discountenanced in judicial opinion. The rule

of the latter class, on the contrary, are numerous and well established, and affect in a marked degree the daily course of proof in litigation.

Title I: RULES OF ABSOLUTE EXCLUSION.

§ 2180. *Indecency.* The notion of indecency is often regarded as though it were an absolute quality of words and actions. In truth, it is merely a relative term. "Unto the pure, all things are pure," said Paul. Indecency depends upon the spirit and purpose of the utterance or the act. The law punishes what it calls "indecent exposure of the person"; but it has no penalty for the very same actions when done in the presence of a physician for the purpose of obtaining his medical assistance. The utterance of vile words of slander may be indecent from the mouth of the slanderer; but the repetition of those words in a court of justice by the witness who is called by the injured person to prove them in his action for redress is in no sense indecent. What we are to conclude, then, since the process of investigating the truth in courts of justice is both an indispensable and a dignified function of life, is that no utterances or acts called for in evidence in that process are to be prohibited because under other circumstances they might be characterized by indecency. In other words, the general policy of discountenancing indecency does not extend to the exclusion of evidence in a court of justice.

To this the only qualification can be that, if utterances or acts, which might be indecent in some circumstances and might therefore excite prurient attention among onlookers at a public occasion and lead to shame and embarrassment in the person of whom they are required in evidence, are not materially useful for the purpose of the proof in hand, they may be dispensed with and prohibited; the discretion of the trial Court to determine the expediency in each case. This limitation upon the general principle is a fair one, and would probably find general judicial recognition. Its application would sometimes take the extreme form (as in Lord Mansfield's ruling) of refusing to entertain at all a specific plea or cause of action; but the principle would be in effect the same, whether it resulted in a rule of evidence or in a rule of substantive law. Lord Mansfield's utterance plainly lays down both the general principle and its qualification:

1766, *Mansfield, L. C. J.*, in *Dacosta v. Jones*, Cowp. 739 (refusing to allow the trial of a wager as to the sex of the Chevalier D'Eon): "The trial of this cause made a great noise all over Europe; and, from the comments made upon it, and farther consideration, I am sorry that I did not at once yield to the consideration that it led to indecent evidence, and was injurious to the feelings and interests of a third person. I am sorry, likewise, that the witnesses subpoenaed had not been told they might refuse to give evidence if they pleased. But no objection to their being examined was made by the counsel for the defendant, nor did any of themselves apply for protection or hesitate to answer. . . . Mere indecency of evidence is no objection to its being received when it is necessary to the decision of a civil right or criminal liability. Upon this ground we think that Mr. J. Burnet was wrong in refusing to try the case before him where a young lady brought an action of slander for saying that she had a defect in her person which unfitted her for

marriage, and the defendant alleged in his plea that she had such a defect; for there, if the statement was false, the plaintiff had received a grievous injury, for which she was entitled to exemplary damages; and, if it was true, the defendant ought to have been freed from the charge of a malicious lie, however he might still be liable to censure for indelicately proclaiming the truth. But if it had been merely an action on a wager whether the young lady had such a defect, it would have been nearly the present case. . . . Here is a person who represents himself to the world as a man, is stated on the record to be 'Monsieur le Chevalier D'Eon,' has acted in that character in a variety of capacities, and has his reasons and advantages in so appearing. Shall two indifferent people, by a wager between themselves, try whether he is a cheat and impostor, and be allowed to subpoena all his intimate friends and confidential attendants to give evidence that will expose him all over Europe? Such an inquiry is a disgrace to judicature."¹

§ 2181. *Impropriety (Judge, Counsel, Juror).* In the case of certain officers of justice, it has sometimes been argued that their appearance as witnesses would be a violation of the policy applicable to their profession or function:

(1) A *judge*, it has been argued, should not become a witness, because of the difficulty of reconciling the due exercise of his functions as judge and as witness (*ante*, § 1909).

(2) A *counsel or attorney*, it has been thought, should not appear as witness, except in unavoidable necessity, because (among other reasons) of the danger which this practice would involve of a loss of public confidence in the integrity of the profession (*ante*, § 1911).

(3) A *juror*, it has been argued, should not be a witness, because of the inconsistency of the two functions (*ante*, § 1910). Whether the other rule about jurors, that they shall not testify to the doings of the jury-room (if this be a rule of evidence at all), is a rule of the present sort, is open to question (*post*, § 2352).

§ 2182. *Inconvenience (Public Records).* The removal of public records from their proper place of custody, to be used as evidence in court, is attended with danger of loss and mutilation of the records and with delay and annoyance to those who are entitled to consult them and those who are charged with preparing them. For these reasons, and especially since the purpose of proof can usually be as well served by a copy, Courts have often laid down a rule forbidding the use, as evidence, of the originals of public records. To what extent the present rule of policy makes such a prohibition can be better examined elsewhere (*post*, § 2373), where the rule as to Official Secrets comes

¹ 1763, *Dacosta v. Jones*, Cowp. 729 (action on a wager as to the sex of the Chevalier D'Eon, a French person who in male attire had frequented race-courses, fought duels, etc., in England; testimony of many who had been confidentially employed by the Chevalier was received, and a verdict for the plaintiff — who bet on the female sex — was given; but the whole inquiry was declared improper and judgment rendered for the defendant; quoted *supra*); 1900, *Renaud v. Bay City*, 124 Mich. 29, 83 N.W. 617 (a wife suing for personal injury testified to a miscarriage within a week thereafter; a question whether she had intercourse

with her husband during that week was excluded, on grounds of "public policy"; as to this, if it was material as being inconsistent with her testimony, it should be received, just as the fact of sexual intercourse is always provable when material; but if the fact was not relevant, it should have been excluded on that ground; the ruling is unsound); 1911, *Fall v. Overseers*, 3 Muml. 495, 502, 506 (admissible where "necessary to effectuate the purposes of justice"; here, intercourse of third persons with a bastardy complainant). For further applications of the principle, see the citations under antepic preference, or real evidence (*ante*, § 1180).

to be discriminated from the present rule. It is to be noted that, so far as the *illegality* of the removal of the document is concerned, there is concededly no objection on that score (*post*, § 2183).

§ 2183. *Illegality: (1) Documents, Chattels, Testimony, obtained by Illegal Search, Removal, or Compulsion.* Necessity does not require, and the spirit of our law does forbid, the attempt to do justice incidentally and to enforce penalties by indirect methods. An employer may perhaps suitably interrupt the course of his business to deliver a homily to his office-boy on the evils of gambling or the rewards of industry. But a judge does not hold court in a street-car to do summary justice upon a fellow-passenger who fraudulently evades payment of his fare; and, upon the same principle, he does not attempt, in the course of a specific litigation, to investigate and punish all offences which incidentally cross the path of that litigation. Such a practice might be consistent with the primitive system of justice under an Arabian sheikh; but it does not comport with our own system of law. It offends, in the first place, by trying a violation of law without that due complaint and process which are indispensable for its correct investigation. It offends, in the next place, by interrupting, delaying, and confusing the investigation in hand, for the sake of a matter which is not a part of it. It offends, further, in that it does this unnecessarily and gratuitously; for since the persons injured by the supposed offence have not chosen to seek redress or punishment directly and immediately, at the right time and by the proper process, there is clearly no call to attend to their complaint in this indirect and tardy manner. The judicial rules of evidence were never meant to be an indirect process of punishment. It is not only anomalous to distort them to that end, but it is improper (in the absence of express statute) to enlarge the fixed penalty of the law, that of fine or imprisonment, by adding to it the forfeiture of some civil right through loss of the means of proving it.

For these reasons, it has long been established that the admissibility of evidence is not affected by the illegality of the means through which the party has been enabled to obtain the evidence. The illegality is by no means condoned; it is merely ignored:

1841, *Wilde, J., in Com. v. Dana*, 2 Metc. 320: "Admitting that the lottery tickets and materials were illegally seized, still this is no legal objection to the admission of them in evidence. If the search warrant were illegal, or if the officer serving the warrant exceeded his authority, the party on whose complaint the warrant issued, or the officer, would be responsible for the wrong done. But this is no good reason for excluding the papers seized, as evidence, if they were pertinent to the issue, as they unquestionably were. When papers are offered in evidence the Court can take no notice how they were obtained, — whether lawfully or unlawfully, — nor would they form a collateral issue to determine that question."

1875, *Scholfeld, J., in Stevenson v. Earnest*, 80 Ill. 513, 518: "It is contemplated, and such ought ever to be the fact, that the records of Courts remain permanently in the places assigned by the law for their custody. It does not logically follow, however, that the records, being obtained, cannot be used as instruments of evidence; for the mere fact of [illegally] obtaining them does not change that which is written in them. . . . Sup-

pose the presence of a witness to have been procured by fraud or violence, while the party thus procuring the attendance of the witness would be liable to severe punishment, surely that could not be urged against the competency of the witness. If it could not, why shall a record, although illegally taken from its proper place of custody and brought before the Court, but otherwise free from suspicion, be held incompetent?"

1807, *Lumpkin*, P. J., in *Williams v. State*, 100 Ga. 511, 28 S. E. 634: "As we understand it, the main, if not the sole, purpose of our constitutional inhibitions against unreasonable searches and seizures, was to place a salutary restriction upon the powers of government. That is to say, we believe the framers of the constitutions of the United States and of this and other States merely sought to provide against any attempt, legislation or otherwise, to authorize, justify, or declare lawful, any unreasonable search or seizure. This wise restriction was intended to operate upon legislative bodies, so as to render ineffectual any effort to legalize by statute what the people expressly stipulated could in no event be made lawful; upon executives, so that no law violative of the constitutional inhibition should ever be enforced; and upon the judiciary, so as to render it the duty of the Courts to denounce as unlawful every unreasonable search and seizure whether confessedly without any color of authority, or sought to be justified under guise of legislative sanction. For the misconduct of private persons, acting upon the individual responsibility and of their own volition, surely none of the three divisions of government is responsible. If an official, or a mere petty agent of the State, exceeds the authority with which he is clothed, he is to be deemed as acting, not for the State, but for himself only; and therefore he alone, and not the State, should be held accountable for his acts. If the constitutional rights of a citizen are invaded by a member of the government, the most that any branch of government can do is to afford the citizen a redress as is possible, and bring the wrongdoer to account for his unlawful conduct. Whether or not prohibiting the Courts from receiving evidence of this character would have any practical and salutary effect in discouraging unreasonable searches and seizures, and thus tend towards the preservation of the citizen's constitutional right to immunity therefrom, is a matter for legislative determination."¹

¹ Accord: *Eng*; 1728, *Bishop Atterbury's Trial*, 16 How. St. Tr. 495, 639 (the Crown having obtained treasonable letters, imputed to the defendant, by intercepting the mails under authority of a statute, questions directed to discover whether that authority had been properly followed in so doing were not allowed; 1740, *Jordan v. Lewis*, 2 Stra. 1122, 14 East 306, note (malicious prosecution; copy of indictment admitted, though the order granting it was to another person; "nor could the Court take notice in what manner it was obtained"); 1811, *Legatt v. Tolliver*, 14 East 302 (similar; "if the officer shall, even without authority, have given a copy of the record," it is admissible, although it were "surreptitiously obtained"); 1814, *Stocks v. De Tastet*, 4 Camp. 11 (certain former testimony was said to have been obtained by breach of trust; "What is proved to have been written or signed by any of the defendants, I must admit as evidence against them, without considering how it was obtained"); 1836, *R. v. Derrington*, 2 C. & P. 419 (the turnkey promised to post a letter of the accused, but instead handed it to the authorities); 1827, *Caddy v. Barlow*, 1 Man. & Ry. 375, 377 (malicious prosecution; copy of an indictment receivable, though not procured according to law, "without inquiry to the mode by which" he became possessed of it"); 1849, *R. v. Grans*, 11, 7 State Tr. n. s. 979, 267 (document taken by the police illegally); 1854,

Phelps v. Frew, 8 E. & B. 480, 487, 441, *Crompton*, J. (preceding doctrine approved); *Con.*; 1866, *R. v. Doyle*, 12 Ont. 230 (letters obtained by unlawful search); *Ala.*; 1867, *Chastain v. State*, 38 Ala. 29, 8 So. 304 (found on searching defendant, admitted, irrespective of legality of search); 1893, *Shiel v. State*, 104 Id. 35, 41, 16 So. 65 (similar); *Scott v. State*, 113 Id. 64, 21 So. 425 (carry concealed weapon; illegality of the search; the officer testifying to it, immaterial); *Starchman v. State*, 68 Ark. 536, 36 S. 940 (tools found by officers searching defendant's house, admitted irrespective of legality of search); *Cal.*; 1894, *People v. Alden*, 113 Cal. 294, 45 Pm. 827 (judgment-roll improperly moved for use as evidence); *Conn.*; 1896, *Griswold*, 67 Conn. 290, 34 Atl. 1047 (set of papers by a trespass on premises); *Ga.*; *Wood v. McGuire*, 21 Ga. 576, 583 (papers properly ordered to be given up); 1897, *Will v. State*, 100 Id. 511, 28 S. E. 634 (liquors by illegal search, admitted; repudiating the contrary obiter intimation in *Rusher v. State*, 363, 21 S. E. 593; quoted *supra*); 1901, *R. v. State*, 113 Id. 267, 38 S. E. 841; 1903, *Ja v. State*, — id. —, 45 S. E. 604 (stolen found by illegal search); *Ill.*; 1875, *Stevie Earnest*, 80 Ill. 512, 517 (records illegally moved from court; quoted *supra*); 1891, *G v. People*, 138 Id. 169, 165, 47 N. E. 1068

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Two other principles, however, must be discriminated in their operation. (a) *Official records* are sometimes excluded because the matter contained in them is privileged from disclosure, or because their custodians are not amenable to process (*post*, § 2373).²

(b) *Self-eliminating documents*, or other evidence, obtained from an accused person, may be excluded, not because of the illegal nature of the search

copy; articles obtained by a detective's search of defendant's rooms without a warrant, admitted; 1892, *Shebert v. People*, 143 id. 571, 563, 33 N. E. 431 (similar; here, letters); 1894, *Trask v. People*, 181 id. 520, 36 N. E. 245 (similar; here, papers); *La.*: 1897, *State v. Van Tassel*, 108 id. 6, 72 N. W. 497, *semble* (papers taken by illegal search); 1901, *Sullivan v. Nicolson*, — id. —, 34 N. W. 978 (illegal order for inspection of premises); *La.*: 1896, *State v. Renard*, 50 La. An. 442, 33 No. 894 (letter given to a trustee in jail for mailing, and by him handed to officials); *Mo.*: 1876, *State v. Gorham*, 60 Mo. 270, 272 (admissible, "whether it is or not improperly taken from the office where the law requires, as in this case, that it shall be constantly kept"; and of an internal-revenue record-book); *Mass.*: 1833, *Faunce v. Gray*, 21 Pick. 243, 246 (deposition of defendant, taken in *perpetuum*, admitted, regardless whether it had been "unfairly obtained" by a "perversion and abuse" of the statutory process); 1841, *Com. v. Dana*, 2 Met. 329 (quoted *supra*); 1850, *Com. v. Certain Lottery Tickets*, 5 Cush. 366, 374 (approving *Com. v. Dana*); 1862, *Com. v. Certain Intox. Liquors*, 4 All. 593, 600 (officer's misconduct in executing process does not exclude his testimony based on knowledge thus obtained); 1873, *Com. v. Welsh*, 110 Mass. 369 (similar); 1893, *Com. v. Taylor*, 132 id. 361 (similar, for a medical officer making an unauthorized autopsy); 1895, *Com. v. Henderson*, 140 id. 308, 5 N. E. 632 (like *Com. v. Welsh*); 1899, *Com. v. Keenan*, 148 id. 470, 472, 30 N. E. 101 (similar); 1892, *Com. v. Ryan*, 137 id. 403, 406, 32 N. E. 349 (ballots admitted, irrespective of the process of obtaining them); 1893, *Com. v. Tibbette*, ib. 519, 521, 32 N. E. 910 (letters obtained by search under warrant for search of husband's premises for liquor); 1893, *Com. v. Hurley*, 150 id. 159, 32 N. E. 342 (police officers unlawfully arresting, allowed to testify to what they found); 1896, *Com. v. Byrnes*, ib. 173, 174, 35 N. E. 343 (batter-sample, admitted, irrespective of the legality of obtaining it); 1894, *Com. v. Brelsford*, 161 id. 61, 36 N. E. 677 (like *Com. v. Welsh*); 1895, *Com. v. Welch*, 163 id. 373, 40 N. E. 103 (unlawful search of the person for liquor); 1895, *Com. v. Acton*, 165 id. 11, 42 N. E. 329 (illegal search for liquor by officers); 1896, *Com. v. Smith*, 166 id. 370, 44 N. E. 503 (unlawfully seized gaming implements); *Mich.*: 1891, *Cleot v. Rosenthal*, 100 Mich. 193, 197, 55 N. W. 1009 (testimony admitted to the contents of books, by one who saw them while they were in the sheriff's possession under an unauthorized attachment); *Mo.*: 1895, *State v. Pomeroy*, 130 Mo. 469, 497, 32 S. W. 1002 (lottery tickets seized by officers from defendant's desk and on his person, without a

search-warrant); *N. H.*: 1889, *State v. Flynn*, 36 N. H. 64 (liquor found on defendant's premises by officers searching under a warrant, admitted, irrespective of the legality of the search); 1895, *State v. Sawtelle*, 64 id. 496, 32 Atl. 531, *semble* (a telegram claimed by the company to be privileged was ordered to be produced, and as to the defendant it was held that "the method of procuring the telegram did not concern him"); *N. Y.*: 1903, *People v. Adams*, 176 N. Y. 361, 66 N. E. 626 (seizure of papers under a search-warrant); *Or.*: 1901, *State v. McDaniel*, — Or. —, 63 Pac. 320 (letter seized on defendant's person); *S. C.*: 1893, *State v. Atkinson*, 40 S. C. 343, 371, 16 S. E. 1091 (papers taken from defendant's home by trespass); *U. S.*: 1899, *Bacon v. U. S.*, 39 C. C. A. 27, 97 Fed. 85 (letter of a bank-president illegally obtained by the State receiver and handed to the U. S. marshal); *Vt.*: 1891, *State v. Mathers*, 64 Vt. 101, 23 Atl. 590 (letter obtained surreptitiously; "the Court can take no notice of how they were obtained, whether legally or illegally"); 1899, *Barrett v. Fish*, 72 id. 18, 47 Atl. 174 ("A court of law will take no notice, on trial of a respondent, how letters or other papers offered in evidence were obtained, for the purpose of determining their admissibility in evidence"); 1901, *State v. Slamon*, 73 id. 212, 50 Atl. 1007 (general principle conceded); *W. Va.*: 1892, *State v. Douglass*, 20 W. Va. 770, 791 (improper conduct of the landlord of the defendant's counsel in searching the latter's trunk during his absence, or "any improper means they may have used," held not to exclude the fact of finding a pistol); 1897, *State v. Crum*, 44 id. 313, 29 S. E. 527 (pistol discovered by illegal search of the defendant, admissible); 1904, *State v. Edwards*, 51 id. 320, 41 S. E. 429 ("If it was an illegal seizure, that is no objection to the use of the papers as evidence, they being proper evidence in the case in other respects").
Contra: 1885, *Boyd v. U. S.*, 116 U. S. 616, 618, 6 Sup. 524 (documents obtained from the accused, by official seizure unlawful under the Fourth Amendment prohibiting unreasonable searches and seizure, not admissible; unsatisfactory opinion; the case is further examined *post*, § 2264).

For an analogous principle, see the doctrine about admitting a confession obtained by fraud, *ante*, § 241.

For the rule as to confessions made by an accused on an illegal examination before a magistrate, see *ante*, §§ 249, 252.

² One practical difference is that a document might be receivable though illegally removed from another county, and yet the production could not have been compellable; e. g. 1848, *Sayer v. Glossop*, 12 Jur. 464, Parke, B.

or other act by which they were obtained, but because the privilege against self-crimination involves their exclusion (*post*, § 2264).

§ 2184. *Same*: (2) Documents violating Stamp-Tax Laws. By statutes existing for three generations past in England,¹ and by two Federal statutes, passed at different times for temporary purposes of revenue,² it was provided that a document not duly garnished with the required revenue-stamp should not be receivable in evidence. The policy of these statutes was a poor one, for the reasons already stated (*ante*, § 2185).³ Their application depends so much upon the precise wording of the different statutes that the English rulings are of little value in the interpretation of our statutes.⁴ In the United States, the Courts of the individual States ruled with practical unanimity that the Federal statutes did not effect the exclusion of unstamped documents in trials in the State Courts, first, because the Federal Congress has no constitutional power (*ante*, § 6) to regulate the rules of evidence in the State Courts⁵ (though this was in only a few Courts made the ground of decision), and, secondly, because the statutes did not expressly purport to make a rule for any but the Federal Courts.⁶ The application of the statutes has usually been sufficiently indicated by their words.⁷

¹ Consolidated in 1870, St. 33 & 34 Vict. c. 97, and in 1891, St. 54 & 55 Vict. c. 39, § 14.

² St. 1862, July 1, as amended by St. 1864, June 30, §§ 152, 156, 163; St. 1898, June 13, c. 448, §§ 6, 13, 14, 30 Stat. 448, repealed by St. 1902, April 12, c. 500, § 7, 32 Stat. 56.

³ See the recommendations in the Second Report, 1883, of the Common Law Practice Commission, p. 36.

⁴ Citations of the English cases may be found in the following places: 1825, *Hawkins v. Warren*, 3 B. & C. 690; 1872, *Marine Investment Co. v. Haviside*, L. R. 5 H. L. 624; 1868, *McAfee v. Hale*, 24 Ia. 355; *Bent, Evidence*, 8th ed., § 236.

⁵ 1868, *Craig v. Dimock*, 47 Ill. 308; 1868, *Hunter v. Cobb*, 1 Bush 239. The only ruling of a State Court to the contrary is said to be *Turapike Co. v. McNamara*, 72 Pa. 278 (1872), where *Shawwood and Thompson, JJ.*, dissented.

⁶ The following cases collect the authorities: 1897, *Trowbridge v. Addams*, 23 Colo. 518, 48 Pac. 525; 1901, *Garland v. Gaines*, 73 Conn. 662, 49 Atl. 19; 1901, *Small v. Blomcomb*, 112 Ga. 279, 37 S. E. 491; 1867, *Latham v. Smith*, 45 Ill. 29; 1902, *Richardson v. Roberts*, 195 Id. 27, 62 N. E. 840; 1902, *Wade v. Foss*, 1 Me. 230, 52 Atl. 640; 1869, *Clemens v. Conrad*, 19 Mich. 170, 176; 1901, *Kennedy v. Rountree*, 59 S. C. 324, 37 S. E. 342; 1899, *Knox v. Rossi*, 25 Nev. 94, 57 Pac. 179, 48 L. R. A. 305.

⁷ See Gould & Tucker's Notes to the War Revenue Act, 1898; 1874, *Cox v. Jones*, 52 Ga. 457, 438; 1900, *State v. Shields*, 112 Ia. 27, 83 N. W. 907; 1900, *Taft v. Simpson*, 125 Mich. 306, 83 N. W. 77; 1872, *Owaley v. Greenwood*, 13 Minn. 439; 1901, *Plankett v. Hamschka*, 14 S. D. 464, 86 N. W. 1004.

TITLE II: RULES OF CONDITIONAL EXCLUSION (PRIVILEGE).

SUB-TITLE I: PRIVILEGE, IN GENERAL.

CHAPTER LXXIV.

§ 2190. History of Testimonial Compulsion in general.

§ 2191. Constitutional Guaranty of Compulsory Process; of Compensation for Services.

§ 2192. Duty to Give Testimony; General Principle.

§ 2193. Same: Applied to Production of Documents.

§ 2194. Same: Applied to Premises, Chattels, and Corporal Exhibition.

§ 2195. Officers possessing Power to Compel Testimony; Witnesses' Liability to Action, and Immunity from Arrest.

§ 2196. Privilege Personal to the Witness; Party's Objections.

§ 2197. Kinds of Privilege.

§ 2190. History of Testimonial Compulsion, in general. In looking back over the history of the recognition of the duty to testify, it must be kept in mind that, up to the 1400s, the modern witness is practically unknown in jury trials, and that not until the 1500s is he a common figure in the trial and an important source of information for the jury.¹ Even in Coke's time, in the early 1600s, it is a comparatively recent feature that he is alluding to when he remarks "most commonly juries are led by the depositions of witnesses."² Up to that period the jury had fulfilled the double capacity of triers and of witnesses; their own knowledge of the affair, acquired as neighbors of the parties or by searching about for evidence before the trial, had been a chief source of that information which is nowadays furnished to them by ordinary witnesses.³ There were, to be sure, in certain classes of cases, persons not technically jurors, who came as witnesses, — deed-witnesses and transaction-witnesses, i. e. persons who at the time of signing a deed or striking a bargain or celebrating a marriage had been called upon by the parties to bear witness in case of future need. These had originally served as the very triers themselves, in the days before jury-trial, and their oaths had formed a distinct mode of trial, which survived alongside of jury-trial.⁴ As the latter progressed and expanded, these deed-witnesses and transaction-witnesses became gradually obsolete as a separate form of trial, and came to be employed in connection with jury-trial. They were summoned with the jurors, and they did not testify openly in court, but went out with the jurors to deliberate and give information to them; so that they bore the character, for a long period — say, down to the end of the 1400s — of half jurors, half witnesses.⁵

Now these persons joined with and yet separate from the jurors proper, were fully recognized to be under the same liability and duty as the jurors them-

¹ Thayer, Preliminary Treatise on Evidence, 122-134.

² Coke, 2 Inst. 28.

³ Thayer, *ubi supra*, 90-97.

⁴ Thayer, 17-24.

⁵ Thayer, 97-104.

selves; they were summoned with the jurors, and were equally subjected to compulsory process.⁶ Whether the recognition of this was felt to rest more upon the implied pledge given when the person had been formally called upon by the party to bear witness, or upon the assimilation in thought of the jurors and these persons, does not clearly appear; probably both considerations entered. Towards the end of the 1400s, it became uncommon on account of the inconvenience of numbers, to summon them with the jurors, and their function as joint juror-witnesses fell into disuse.⁷

In the meantime the ordinary modern witness — i. e. the person who happens to know something on the matter in issue — was gradually appearing. He was asked by the party to come and contribute his help, or he came of his own motion and interest in the cause. But he could not be compelled to come. A marked feature of the primitive Germanic law was the failure to recognize any general testimonial duty. There must be some specific pledge of faith beforehand (as in the case of the deed-witness or transaction-witness) to bear testimony for the party when called on.⁸ This tradition was inherited by our law, and was at the period in question (the end of the 1400s) still a living force.

But more than this. The ordinary witness (such as we now know him) was not only not compelled; he was not welcomed. There was a radical and strict discouragement of maintenance; and the man who comes to labor privately with his neighbors on the jury by generally urging his influence in favor of one of the parties was not carefully distinguished from the man who comes merely to tell them what he knows of the facts. He is, in either case (they thought), trying to make them decide for one of the parties rather than the other; he is a meddler; that was the law's attitude towards him. This feature of the thought of the times is perhaps difficult nowadays to conceive. But it contains the whole explanation of the ordinary witness' position in the 1400s.⁹

The result of this rooted opposition to whatever bore the semblance of maintenance was that anybody who was not somehow concerned as a party or a counsel in the cause ran the risk, if he came forward to testify to the jury, of being afterwards sued for maintenance by the party against whom he had spoken.¹⁰ "If he had come to the bar out of his own head and spoken

⁶ Thayer, 97-104.

⁷ Thayer, 101.

⁸ Schroeder, *Lehrbuch der deutschen Rechtsgeschichte*, 4th ed., 1902, pp. 86, 363 ("In order to bind document-witnesses once for all to a subsequent giving of testimony, the party had to pay document-money or give wine; for no public testimonial obligation existed [in the Frankish period], and a civil obligation could be created only by a contract entered into with a consideration"); Pollock and Maitland, 1895, *Hist. Eng. Law*, II, 599 ("It seems to have been a general rule that no one could be compelled, or even suffered, to testify to a fact, unless when that fact happened he was solemnly 'taken to wit-

ness'"). It has been pointed out by Professor Glanville (Histoire du droit et des institutions de la France, 1895, VI, 540) that the liability of the witness, if his oath were challenged as false by the opponent, to vindicate himself by judicial combat, was a serious one, and naturally prevented the recognition of any legal obligation to appear as a witness; and he notes the contrast in the ecclesiastical courts, where the testimonial obligation already existed.

⁹ It has already been further examined in dealing with the history of disqualification by interest (*ante*, § 575) and of the Hearsay rule (*ante*, § 1364).

¹⁰ The data are given in Thayer, 124-125.

for one or the other," says a judge in 1450,¹¹ "it is maintenance, and he will be punished for it. And if the jurors come to a man where he lives, in the country, to have knowledge of the truth of the matter, and he informs them, it is justifiable; but if he comes to the jurors or labors to inform them of the truth, it is maintenance, and he will be punished for it." Thus the state of things was that the person informing the jury must (if he would escape a charge of maintenance) either be an interested party, or his counsel or his servant or tenant or relative—in short, so situated that "the law presumes him bound to be with the party"—¹² or he must have been officially called upon, either by summons as a juror or deed-witness, or by the express request of the jury or of the judge—in short, by "compulsion of law";¹³ since "what a man does by compulsion of law cannot be called maintenance."¹⁴ This state of things lasted well on into the 1500s.¹⁵

But gradually it became intolerable, as may be imagined. By that time the jury was less and less able to do justice to the cause through the means of its own neighborhood-knowledge. The summoning of deed-witnesses and transaction-witnesses with the jury (a method in any event available in only certain classes of cases) had through its cumbrousness fallen into disuse. No other form of compulsory summons than that appropriate to jurors and these quasi-jurors was known in tradition.¹⁶ The doctrine of maintenance was a harsh obstacle in the way of obtaining by persuasion the attendance of any other persons capable of giving material information. In these conditions, the trend of the law was naturally marked out by the circumstances. The lead was furnished by the existing qualification, already noted, that "what a man does by compulsion of law cannot be called maintenance." Create a general compulsion of law for all persons whose information may be needed or desired as useful by the parties, and the obstacle to getting witnesses would be removed. Let an order of the judge, commanding such a person's appearance, be obtainable, as of course, before the trial, and the risk of a charge of maintenance would be removed, and no man need fear to come forward as a witness. Such was the expedient which was plainly dictated by the exigency; and such, beyond a doubt, was the genesis—slow though the creative process was—of the notable statute of Elizabeth, in 1562-3, by which a penalty was imposed and a civil action was granted against any person who refused to attend, after service of process and tender of expenses.¹⁷

¹¹ Y. B. 29 H. VI, 6, 1; quoted in Thayer, 129.

¹² Cheyne, C. J., in 1433, Y. B. 11 H. VI, 43, 36; quoted in Thayer, 129.

¹³ 1406, Y. B. 9 H. IV, pl. 24; Y. B. 9 id. 6, 8; quoted in Thayer, 129.

¹⁴ Littleton, arguing, in 1450, Y. B. 29 H. VI, 6, 1; quoted in Thayer, 129.

¹⁵ 1527, Y. B. 27 H. VIII, 2, 6; quoted ante, § 575.

¹⁶ As late as 1481 (Y. B. 29 Ed. IV, 23, 1; quoted in Thayer, 129, note) a judge even refuses to compel a man to testify who is already in the court.

¹⁷ Stat. 5 Eliz. c. 2, § 12 ("If any person or persons upon whom any process out of any of the courts of record within this realm or Wales shall be served to testify or depose concerning any cause or matter depending in any of the same courts, and having tendered unto him or them, according to his or their countenance or calling, such reasonable sums of money for his or their costs or charges as having regard to the distance of the places is necessary to be allowed in that behalf, do not appear according to the tenor of the said process, having not a lawful and reasonable let or impediment to the contrary, that then the party making default" shall forfeit £10 and

No doubt a process had been issued on demand, increasingly often, in the preceding generation; but this appears as the first definite recognition of the general right to have that process and the general duty implied by it.¹⁸ This statute did for testimony at common law what John de Waltham's subpoena had done for testimony in chancery, more than a hundred years before, by an expedient almost precisely similar.¹⁹

This statute of Elizabeth, then, which in our day appears merely to supply a means of getting a hold upon persons who are not willing to testify, and typifies the *duty* of being a witness, appears in its inception as serving also a different and more restricted purpose. By giving a command to those who were willing enough, but were timorous, it represented their *right* to come and to testify, unmolested by the apprehension of maintenance-proceedings. Its provision for a civil action against persons refusing — a provision which at first sight gives us of to-day an incorrect impression — was intended still further to counteract their fears of maintenance-proceedings by the opponent if they *did* come, by subjecting them to an action by the summoning party if they *did not* come. In other words, the exigency which the statute meant to meet was not so much the witness' insensibility to his legal duty to the party desiring his attendance as his sensitiveness to the legal claims of the opposite party to his non-attendance. Of a legal duty to attend or to give testimony, it can hardly be said that there is at this stage any settled recognition. The effort is rather merely to create a freedom to attend.

As this freedom came to be exercised more and more generally, and the ordinary witness became, by the 1600s, the chief source of the jury's information, the notion of a duty was naturally developed from and added to the

give further recompense for the harm suffered by the party aggrieved).

¹⁸ That this step was taken in order to remove the obstacles which the law of maintenance otherwise presented may be easily inferred from the recorded persistence of that law down to within a few years of the statute (as shown in the case of 1537, cited *supra*). The office of the subpoena as a sort of indemnity against an action of maintenance plainly appears also in a petition in Chancery, of the prior century, where the petitioner asks for a subpoena to his witness, because "the same David will gladly knowelygge the treweth of the same matiers, bot he wald have a mandement fro yowe, for the cause that he shuld noight be haldyn parcial in the same matier" (Calendars of Proceedings in Chancery, 1450-60, I, p. xix; quoted in Thayer, 129). Moreover, this notion that people who come forward, without compulsion, to talk to the jury are meddlers, and that a peremptory command of the Court can alone remove the stigma of impropriety, was so rooted in popular and professional feeling that it only disappeared slowly and gradually; and as late as the early 1600s a learned clerk of the Star Chamber (*c. 1625*, Hudson, *Treatise of the Star Chamber*, III, § 21, in Hargraves' *Collectanea Juridica*, II, 207) remarks that he who "comes to yield his testi-

mony without compulsion" is "esteemed a forward witness."

¹⁹ He first framed it in its present form, when a clerk in Chancery, in the latter end of the reign of Edward III (about 1378); but the invention consisted in merely adding to the old clause "*quibusdam causis de causis*," the words "*et hoc sub pena centum librorum nullatenus omitas*;" and I am at a loss to conceive how such importance was attached to it, or how it was supposed to have brought about so complete a revolution in equitable proceedings; for the penalty was never enforced, and if the party failed to appear, his default was treated (according to the practice prevailing to our own time) as a contempt of court, and made the foundation of compulsory process" (Campbell, *Lives of the Chancellors*, 5th ed., I, 259). The learned writer would not have been "at a loss to conceive" the importance of the expedient, if he could have been acquainted with the modern researches into the history of witnesses. There had been before that time no compulsion; and the *pena of centum libri* effectually supplied the compulsion. We may well understand that a "revolution in equitable proceedings" was by this *sub pena* clause brought about. This and the statute of Elizabeth mark an epoch in the history of legal theory and practice. The history of the subpoena is further noticed *infra*, note 27.

notion of a freedom or right.²⁰ In the next century, and hardly before then, do we find a plain recognition of the duty; and it is noticeable that there are two stages of development, for the duty of attendance to be sworn comes earlier than the duty of disclosure of knowledge. The obligation to attend and bear testimony generally had been settled; but for some time afterwards there appears still to be lacking the full conception that the answer to a specific question on the stand can be compelled; and that all desired facts are bound to be disclosed.²¹ The history of the various claims of exemption, from that time onward,²² shows that the final achievement was in the early 1600s distinctly a new one:

1612, Sir Francis Bacon, in the *Countess of Shrovesbury's Trial*, 2 How. St. Tr. 709, 778: "You must know that all subjects, without distinction of degrees, owe to the king tribute and service, not only of their deed and hand, but of their knowledge and discovery. If there be anything that imports the king's service, they ought themselves undemanded to impart it; much more, if they be called and examined, whether it be of their own fact or of another's, they ought to make direct answer."

But as yet there was one important step to be taken. The statute of Elizabeth had apparently intended to provide only for civil causes. In criminal causes, the date when process began to be issued for the Crown's witnesses does not appear; though presumably it preceded the time of Elizabeth's statute. But the accused in a criminal cause was not allowed to have witnesses at all,²³ — much less to have compulsory process for them. By the early 1600s this disqualification began to disappear, and the accused was occasionally allowed to put on witnesses, who spoke without oath. After two generations, and by 1679, under the Restoration, the judges began to grant him, by special order, compulsory process to bring them;²⁴ and finally, at slow intervals, in 1695 and in 1701, he was guaranteed this right by general statutes.²⁵ This guarantee was afterwards embodied in most of the constitutions of the United States.

In the remaining important field of jurisdiction, the Court of Chancery, the general doctrine becomes a part of English history at a time when it was already in part achieved in another system of law. When the Chan-

²⁰ 1899, *Dobson v. Crew*, Cro. Eliz. 705 (bond to give testimony; the Court said that, even apart from the bond, "he is compellable by the law").

²¹ As late as about 1630, a clerk of the Star Chamber, Hudson, is found writing (*Treatise on the Star Chamber*, part III, § 21, Hargraves' *Collectanea Juridica*, II, 206) that "the great question hath been, whether a witness which in examination will not give any answer shall be compelled to make answer to the interrogatories; . . . [and Lord Chancellor Egerton] gave me answer, that he knew no law to compel a witness to speak more than he would of his own accord." This was certainly not the then practice of the Star Chamber (*post*, § 2250), but the statement looks like a reminiscence of the ecclesiastical law, as noticed *infra*, note 27.

²² *Post*, § 2212 (trade secrets), § 2266 (confidences), § 2290 (attorney and client).

²³ The history of this disqualification has already been examined (*ante*, § 575).

²⁴ *Ante*, § 575.

²⁵ 1695-c. St. 7 & 8 W. III, c. 3, § 7 (persons indicted for treason and misprision "shall have the like process of the court where they shall be tried, to compel their witnesses to appear for them at any such tryal or tryals as is usually granted to compel witnesses to appear against them"); 1702, St. 1 Anne, c. 9, § 3 (requires that witnesses produced for the accused in felony shall be sworn); the latter statute was treated by implication as authorizing compulsory process: 1694, *Starkie, Evidence*, I, 36.

cellors in the 1400s were forming the procedure of their court after the model of the ecclesiastical law, they found a doctrine *de testibus cogendis* long canvassed as a theoretic principle in the system from which they borrowed. There had indeed been a time when that system was passing through a development something like our own,—at least, when the compellability of witnesses was a new thing; the decretals of the 1200s indicate this;²⁰ and a final settlement had not been reached when the English Court of Chancery began to flourish, and to borrow the Continental rules.²¹ But the Chancellors, without waiting, pushed the principle to the extreme test of practicality, and invented the keen compulsory weapon of the subpoena writ.²² This gave them more than a century's start of the common-law Courts in the recognition of a definite testimonial compulsion and duty. It may be supposed, moreover, that the rapid increase in the activity of the Chancery during the 1500s was one of the causes which contributed to the introduction at that time of compulsory process for witnesses in the common-law courts, and was the chief influence in prescribing for that process the specific form of the *subpoena* writ. It may even be that the Chancery's priority in the use of compulsory process was itself one of the causes that had made it more efficient and more popular.

§ 2191. *Constitutional Guaranty of Compulsory Process.* This history of the law securing for accused persons the right to compulsory process for their witnesses shows that the purpose of the statutes was merely to cure the defect of the common law by giving to parties defendant in criminal cases the common right which was already in custom possessed both by parties in civil cases and by the prosecution in criminal cases. The Bills of Rights in most of the Constitutions have incorporated this statutory right,¹

²⁰ *Corpus Juris Canonici*, Decretal II, 20 (*de testibus et attest.*), 21 (*de testibus cogendis*); Gleason, cited *supra*, note 8.

²¹ That law seems to have suffered an arrest of development, and never to have reached explicitly the complete conception of a testimonial duty. "The canon law recognized a public duty and liability to bear witness, . . . although to be sure the earlier doctrine had partially refused this recognition, for criminal cases in general, or at least for the accusatio-proceeding in particular" (Hinrichs, *Kirchenrecht*, 1897, VI, pt. 1, § 364, p. 97, note 1). The modern Church jurists, in regard to the coercion of a witness, "incline to hold it allowable, at least when proof cannot be supplied in any other manner" (Droste, *Canonical Procedure*, tr. Meuser, 1887, § 66). Even in modern French criminal procedure (which is founded on canon-law methods), a witness who refused on the stand to answer a specific question cannot be compelled (Bodington, *French Law of Evidence*, 1904, p. 116).

²² For the history of the *subpoena* writ, see the quotation from Lord Campbell, *supra*, note 19, and farther, Hudson, *Treatise of the Star Chamber*, pt. III, § 21, in Hargr. *Coll. Jurid.* II, 207; Leadam, *Select Cases in the Star Chamber*, *Seld. Soc. Pub.* vol. XVI, p. xxii; Spence,

Equitable Jurisdiction, I, 328, 345, 360; *Choice Cases in Chancery*, 1 (1672).

¹ The usual provision is that in criminal cases the accused shall have the right to "compulsory process for obtaining witnesses" (or, "process to compel the attendance of witnesses") "in his favor" (or, "in his behalf"); special variations are noted below; the figures indicate the date, article, and section of the Constitutions: Ala. 1875, I, 7; Ark. 1874, I, 8; Cal. 1879, I, 13; Colo. 1876, II, 16; Conn. 1813, I, 9; Del. 1831, I, 7; Fla. 1887, Decl. of R. 11; Ga. 1877, I, 5; Ida. 1889, I, 13; Ill. 1870, II, 9; Ind. 1851, I, 13; Ia. 1857, I, 10 (for criminal cases, the usual clause; "Any party to any judicial proceeding shall have the right to use as a witness, or take the testimony of, any other person, not disqualified on account of interest, who may be cognizant of any fact material to the cause"); Kan. 1859, Bill of R. 10; Ky. 1891, 11; La. 1898, 9; Me. 1819, I, 6; Md. 1867, Decl. of R. 21 ("to have process for his witnesses; to examine the witnesses for and against him on oath"); Mass. 1780, Decl. of R. 13 ("a right to produce all proofs that may be favorable to him"); Mich. 1830, VI, 28; Minn. 1857, I, 6; Miss. 1890, III, 26; Mo. 1875, III, 23; Mont. 1890, I, 16; Neb. 1875, I, 11; N. H.

because those clauses of the Constitutions were intended to sanction permanently the more fundamental features of just and liberal criminal procedure, particularly in the parts which had at various times in the past been found liable to abuse. The Constitutions, in this instance, provided nothing new or exceptional; but gave solid sanction, in the special case of accused persons, to the procedure ordinarily practised and recognized for witnesses in general.

It follows that this right does not override and abolish such *exemptions and privileges* as may be otherwise recognized by common law or statute; the right guaranteed is merely the general right to the compulsory process which is required for making practical the testimonial duty, so far as that duty otherwise exists.² So, also, this guarantee does not define the extent to which testimonial attendance is conditional on the party's *tender of expenses*; ³ whether an accused must make such a tender remains to be determined by the law as otherwise defined.⁴

§ 2192. *Duty to give Testimony; General Principle.* For three hundred years it has now been recognized as a fundamental maxim that the public (in the words sanctioned by Lord Hardwicke) has a right to every man's evidence. We may start, in examining the various claims of exemption, with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional and are so many derogations from a positive general rule:

1742, *Bill for Indemnifying Evidence*, Cobbett's Parliamentary History, XII, 675, 693 (the debate being upon a bill to pardon in advance such witnesses as should criminate themselves in testifying to the frauds of Sir Robert Walpole, Earl of Orford, the debate

1793, Bill of R. 15 (like Mass.); N. J. 1844, I, 8; N. C. 1875, I, 11 ("to confront the accusers and witnesses with other testimony"); N. D. 1889, I, 13; Oh. 1851, I, 10; Or. 1859, I, 11; Pa. 1874, I, 9; R. I. 1843, I, 10; S. C. 1895, I, 18; S. D. 1889, VI, 7; Tenn. 1870, I, 9; Tex. 1876, Bill of R. 10; U. S. 1787, Am. 6; Utah 1898, I, 12; Va. 1903, I, 8 (like Va.); Vt. 1793, I, 10 ("to call for witnesses in his favor"); Wash. 1899, I, 22; W. Va. 1872, III, 14; Wis. 1848, I, 7; Wyo. 1899, I, 10.

The Federal clause first occurs in its present form in the resolution of amendment by Congress, March 4, 1789, but it was founded on the recommendations of the Constitutional Convention of New York and of North Carolina, July 26 and Aug. 1, 1788; their proposal declared the accuser's right "to have the means of producing his witnesses" and "to call for evidence" (Kilgus's Debates, I, 328, 334, 339, IV, 243). None of the other ratifying States (except Rhode Island, after the Congress above mentioned) seem to have called for this clause.

² 1897, *State v. Wiltsey*, 103 Ia. 54, 72 N. W. 415 (witness prevented by illness); 1884, *Re Dillon*, 7 Sawyer 561, 569 (Hoffman, J.: "The object and effect of the constitutional provision were merely to give to the accused the right to such process as is usually granted to compel witnesses to appear on the side of the prosecution against them"; here, a foreign consul's

privilege). The contrary was maintained by the Executive, through Mr. Marcy, Secretary of State, in this same matter of Consul Dillon, so far as the consular exemption was based on a treaty made subsequent to the Federal Constitution; the authorities are cited *post*, § 2372.

It would seem that, for procuring the attendance of a convict in prison, process (usually provided for by statute) would be obtainable even in civil cases; but this right has sometimes been placed upon the basis of the constitutional provision: 1196, *Hancock v. Parker*, 100 Ky. 143, 37 S. W. 594.

³ *Contra*: 1853, *West v. State*, 1 Wis. 209, 230 ("It would be in many cases but bitter mockery to grant the prisoner the right to have witnesses examined in his behalf, and then to deny him the necessary process of the law to procure their attendance").

⁴ For these requirements as to tender of expenses, see *post*, § 2201.

For other analogies, as to constitutional provisions merely sanctioning a general principle, and not affecting its exceptions, see *ante*, § 1397.

For the question whether the statutory rule refusing a continuance, where the accused's witnesses' desired testimony is admitted to be as averred, is in violation of the constitutional provision guaranteeing compulsory process, see *post*, § 2365.

took a general range): *Duke of Argyll* (for the bill): "On the present occasion, my lords, I pronounce with the utmost confidence, as a maxim of indubitable certainty, 'that the public has a claim to every man's evidence,' and that no man can plead exemption from this duty to his country." *L. C. Hardwicke* (against the bill): "It has, my lords, I own, been asserted by the noble duke, that the public has a right to every man's evidence, — a maxim which in its proper sense cannot be denied. For it is undoubted true that the public has a right to all the assistance of every individual."

1802, *Smith, M. R.*, in *Butler v. Moore*, *McNally*, Evidence, 258: "It is the undoubted legal constitutional right of every subject of the realm, who has a cause depending, to call upon a fellow-subject to testify what he may know of the matters in issue; and every man is bound to make the discovery, unless specially exempted and protected by law."

1827, *Mr. Jeremy Bentham*, Draft for a Judicial Establishment (*Works*, Bowring's ed. IV, 320): "What then? Are men of the first rank and consideration, are men high in office, men whose time is not less valuable to the public than to themselves, — are such men to be forced to quit their business, their functions, and what is more than all, their pleasure, at the beck of every idle or malicious adversary, to dance attendance upon every petty cause? Yes, as far as it is necessary, — they and everybody! What if, instead of parties, they were witnesses? Upon business of other people's, everybody is obliged to attend, and nobody complains of it. Were the Prince of Wales, the Archbishop of Canterbury, and the Lord High Chancellor, to be passing by in the same coach while a chimney-sweeper and a barrow-woman were in dispute about a halfpennyworth of apples, the chimney-sweeper or the barrow-woman were to think proper to call upon them for their evidence, could they refuse it? No, most certainly."

1861, *Willes, J.*, in *Ex parte Fernandez*, 10 C. B. n. s. 3, 30: "Every person in this kingdom, except the sovereign, may be called upon and is bound to give evidence, to the best of his knowledge, upon any question of fact material and relevant to an issue tried in any of the Queen's courts, unless he can show some exception in his favor."

1818, *Tugman, C. J.*, in *Beird v. Cochran*, 4 S. & R. 307, 400: "From the nature of society, it would seem that every man is bound to declare the truth when called upon in a court of justice. . . . The general welfare will be best promoted by considering the disclosure of truth as a debt which every man owes his neighbor, which he is bound to pay when called on, and which in his turn he is entitled to receive."

1852, *Smith, J.*, in *West v. State*, 1 Wis. 208, 228: "In no just sense can the requirement upon a citizen of his attendance upon court to testify as a witness be considered as the taking of private property for public use, within the meaning of the constitution. The object of that provision in the fundamental law was to protect the citizen from grasping demands of government, not to absolve him from any of those various personal duties which every good citizen owes to his country, such as the performance of military duty, obedience to the call of the proper authority for his personal service in suppressing a riot, the apprehension of a felon, affording assistance to officers in making arrests, resisting, and the like. There are very many instances in which the citizen is required to perform personal service or render aid to his government, without other compensation than that of his participation in the general good and his enjoyment of the general safety and advantage which result from common acquiescence in such obligations on the part of all the citizens alike and which is essential to the existence and safety of society."

1856, *Perkins, J.*, in *Israel v. State*, 8 Ind. 467: "It is as much the duty and interest of every citizen to aid in prosecuting crime as it is to aid in subduing any domestic or foreign enemy; and it is equally the interest and duty of every citizen to aid in fur-

¹ *Mass. Const.* 1780, Decl. of R. 10 ("Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty, and property, according to standing laws. He is obliged, consequently, to contribute his share

to the expense of his protection; to give personal service or an equivalent, when necessary"); so also *N. H. Const.* 1780, Bill of Rights, § 12; *Vt. Const.* 1792, I, § 9

ing to all, high and low, rich and poor, every facility for a fair and impartial trial when accused; for none is exempt from liability to accusation and trial."

1859, *Caten, C. J.*, in *Bennett v. Walker*, 23 Ill. 97, 101 (compelling the heir of the grantor of a lost deed to execute another): "He says he owes the complainants no such duty. He forgets that society often imposes upon all its members the obligation to submit to inconveniences and trouble, and even expense, for the sole benefit of others. Where was the obligation resting upon R. & to attend as a witness in this case? . . . What right have the Courts to compel any one to quit his own affairs, no matter how pressing they may be, and attend as a witness or juror in litigation between strangers? This duty to assist others who stand in need of our assistance for the maintenance of their rights necessarily flows from the relations we bear each other as members of the same community, we being mutually dependent upon each other for security and protection."

From the point of view of the duty here predicated, it emphasizes the sacrifice which is due from every member of the community. That sacrifice may take two forms, either of them serious enough. In the first place, it may be a sacrifice of time and labor, and thus of ease, of profits, of livelihood. This contribution is not to be regarded as a gratuity, or a courtesy, or an ill-requited favor. It is a duty, not to be grudged or evaded. Whoever is impelled to evade or to resent it should retire from the society of organized and civilized communities, and become a hermit. He is not a desirable member of society. He who will live by society must let society live by him, when it requires to.

Or the sacrifice may be of his privacy, of the knowledge which he would preferably keep to himself because of the disagreeable consequences of disclosure. This inconvenience which he may suffer, in consequence of his testimony, by way of enmity or disgrace or ridicule or other disfavoring action of fellow-members of the community, is also a contribution which he makes in payment of his dues to society in its function of executing justice. If he cannot always obtain adequate solace from this reflection, he may at least recognize that it defines an unmistakable axiom. When the course of justice requires the investigation of the truth, no man has any knowledge that is rightly private. All that society can fairly be expected to concede is that it will not exact this knowledge when necessity does not demand it, or when the benefit gained by exacting it would in general be less valuable than the disadvantage caused; and the various privileges are merely attempts to define the situations in which, by experience, the exaction would be unnecessary or disadvantageous. The duty runs on throughout all, and does not abate; it is merely sometimes not insisted upon.

From the point of view of society's right to our testimony, it is to be remembered that the demand comes, not from any one person or set of persons, but from the community as a whole,—from justice as an institution, and from law and order as indispensable elements of civilized life. The dramatic features of the daily court-room tend to obscure this; the matter seems to be between neighbor Doe and neighbor Roe; we are prone to shape our own course by the merits of the one or the other of their causes. But the

right merely happens to be exemplified in the case of *Doe v. Roe*; that is all. The whole life of the community, the regularity and continuity of its relations, depend upon the coming of the witness. Whether the achievements of the past shall be preserved, the energy of the present kept alive, and the ambitions of the future be realized, depends upon whether the daily business of regulating rights and redressing wrongs shall continue without a moment's abatement, or shall suffer a fatal cessation. The business of the particular cause is petty and personal; but the results that hang upon it are universal. All society, potentially, is involved in each individual case; because the process itself is one of vitality. Each verdict upon each cause, and each witness to that verdict, is a pulse of air in the breathing organs of the community. The vital process of justice must continue unceasingly; a single cessation typifies the prostration of society; a series would involve its dissolution. The pettiness and personality of the individual trial disappear when we reflect that our duty to bear testimony runs not to the parties in that present cause, but to the community at large and forever.

It follows, on the one hand, that all privileges of exemption from this duty are exceptional, and are therefore to be discountenanced. There must be good reason, plainly shown, for their existence. In the interest of developing scientifically the details of the various recognized privileges, judges and lawyers are apt to forget this exceptional nature. The presumption against their extension is not observed in spirit. The trend of the day is to expand them as if they were large and fundamental principles, worthy of pursuit into the remotest analogies. This attitude is an unwholesome one. The investigation of truth and the enforcement of testimonial duty demand the restriction, not the expansion, of these privileges. They should be recognized only within the narrowest limits required by principle. Every step beyond these limits helps to provide, without any real necessity, an obstacle to the administration of justice.

On the other hand, if this duty exists for the individual to society, so also he may fairly demand that society, so far as the exaction of it is concerned, shall make the duty as little onerous as possible. He may demand that the compulsion be relaxed so far as it is not indispensable for the ascertainment of truth. He may demand that the situation of a witness be made as free from annoyances as is possible; that delay be diminished; that needless technicalities be ignored; that some sort of compensation for loss of time be provided; that the rules of evidence and the conduct of counsel be not such as to inflict unnecessary annoyance upon innocent persons;² and that the law in general be so formed as to reduce to a minimum the necessary sacrifices made by the witness in the name of duty. These just demands are too often as much ignored by the profession of the law as are the duties of witnesses by laymen. In the adjustment of the unquestioned duty of the latter to the correlative right of society, speaking through the law and its practitioners, much remains yet to be desired.

² Compare §§ 761, 982, *ante*.

§ 2193. Same: Testimonial Duty applied to Production of Documents. This testimonial duty to attend and disclose all that is desired for the ascertainment of truth applies to every form and material of evidence whatever. In particular it applies to such evidential material as exists in a person's hands in the form of documents. "There is no difference in principle," said a great judge,¹ "between compelling a witness to produce a document in his possession, under a subpoena *duces tecum* (in a case where the party calling the witness has a right to the use of such document), and compelling him to give testimony when the facts lie in his own knowledge." This much is unquestionable; for to give up facts possessed by physical control is no different from the giving up of data possessed by mental impression:

1775, *Trial of Maharajah Nundocomar*, 20 How. St. Tr. 1037; Mr. Stewart, for the Governor and Council of the East India Company, wished not to produce the Council records, because it would lead to "many inconveniences and ill consequences to exhibit the proceedings of the Council in an open court of justice, especially as they may sometimes contain secrets of the utmost importance to the interest and even to the safety of the State"; the Court: "We are not surprised that the Governor-general and Council should be desirous to prevent their books being examined, which might tend to the consequences they mention. It would be highly improper that their books should be wantonly subjected to curious and impertinent eyes. But at the same time it is a matter of justice that, if they contain evidence material to the parties in civil suits, they may have an opportunity of availing themselves of it. Humanity requires it should be produced when in favor of a criminal, justice when against him. The papers and records of all the public companies in England — of the Bank, South Sea House, and the East India House — are liable to be called for, when justice shall require copies of the records and proceedings, from the highest court of judicature down to the court of pie-powder, and continually given in evidence. When it is necessary they should be produced, the Court will take care they are not made an improper use of."²

There was, however, a doubt once raised as to the existence at common law of adequate process, comprehensive and unlimited, which should serve to enforce this duty as effectively for documents as for oral testimony. This doubt was repudiated as soon as raised, by an opinion which has ever since been accepted as final:

1806, *Amey v. Long*, 9 East 473, 479; Mr. Gibbs, Attorney-General, and Mr. Garrow, arguing against the issuing of such process: "The writ of subpoena *duces tecum* only lay to public officers for the production of the public documents in their custody, in which all persons had or might have an interest, and could not properly be extended to private persons"; *Ellenborough, L. C. J.*, repudiating this argument: "The right to resort to means competent to compel the production of written, as well as oral, testimony seems essential to the very existence and constitution of a Court of common law, which receives and acts upon both descriptions of evidence, and could not possibly proceed with due effect without them. And it is not possible to conceive that such Courts should have immemorially continued to act upon both, without great and notorious impediments having occurred, if they had been furnished with no better means of obtaining written evidence than what the immediate custody and possession of the party who was interested in the production of it, or the voluntary favor of those in whose custody the required

¹ 1830, *Shaw, C. J.*, in *Hall v. Loveland*, 10 Pick. 9, 14.

² For instances of the general rule that the

privacy of documents is no excuse for non-production, see post, § 2212.

instruments might happen to be, afforded." *Meane, Park, Marryat, and Fell* (arguing for the doctrine approved): "This writ is of essential importance to the due administration of justice, oftentimes as much so as the common writ of subpoena to compel the attendance of witnesses; for where a matter depends upon written evidence in the possession of another than the party in the cause who is interested in its production, it would be nugatory to enforce his personal attendance without the document by which the truth of the fact in issue can alone be proved"; *Lawrence, J.*, said "this was one of the greatest questions he had ever heard agitated in Westminster Hall, — one which most deeply affected the administration of justice both civil and criminal. He could not reconcile it to his mind to suppose that the innocence of a person accused might depend on the production of a certain document in the possession of another, who had no interest in withholding it, and yet that there should be no process in the country which could compel him to produce it in evidence."

1834, *Bayley, B.*, in *Summers v. Mosley*, 2 Cr. & M. 477: "The origin of the subpoena *duces tecum* does not distinctly appear. It has been said on the part of the defendant that it was not introduced or known in practice till the reign of Charles II, and it may be that in its present form the subpoena *duces tecum* was not known or made use of until that period. But no doubt can be entertained that there must have been some process similar to the subpoena *duces tecum* to compel the production of documents, not only before that time, but even before the statute of 5 Elizabeth. Prior to that statute, there must have been a power in the Crown (for it would have been utterly impossible to carry on the administration of justice without such power) to require the attendance in courts of justice of persons capable of giving evidence, and the production of documents material to the cause, though in the possession of a stranger. The process for that purpose might not be called a subpoena *duces tecum*, but I may call it a subpoena to produce. The party called upon in pursuance of such a process, not as a witness, but simply to produce, would do so or not, and if he did not, I can entertain no doubt that it would have been open to the party for whom he was called to make an application to the Court in the ensuing term to punish him for his contempt in not producing the document in obedience to such subpoena."³

This general and equal duty to produce documentary material is, of course, like the duty to give oral testimony, subject to various specific privileges. These may be later considered in their appropriate places.⁴

§ 2194. *Same: Testimonial Duty applied to Premises, Chattels, and Corporal Exhibition.* If a person, by virtue of his very existence in civilized society, owes a duty to the community to disclose for the purposes of justice all that is in his control which can serve the ascertainment of the truth, this duty includes equally the mental impressions preserved in his brain, the documents preserved in his hands, the corporal facts existing on his body,

³ So, too, the process for documents will be implied wherever testimonial compulsion in general is predicated by a statute: 1861, *Mitchell's Case*, 12 Abb. Pr. 249, 262 (production of documents is obtainable from a party-opponent under a statute making him compellable like any other witness; good opinion by Daly, J.); 1879, *U. S. v. Tilden*, 10 Ben. 566, 578 (under U. S. Rev. St. § 863, making a witness, when beyond the district of personal attendance, compellable to give a deposition, the witness is equally liable to produce documents on subpoena *d. t.* for the deposition; good opinion by Choate, J.).

⁴ For example, the privilege as to title-deeds and securities under a lien (post, § 2311), trade-

secrets (post, § 2312), a civil party's documents (post, § 2319), official documents (post, § 2367), self-incriminating documents (post, § 2364), and confidential communications of various sorts (post, §§ 2385-2394). Moreover, the general requirement of notice and summons by subpoena, finds special application in the use of a subpoena *duces tecum* for documents (post, § 2300).

Distinguish, however, the question whether before trial a third person, not a party, can be compelled to disclose documents, — a subject already treated (*ante*, §§ 1857-1859); there may be an obligation to disclose them finally on the trial, and yet there may be no right to inspect them before trial.

§§ 2190-2197] TESTIMONIAL DUTY; PREMISES, CHATTELS. § 2194

and the chattels and premises within his control. There can be no discrimination. The latter forms of disclosure, though more rarely asked for, are not a whit the less necessary or proper. They are included in the general duty. Apart from specific privileges, then, a person is bound, if required, to furnish evidence by exhibiting his *corperal features*, his *chattels*, and his *premises*, to the inspection of the tribunal or its duly delegated officers, and to do or exhibit any other thing which may in any form furnish evidence:

1887, *Brewer, J.*, in *U. S. v. Mullancy*, 32 Fed. 370 (compelling a defendant to write his name): "Then the other phrase is, whether you can compel a witness on cross-examination to do other than answer questions. This was a physical act which he was called upon to do in the presence of the jury. It is a matter of common experience in a courtroom that witnesses are often called upon either for some exposure of their person or to do some physical act supporting or contradicting their testimony. A chemist who has stated that a certain test discloses the presence of poison may be called upon to repeat that test in the presence of the jury, that they may see whether the testimony is true and the test accurate. A person who testifies to his physical condition may be compelled (there being no improper exposure of person) to uncover his body, that the jury may see whether there be such a physical condition as he has testified to. The witness may say, for instance, that he was never wounded in the arm, and on cross-examination it would be competent to compel him to lift up his sleeve, that the jury may see whether or no there was a scar or mark of wound on his arm."

Nevertheless, Courts have occasionally entertained a doubt, in this respect, of the same unfounded nature as that which was once raised (*ante*, § 2193) for the production of documents,—that is, a doubt as to the existence of appropriate process to compel this sort of testimony. Upon this ground such a compulsion has sometimes been refused.¹ But how culpable is this self-stultifying concession by a Court of justice that it knows of no process to execute its powers for enforcing a conceded duty! There cannot be a precise precedent for everything. Where there is a clearly established principle, the lack of a precedent is no obstacle. There must sometime be a first precedent. Were the judges of Charles II or George III, who themselves were but the followers of six centuries of royal judges, the last generation vested with the authority to apply old principles in new forms? Nobody has been able to find any definite authority for the *duces tecum* form of subpoena; but the judges of 1808 were not moved by such trifling;² such a power, they declared, is "essential to the very existence and constitution of a Court of common law." The mere phrasing of an auxiliary writ is not to stand in the way of inherent powers. Is there any known precedent of a writ to a court-bailiff ordering him to shut the doors to keep out

¹ 1899, *McGuff v. State*, 38 Ala. 147, 151, 7 So. 59 (carnal knowledge of a child under ten years; defendant's claim to have the child submit to an examination by medical experts, held not a right; whether the power to order it exists, undecided; but if it does, the trial Court has a discretion as to cases of extreme necessity for it); 1880, *Re Shephard*, 3 Fed. 12 (subpoena will not issue to bring any but writings or books, as declared in *U. S. Rev. St.* § 869; here refused

for patterns of stove-castings); 1891, *Johnson v. S. R. Co. v. North B. S. Co.*, 48 Fed. 191, 194 (drawings, but not templates, held within a subpoena *d. t.*).

For the right to inspect premises and chattels of a party before trial, which rests on different principles, see *ante*, § 1862; and for the privilege of a party, see *post*, § 2231.

² *Amey v. Long*, quoted *ante*, § 2193.

an excessive throng, or to open the windows to let in fresh air? But no judge ever refrained from such orders because he had never seen such a form. The ordinary subpoena for a witness is of no avail when he is in prison; but the judges — somebody, sometime, no one knows who or when — varied the form of words and ordered the jailer *habeas corpus ad testificandum*.² They did not supinely sit and watch justice defrauded of testimony because the usual piece of parchment did not precisely fit the exigency.⁴ The Courts can as well command a witness to let the jury, or qualified experts, inspect his premises, his chattels, or his person,⁵ as to produce his documents. It is not to be supposed that our Courts will finally commit themselves to the denial of such a plain dictate of principle and of common sense.⁶

§ 2195. **Officers possessing Power to Compel Testimony; Witness' Liability to Action, and Immunity from Arrest.** In connection with the enforcement of the testimonial duty, certain other questions arise, not concerning the admissibility of evidence or the scope of privilege, but involving independent principles of substantive and procedural law:

(1) The duty to give testimony is a duty to the State, but the function of enforcing the duty resides specifically in the judicial branch of the government. The question thus arises, on the one hand, whether the power of enforcement can for any purpose be exercised by the legislative branch, in the course of investigations which it may choose to make, either as preliminary to its decision upon legislation or as ancillary to the enforcement of its own internal order.¹ The question arises, on the other hand, whether, in the judicial branch, the power of enforcement can be delegated to inferior officers other than the judges themselves, such as notaries,² or commissioners to take depositions, or others.³

² Post, § 2199.

³ If there must be a Latin catchword, the *duces tecum* form would do equally well for chattels conveniently portable; for all else, a command *paratus es ad exhibendum* would meet the case.

⁴ Subject always to the privileges post, §§ 2310-2321.

⁵ The following rulings exercised such a power: 1893, *King v. State*, 100 Ala. 35, 14 So. 378 (assault; the person assaulted, being examined for the prosecution, was held compellable, at the defendant's instance, to exhibit his wounded arm to the jury, "no question as to the delicacy of the proposed exhibition" being involved); 1903, *State v. Pucca*, — Del. —, 55 Atl. 831 (rape under age; prosecuting witness ordered to submit to physical examination by a surgeon on behalf of the defendant). The following rulings of exclusion seem to have rested on the facts of the case: 1903, *Bowers v. State*, — Tex. Cr. —, 75 S. W. 299 (slander charging unchastity; trial Court's refusal to order a physical examination of the complaining witness, held proper); 1902, *Goodwin v. State*, 114 Wis. 318, 90 N. W. 170 (complaining witness, held not subject on the facts to medical examination, after leaving the stand, to ascertain whether she

was suffering from hysteria; as affecting her credibility). Compare *Bagwell v. R. Co.*, 100 Ga. 611, 34 S. E. 1018 (1900), cited post, § 2220.

For the privilege of a party in civil cases, see post, § 2230; for the self-crimination privilege, see post, § 2265; for the privilege against disclosure of disgraceful facts, see post, § 2316.

¹ Consult the following: 1876, *Whitcomb's Case*, 120 Mass. 118; 1880, *Kilboarn v. Thompson*, 108 U. S. 176, more fully in *Smith's Digest of Precedents of the Senate and House*, 1894, 53d Cong. 2 sess. Misc. Doc. No. 278, p. 536; 1887, *Re U. S. Pacific Railway Commission*, Circ. Ct. N. D. Cal., *Smith's Digest*, pp. 631-707; 1894, *Interstate Commerce Com'n v. Brimason*, 164 Id. 447, 473, 488, 155 U. S. 3, 14 Sup. 1125; 1897, *Re Chapman*, 166 Id. 681, 17 Sup. 677.

² Consult the following: 1903, *Burns v. Superior Court*, 140 Cal. 1, 73 Pac. 397 (overruling *Lesinsky v. Superior Court*, 72 Cal. 510, 14 Pac. 104); 1897, *Re Beardsley*, 37 Kan. 666, 16 Pac. 153; 1879, *Ex parte Krieger*, 7 Mo. App. 367; 1893, *De Camp v. Archibald*, 50 Oh. St. 618, 623, 25 N. E. 1056.

³ Consult the following: 1896, *Ex parte Rucker*, 108 Ala. 245, 19 So. 314 (commissioner); 1843, *People v. Cansels*, 3 Hill N. Y. 164, 167 (justice of the peace); 1901, *Re Davies*, 168

(2) The testimonial duty, like other fundamental duties, may subject the violator of it to an action by the person injured by the violation, that is, by the party whose cause fails to be duly vindicated in court for lack of the testimony. Ordinarily, the plaintiff at common law in such an action on the case would have the difficult task of proving that his loss of his rights was caused specifically by the defendant's failure to bear testimony. The statute of Elizabeth⁴ attempted to ease this difficulty by providing also that a person failing to obey a summons to testify should forfeit a specific sum of money to the party summoning him; the latter expedient has frequently been imitated in modern statutes.⁵ The action against one whose false testimony has resulted in the unjust loss of a party's cause seems to rest equally, in principle, upon a violation of the testimonial duty; but the doctrine of privilege in substantive law has been thought to protect against such claims.⁶

(3) The testimonial duty is temporarily paramount to other considerations; moreover, subjectively, the witness should be encouraged, by the removal of all obstacles, to fulfil it freely and promptly; hence, an immunity from arrest on civil process is conceded to him, pending his travel to and from the place of trial and his stay at the place. This immunity, as affecting a number of rules of legal procedure and substantive right,⁷ is beyond the scope of the rules of evidence.

§ 2196. *Privilege personal to the Witness; Party's Objections.* The grounds for exemption from the testimonial duty are entirely extrinsic to the purpose of ascertaining the truth (*ante*, § 2175). They are based on a policy of dispensing with the compulsion of attendance and disclosure wherever it is not necessary, or is more disadvantageous in respect to other interests of the community (*ante*, § 2192). The exemptions are therefore in no sense provided for the benefit of the party whose opponent is deprived by them of the evidence which he desires. They are not intended to secure for him a better likelihood of demonstrating the truth of his cause; on the contrary, they constitute so many obstacles to the ascertainment of the truth, and these are suffered only because the several extrinsic policies are deemed to be in these respects paramount to the purpose of ascertaining the truth. For example, if Doe offers to prove the contents of a document, the rule that he must produce the original is a rule intended to secure a better likelihood of learning the contents accurately, and the invocation of it by his opponent Roe is the invocation of a rule which is directly intended to assist Roe in the establishment of the facts of the case. But, when Doe calls a witness who is exempted by illness from attendance, or is privileged not to disclose his title-deeds, it is

N. Y. 89, 61 N. E. 118 (attorney-general, and justices of the Supreme Court); 1903, U. S. v. Beavers, 125 Fed. 778 (U. S. Commissioner).

Upon the general question of the jurisdiction and power of various officers to use process of contempt in compelling testimony, consult the following: 1903, *Manson v. Wilcox*, 140 Cal. 206, 73 Pac. 1004; *Rapalje on Witnesses*, §§ 303 ff.

⁴ *Ante*, § 2190.

⁵ For examples, see the following cases: *Yeatman v. Dempsey*, 7 C. B. n. s. 628, and annotation in 97 Eng. Com. L. R.; 1834, *Wilkie v. Chadwick*, 13 Woud. 49; 1836, *Smith v. Merwin*, 15 Id. 184; 1838, *Mattocks v. Whenton*, 10 Vt. 493, 494.

⁶ The cases are collected in *Ames' Cases on Torts*, I, 618, note 6.

⁷ *Greenleaf, Evidence*, §§ 316-318, and cases cited; *Rapalje on Witnesses*, § 306.

obvious that this rule is in no sense directed to the better ascertainment of the facts, nor intended to safeguard Roe in his interest as a suitor entitled to a careful investigation of the facts. It concerns solely the interests of the witness, in his relation to justice and the State, — his interests not to have his testimonial duty enforced against him where paramount considerations of policy prevail over the purpose of judicial investigation.

Three consequences follow: (1) The *claim of privilege* can be made solely by the *witness himself*; the privilege (as the common phrasing runs) is purely personal to himself. Whether he chooses to fulfil his duty without objection, or whether he prefers to exercise the exemption which the law concedes to him, is a matter resting entirely between himself and the State (or the Court as its representative). The party against whom the testimony is brought has no right to claim or to urge the exemption on his own behalf; and, on the witness' behalf, the Court is to be left to accord the protection if it is a proper one.¹

(2) (a) An *improper ruling* by the Court, upon a question of privilege, *cannot be excepted to by the party* as an error justifying an appeal and a new trial, if the ruling *denies the privilege* and compels the witness to testify. By hypothesis, the privilege does not exist, for the benefit of the party nor for the sake of the better ascertainment of the truth of his cause. The offered testimony is relevant, and is, in all other respects than the privilege, admissible. The admission of it, by denying the privilege, has not introduced material which in any way renders less trustworthy the finding of the verdict; on the contrary, only the exclusion of it could have been an obstacle to the ascertainment of the truth. The only interest injured is that of the witness himself, who has been forced to comply with a supposed duty, which as between himself and the State did not exist; his remedy was to refuse to obey, and to appeal for vindication if the Court had attempted improperly to use compulsory process of contempt. This view has been accepted by some Courts.² But the opposite view naturally possesses attraction for those Courts — and they are in the majority — who cannot evade the Anglo-Norman instinct to look upon litigation as a legalized sport, of orthodox

¹ This is conceded with practical unanimity. Its application to the *privilege against self-crimination*, the *privilege against anti-marital testimony*, and the *privilege for client's communications to attorneys*, where special questions arise, is treated post, §§ 2270, 2242, 2321. Its application to other privileges in general is seen in the following cases: 1841, *Doe v. Egremont*, 2 Moo. & Rob. 306 (on counsel appearing for a witness claiming privilege for documents, Rolfe, B., refused to hear him, ruling that the witness should state the reasons for his claim, and then the judge is "to give to the witness the protection claimed, if he finds him to be entitled to it"); 1877, *Laliberté v. R.*, 1 Can. Sup. 117, 131, 139, 140, by three judges; 1822, *Treat v. Browning*, 4 Conn. 408, 416 (self-diagnosing testimony); 1890, *Royer v. Teague*, 106 N. C. 576, 625, 11 S. E. 645 (voter's privilege); 1890,

State v. Kraft, 18 Or. 550, 556, 23 Pac. 643, 645 (voter's privilege); 1842, *Ralph v. Brown*, 3 W. & S. 395, 400; 1902, *State v. Hill*, 52 W. Va. 296, 43 S. E. 160 (self-diagnosing facts); 1902, *State v. Prater*, ib. 132, 43 S. E. 230 (similar); 1868, *State v. Olin*, 26 Wis. 309, 316 (voter's privilege).

² 1834, *Marston v. Downes*, 1 A. & E. 31, 24 (the mortgage of a third person having been proved to the jury, against his protest and in supposed violation of his privilege, held that "the defendants were not a privileged party, and they therefore had no right of objection, even on the supposition that the learned judge had done wrong"); 1842, *Ralph v. Brown*, 3 W. & S. 396, 400 (Gibson, C. J.: "Nor is the violation of his right a subject of exception, for no one else is injured by it"); 1843, *I. Apple v. Pease*, 27 N. Y. 45, 72, per Selden, J.

respectability, with high stakes, the game to be conducted according to strict rules under judicial supervision, and to be won or lost according as these rules are observed or disregarded. From this point of view, plainly, the trial Court's erroneous denial of privilege is a proper subject for exception and forms *per se* a reason for putting the opposing party, irrespective of the truth of the cause, to the delay, expense, and risk of a new trial. Upon the sporting theory of litigation there is no escape from this conclusion; though it is impossible to reach that conclusion upon any other theory. The sporting theory³ maintains thus far the upper hand, and by most Courts the party is to-day allowed the right to except to a ruling erroneously denying a privilege.⁴

(b) If, however, the ruling erroneously *affirms the privilege*, the case is different; for here the party who desired the testimony has obviously lost evidence which by hypothesis is relevant and might have assisted the establishment of the truth of his cause. Hence, the deprivation of this evidence is for him as proper a ground of complaint and exception as it would be in any other instance,⁵ and may become a ground for granting a new trial, so far as the rejection of a specific item of evidence can ever be properly so considered.⁶

(3) The privilege being purely personal to the witness, it follows, conversely, that the *irrelevancy* of a fact inquired about can never justify a privilege of refusing to answer. As the party has no concern with privilege proper, so the witness has no concern with anything but privilege. Irrelevancy is a ground for objection by the party alone.⁷

§ 2197. *Kinds of Privilege, summarized.* The kinds of exemption which are accorded to a person in respect of his testimonial duty may be grouped under two heads, according as they exempt him either merely from the task of travelling to and attending the court where his testimony is desired, or, having attended, from disclosing a certain part of his knowledge. An exemption of the first sort — which may be termed *viatorial privilege* — may and sometimes does result in an exemption also of the second sort, *i. e.* from giving any testimony whatever; but this is rather an accidental and not an intended effect — as appears when a witness is exempted from attendance at the court-room, but is nevertheless still liable to testify before a commissioner sent to take his deposition at his residence. An exemption of the second

³ Commented on in other aspects *ante*, §§ 21, 1845.

⁴ The cases applying it to the *privilege against self-accrimination* and the *privilege against anti-marital testimony*, which involve special questions, are collected under those heads, *post*, §§ 2241, 2270. The following cases apply it to other privileges: 1854, *Phelps v. Prew*, 3 E. A. B. 480; 1868, *State v. Olin*, 23 Wis. 309, 318.

⁵ This is conceded in all the cases cited *supra*, note 2: 1842, *Coleridge, J.*, in *Doe v. Date*, 3 Q. B. 609, 621: "There is a very broad distinction between cases where the privilege has been [erroneously] allowed and those where

it has been [erroneously] disallowed. In the former case, a party has been precluded from proving that which he was entitled to prove. In the latter case, the party [person] whose privilege has been disallowed has no *locus standi* in banc. . . . Legitimate evidence has been produced against him [the party]; he is not prejudiced by that, and can have no ground for complaint." *Contra*: 1853, *Dickerson v. Talbot*, 14 B. Monr. 49, 53 (title-deeds of third person).

⁶ For these considerations, see *ante*, § 21.

⁷ This doctrine is examined in detail *post*, § 2210.

sort, which may be termed *testimonial privilege*, or Privilege proper, never includes or effects an exemption of the first sort.

The *viatorial privilege* consists in exempting the witness from attendance until three conditions are fulfilled: first, he is to have notice that his testimony is required, and he *summoned to attend*; secondly, he is, in some cases, to receive in advance an *indemnity for his expenses*; and, thirdly, he is to be excused where his health or other sufficient circumstance constitutes an *inability to attend*.

The *testimonial privileges* fall naturally under two heads, according as the disclosure which they affect is a *topic or class of facts* in his knowledge, or is a *communication from or to another person*, irrespective of its subject. The *concededly privileged topics* are some half-dozen in number, although others have been from time to time sought to be added to the list. The *privileged communications*, as universally conceded, are those made by persons holding a certain confidential relation, — in particular, that of husband and wife, attorney and client, fellow-jurors, and government and informer; to these are added, in some jurisdictions, the relations of priest and penitent, and physician and patient; and occasionally sundry other additions have been attempted.

TITLE II (*continued*): PRIVILEGE.

SUB-TITLE II: VIATORIAL PRIVILEGE.

CHAPTER XXV.

§ 2199. (1) Notice and Summons; Subpoena.
 § 2200. Same: Subpoena *duces tecum* for Documents.

§ 2201. (2) Indemnity for Expenses; (a) Tender in Advance.

§ 2202. Same: (b) Amount of Charges.

§ 2203. Same: Expert's Fees.

§ 2204. (3) Inability to Attend; in General.
 § 2205. Same: (a) Illness, and the like; Merchants' Books.

§ 2206. Same: (b) Sex, Occupation; Officers and Official Records.

§ 2207. Same: (c) Distance from Place of Trial.

§ 2100. (1) *Notice and Summons; Subpoena.* Common fairness prescribes that, before the witness be enforced to perform his testimonial duty, adequate and express notice be given him that the testimony is likely to be needed, and a formal summons be made to him to attend for the purpose. This process secures the effect, not only of notifying him when, and where, and in what sort of cause his testimony is wanted, but also of assuring him that the authority of State has sanctioned the demand, of furnishing him a voucher for proving his claim to indemnity (where it is not demandable in advance), as well as of satisfying the Court, in case the witness is not present when called to the stand, that due diligence has been used to procure him and (in a contempt proceeding) that a default appears *prima facie* on his part.

The form of document traditionally used for this purpose is the writ of *subpoena*,¹ which commands the witness to appear at a certain court on a certain day to testify what he knows in a cause between certain parties and to attend the court for that purpose until discharged. Where the witness is desired to bring documents, a specific clause to that effect is additionally required to be inserted.² The notice conveyed in the subpoena is secured by reading or showing it to him and furnishing him with a copy,³ the original being taken back by the process-server for filing in court with his indorsement or affidavit of service. The service is sometimes made by leaving the copy at the witness' place of abode or of business, although a personal service into the witness' hands may in strictness be required. The service should be made a reasonable time before the day specified for attendance; and the witness is ordinarily not deemed to be in default unless the service conforms to these requirements. The sufficient question in all cases should be, Has the person in all probability had actual knowledge, a reasonable time beforehand, that his testimony would be lawfully required at the time and place specified?⁴ Upon principle, therefore, where a person already in court is

¹ So called from the closing words of the writ, which commanded the party to attend in person, on a penalty for disobedience; the full Latin clause is given ante, § 2190, note 19; for the history of the subpoena see the citations in note 27.

² Post, § 2200.

³ It has long been settled that an abstract of the writ, or "subpoena-ticket" suffices: 1000, *Gardwin v. West*, Cr. Cr. 522, 540.

⁴ This question depends rather upon general principles as to the service of process, and not

desired as a witness, and is then and there called by order of the Court, no subpoena or other formal summons is needed, for it would be the merest technical formality.⁵ If the desired witness is *confined in jail*, a subpoena would be of no avail, since he could not obey it and his custodian would still lack authority to bring him; accordingly, a writ to the custodian is necessary, ordering the prisoner to be brought to give testimony; this writ of *habeas corpus ad testificandum*, grantable in discretion at common law, is now usually authorized by statute as a matter of course.⁶

§ 2200. *Same: Subpoena duces tecum for Documents.* (1) The form of the subpoena, when the production of documents is desired, is varied by the insertion of a special clause adapted to the purpose, and requiring the witness to bring with him — *duces tecum* — the desired document.¹ The ordinary clause *ad testificandum* is, however, at the same time commonly preserved; and the question is thus raised whether the summoning party can require the production of a document without also putting the producer on the stand to speak as to his general knowledge of the case. It would seem that the two forms of testimony are separable, and that the summoning party may therefore elect to have the one without the other; and this is the generally accepted opinion,² — a result harmonizing with the solution of the analogous question (*ante*, § 1894) whether the calling of the witness merely to produce a document makes him the party's own so as to subject him to cross-examination by the opponent.

upon any peculiarity of the law of evidence; moreover, it usually arises in contempt proceedings where the trial Court's determination depends so much on the facts of each case that it hardly creates a precedent; and the rulings are therefore not here collected; consult the following: 1736, *Wakesfield's Case*, *Lee t. Hardw.* 313; 1834, *Wilkie v. Chadwick*, 13 *Wend.* 49; 1839, *Mattocks v. Wheaton*, 10 *Vt.* 493; 1899, *Chambers v. Oehler*, 107 *La.* 155, 77 *N. W.* 553; 1902, *Re Hainer*, 67 *N. J. L.* 442, 51 *Atl.* 239; *Greenleaf, Evidence*, §§ 308, 314, 318; *Tidd, Practice*, II, 806; *Chitty, Practice*, III, 639; *Rapalje, Witnesses*, § 302.

¹ 1850, *R. v. Sadler*, 4 *C. & P.* 213 (for criminal cases). A general provision to this effect is sometimes made by statute: *Ark. Stats.* 1894, § 2944; *Cal. C. C. P.* 1872, § 1990; *Haw. Civ. L.* 1897, § 1373; *Ky. C. C. P.* 1895, § 608; and doubtless in other jurisdictions also.

² *Starkie, Evidence*, I, 81; *Greenleaf, Evidence*, § 312.

³ The command then is to appear "to testify all and singular those things which you or either of you know in a certain cause," and also "that you do diligently and carefully search for, examine, and inquire after and bring with you and produce" a specified document, "together with all copies, drafts, and vouchers relating to the said documents and letters, and all other documents and paper writings whatsoever that can or may afford any information or evidence in this cause; then and there to testify and show all and singular those things which you or either

of you know, or the said documents, letters, or instruments in writing do import, of and concerning the said cause now depending" (*Chitty's Practice of the Law*, III, 639). For the history of this form, see the quotations *ante*, § 2198.

For the question whether a subpoena *duces tecum* is a proper form of process for obtaining documents from a party-opponent, see post § 2210.

⁴ 1830, *Davis v. Dale*, 4 *C. & P.* 335; 1854, *Summers v. Monsey*, 2 *Cr. & M.* 477 (the witness had refused to produce unless he was also sworn for the party calling him; *Bayley B.*: "We are clearly of opinion that he has no right to require that a party bringing him into court for the mere purpose of producing a document should have him sworn in such a way as to make him a witness"); 1850, *Martin v. Williams*, 16 *Ala.* 190, 193; 1859, *Hall v. Young*, 37 *N. H.* 134, 142, *semble*; 1845, *Aiken v. Martin*, 11 *Paige* 499, 502; 1841, *Sherman v. Barrett*, *McMull.* 147, 152. *Contra*: 1872, *Murray v. Elston*, 23 *N. J. Eq.* 212, 214, *semble* (holding that a subpoena *d. t.* without a clause *ad testificandum* is void). But where the demand for the witness' oral testimony is made, not by the opponent, but by the witness himself, in order to prove his non-liability to produce the document, it is of course a proper one; 1858, *Hall v. Young*, *supra*, *semble* (for a peremptory order, subjecting to contempt proceedings, possession must be clearly shown, and for this purpose the witness should be sworn); 1845, *Aiken v. Martin*, *supra* (claim of privilege).

(2) The *time* and *mode of service* would ordinarily be regulated by the general principle applicable to an ordinary subpoena (*ante*, § 2199).⁵ In particular, no subpoena would be required for documents already in court in the witness' control.⁶ Statutes sometimes regulate the subject in full detail.⁷ A peculiarity of the subpoena *duces tecum* is that, in the nature of things it must specify with as much precision as is fair and feasible the *particular documents desired*; because the witness ought not to be required to bring what is not needed, and he cannot know what is needed unless he is informed beforehand.⁸

(3) It often happens, however, that the party desiring the evidence does not precisely know what documents exist in the hands of the witness or what existing documents contain relevant material; or that a document, if of a certain tenor, would be privileged from disclosure, on one or another ground (*post*, §§ 2210-2223). In such a situation, it is obviously not for the witness to withhold the documents upon his mere assertion that they are not relevant or that they are privileged. The question of relevancy is never one for the witness to concern himself with (*post*, § 2210); nor is the applicability of a privilege to be left to his decision. It is his duty to bring what the Court requires; and the Court can then to its own satisfaction determine by inspection whether the documents produced are irrelevant or privileged.⁹ This does not deprive the witness of any rights of privacy, since the Court's determination is made by its own inspection, without submitting the documents to the opponent's view; and, unless such a mode of determination were employed, there could be no available means of preventing the constant evasion of duty by witnesses:

1808, *Ellenborough, L. C. J.*, in *Amsy v. Long*, 9 East 473, 485: "There are circumstances in respect of which the production of an instrument required in the terms of a subpoena, would not be enforced by the authority of the Court, — which is a proposition too clear to be doubted. And to be sure, though it will always be prudent and proper for a witness served with such a subpoena to be prepared to produce the specified papers and instruments at the trial, if it be at all likely that the judge will deem such productions fit to be there insisted upon; yet it is in every instance a question for the consideration of

⁵ 1838, Chitty, *Practice of the Law*, III, 829 ff.

⁶ 1863, *Boynton v. Boynton*, 16 Abb. Pr. 37; 1896, *Hutton v. Herts & H. Co.*, 118 Mich. 475, 78 N. W. 1041.

⁷ *E. g.*, Ga. Code 1896, §§ 5235-5237; La. C. Pr. 1894, §§ 141-143, 474; N. Y. C. C. P. §§ 867-869; Laws 1877, c. 418, and 1879, c. 843; Va. Code 1887, §§ 3353-3358; West Va. Code 1900, c. 130, §§ 26-28.

⁸ 1901, *Carson v. Hawley*, 82 Minn. 304, 84 N. W. 746 (demand for all books and papers of a business during three months, held insufficient); 1880, *Ex parte Brown*, 72 Mo. 83, 93 (there must be a "reasonably accurate description of the paper wanted," and a showing that it is material in a pending case; here, a call for all telegrams between half a dozen persons within fifteen months past was held too broad); 1876, *U. S. v. Babcock*, 3 Dill. 566, 570 ("The papers

are required to be stated or specified only with that degree of certainty which is practicable considering all the circumstances of the case, so that the witness may be able to know what is wanted of him and to have the papers on the trial so that they can be used if the Court shall then determine that they are competent and relevant evidence"; the person summoned is bound to make reasonable search for the documents); 1882, *U. S. v. Hunter*, 15 Fed. 712 (rules prescribed as to the particularity of the notice). Compare the general doctrines of *privilege for documents* (*post*, §§ 2211, 2219), and *discovery against a witness before trial* (*ante*, §§ 1857, 1859).

⁹ In this respect the rule differs from that which has been applied in Chancery practice to discovery of documents by a *party-opponent* (*post*, § 2219); but the latter rule is anomalous and rests on a peculiar tradition.

the judge at Nisi Prius whether, upon the principles of reason and equity, such production should be required by him, and of the Court afterwards, whether, having been there withheld, the party should be punished by attachment." *Messrs. Park, Merryat, and Bell* (arguing for the successful side); "As the obligation of a witness to answer by *parol* does not depend upon his own judgment, but on that of the Court, the same rule must prevail with respect to his production of documentary evidence. The witness is bound at all events to bring with him the papers which he has been subpoenaed to produce; and when it is in Court, he may then state any legal or reasonable excuse for withholding it, of which the Court will judge. In this respect there can be no distinction between *parol* and written evidence. Proof of either kind, if within the knowledge or possession of the witness, ought to be produced if legal; and of its legality the Court and not the witness must judge."⁸

(4) The requirement to produce assumes that the document is *within the control of the witness*. One who is dumb cannot be in default for not testifying orally, and one who has no lawful control over a document cannot properly be liable to produce it. Whether the witness has such a control depends upon the facts of each case.⁹ When the documents desired are those of a *corporation*, its officer who is their custodian is the proper person to serve with process and to hold liable for non-production.¹⁰

§ 2201. (2) *Indemnity for Expenses*; (a) *Tender in Advance*. Ever since the statute of Elizabeth (and before that time it does not appear what the practice was¹), the indemnity to which the witness is entitled has been required, at least in *civil causes*, to be tendered to him in advance, at the time of serving the subpoena;² in lack of this, the witness is not compellable to attend.

⁸ *Accord*: 1835, *Doe v. Kelly*, 4 Dowl. Pr. 273; 1882, U. S. v. *Hunter*, 15 Fed. 712 (if the witness has a doubt as to the relevancy of the document, he should submit it to the Court); 1845, *Chaplain v. Briscoe*, 5 Sm. & M. 193, 207. The court should of course provide that the *irrelevant parts* of a book or document be not seen by the opponent; 1824, *Hawkins v. Howard*, Ry. & Mo. 64. When the document is lawfully producible, the producer may be required to read it aloud: 1863, *People v. Dyckman*, 24 How. Pr. 222, 226.

⁹ 1807, *Amey v. Long*, 1 Camp. 14, 9 East 473, 483 (subpoena *d. t.* directed to G. and L. or one of them; it was served on L. only, but G. owned and had possession of it; they were partners; *Ellenborough, C. C. J.*: "Although a paper should be in the legal custody of one man, yet if a subpoena *d. t.* is served on another who has the means to produce it, he is bound to do so"; yet no man is obliged "to sue and labor in order to obtain the possession of any instrument from another for the purpose of its production afterwards by himself, in obedience to the subpoena").

¹⁰ 1834, *R. v. Woodley*, 1 Moo. & Rob. 390 (a person holding documents as attorney of the lord of a borough, and also as steward of the borough, held bound to produce in the latter character, in *quo warranto* against the bailiff of the borough); 1825, *Bank of Ulster v. Hillard*, 5 Cow. 153, 156 (*Savage, C. J.*: "The obligation of *calling* [a bank-clerk] to produce the [bank-]

books upon the *duces tecum* depends on the question whether they were in his possession and under his control. He was the mere clerk of the plaintiffs, and in that character had no such property in or possession of the books as imposed the obligation to bring them"); 1883, *Wertheim v. Contin. R. & T. Co.*, 15 Fed. 716 (a corporation not a party is compellable like other persons to produce its books; the officers of a corporation, are the custodians of its books for this purpose; here the president and secretary were compelled).

From the foregoing conditions, attached to the requirement of notice and demand by subpoena *duces tecum*, are to be discriminated the exemption from mere attendance with documents (not from disclosure) sometimes granted on grounds of convenience (*post*, § 2205); and also the various privileges against disclosure of documents, in particular, those affecting *title-deeds*, *securities*, and the like (*post*, § 2211), *trade-secrets* (*post*, § 2212), a *civil party-opponent's* documents (*post*, § 2219), *self-incriminating* documents (*post*, § 2264), documents communicated between *attorney and client* (*post*, § 2307), and *official documents* (*post*, § 2373).

¹ *Ante*, § 2190.

² 1562, St. 5 Eliz. c. 9, § 12 (penalty provided against any person who "having not a lawful and reasonable let or impediment to the contrary," fails to appear to testify in a cause after process served upon him "and having tendered unto him or them, according to his or their countenance or calling, such reasonable sums

This condition was never imposed upon the prosecution in criminal cases. But whether it was equally dispensed with in favor of the accused in criminal cases was never settled at common law. So far as early precedent was concerned, the statute of Elizabeth was passed more than a century before the accused obtained the right to compulsory process for his witnesses.³ Yet before this became his right, and while it was being permitted as a favor, the early practice seems to have applied to him the rule for parties to civil causes.⁴ In later times, the tradition became uncertain, and judicial opinion left the matter in doubt.⁵ Finally, by statute in most jurisdictions, the wise step was taken of declaring both parties in criminal causes exempt from a tender in advance.⁶

of money for his or their costs and charges, as having regard to the distance of the places in necessary to be allowed in that behalf"). No exception was recognized for a party suing in *forma pauperis*: 1838, *Blackburn v. Hargreaves*, 2 Law. Cr. C. 259. In Tennessee, North Carolina, and Georgia alone, no such requirement exists for civil cases: *infra*, note 6.

³ *Ante*, § 2160.

⁴ 1844, *Braddon's Trial*, 9 How. St. Tr. 1127, 1167 (quoted *post*, § 2202).

⁵ 1814, *Phillippe's Evidence*, I, 9-13 (recognizes no discrimination as to defendants); 1824, *R. v. Cooke*, 1 C. & P. 323 (defendant need not tender); 1850, *Pell v. Daubeny*, 5 Exch. 958, per Alderson, B. (tender not necessary in criminal cases generally); 1866, *Smith's and Ogden's Trial*, Lloyd's Rep. 24, 28, 29 (the Court of two judges was divided, and gave no reasons); 1828, *Ex parte Chamberlain*, 4 Cow. 49 (tender not necessary by defendant in felonies); 1901, *Huckins v. State*, — Nebr. — 86 N. W. 455 (tender not necessary by defendant); 1853, *West v. State*, 1 Wis. 209, 233 (defendant need not tender; treated as a deduction from the right to compulsory process, *ante*, § 2191). A witness who is too poor to pay his expenses should be exonerated from a charge of contempt: *Phillippe's Evidence*, I, 13; 1836, *People v. Davis*, 15 Wend. 602, *ser. Me.*

⁶ In the following list are collected the statutes concerning tender of expenses generally, as involved in this and the ensuing section: *Ala.* Code 1897, § 1341 (on non-payment of fee on demand in any civil cause, witness need not "appear again as a witness in the same cause until his fees are paid"); *Alaska* C. C. P. 1900, § 674 (like Or. Annot. C. 1892, § 844); *Aris.* Rev. St. 1887, § 1828 (no attachment for contempt in a civil suit, unless there has been a tender of lawful fees); *Ark.* Stats. 1894, § 2941 (fees for travel and one day's attendance must be tendered); § 2113 (tender not necessary in criminal causes); *Cal.* C. C. P. 1872, § 1987, (fees for travel both ways and one day's attendance, required); *Conn.* Gen. St. 1897, § 1046 (fees for travel and one day's attendance must be tendered); *D. C.* Code 1901, § 1059 (fees for travel both ways and one day's attendance must be tendered); *Ga.* Code 1895, § 8261 (fees in civil cases are not demandable before attendance); 1895, *Roberts v. State*, 24 Ga. 66, 21 S. E.

122 (statute for State payment, construed); *Haw.* Civil Laws 1897, § 1348 (in a court of record, in a civil cause, attendance is not required unless "travelling fees" be paid or tendered); *Ida.* Rev. St. 1887, §§ 6037, 6090 (fees for travel both ways and one day's attendance must be tendered); *Ind.* Rev. St. 1897, §§ 502, 503, 505 (compellable to attend in the same county without tender; out of the county, fees for travel and one day's attendance must be tendered, and then from day to day, one day's fee in advance); § 1686 (in criminal cases, no tender necessary); *Ia.* Code 1897, § 4662 (fees demandable in advance for travel both ways and one day's attendance, and, at the beginning of each day after the first, that day's fees; except for parties); § 1298 (fees demandable in advance by the accused's witnesses, unless subpoena is issued on order of judge); 1900, *State v. Keenan*, 111 Ia. 396, 22 N. W. 792 (statute applied); *Kan.* Gen. St. 1897, c. 95, §§ 341, 342 (fees for travel and one day's attendance are demandable, and one day's fee at the beginning of each day after the first); *Ky.* C. C. P. 1895, § 536 (fees must be tendered for travel and one day's attendance); *C. Cr. P.* § 151 (fees need not be tendered in criminal cases); *Stats.* 1899, § 1734 (in a civil case, no attendance is necessary, if residing more than twenty miles away, unless tendered travel fees in advance or ordered to come without tender); 1887, *Thurman v. Virgin*, 18 B. Monr. 785, 790 (under the statutes, tender is still necessary in civil suits for witnesses residing out of the county); *La.* Rev. L. 1897, § 5943, *C. Pr.* 1894, § 134 (a witness who has attended and obtained a certificate and demanded the fee of the party is not compellable to attend in the same case at a subsequent term until the fee is paid); *Ma.* Pub. St. 1882, c. 82, § 106 (no person is obliged to attend as a witness unless on prepayment of fees for travel and for one day's attendance); c. 132, § 8 (a witness for the accused in a criminal case may require prepayment of fees); c. 184, § 15 (otherwise for a witness summoned for the State); *Mass.* Pub. St. 1882, c. 169, § 3, *Rev. L.* 1902, c. 175, § 3 (fees for travel and one day's attendance must be tendered); *P. S.* c. 213, § 34, *R. L.* c. 218, § 58 (witness summoned by Commonwealth is bound to attend without prepayment); *Mich.* Comp. L. 1897, §§ 802, 10148 (fees for one day's attendance and travel both ways must be

The requirement of a tender (in cases where it is applicable) is a continuing one, i. e. when the time of attendance has expired which was covered by the tender, and the witness is still needed, a new tender must be made in advance, from day to day, of his cost of maintenance or daily fee.⁷ On the other hand, the requirement of a tender ceases when the necessity for it

tendered); § 11908 (tender not necessary in criminal cases); *Miss. Gen. St. 1894*, § 5548 (attendance is not compellable unless fees for travel both ways and one day's attendance are offered); § 5596 (in criminal cases, attendance is compellable for defendant without fees, and the attorney-general or county attorney may also compel it for State); *Miss. Annot. Code 1892*, § 3083 (a witness in a civil case unpaid at the end of each day is not obliged to attend further till paid, unless the party files an affidavit of inability to pay); *Mo. Rev. St. 1899*, § 3546 (in criminal cases, attendance is compellable without tender); § 4663 (not compellable to attend more than forty miles from residence, unless fees for travel both ways and one day's attendance are tendered); *Mont. C. C. P. 1898*, §§ 3302, 3400 (fees for travel both ways and one day's attendance must be tendered); *Pol. C. § 4655* (no attendance is compellable unless fees for travel both ways and one day's attendance are tendered, and thereafter each day's fees in advance); *Nebr. Comp. St. 1899*, § 5929 (fees for travel and one day's attendance are demandable in advance); § 5938 (after the first day, each day's fees are demandable in advance); *Neu. Gen. St. 1885*, § 3410 (fees for travel both ways and one day's attendance are demandable in advance; possibly, from the context, this applies only to witnesses summoned out of the county); *N. H. Pub. St. 1891*, c. 234, § 5 (fees for travel and one day's attendance are to be tendered); § 9 (on tender of double the local fees, a witness may be summoned for a Federal cause in another State); 1860, *Whitney v. Pierce*, 40 N. H. 114 (before an auditor, a party as witness is not entitled to a tender of charges); *N. J. Gen. St. 1896*, Evidence § 13 (the witness shall pay a forfeit if he fails to appear after process served and charges "paid or tendered at the time of such service"); 1819, *Ogden v. Gibbons*, 2 South. 519, 528 (statute applied); *N. Y. C. C. P. 1877*, § 828 (fees for travel both ways and one day's attendance must be tendered); *N. C. Code 1893*, § 1368 (no fees are demandable in advance; but a witness in civil cases, except on behalf of the State or a municipal corporation, may leave after one day, unless tendered what is then due); *N. D. Rev. C. 1895*, §§ 5639, 5643 (in civil cases, fees for travel and one day's attendance are demandable in advance, and after the first day, each day's fee at the beginning); *Oh. Rev. St. §§ 5250, 5251* (not compellable to attend unless on payment of travel and one day's attendance fees); *Okla. Stats. 1893*, §§ 4219, 1600 (civil cases; fees for travel both ways and one day's attendance are demandable in advance); §§ 4228, 1600 (each day's fees after the first are demandable at its commencement); *Or. C. C. P. 1892*, § 792 (like Cal. C. C. P. § 1967); § 795 (double fees demandable for attendance compellable only on court order);

§ 646 (fees may be demanded at the close of each day for attendance next day); *St. 1901*, pp. 22, 128 (fees regulated); *N. J. Gen. L. 1896*, c. 244, § 8 (fees for travel to court and one day's attendance must be tendered, except for summons on behalf of the State); *S. D. Stats. 1899*, §§ 6497, 6506 (like N. D. Rev. C. §§ 5639, 5643); *Tenn. Code 1896*, § 5608 (every witness subpoenaed shall appear); 1836, *Smith v. Barger*, 5 Yerg. 389 (by construction of the statute, no tender is necessary in civil cases); 1865, *Carren v. Breed*, 2 Coldw. 445, 447 (same); *Tex. C. Cr. P. 1895*, § 291 (tender of fees is not necessary where a magistrate issues an attachment); *U. S. Rev. St. 1878*, § 670 (fees for travel both ways and one day's attendance must be tendered to a witness summoned for *deimus* deposition); § 4906 (no witness is guilty of contempt unless the fees, etc., are "paid or tendered him at the time of the service of the subpoena"); *St. 1896*, c. 541, § 41, July 1, 30 Stat. L. 556 (no person shall be required to attend as witness before a referee in bankruptcy unless his fees, etc., are "first paid or tendered him"); 1903, *Re Boeshore*, 125 Fed. 651 (mere failure to demand a fee not tendered is not a waiver of the necessity of tender); 1906, *Re Kerber*, ib. 653 (similar); *Utah Rev. St. 1896*, § 3419 (civil cases; fees for travel both ways and one day's attendance must be tendered); § 996 (similar; and each day's fee must be tendered in advance); *Va. Code 1867*, § 3354 (fees for one day's attendance and mileage and tolls are demandable, a reasonable time before attendance); § 4091 (in criminal cases, attendance is obligatory without payment or tender); *Vt. St. 1894*, §§ 1352, 1354 (fees for travel and one day's attendance must be tendered); *Wash. C. Stats. 1897*, § 5995 (not compellable in civil action unless fees for travel both ways and one day's attendance are tendered in advance, on demand); § 6743 (justice's court; similar, but reading "mileage and one day's attendance"); § 1823 (similar, but reading "one day's attendance, together with mileage going to the place"); *W. Va. Code 1891*, c. 130, § 27 (one day's attendance and mileage and tolls must be paid, if required, a reasonable time beforehand); c. 162, § 1 (attendance obligatory in criminal cases without payment or tender); *Wis. Stats. 1898*, § 4087 (attendance not obligatory in civil action, except on behalf of the State, unless fees for one day's attendance and travel both ways are tendered); § 4050 (no tender necessary for witness summoned for the State in any civil action, or in any criminal action for either party); *Wyo. Rev. St. 1897*, §§ 2599, 3292 (substantially like Oh. Rev. St. § 5251).

⁷ 1860, *Bliss v. Brainard*, 43 N. H. 235 (if notice and demand are made by the witness); 1838, *Mattocks v. Wheaton*, 10 Vt. 493, 495. This is often declared in the statutes cited *supra*.

cesses, for example, when the witness is already in court for another purpose.⁹ Moreover, a voluntary attendance without a demand of expenses at the time of service is a final waiver of the requirement, and the witness cannot insist upon it at the moment of being called to the stand.⁹

The truth is that the whole doctrine of requiring a tender in advance is a questionable one. Its defect is, in the first place, that it tends to create the false impression (*ante*, § 2192) that the witness' duty runs to the parties and not to the community, and that he is rendering his services for money to the party that desires them. It tends to intensify the unwholesome partisan spirit of witnesses and to put them in the position of paid retainers. It lowers the moral level of litigation. Its fault is; furthermore, that it places an unequal burden upon litigants, according as they are more or less able in advance to furnish the money for witness fees. If a poor man in a criminal cause is entitled, without advances, to the testimony of those who can vindicate him, he is equally entitled to it in a civil cause to defend him from injustice or to aid the enforcement of his right; any distinction in this respect between civil and criminal causes is a false one. Moreover, the question is not whether the parties in civil causes should ultimately bear the expenses of their litigation, and whether litigation should be absolutely free; that is a different problem; here we ask only whether payment in advance is necessary; there are other ways of securing the parties' liability for costs. Nor is it the question whether parties shall be licensed to cause inconvenience to their neighbors by summoning promiscuously a horde of unnecessary witnesses, without risk or hindrance; that abuse can be guarded against by penalties for parties who are found by the Court to have summoned witnesses with wanton superfluity; and in many jurisdictions such measures are provided. Nor is it a question whether the burden of advancing the expenses shall be thrown by the party upon the witness himself; that burden is not considered by the law as a hardship in criminal causes; nor would it extend to more than the expense of travelling to the place of trial, and even this amount could then be reimbursed on arrival; moreover, the witness' actual inability to advance his own expenses is a sufficient excuse, in contempt proceedings, for his non-attendance.¹⁰ The real question is simply whether parties who can ill afford the expense shall be put at a relative disadvantage to their opponents who by the mere possession of money are enabled to prepare more freely and effectually for the proof of their cause; and in this aspect the requirement of tender is a plain injustice. For these

⁹ 1838, *Blackburn v. Hargreaves*, 2 *Low. Cr. C.* 259 (witness also summoned for the opponent).

¹⁰ 1834, *Rosak v. Redzinski*, 87 *Wis.* 525, 529, 58 *N. W.* 262 (the attendance is a waiver of payment in advance). *Contra*: 1884, *Braddon's Trial*, 9 *How. St. Tr.* 1127, 1167 (cited *post*, § 2201); 1768, *Blackstone, Commentaries*, III, 369 ("no witness, unless his reasonable expenses tendered to him, is bound to appear at all; nor, if he appears, is he bound to give evidence

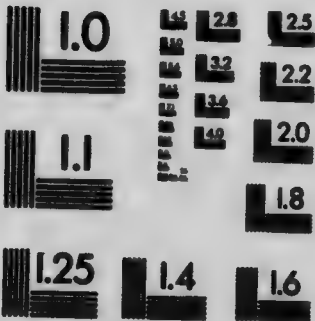
till such charges are actually paid him," except he resides and is called within the "bill of mortality"). It was even ruled that a tender at the trial could not cure the lack of a prior tender: 1748, *Bowles v. Johnson*, 1 *W. Bl.* 16, *semble*. The witness may waive the tender of the entire amount by accepting less: 1639, *Goodwin v. West*, *Cro. Car.* 522, 540. Compare the Federal cases *supra*, note 6.

¹¹ *Supra*, note 5.



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two chief reasons it should be abolished, as an anomaly in the law and a detriment to justice, surviving by mere force of tradition.¹¹

§ 2202. *Same: (b) Amount of Tender.* The amount of the expenses required by the statute of Elizabeth to be tendered was to be merely "reasonable";¹ and the judges of England set their faces, from the beginning, against any attempt to deduce fixed rules, by nice calculations, for applying this principle:

1684, *Braddon's Trial*, 9 How. St. 1127, 1167; *Witness for defendant*: "My lord, I shall not give any evidence till I have my charges"; L. C. J. *Jefferies*: "Braddon, if you will have your witnesses swear, you must pay them their charges"; *Defendant*: "My lord, I am ready to pay it, I never refused; but what shall I give him?" L. C. J.: "Nay, I am not to make bargains between you; agree as you can."²

It was plain, however, that the charge should include three general items, namely, the cost of coming to court, the cost of returning home, and the cost of sojourning at the place of trial during the time required for attendance. Within these items, no further detailed rates or rules were promulgated; except that, under the statute, the reckoning of all three would vary according to the witness' "countenance or calling,"—a distinction proper enough where the separation of ranks of life was so clear and fixed.³

But in the United States this policy has been abandoned,—partly because the theory of social democracy could hardly abide a legal discrimination based on social distinctions, but partly also, it may be presumed, because a lack of fixity in charges tends not only to create uncertainty and dispute as to the witness' obligation, but also to induce undue exactions by witnesses and undue pecuniary payments by parties under cover of the required expenses. By statute, therefore, the rates to be paid for attendance and for travel are now generally prescribed. What has thus been lost in depriving witnesses occasionally of adequate compensation for expenses of maintenance has probably been more than made up by the removal of the greater disadvantages above mentioned. The three general items, however, of travel to and from

¹¹ It may be added that the constitutional guaranty that property and (in a few constitutions) services shall not be taken by the State without due compensation does not create any exceptions to the recognized duty of a citizen to furnish, without tender of expenses, such testimony as he is capable of furnishing: 1853, *West v. State*, 1 Wis. 209, 233; 1856, *Israel v. State*, 8 Ind. 467; 1877, *Buchman v. State*, 59 id. 1, 14 (but distinguishing the case of an expert, *post*, § 2203).

¹ *Ante*, § 2201, note 2.

² 1741, *Chapman v. Pointon*, 2 Stra. 1122 ("they would not enter into any nice calculations of the expense, but confined their inquiry to the question whether the non-attendance was through obstinacy or not"). The various early English statutes extending the process of subpoena, collected in Phillips on Evidence, I, 9-13, exhibit this same disinclination to fix the rate of charges.

³ 1736, *Wakefield's Case*, Lee cas. t. Harwicke 313 ("You must not only have an affidavit of tendering the shilling, but likewise of a tender of reasonable charges"); 1741, *Ryder v. Fletcher*, 13 East 16, note (measure of reasonable traveling expenses, discussed); 1768, *Blackstone Commentaries*, III, 369 (quoted *ante*, § 2201, note 2; the "bills of mortality" denoted certain boundaries in the city of London, and apparent within these limits a shilling, or nominal sum for travel was all that was required); 1771, *Fuller v. Prentice*, 1 H. Bl. 49 ("the whole which necessary expenses, as well of their going to the place of trial, as of their return from and also during their necessary stay there, ought to be tendered to them at the time of serving the subpoena"); 1815, *Horse v. Smith*, 6 Taunt. 1 (the tender must cover "sufficient for his subsistence during his probable stay there"); 1818, *Newton v. Harland*, 9 Dowl. Pr. 16 (expenses of return are to be included).

and maintenance at the place of trial are almost universally preserved in these statutes.⁴

§ 2203. *Same: Expert's Fees.* May an additional, but reasonable, charge, proportionate to the value of time spent and skill exercised, be demanded, as a condition precedent to attendance, by an expert witness, — that is (*ante*, §§ 560, 1923), by one who is called to testify, not merely to the facts of his simple observation by eye and ear, but to an opinion drawing from the facts such inferences as are receivable only from persons specially qualified by experience or study? This question, it is to be noted, is not whether such witnesses should ultimately be paid larger compensation for their attendance; but whether, as a matter of right and privilege, they are not liable to compulsory process unless such compensation is tendered beforehand. The regulation of the amount of charges is a large question, involving various considerations, not here to be examined; but the specific question whether the expert witness has any greater privilege than the ordinary witness may be determined independently of the policy of the other measure.

At first sight, it might be supposed that the exaction of the valuable special services of an expert, without other than the ordinary witness' pitance, was a hardship which ought not to be imposed:

1843, *Maule, J.*, in *Webb v. Page*, 1 C. & K. 23: "There is a distinction between the case of a man who sees a fact and is called to prove it in a court of justice, and that of a man who is selected by a party to give his opinion on a matter with which he is peculiarly conversant from the nature of his employment in life. The former is bound as a matter of public duty to speak to a fact which happens to have fallen within his knowledge; without such testimony the course of justice must be stopped. The latter is under no such obligation."

1877, *Worden, J.*, in *Buckman v. State*, 59 Ind. 1, 13: "The position of a medical witness testifying as an expert is much more like that of a lawyer than that of an ordinary witness testifying to facts. The purpose of his service is not to prove facts in the cause, but to aid the Court or jury in arriving at a proper conclusion from acts otherwise proved. . . . If physicians and surgeons can be compelled to render professional services by giving their opinions on the trial of criminal causes without compensation, then an eminent physician or surgeon may be compelled to go to any part of the State at any and all times to render such service, without other compensation than such as he may recover as ordinary witness-fees."

But this argument is specious only. The grounds upon which it may be concluded that no different privilege should be established for expert witnesses than for others, may be summarized as follows: (1) The expert is not asked to render professional services as a physician or chemist or engineer; he is asked merely, as other witnesses are, to testify what he knows or believes. (2) The hardship upon the professional man who loses his day's fees of fifty or one hundred or more dollars is no greater, relatively, than upon the storekeeper or the mechanic who loses his day's earnings of two dollars or ten

⁴ The statutes cited *ante*, § 2201, and others associated with them in the statute-books, show *recover his expenses*, see the following cases: 1850, *Pell v. Daubeny*, 5 Exch. 955; 1860, *Bliss v. Brainard*, 43 N. H. 255.

For the witness' action against the party to

dollars; each loses his all for the day; moreover, though the recoupment of the witness-fee of one or two dollars is relatively greater for the mechanic, yet his risk of losing continued employment by enforced absence is greater than for the professional man, and more than equalizes the hardship to him. (3) It is only by accident, and not by premeditation or deliberate resolve with reference to the litigation, that either has become desirable as a source of evidence; neither the expert in blood-stains nor the bystander at a murder has expressly put himself in the way of qualifying as a witness, so that no claim based on a special dedication of services for the case can be predicated of one rather than of the other. (4) The practical difficulty of discriminating between various kinds of experts and their earnings, and between that testimony which they give as such and that which they give as ordinary observers, would be serious, and would introduce confusion and quibbling into the law. (5) Finally, so far as concerns the policy of doing whatever should attract and not deter desirable witnesses, it would seem that no special favor need be shown to expert witnesses. No one will ever refrain from entering a professional calling because of the fear of having to spend his time gratuitously at trials; and yet an ordinary person is often deterred from observing (or disclosing his observation) of a street accident or the like, because of the apprehension of being summoned as a witness; so that the latter sort, if either, should be the one to be encouraged by special compensation. These reasons, in one or another form, have been expounded in the following judicial utterances:

1881, *Tindal, C. J.*, in *Loneragan v. Assurance Co.*, 1 Bing. 729, 731: "There is no reason for assuming that the time of medical men and attorneys is more valuable than that of others whose livelihood depends on their own exertions"; *Park, J.*: "Time to a poor man is of as much importance as to an attorney."

1875, *Manning, J.*, in *Ex parte Dement*, 58 Ala. 389, 393: "It is not intimated by any of them [the precedents] that a physician, when testifying, is to be considered as exercising his skill and learning in the healing art, which is his high vocation; or that a counsellor-at-law, in the same situation, is exerting his talents and acquirements in professionally investigating and upholding the rights of a client. If this were so, each one should be paid for his testimony as a witness, as he is paid by clients or patients, according to the importance of the case and his own established reputation for ability and skill. But in truth he is not really employed or retained by any person; and the evidence he is required to give should not be given with the intent to take the part of either contestant in the suit, but with a strict regard to the truth, in order to aid the Court to pronounce a correct judgment. Perhaps the attitude of one testifying as an expert, of a matter in respect to which he is made conversant or skilled by his ordinary employment, is not so different as is supposed from that of another who testifies to acts or things done by or between the parties to a cause. It generally happens that, after all the direct facts of a transaction are brought before a Court, a knowledge of other facts, not part of the dealing or affair between the litigants, is necessary to a proper understanding and decision thereupon. For instance, [in proving the value of a commodity sold or the foreign law applicable or the usage of trade in interpretation,] . . . in all these instances, persons who may be wholly unacquainted with the parties to a cause, and know nothing of the transactions between them, may be required to come from their offices and the care of their own important affairs into court to testify for the benefit of strangers, in regard to matters in which they have themselves become

conversant only by attending to their own business. And why are they required to do so? Because they know things important to the right determination of a controversy pending. . . . For in fact they are all witnesses at last. And the same principle which justifies the bringing of the mechanic from his workshop, the merchant from his storehouses, the broker from 'change, or the lawyer from his engagements, to testify in regard to some matter which he has learned in the exercise of his art or profession, authorizes the summoning of a physician, or surgeon, or skilled apothecary, to testify of a like matter, when relevant to a cause pending for determination in a judicial tribunal. . . . [He] would be deposing only to things which he had learned in the course of his occupation or profession, or of the preparation for it, and the disclosure of which to the Court would conduce to a correct understanding of a cause before it. His testimony would concern the administration of justice; and of him, as of other witnesses, it could be justly 'claimed by the public as a tax paid by him to that system of laws which protect his rights as well as others.' . . . It is therefore of vital public interest that the tribunals which pronounce these judgments shall have power to coerce the production of any relevant evidence, existing within the sphere of their jurisdiction, requisite to prevent them from falling into error."

1893, *Bissell, J., in Board v. Lee*, 3 Colo. App. 177, 180, 32 Pac. 841: "It is apparently nothing but a question of relative value; and it frequently happens that the loss of time is a less serious one to the professional witness than to the person engaged in the more active business walks of life."

1897, *Magruder, J., in Dixon v. People*, 168 Ill. 179, 48 N. E. 108: "The grounds upon which the right to such extra compensation on the part of expert witnesses has been sustained have generally been three in number: [1] The first ground is that the time of the expert witness is more valuable than the time of ordinary men, and that, by attendance at court to give his testimony, such a witness meets with a loss of time. . . . Loss of time, as a ground for claiming extra compensation for services as a witness, applies as well to all ordinary witnesses as to expert witnesses. It is conceded that when any witness, whether he is an expert witness or not, is acquainted with any facts which bear upon the matter in controversy in a litigation, he is obliged to testify; and a distinction is drawn between the testimony of an expert witness who is acquainted with the facts about which he testifies, and an expert witness who is called upon to give his opinion, in reply to a hypothetical question, without any knowledge of facts. Manifestly, the witness who goes to court and testifies as to the facts of which he knows is subjected to a loss of his time as much as a witness who goes there to testify as an expert upon a mere matter of opinion. [2] The second ground upon which the claim for such extra compensation is based is that the skill and accumulated knowledge of the expert are his property, and that a man's property should not be taken without just compensation. . . . There is no infringement here of a property right. It may be conceded that in a certain sense the knowledge of the physician, acquired by special study, is property; but the question here is, not so much whether certain knowledge is property, as whether the requirement that he shall answer a hypothetical question is a taking of his property. Where he is required to make an application of his knowledge to a particular case, so as to secure a particular result, — such as, for instance, the curing of a disease or the healing of a wound, — then he would undoubtedly be entitled to compensation. . . . A physician or surgeon cannot be punished for a contempt for refusing to make a *post mortem* examination unless paid therefor; nor can he be required to prepare himself in advance for testifying in court, by making an examination, or performing an operation, or resorting to a certain amount of study, without being paid therefor. But when he is required to answer a hypothetical question, which involves a special knowledge peculiar to his calling, he is merely required to do what every good citizen is required to do in behalf of public peace and public order. . . . [3] If the precedent is once established that expert witnesses must be paid a reasonable compensation for their testimony, then it will not be long before such testimony will be offered to the highest bidder. The

temptation will be to give opinions in favor of that party to the suit who will pay the highest price. The testimony of expert witnesses will thus become partisan and one-sided. The theory upon which such witnesses are required to testify in cases like this is that they are *amici curiæ*, and that, testifying under the sanction of an oath, they do so, not with intent to take the part of either contestant in the suit, but with a view to arriving at the truth of the matter, and for the purpose of aiding the Court to pronounce a correct judgment. . . . Moreover, if a physician is to be allowed extra compensation as an expert witness, then men pursuing other occupations which require special experience will have the same right to demand extra fees. A banker will claim that he has earned extra compensation, a merchant will make the same claim, and so with men engaged in other branches of business. It will be easy to say in such cases that the testimony called for is the result of special knowledge and acquired skill, and therefore should be paid for. Almost every lawsuit involves testimony which is in the nature of opinion, in addition to testimony which speaks of the mere facts within the knowledge of the witness. For instance, A sells B a certain quantity of wheat, and delivers the same, and sues for the price of the wheat. One witness testifies as to the contract, which he heard the parties make. Another testifies to the delivery of the wheat, which he saw delivered. These witnesses testify to actual facts heard and seen. But still another witness, who may know nothing about the facts, may yet be required to state the value of the wheat at the time of the contract, or at the time of the delivery; and he may be required to testify from his knowledge of the market prices of wheat, as given in the market quotations. Such a witness, however, as to the value, and as to market prices, is not regarded as an expert witness who is entitled to extra compensation. . . . [4] It can make no difference whether the suit in which the witness is called upon to testify is a suit between private parties, or is a suit between the State and an alleged criminal. In either case the object is to promote public justice, and to aid the due administration of justice. It is just as important to the peace and good order of society that private controversies should be settled upon correct proofs, and in accordance with truthful testimony, as that criminals who violate the laws of the State should be punished. It is the duty of the ordinary witness and of the expert witness to testify as to facts within his knowledge which bear upon the decision of controversies in the courts. Such duty devolves upon him as a citizen; and in view of the protection which he receives from the laws of the country, in the matter of his personal liberty, and in the matter of the protection of his property, this duty devolves as much upon a physician who is required to testify as an expert witness in answer to hypothetical questions as it does upon the ordinary witness testifying to facts within his knowledge."

It has therefore been generally held that an expert witness is not entitled to demand additional compensation, other than the ordinary witness-fees, before attending to testimony on the stand.¹

¹ In the following list are included the few cases which do concede such a privilege, as well as cases sometimes cited upon this point but really not involving it: *Eng.*: 1831, *Lonergan v. Assur. Co.*, 7 Bing. 729 (rule allowing the taxation of special compensation to medical men and attorneys, acknowledged, but disapproved; quoted *supra*); 1831, *Collins v. Godefroy*, 1 B. & Ad. 250, 256 (plaintiff, "a professional man," not allowed to recover special fees in assumpsit, because he was under "a duty imposed by law to give evidence"; the practice of taxing such costs notwithstanding); 1843, *Webb v. Page*, 1 C. & K. 23, Maule, J. (witness to value of cabinet-work, not bound to testify without pay for loss of time; quoted *supra*); *Ala.*: 1875, *Ex parte Dement*, 53 Ala. 399 (no extra compensa-

tion demandable as a condition by any professional person): *Ark.*: 1895, *Flinn v. Prairie Co.*, 60 Ark. 304, 307, 29 S. W. 459 (every citizen is bound to testify without requiring extra compensation; here applied to a physician); *Colo.*: 1893, *Board v. Lee*, 3 Colo. App. 177, 179, 32 Pac. 841 (experts must testify to professional opinion without extra compensation); *Ida.*: 1896, *Fairchild v. Ada Co.*, 6 Ida. 340, 55 Pac. 654, *semble* (extra fees for medical opinion as an inquest, not demandable; otherwise for an autopsy); *Ill.*: 1894, *Wright v. People*, 113 Ill. 540 (a physician testified to the mental condition of a person examined by him, but refused to answer a hypothetical question without an extra fee; held not privileged, because pertinent to the preceding matters); 1897, *Dixon v. People*,

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But from this result certain other questions are to be distinguished. (a) *Special services other than attendance to give testimony on a trial* are not within the duty of any witness; hence, a professional man is entitled to demand special compensation for such services as a chemical analysis, a *post mortem* autopsy, or any work necessary to qualify expressly to furnish testimony.² (2) The rate of charge which may be made for a professional man, not as a privilege or condition precedent, but as the *measure of the fee due him after testifying* — i. e. the ordinary question of the amount of costs taxable to the party liable or claimable by the witness — depends usually upon the statutes prescribing the rate of compensation for witnesses. In England, by the original statute of Elizabeth and its successors (*ante*, § 2202) no attempt was made to fix the rates; the charges were to be "reasonable"; and under these statutes it came to be accepted (although the judges differed somewhat in their understanding of the practice) that no allowance should be made for loss of time to any witness, expert or lay, foreign or domestic.³

188 *id.* 179, 48 N. E. 106 (physician summoned as an expert; no greater fee than the ordinary one is demandable, in either civil or criminal cases; quoted *supra*); 1899 *North Chicago S. R. Co. v. Zeiger*, 182 *id.* 9, 84 N. E. 1006 (Dixon case approved); *Ind.*: 1856, *Israel v. State*, 8 *Ind.* 467 (under a constitutional provision that "no man's particular services shall be demanded without just compensation," the services of witnesses in criminal cases may still be required); 1877, *Buchman v. State*, 59 *id.* 1, 14 (physicians and surgeons need not testify as to professional opinions without extra compensation, under the above clause; preceding case distinguished; quoted *supra*); *Rev. St.* 1897, § 517 ("A witness who is an expert in any art, science, trade, profession, or mystery, may be compelled to appear and testify to an opinion, as such expert, in relation to any matter, whenever such opinion is material evidence, relevant to an issue on trial," without payment of other than usual fees, the same as he can be compelled to "testify to his knowledge of facts relevant to the same issue"); *Mass.*: 1896, *Barrus v. Phaneuf*, 166 *Mass.* 123, 44 N. E. 139 (action for expert's fees promised; the Court *obiter* remarked that it would be "slow to admit that the Court would be without power to require the attendance of a professional or skilled witness upon a summons duly served and with payment of the statutory fees," merely to give testimony of opinion); *Minn.*: 1883, *LeMere v. McHale*, 30 *Minn.* 410, 15 N. W. 682, *semble* (accepts the distinction of *Webb v. Page*, Eng.; here applied to physicians); 1887, *State v. Teipner*, 36 *id.* 535, 32 N. W. 678 (expert compellable to testify to a professional opinion without extra compensation; applied here to a physician); *N. Y.*: 1872, *People v. Montgomery*, 13 *Abb. Pr. n. s.* 207, 238 (physician may not be required to examine an accused as to sanity and to listen to testimony, so as to form an opinion, without extra compensation; but, *semble*, he may be required to attend and "give proper impromptu answers"); *Or.*: 1862, *Daly v. Multnomah Co.*, 14 *Or.* 20, 12 *Pac.* 11 (services as

an ordinary witness are not within a constitutional provision similar to that of Indiana; as to experts, no decision); *Pa.*: 1846, *Allegheny Co. v. Watt*, 3 *Pa. St.* 462, 464 (attendance as an expert witness may not be conditional on extra compensation); 1856, *Northampton Co. v. Innes*, 26 *id.* 156 (preceding case approved); 1889, *Com. v. Higgins*, 5 *Kulp* 269 (physician not privileged to demand special compensation for a professional opinion on the stand); *Tex.*: 1879, *Summers v. State*, 5 *Tex. App.* 365, 377 (expert must testify to a professional opinion without extra compensation); *U. S.*: 1854, *Re Roelker*, 1 *Sprague* 276 (an expert is not compellable to testify to professional opinion without extra compensation; here applied to an interpreter of German); 1881, *Parker, J., U. S. v. Howe*, U. S. Dist. Ct. W. D. Ark., 12 *Cent. L. J.* 192 (expert may demand extra compensation for professional opinion).

² 1875, *Ex parte Dement*, 53 *Ala.* 389, 397 (question reserved, as to compensation for work done to qualify as a witness); 1895, *Flinn v. Prairie Co.*, 60 *Ark.* 204, 207, 29 *S. W.* 459 (making preliminary examination, or attending to listen to testimony, not compulsory); 1895, *Clark Co. v. Kerstan*, *ib.* 508, 30 *S. W.* 1046 (similar); 1893, *Board v. Lee*, 3 *Colo. App.* 177, 179, 32 *Pac.* 841 (*post mortem* examination, etc., not compellable without extra compensation); 1898, *Fairchild v. Ada Co.*, 6 *Ida.* 340, 55 *Pac.* 634 (cited *supra*, note 1); 1872, *People v. Montgomery*, 13 *Abb. Pr. n. s.* 207, 238 (cited *supra*); 1846, *Allegheny Co. v. Watt*, 3 *Pa. St.* 462 (physician not compellable to make *post mortem* examination); 1856, *Northampton Co. v. Innes*, 29 *id.* 156 (preceding case approved); 1879, *Summers v. State*, 5 *Tex. App.* 365, 378 (*post mortem* examination not compellable without special compensation); 1898, *Northern P. R. Co. v. Keyes*, — *C. C. A.* —, 91 *Fed.* 47 (witness not compellable to prepare voluminous and expensive tabulations, without a tender of expense).

³ 1815, *Tremain v. Barrett*, 6 *Taunt.* 88, *C. P.*; 1816, *Moor v. Adam*, 3 *M. & S.* 152,

To this rule, a little later, an exception was conceded for medical men and attorneys.⁴ But in the United States, the practice of fixing definite rates for witnesses' compensation was early introduced by statute; and in some of these statutes a difference is now authorized in favor of expert witnesses. With the policy of these measures (though they depend in part upon the considerations already examined in discussing the supposed privilege) we are not here concerned.

§ 2204. (3) *Inability to Attend; in General.* The witness' duty to attend is subject to a third limitation, namely, his inability to do so without direct and serious danger, to his health or his family's welfare or his livelihood sufficient to overbalance the need for his personal presence in court. This excuse does not exempt him from giving testimony. It is a viatorial privilege only; and the question which it raises is merely whether he is compellable to attend court or whether, instead, a commissioner is to be sent (if the party desires to take that step) to the witness at his domicile to take his testimony there. A proper regulation of the practice in this respect would establish identical rules for the witness' excuse for non-attendance (as here) and for the party's excuse for not producing him and for offering his deposition instead (*ante*, §§ 1402-1414); but the two sets of rules are not usually made uniform in the statutes, and the precedents applying them must therefore be kept distinct.

In general, at common law, the concessions made to a witness on the ground of inability to attend were limited, but reasonable, in scope. The duty of attendance presupposes some sort of sacrifice, and the hardship of this sacrifice is in itself no excuse for failing to attend; it is the witness' just contribution to the demands of social order. Nevertheless, there must be, in fairness, some concession to pressing exigencies. The following passages illustrate the range of judicial opinion in applying this concession:

K. B.; 1832, *Lopes v. De Tastet*, 3 B. & B. 293.

⁴ 1816, *Moor v. Adam*, *supra*, per Ellenborough, L. C. J.; 1820, *Willis v. Peckham*, 1 B. & B. 516, K. B., per Park, J.; 1821, *Severn v. Olive*, 3 id. 72 (where the time and expense of making costly experiments, as well as of attendance to testify, were allowed for medical men); 1831, *Loneragan v. Assur. Co.*, 7 Bing. 725, C. P. (exception conceded, but disapproved); 1831, *Collins v. Godefroy*, 1 B. & Ad. 950, 956, K. B. (but not allowing any legal claim for these fees in assumpsit against the party); 1843, *Webb v. Page*, 1 C. & K. 23, Maule, J. (exception applied to value-witness); 1862, *Parkinson v. Atkinson*, 31 L. J. r. s. C. P. 199.

For the English rule to-day, see Rules of Court 1893, Ord. 37, R. 9; Ord. 65, R. 27.

⁵ *Ia. Code*, 1897, § 4661 (expert witnesses, as defined, are to receive "additional compensation [over \$1.25, etc.], to be fixed by the Court, with reference to the value of the time employed and the degree of learning or skill required," but not to exceed \$4 per day); 1873, *Snyder v. Iowa City*, 40 Ia. 446 (statute ap-

plied); *La. St.* 1834, No. 19 (witnesses called only as experts are to receive additional compensation, fixed by the Court, "with reference to the value of the time employed and the degree of learning or skill required"; see also C. Pr. 1897, § 462); *Miss. Gen. St.* 1894, § 554 (for "an expert in any profession or calling the judge may allow such fee as" "in his judgment may be just and reasonable"); 1892, *Marr v. Buffalo*, 87 N. Y. 189; *N. C. Code* 1888, § 3756 ("experts, when compelled to attend and testify, shall be allowed such compensation and mileage as the Court may in its discretion order"); 1872, *State v. Dollar*, 66 N. C. 61 (statute considered); *Tenn. Code* 1896, § 72 (coroner may summon a surgeon or physician to give a professional opinion, "whose fee shall not exceed the coroner's"; may summon chemist to examine for poison, whose fee shall not exceed twenty dollars).

On the general question of taxing expert fees, see also the following rulings: 1861, *Faulkner v. Hendy*, 79 Cal. 263, 21 Pac. 75; 1870, *Clark's Petition*, 104 Mass. 537, 542.

1866, *Cowen, J.*, in *People v. Davis*, 15 Wend. 602, 608: "The process of subpoena demands great and extraordinary efforts on the part of the witness to obey. It commands him expressly to lay aside his business and excuses; and, while it lays him under severe obligations, it clears away obstructions in the path of obedience; the witness was always privileged from arrest on civil process in going, staying, and returning. It is not denied that serious sickness in his family, such as would prevent a prudent father or husband from leaving home on his own important business, would save him from the imputation of a contempt and, perhaps, from an action. But such a cause ought clearly to be shown to the Court. . . . Above all, where the summons allows him full time, he should struggle to get ready, as he would to go abroad on his own pressing business. If inevitably disappointed, after exhausting every reasonable expedient, he ought certainly to be excused from the payment of a penalty which presupposes some degree of neglect, at least. Witnesses are the summary instruments of investigation in all our common-law courts. It is not until a positive disability is apparent that their domestic examination will be received as a substitute for their actual presence. The important right of oral examination and cross-examination is at stake; and every good citizen, if he could be supposed to regard nothing beyond his own rights, should struggle for the front rank in the order of obedience."

1851, *Grier, J.*, in *Ex parte Beebees*, 2 Wall. Jr. 127: "Where the witness who has been subpoenaed shows no disposition to treat the process of the Court with contempt, the issuing of an attachment is always a matter of discretion with the Court. Where the witness is sick, where a member of his family is dangerously ill, where age or infirmity or any other reason which would render his compulsory absence from home dangerous to his health or oppressive, the Court will not compel his attendance, but will either postpone the cause or order the deposition of the witness to be taken. In the present case there is no physical disability alleged to excuse the attendance of the witness. But under the circumstances in evidence we think it would be a great hardship and would probably cause derangement and injury to the business of the witness. . . . Must the witness be dragged from his counting-house, to the great injury of his business, and compelled to transport himself and a cartload of books of account to Philadelphia for the mileage and daily pay allowed by the law? Shall he shut up his bank, suspend his business, merely to save a little expense to the party who wants his evidence? If there was an absolute necessity for such a sacrifice on the part of the witness, if there would be a failure of justice unless his attendance at this place were enforced, the Court would be bound to issue this compulsory process. But where, as in the present case, it is but a question of convenience and expense between the party and the witness, we think that the witness may justly demur to an application which is to transfer the burthen to his shoulders."

§ 2205. *Same: (a) Illness, and the like; Merchants' Books.* It has always been recognized, at common law, that *serious illness* furnished a sufficient excuse for non-attendance.¹ Beyond this, it can hardly be said that any rules have been formulated. The matter has been left almost entirely to

¹ 1852, *Maclin v. Wilson*, 21 Ala. 670 (statute excusing for "incapacity to attend" includes all cases where "he was not guilty either of negligence or wilful disobedience"); 1873, *Cutler v. State*, 42 Ind. 244, 246 ("severe sickness," held a sufficient excuse); 1880, *State v. Hatfield*, 72 Mo. 518 (illness preventing attendance, held sufficient); 1839, *Jackson v. Perkins*, 2 Wend. 306, 317 ("No witness is bound to endanger his life by his attendance at court"); 1836, *People v. Davis*, 15 Id. 602 (illness of the family, held insufficient on the facts; quoted *ante*, § 2204); 1842, *Eller v. Roberts*, 3 Ired. 11 (witness disabled by a wound from walking; "this inability

must be passed upon and decided by reference to the modes of travelling which are in use in the community," so that if some other mode of conveyance was practicable, no excuse existed); 1858, *Slaughter v. Birdwell*, 1 Head 341, 343 (dangerous sickness of wife or family, held not sufficient under the old statute, excusing for "incapacity to attend"); 1874, *Foster v. McDonald*, 13 Heisk. 619 (serious illness of wife or family, held sufficient under a statute requiring "sufficient cause"); 1788, *Butcher v. Coats*, 1 Dall. 340 (witnesses excused, who were "so much indisposed as to be utterly incapable of attending").

the trial Court's discretion, — especially because the propriety of punishing for contempt depends somewhat upon the wilfulness of the disobedience of the Court's order and thus introduces a personal element distinct from the abstract duty of the witness.² Nevertheless, it may be assumed that a *hardship to one's livelihood*, such as might be involved in the summons of a very poor man having a family dependent on his scanty wage,³ or of a merchant called upon for a long withdrawal of the essential books of his daily accounting,⁴ should in some instances be treated as a sufficient ground for exemption.

§ 2206. *Same: (b) Sex; Occupation; Officers and Official Records.* For the sake of convenience only, certain innovations have been introduced in some jurisdictions by statute, excusing specific classes from attendance, and conceding a privilege, subject usually to the trial Court's discretion. (1) For reasons which can best be appreciated by those familiar with the Southern ideal of womanhood, "*females*" have been in a few Southern States exempted from attendance as witnesses in the court-room.¹ (2) In a few jurisdictions, an exemption has been accorded to persons of *specific occupations*, — presumably such as would be frequently liable to a call for testimonial services and would also be specially injured by the difficulty of delegating the conduct of their occupation to other hands.² (3) In a few jurisdictions,

¹ 1853, Smith, J., in *West v. State*, 1 Wis. 209, 235 ("The award of the attachment rests in the sound discretion of the Court to whom application is made; . . . the refusal of which is not necessarily error, and only becomes so when that discretion is clearly abused").

² 1814, Phillippa, Evidence, I, 13; 1836, *People v. Davis*, 15 Wend. 602 (poverty, held insufficiently shown on the facts).

³ 1851, *Ex parte Beebees*, 2 Wall. Jr. 127 (attendance from New York before a Master in Philadelphia, with large quantities of documents, not compelled on the facts; quoted *ante*, § 2204). This privilege is sometimes expressly declared by Statute: Ga. Code 1895, § 5258 (on service of a subpoena *d. t.*, a witness making affidavit "that he cannot produce the books required without suffering a material injury in his business," may furnish a transcript and not produce the originals); § 5259 (the opposite party may have inspection if not satisfied with the transcript); Wis. Stat. 1898, § 4182c (certain insurance companies' books, not required to be produced except by special order); § 4189 (so also for bankers' books).

There are also statutes, which, though they do not expressly confer upon the witness the privilege of not producing such books, yet do exempt the party to the cause from offering the original and thus often practically obviate the inconvenience; these have been already examined (*ante*, §§ 1223, 1683, 1710).

For the witness' privilege as to not disclosing title-deeds and other private documents (which does not exempt him from bringing them to court), see *post*, § 2211.

⁴ Ala. Code 1897, § 1833 (in civil cases, evidence may be taken by deposition, "1, when

the witness is a woman"); 1892, *Ex parte Jenks*, 101 Ala. 451; 3 So. 544 (attendance may be required by order under the Code); 1894, *Ex parte Branch*, 104 Ala. 231, 16 So. 926 (same; except when the witness resides out of the county); Ga. Code 1895, § 5257 ("all female witnesses" may be examined by commission); § 5306 ("no female witness shall be required to leave her home to appear" before commissioners); 1871, *City Fire Ins. Co. v. Carrigan*, 41 Ga. 640, 673; 1886, *Powell v. R. Co.*, 77 Id. 192, 195, 3 S. E. 757; 1893, *Western & A. R. Co. v. Denmead*, 93 Id. 351, 356, 9 S. E. 683; 1890, *Augusta & S. E. Co. v. Rundall*, 85 Id. 297, 315, 11 S. E. 706 ("The statute does not exempt females from attendance upon court; it simply permits their interrogatories to be taken; nevertheless, their attendance should not be compelled without good reason"); La. C. Pr. 1894, § 349 (no order shall be made "requiring a female [party] to answer interrogatories on facts and articles in open Court," unless on affidavit "to the materiality of the interrogatories, and that they are not propounded for the purpose or in the hope of having them taken for confessed, but with the bona fide desire to have them truly answered by the party interrogated"); Rev. L. 1897, § 3942 (no member of religious order of Saint Ursuline Nuns, in New Orleans, compellable to appear in court to give testimony); Tenn. Code 1896, § 5625 (female witness not compelled to attend "unless upon sufficient cause shown").

⁵ *Man. Rev. St.* 1902, c. 80, § 45 (superintendent of an insane asylum, if he does not refuse to depose at the asylum, is not compellable to attend court in any civil case, on affidavit that it would be "seriously detrimental

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certain *public officers* are expressly exempted by statute from attendance; moreover, at common law it is a question whether the Crown or the Executive is bound to attend court, or at least is liable to compulsory process.³ (4) The *irremovability of public records* concerns several principles which need to be discriminated. The rule requiring the party to produce a documentary original is dispensed with for public records, *and a copy may be used* (*ante*, §§ 1215, 1218). As a general rule of convenience, intended to preserve them from harm and keep them available constantly for consultation, the originals are generally *forbidden to be removed* for evidence (*ante*, § 2182). If, however, they are unlawfully removed, the illegality does not of itself exclude them (*ante*, § 2183). These principles involve no question of privilege. But a few statutes expressly provide that the *custodian of public records* is not *compellable* to remove and produce them; moreover, the testimonial privilege as to *official secrets* operates sometimes to prevent the disclosure of the contents of such documents.⁴

§ 2207. *Same: (c) Distance from Place of Trial.* The jurisdiction of a court may cover an extensive territory; but at common law no discrimination was made in regard to the distance of the witness' residence from the place of trial where his testimony was needed. He was not exempted by distance, if he was within reach of the court's process. Inordinate hardship was thus constantly caused to witnesses by the necessity of travelling a long distance and absenting themselves for a tedious period from their occupations, perhaps after all for no important benefit to justice. Modern statutes have usually remedied this hardship by limiting the distance from which a witness is compellable to come to the place of trial. Any such fixed rules must of course operate somewhat arbitrarily and therefore unjustly. They have no reference to the importance of the cause or of the individual witness' testimony, nor to his ability to absent himself without serious hardship, nor to the facilities available for travel. Moreover, when they regulate the exemption merely by political subdivisions — as by counties — they even fail to take account of the very reason for their enactment, since the county line may be but a few miles from the place of trial. Such statutes are therefore ill-advised and defective, whenever they do not leave it always to judicial discretion to obviate their arbitrariness by compelling attendance beyond the usual distances when this measure seems necessary. Nevertheless, these statutes represent a just need in legislation and rest on a sound general policy, as set forth in the following passage:

1848, *New York Commissioners (David D. Field and others) of Practice and Pleading*, First Report, 250: "Can there be a doubt that, under our present system, the rights

and hazardous to the welfare of the inmates or some of the inmates"; *Idu.* St. 1899, Feb. 10, § 4 (practising physician or attorney-at-law, out of the county of residence); *Ind.* Rev. St. 1897, § 432 (practising physician or attorney-at-law); *La.* St. 1877, No. 103 (cited *post*, § 2207, note); *Tenn.* Code 1896, §§ 5624-5628 (same).

³ These questions, however, have to be dis-

criminated from that of the testimonial protection given to *official secrets*; and hence the precedents and statutes are better dealt with in one place (*post*, § 2371).

⁴ The last two principles are sometimes confused in the precedents, and accordingly the authorities are better examined in one place, *post*, § 2373.

of witnesses are grossly disregarded? Why should the law permit a person to be taken from Suffolk to Niagara against his will, and at great sacrifice, because two persons in Niagara have a legal dispute? The loss to the witness may be more than the whole subject of litigation. Does not the law in this case inflict a greater wrong than it may redress a loss? We think it does; and we propose to prevent it hereafter, by declaring that no person shall be taken hereafter out of his own county for another person's civil action. . . . There should seem, moreover, to be no good reason to require the personal attendance of a witness at so great a sacrifice. No doubt, his appearance upon the stand, where the testimony may be taken from his lips, is preferable to a written deposition, taken at a distance. But that is not the only question. The point is this: whether the increased advantage to the parties of having the judge and jury see the witness, is more than a counterpoise to the increased injury to the witness from being brought so far, and at so great a loss. We think the question can be answered in only one way. In his own county let him be called to the stand. If it be wanted in another let it be taken in his own, and transmitted thither. Should there be a really urgent occasion for the personal attendance of the witness, there can be little doubt that the party may be able to induce him to attend, by compensating him for his expenses and time. So it is now, where a witness is wanted from another State; the party makes an arrangement with him to come, in many cases where his attendance is important. If a witness in Jersey City be wanted for a trial in New York, he can generally be induced to attend, though he cannot be compelled to do so. So it will happen, we doubt not, if our plan be adopted."¹

¹ From the following statutes, dealing with this privilege, are to be distinguished those which prescribe the conditions on which a deposition is receivable (*ante*, §§ 1411-1413); the two sets of rules, as already noted (*ante*, § 2904), should properly coincide, but in fact that is not always the case: *Ala. Code* 1897, § 1923 (no subpoena is in issue for a witness residing more than 100 miles distant, unless on affidavit that his personal attendance is "necessary to a proper decision of the cause, and that his deposition would be insufficient for that purpose"); 1894, *Ex parte Branch*, 105 *Ala.* 231, 233, 16 *So.* 936 (under Code § 2793 — in the prior Code — a witness residing more than 100 miles from the court-house is not compelled to attend; under §§ 2793, 2900, and 2912, a witness who is a woman or disabled by illness, etc., and resides without the county, is not compellable to attend); *Alaska C. C. P.* 1900, § 630 (like *Or. Annot. C.* 1892, § 796); *Ariz. P. C.* 1887, § 2084 (attendance out of the county of residence or of subpoena-service is not obligatory, unless by judicial order indorsed on a subpoena, made on affidavit that "the evidence of the witness is material, and his attendance at the examination or trial necessary"); *Ark. Stat.* 1894, § 2940 (attendance at trial is not obligatory in a civil action "except in the county of his residence or an adjoining county," nor attendance at a deposition out of the county of residence or of service on 3 days' notice); § 2113 (in criminal cases, no such limitation exists); § 2979 (not compellable to attend where his deposition is allowable, unless he has failed to give it after summons); § 2788 (party residing in the same or adjoining county, compellable to attend); § 2960 (Court may order personal attendance in spite of the ordinary exemption, on affidavit that his testimony "is important, and that the just and proper effect of his testimony cannot, in a

reasonable degree, be obtained without an oral examination before the jury"); *Cal. C. C.* 1872, § 1099 (attendance out of county of residence, not compellable, unless within 30 miles); *P. C.* § 1330 ("No person is obliged to attend out of the county of residence or of service on subpoena, unless a subpoena is indorsed by the trial judge's order, or a judge of the supreme or superior court, on affidavit of the party, stating that he believes "the evidence to be material and attendance necessary"); *D. C. Comp. St.* 1894, c. 26, § 17 (like *U. S. R.* § 870); *Code* 1901, § 1059 (no witness need attend for depositions out of the county of residence nor more than 40 miles from his residence); *Ida. Rev. St.* 1897, § 6039 (like *Cal. C. C. P.* § 1330); § 8152 (like *Cal. P. C.* § 1330); *Ida. Code* 1897, § 4660 (attendance not compellable (1) out of the State where served, or (2) more than 70 miles from the residence, or (3) except in a district or superior court, more than 30 miles "from his place of residence, or of service, if not in the same county"); *Kan. Gen. St.* 1897, c. 93, § 340 (attendance on a civil trial not compellable "except in the county of his residence," nor for a deposition except the or "where he may be" at service of subpoena); *Ky. C. C. P.* 1895, § 534, *C. Cr. P.* § 151 (witness need not attend if residing more than 30 miles from the place of trial, or if residing, being when served, out of the county; except in criminal cases); *C. C. P.* § 149 (party residing within 30 miles may be compelled to attend like any other witness); *La. Rev. L.* 1895, § 3941 (attendance "out of the parish" of residence, not compellable); § 3959 (personal attendance of any witness, compellable on affidavit that "the personal attendance of such witness open court on the trial of the case is necessary in order to elicit the truth from such witness which cannot be done by taking his deposition o

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of court"; and in all jury cases, the same may be done on request in writing without affidavit); *St. 1877*, no. 103 (physicians living more than 10 miles distant, not compellable to attend in a civil or a "wherever in their opinion the life of any of their patients might be endangered by their attendance," a sworn certificate of the facts to be forwarded by the physician; provided that at either party's request the Court may order the testimony "to be taken summarily in due course after notice" to the opponent); *Rev. L. 1897*, § 3940 (in Orleans parish, any party "shall have the right to have the personal attendance of any witnesses" by subpoena, unless such testimony has been "taken contradictorily with the parties" under *St. 1848*, Sept. 16); *C. Pr. 1894*, §§ 351, 352 (party residing out of the parish, not compellable to answer interrogatories in open court); *1844*, *Cruker v. Turnstall*, 6 Rob. La. 354, 355 (preceding sections applied); *1846*, *Walker v. Copley*, 1 La. An. 247 (same); *Mont. C. C. P. 1895*, § 3304 (like Cal. C. C. P. § 1899); *P. C. § 2464* (like Cal. P. C. § 1330); *Nebr. Comp. St. 1899*, § 5026 (attendance is not compellable in a civil action out of the county of residence, nor for a deposition out of the county of residence "or where he may be" when served); *Nebr. Gen. St. 1895*, § 2410 (like Cal. C. C. P. § 1899); § 4426 (like Cal. P. C. § 1330, substituting "district" for "county," and omitting "judge of the superior court"); *N. D. Rev. C. 1895*, §§ 5647, 5656 (not compellable in civil cases to attend trial out of the county of residence, or to give a deposition out of the county of residence or service); § 5369 (criminal cases; like Cal. P. C. § 1330); *St. 1899*, c. 175 (no person in criminal cases is obliged to attend out of the county of residence or service, unless on order of a judge based on an affidavit of materiality and necessity); *Ok. Rev. St. 1899*, § 5250 (no person compellable in a civil case to attend out of the county where he resides or is subpoenaed, except to the adjoining county, or to the county where venue has been changed; nor when he is custodian of an irremovable official document, unless the Court orders its removal); *Ok. Stat. 1898*, § 4218 (witness not obliged to attend in civil trials out of the county of residence, nor to attend for a deposition out of the county of residence or of service of subpoena); § 1600 (not compellable to attend more than 100 miles distant to give a deposition for use in another jurisdiction); § 3344 (criminal cases; not obliged to attend out of the county of residence or service of sub-

penna, except as in Cal. P. C. § 1330); *Or. C. C. P. 1892*, § 795 (not compellable to attend out of the county of residence or service, unless the residence is within 20 miles; except in a court of record, upon the Court's order induced on subpoena and made on affidavit that "the testimony of the witness is material and his oral examination important and desirable"); *S. D. Stat. 1899*, §§ 6455, 6456 (like N. D. Rev. C. §§ 5647, 5656); § 8006 (like Cal. P. C. § 1330, omitting mention of supreme and superior court judges); *U. S. Rev. St. 1876*, § 670 (no witness is compellable to attend for a *dedimus* deposition "out of the county where he resides, nor more than 40 miles from the place of his residence"); § 676 (in civil cases, a subpoena shall not run more than 100 miles from the place of the court, if the witness lives out of the district of the court); *1899*, *Davis v. Davis*, 90 Fed. 791 (R. S. § 663, contrast with the foregoing; a witness may be compelled to appear for deposition outside the district of the court); *St. 1898*, c. 541, § 41, July 1, 30 Stat. L. 556 (before a bankruptcy referee, attendance as witness is not required "at a place outside of the State of his residence, and more than 100 miles from said place of residence"); *1903*, *U. S. v. Beavers*, 125 Fed. 776 (range of distance covered by a subpoena of a U. S. Commissioner acting under N. Y. Statutes in criminal cases); *Utah Rev. St. 1896*, § 3421 (like Cal. C. C. P. § 1899); § 5022 (like Cal. P. C. § 1330, substituting "a magistrate" for "a justice of the supreme court," etc., and "showing" for "stating that he believes"); *Wash. C. & Stats. 1897*, § 3995 (witness is not compellable to attend out of the county of residence unless within 20 miles, nor before a justice of the peace unless the residence is within 20 miles whether within the county or not); § 4020 (attendance for deposition, compellable at any place within 20 miles); § 6740 (before justice of the peace; subpoena is valid, if the witness "be within 20 miles"); *Wis. Stat. 1899*, § 4056 (attendance before a justice of the peace is obligatory when the witness resides not more than 30 miles distant from his office); § 4096 (opponent examined by deposition cannot be required to go out of the county of residence); § 4100 (witness compellable to give deposition anywhere "within 20 miles of his abode"); *Wyo. Rev. St. 1897*, §§ 2596, 3222 (witness not compellable to go out of the county of residence or service of subpoena).

SUB-TITLE III: TESTIMONIAL PRIVILEGE.

TOPIC A: PRIVILEGED TOPICS

SUB-TOPIC I: SUNDRY PRIVILEGED TOPICS.

CHAPTER LXXVI

- § 2210. (1) Irrelevant Matters.
 § 2211. (2) Documents of Title, Lien, etc.
 § 2212. (3) Trade Secrets and Customers' Names.
 § 2213. (4) Official Secrets.
 § 2214. (5) Theological Opinions.
 § 2215. (6) Political Votes.
 § 2216. (7) Personal Disgrace or Infamy.
 § 2217. (8) Party Opponent in the Civil Suit at Bar; History and Policy of the Privilege.

- § 2218. Same: (a) Discovery in Chancery Statutory Changes for Common Law Trials.
 § 2219. Same: (b) Production of Documents.
 § 2220. Same: (c) Corporal Exhibition.
 § 2221. Same: (d) Inspection of Premises and Chattels.
 § 2222. (9) Facts against One's Interest as Witness Interested but not a Party to the Suit.
 § 2223. (10) Facts involving a Civil Liability in general, independent of the Suit at Bar.

§ 2210. (1) *Irrelevant Matters.* The witness has no privilege to refuse to disclose matters irrelevant to the issue in hand, — first, because irrelevancy is a concern of the parties alone, and may be obviated, as a ground for exclusion, by their consent or failure to object, and, secondly, because there in the mere circumstance of irrelevancy nothing which creates for the witness a detriment or inconvenience such as should suffice (*ante*, § 2192) to override his general duty to disclose what the Court requires. Moreover, the recognition of a privilege of this sort would add innumerable opportunities to make a claim of privilege, and would thus tend to complicate a trial and add to the uncertainty of the event. Accordingly, it has always been accepted, at common law, that no privilege of this sort existed:

1794, *Walker's Trial*, 23 How. St. Tr. 1008: Mr. *Kirkine*, cross-examining *Thomas Dunn*: "Who gave you the [glass of] shrub the next day?"; *Witness*: "Suppose a gentleman was so friendly as to give me a glass of shrub, is that anything?" *Counsel*: "I am not finding fault with it; who was it?"; *Witness*: "I do not know whether that is to be answered or not. . . . I do not suppose that is any material matter"; Mr. Justice *Heald*: "You have nothing to do whether it is material or no; answer the question."

1840, *Nisbet, J.*, in *Williams v. Turner*, 7 Ga. 350: "It will not do to permit a witness to judge what questions he shall answer and what not; unless the questions are such as by law he is not bound to answer, he must answer all."

1853, *Gamble, J.*, in *Ex parte McKee*, 18 Mo. 599, 601: "The opinion of the witness that the question is irrelevant is entitled to no consideration. If a merely frivolous or impertinent question were asked of a witness, the officer taking the deposition might feel himself called upon to compel an answer; but it would only be in a very plain case of impertinence that he would undertake to decide that the witness should be allowed to avoid answering. The Court in which the cause is pending will at the trial reject irrelevant evidence; and it would greatly detract from the value of our statutes which authorize the taking of depositions, if the question of relevancy was to be raised before and decided by every justice of the peace or other officer who takes a single deposition in the case when he cannot know the aspect which the case will probably assume at the trial."

allow the witness himself to pass upon the question of relevancy and refuse to answer such questions as he thought irrelevant, would be to deprive the party of the testimony of every unwilling witness. . . . [The statute authorized the committal of any person refusing to give evidence] 'which may lawfully be required to be given.' It is sufficient to say in general terms that, so far as the witness himself is concerned, he may lawfully be required to answer any questions which it is not his personal privilege to refuse to answer. . . . All evidence which is not of this character the witness may lawfully be compelled to give, even though it may not prove to be relevant and competent in the particular cause in which it is sought to be obtained. The objection to the relevancy or competency of evidence is for the parties litigant to make, and not for the witness."¹

Unfortunately, the compilers of the code of California, a generation ago, inserted a provision — by what authority or reasoning does not appear — which expressly affirmed such a privilege, and this provision has since found its way, by imitation, into a few other codes;² though little practical appli-

¹ *Accord*: 1683, *Ashton v. Ashton*, 1 Vern. 165 (probate of will); a witness demurred to one of the interrogatories "as not pertinent to the matter in issue; the Lord-Keeper overruled the demurrer, because he would not introduce such a precedent as for a witness to demur; it did not concern a witness to examine what was the point in issue"; 1899, *Harding v. American Glucose Co.*, 182 Ill. 551, 55 N. E. 577; 1860, *Bradley v. Veazie*, 47 Me. 85, 87 ("If questions are improperly asked, they must be answered as the justice or presiding judge in his discretion shall dictate"); 1855, *Ex parte McKee*, 18 Mo. 599 (quoted *supra*); 1865, *Porter, J.*, in *Great Western Turnpike Co. v. Loomis*, 32 N. Y. 127, 138 ("When the question is irrelevant, the objection properly proceeds from the party, and the witness has no concern in the matter unless it be overruled by the judge"); 1893, *De Camp v. Archibald*, 50 Oh. St. 618, 626, 35 N. E. 1036 (apart from privilege, the Court's determination of relevancy controls); 1901, *Re Rauh*, 65 id. 126, 61 N. E. 701 (a witness giving a deposition refuses at his peril on the ground of the incompetency of the evidence); 1901, *People's Bank v. Brown*, 50 C. C. A. 411, 113 Fed. 652, *semble*.

The ruling in *Holman v. Austin*, 24 Tex. 669, 673 (1870) went chiefly on the ground of the mayor's lack of jurisdiction; and the remark that, "if the question be 'impr' r," the refusal to answer is no contempt, *was an obiter interpolation based on no authority*. The ruling in *Ragland v. Wickware*, 4 J. J. Marsh. 530 (1839) held the question there put to be relevant, without saying that it would have been privileged if irrelevant. The remark in *Roberts v. Gares*, 2 Ill. 396 (1837) that a witness "is bound to state all the facts in his knowledge that are applicable to the case" was not meant to limit his duty, but to express its extension beyond the mere case of the party calling him. The ruling in *Ex parte Krieger* (1879), 7 Mo. App. 367, purging of contempt a witness who refused as deponent to answer questions before a notary in a proceeding which should properly have been brought as a bill of discovery against him as a party, goes partly on the limited statutory powers of a notary and partly on the

abuse of the process; the headnote, referring to the "irrelevancy" of the questions as a ground, is incorrect.

Distinguish the questions as to the power of a deposition-officer to compel an answer (*ante*, § 2195) and the necessity of taking objections to relevancy before such officers (*ante*, § 18). Distinguish also the party's objection to interrogatories of discovery; 1838, *Walworth, C.*, in *Gihon v. Albert*, 7 Paige 278, 279 (when the party is "advised by his counsel that questions put to him are improper or irrelevant to the matters referred to the master, but which the master decides it is proper for him to answer, he is to refuse to answer; which refusal is in the nature of a demurrer to the interrogatory"); Ala. Code 1897, § 1857 (opponent questioned on interrogatories "is bound to answer all pertinent questions"); and *post*, §§ 2218, 2219. Distinguish also the question of materiality in a congressional investigation, for there it may involve the powers of that body (*ante*, § 2195, note 1).

² *Alaska C. C. P.* 1900, §§ 674, 675, 676 (like Or. Annot. C. 1892, §§ 846, 847, 848); *Cal. C. C. P.* 1872, §§ 2065, 2066 (a witness must answer questions "legal and pertinent to the matter in issue"; it is his "right to be protected from" irrelevant questions, and "to be examined only as to matters legal and pertinent to the issue"); Commissioners' amendment of 1901, § 2064 (witness subpoenaed *d. t.* must attend with papers under his control "lawfully" required; for the validity of this amendment, see *ante*, § 498); 1886, *Ex parte Zeehandelaar*, 71 Cal. 238, 12 Pac. 259 (under Code §§ 2065, 2066, "the refusal to answer a question not pertinent to the issue was no contempt"); 1900, *Re Rogers*, 129 id. 468, 62 Pac. 47 (opinion not clear, but apparently sanctioning a refusal to answer an irrelevant question); 1903, *People v. Glaze*, 139 id. 154, 72 Pac. 965 (prosecution held not compellable to produce at the trial a paper which would not be admissible); *Ga. Code* 1895, § 5281 ("It is the right of a witness to be examined only as to relevant matter, and to be protected from improper questions"); *Ida. Rev. St.* 1887, §§ 6090, 6091 (a witness is compellable to answer all "pertinent and legal

cation of it seems to have been invoked. It is an unsound and impolitic rule. That a witness has no concern with relevancy ought to be the firm correlative of the doctrine that a party has nothing to do with privilege (*ante*, § 2196).

§ 2211. (2) Documents of Title, Lien, etc. The mere fact that a document concerns the private affairs of the witness or that its disclosure would in his opinion inconvenience him does not create a privilege; the duty to assist the truth (*ante*, § 2192) is paramount, and indeed presupposes some sort of sacrifice by the witness:

1842, *Denman*, L. C. J., in *Doe v. Date*, 3 Q. B. 608, 617 (compelling an executor of defendant's lessor to produce a rent-book): "[The executor] possessed it in the character of executor of the late tenant for life; when produced, it proved the fact of payment of rent to his testator. Why was the witness not to prove that fact, either by his personal knowledge, if the party calling him chose to question him, or by any paper which he might possess? Such a paper was not a title-deed, nor within the protection of the rule which exempts witnesses from producing documents in the nature of title-deeds. The production of the paper was a mode of proving a fact; that this fact might be injurious to some interest of his own furnishes no reason for his not producing the book."

1879, *Choate*, J., in *U. S. v. Tilden*, 10 Ben. 566, 578: "While the law jealously protects private books and papers from unreasonable searches and seizures, and from unnecessary exposure, even when necessarily produced in court, yet the principle is equally strongly held that parties litigant have the right to have private writings, which are competent for proof in their cause, produced in court; and to this imperative demand of justice all scruples as to the confidential character of the writings as private property (except in certain well ascertained exceptions growing out of professional employment) must yield from considerations of public policy."

Subject, then, to a general discretion in the Court to decline to compel production where in the case in hand the document's utility in evidence would not be commensurate with the detriment to the witness, any and every document may be called for, however personal and private its contents may be.¹

questions"); *Miss. Annot. Code 1892*, § 1746 (a witness is not to be "excused from answering any question, material and relevant," unless self-criminating); *Mont. C. C. P. 1895*, §§ 3401, 3402 (like Cal. C. C. P. §§ 2065, 2066); *Nev. Gen. St. 1885*, §§ 3415, 3416 (like Cal. C. C. P. §§ 2065, 2066); *Or. C. C. P. 1892*, §§ 847, 848 (like Cal. C. C. P. §§ 2065, 2066); *Utah Rev. St. 1896*, §§ 3431, 3432 (like Cal. C. C. P. §§ 2065, 2066).

The following ruling was improperly influenced by the above code-rulings: 1899, *Ex parte Jennings*, 60 Oh. St. 319, 54 N. E. 262 (refusal to answer upon irrelevant facts, privileged; here, before a notary taking a deposition; but the principle is stated broadly; citing *Ex parte Zeehandelaar*, *supra*; *Minshall*, J., *dis.*). The following ruling rests on a special wording: 1897, *Ehrmann v. Ehrmann*, 2 Ch. 526 ("privilege" in Ord. 31, r. 19 a, sub-rule 2, includes any ground, even irrelevancy, on which discovery is resisted).

¹ Add the citations *ante*, § 2193: *Eng.*: 1702,

Geary v. Hopkins, 2 Ld. Raym. 851 (action for money received; books of East India Company required to be produced, since, if the transfers of stock were made only by entry therein, "it is reasonable that they should be produced for the benefit of the party"); 1808, *Amey v. Long*, 9 East 473 (quoted *ante*, § 2193); 1824, *Hawkins v. Howard*, Ry. & Mo. 64 (action against bankrupt; assignees, not being parties, required to produce the bankrupt's books); 1834, *Doe v. Seaton*, 2 A. & E. 171, 175, 178 (account books in possession of the attorney for a deceased third person not a party, compelled to be produced, the entries affecting the title of the party calling for them); 1843, *Doe v. Date*, 3 Q. B. 608, 617 (executor of G., lessor of defendant, compelled to produce for the plaintiff a rent-book, the executor not being a party, and the book not being a title-deed); *U. S.*: 1859, *Burnham v. Morrissey*, 14 Gray 226, 240 ("We know of no rule of law which exempts any person from producing papers material to any inquiry in the course of justice merely because

To this conceded general rule, two exceptions have been urged:

(a) The *title-deeds to land* were in England always a secret of extraordinary importance. The landed interests, at the time of the common law's formation and until recently, were overwhelmingly dominant in politics, religion, and social intercourse. The safety of those interests was a paramount object. Now, under any title-system not founded on compulsory public registration, the secrecy of the title-instruments comes to be a vital (if selfish) consideration for the occupants of the land. Their possession may be unquestioned; but the instruments under which they claim are constantly defective in some important feature. A boundary may vary, a release be missing, a recital be incorrect,—a score of defects of one sort or another may be apparent in the chain of title. But the possession and the title are as yet unquestioned, and thus the security of title depends practically on preserving these defects from ascertainment by persons opposed in claim, who might be only too glad to take advantage of them.² It comes therefore to be a fundamental maxim of the dominant class that each man is entitled to keep secret his documents of title. Without this, almost any title in the country might lie in jeopardy. It is an absolute demand of self-interest that the appearance shall pass for the reality, and that land-possessors shall not be obliged to occupy and to invest on sufferance, in the constant risk of an overturn through the disclosure of their defective title in the course of testimony casually required for the benefit of strangers litigant. This principle, then, that the disclosure of title-deeds in litigation between other parties was not compellable, appears to have been always accepted in English courts, coming down as an unquestioned tradition; and it was occasionally extended to documents other than those affecting land; though it seems ever to have been regarded as limited by the trial Court's discretion.³

they are private"); 1815, *Gray v. Pentland*, 2 S. & R. 23, 31 (Tilghman, C. J.: "When a paper is in the hands of a third person who is not willing to part with it, the Court will sometimes compel its production by subpoena *duces tecum*; but this is not to be obtained without special permission, and the Court always exercises its discretion in granting or refusing it"); 1814, *Hawkins v. Sumter*, 4 Deas. Eq. 446 (surety for a sheriff, required to produce sheriff's books); 1879, *U. S. v. Tilden*, 10 Ben. 566, 578 (quoted *supra*; but here production was not required merely upon the chance of refreshing the witness' memory); 1883, *Wertheim v. Continental R. & T. Co.*, 15 Fed. 716 (the president and secretary of a corporation, compelled by subpoena *d. t.* to produce the books and papers of the corporation in a suit to which the corporation was not a party); 1898, *Goss P. P. Co. v. Scott*, 89 id. 818 (contracts showing the precise extent of a witness' pecuniary interest in suit; production not required); 1881, *Moate v. Rymer*, 18 W. Va. 642, 645 (*Amey v. Long* approved; here applied to a document showing the amount of an attorney's fee). Distinguish the process of obtaining *discovery before trial* from a witness not a party (*ante*, §§ 1857, 1858).

The following ruling is anomalous: 186, *Masters v. Marsh*, 19 Nebr. 458, 467, 27 N. W. 438 (account-books of third persons were excluded, on the theory that it would be absurd to suppose that "the private account-books of every person" could be compelled to be shown and "subjected to the espionage of the parties"; no authority is cited, nor could be).

² Mr. Samuel Warren's novel, *Ten Thousand A Year*, turns on such a situation.

³ 1796, *Miles v. Dawson*, 1 Esp. 405, Kenyon, L. C. J. (a witness not compelled to produce a warrant of attorney, on the analogy of Chancery's not compelling a *bona fide* equitable owner to produce); 1815, *Copeland v. Watts*, 1 Stark. 95 (a lease belonging to a third person, produced and read, the judge believing that its production would not be prejudicial to the third person's interests); 1815, *Reed v. James*, ib. 132 (a petitioning creditor summoned for assignees in bankruptcy to bring a bill of exchange; *Ellenborough, L. C. J.*: "You cannot with propriety withhold the instrument; I cannot, however, do more than advise you to exercise a sound discretion on the subject"); 1816, *Corson v. Dubola*, Holt 239 (Gibbs, C. J., compelled the production of papers of bankruptcy assignees

In the United States and Canada, however, no reason exists for perpetuating such a privilege. The ethics of it, indeed, may be questionable, for the law hardly does well in lending aid to protect one who is by hypothesis not a lawful owner; nevertheless, in England, the law's failure to protect titles adequately by registration, and the inevitable risks which were thereby created for even *bona fide* titles, furnished a sufficient explanation, if not a justification. But under a system of compulsory public registration of titles or of conveyances there is in such a privilege neither necessity nor utility. Those who do not register their deeds are few in number; they voluntarily take the risk of loss; and their situation does not justify special protection. Those who do register their deeds have no need for such protection; their title, in general, stands or falls by what is publicly recorded, not by what they privately possess; and there is no appreciable motive for demanding a privilege of secrecy for that which can neither hurt nor help them. Accordingly, in the United States, this exceptional privilege has not only not been judicially sanctioned, but does not appear even to have been claimed.⁴

(b) Where a person holds a document, not his own, but subject to a lien which would be lost by his surrender of possession, or owns and holds a document such as a bill of exchange, whose *continued possession is necessary* for the enforcement of his right under it, he may fairly claim not to be compelled to surrender it for evidential purposes in litigation between other parties. This privilege, however, it will be observed, is not to withhold disclosure of contents, but only to *retain possession*;⁵ although in a few instances the

not parties, the production not being prejudicial to them); 1817, *Roberts v. Simpson*, 2 Stark. 203 (trustee, being grantee of the plaintiff, not compelled to produce his title deeds for the defendant); 1822, *Harris v. Hill*, 3 id. 140 (composition deed between a third person and his creditors, held privileged); 1829, *R. v. Hunter*, 3 C. & P. 591, 592 (forgery; as to deeds in a witness' possession, "if these deeds form a part of the evidence of this lady's title to any part of her own estate, you cannot compel her to produce them"); 1834, *Mills v. Oddy*, 6 id. 728, *Parke, B.* (lease not compelled to be produced); 1848, *Doe v. Langdon*, 12 Q. B. 711, 719 (an abstract held not privileged, where no injury could be apprehended by its production).

The privileged witness would of course not be compelled to *testify to contents*: 1842, *Davies v. Waters*, 9 M. & W. 608, 612; though he could be required at least to *describe his deed for identification*: 1847, *Doe v. Clifford*, 2 C. & K. 448; 1854, *Phelps v. Frew*, 3 E. & B. 430, 438 (on claim of privilege for a title-deed, the party then proposing to give other evidence of contents by one who had seen the alleged deed, held not an infringement of the privilege to compel the deed's production for identification by the witness, the outside alone being perused; *Wightman, J.*: "His privilege is only not to produce the instrument for the purpose of disclosing its contents"). But the party could prove the contents by any other evidence available: 1826, *R. v. Upper Boddington*, 8 Dowl. &

R. 726; 1834, *Milston v. Downes*, 6 C. & 381, 382; 1850, *Newton v. Chaplin*, 6 C. R. 367; and the third person's claim of privilege was an excuse for the party's not producing original: *ante*, § 1212.

⁴ The following statutes appear also to negative it: B. C. St. 1899, c. 62, § 112 (similar to B. C. St. 1902, c. 43, § 50); Man. Rev. St. 1902, c. 43, § 49, 50 (privilege apparently abolished, under the system of title-registration).

⁵ *Eng.*: 1818, *Commerell v. Poynton Swanst.* 1 ("A solicitor cannot by virtue of lien prevent the King's subject from obtaining justice"); 1818, *Mayne v. Hawkey*, 3 id. 93; 1830, *Hunter v. Leathley*, 10 B. & C. 854, (action against underwriters; a broker compelled to produce the policy, though he held lien upon it); 1833, *Thompson v. Mosely*, 4 P. 501 (one claiming a lien on a bill was required to produce, but not to surrender it; can stand by the witness while he looks at it); 1848, *Ley v. Barlow*, 1 Exch. 800 (action between allottee of shares and director of a company; document in the hands of defence attorney who had a lien for charges due to the company; *Parke, B.*: "The lien cannot defeat the right to inspect the documents in case of *Hunter v. Leathley* was a solemn decision"); *Can.*: 1868, *Deadman v. Ewen*, N. C. Q. B. 176 (attorney having a lien bound to produce the deed; the Court "have protected any lien he had"); *U. S.*: *Morley v. Green*, 11 Paige 240 (witness

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has been an ill-considered suggestion (due probably to a confusion of this rule with the rule in England for title-deeds to land) that disclosure was not compellable.⁶ Nevertheless, there is one situation in which with propriety the Court may decline even to compel disclosure, namely, the case in which the litigant party seeking to compel it is the *person against whom the lien of the witness runs*. Here his right to use the document evidentially might, on the facts, practically annul the value of the lien, and there is no reason why this should be permitted him.⁷

§ 2212. (3) *Trade Secrets and Customers' Names*. In a day of prolific industrial invention and free economic competition, it may be of extraordinary consequence to the master of an industry that his process be kept unknown from his competitors, and that the duty of a witness be not allowed to become by indirection the means of ruining an honest and profitable enterprise. This risk, and the necessity of guarding against it, may extend not merely to the chemical and physical composition of substances employed, and to the mechanical structure of tools and machines, but also to such other facts of a possibly private nature as the names of customers, the subjects and amounts of expense, and the like. Accordingly, there ought to be and there is, in some degree, a recognition of the privilege not to disclose that class of facts which, for lack of a better term, have come to be known as "trade secrets."

Nevertheless, the occasional necessity of recognizing it should not blind us to the danger of such a measure, or entice us into an unqualified sanction for such a demand. In the first place, in an epoch when patent-rights and copy-rights for invention are so easily obtained and so amply secured, there can be only an occasional need for the preservation of an honest trade secret without

ing a lien must produce the document as evidence, but need not surrender it to the Court's custody, even though the lien be deemed by the Court not to exist; 1845, *Aiken v. Martin*, ib. 499, *semble* (same).

1842, *Kemp v. King*, 2 Moo. & Rob. 437 (a deed of assignment held by an attorney under his lien for costs; privileged); 1847, *Doe v. Clifford*, 3 C. & K. 448 (attorney holding a deed as mortgagee of defendant, not compellable to produce it); 1850, *Bull v. Loveland*, 10 Pick. 9, 14 (action on a note; the possessor of the note had received it from the plaintiff for collection and a sum was due him for advances made under the agreement; held privileged from production; when the retention is on a claim of "legal or equitable interests of his own, it is a question to the discretion of the Court under the circumstances of the case whether the witness ought to produce or is entitled to withhold the paper"); 1855, *White v. Harlow*, 5 Gray 463, 466 (attorney held on the facts not to have such a lien on a note as to be entitled to withhold it).

1886, *Cobb v. Tirrell*, 141 Mass. 459, 5 N. E. 828 ("The plaintiff claimed a right to put the note in evidence as that declared upon by them and as the foundation of their suit, and requested the Court to order the witness to produce the note for these purposes aforesaid, the witness

contending and claiming that it was his own property [and not the plaintiff's property]. This was in effect to ask the Court to decide, in a suit to which F. [the witness] was not a party, that a valuable piece of property belonged to the plaintiffs, and not the witness in whose possession it was. . . . The rights of one actually in possession of property, and claiming to be lawfully so, cannot be dealt with in this summary manner"); 1898, *Davis v. Davis*, 90 Fed. 791 (attorney claiming a lien on papers as against the party summoning him, held not compellable, since "the value of the lien often lies almost altogether in the power to withhold the papers from use as evidence"; otherwise, where the party summoning is not the lienee).

From the foregoing exceptions to the general doctrine must be distinguished those cases in which a privilege has been asked for a document held by the witness as *attorney* and thus governed by the principles of a special exemption (*post*, § 2307); those cases, also, in which the document is held by a trustee or other person as the *agent of the party opponent*, and is thus at common law privileged from production except upon a chancery bill of discovery (*post*, § 2215); and those cases, finally, in which the document is desired to be held back as a *confidential communication* in general (*post*, § 2286).

resort to public registration for its protection. Such instances do occur, but an object of the patent and copyright laws is to render them as rare as possible, and the presumption should be against their propriety. In other words, a person claiming that he needs to keep these things secret at all should be expected to make the exigency particularly plain. In the next place, the occasion for demanding such a privilege arises usually in actions where the party claiming it is one charged with infringing the rights of another by fraudulent competition in business, and the existence of the fraud can be proved only by investigating the claimant's methods of business; in such cases, it might amount practically to a legal sanction of the fraud if the Court conceded to the alleged wrongdoer the privilege of keeping his doings secret from judicial investigation. No privilege at all should there be conceded, although as much privacy as possible might be preserved by compelling disclosure no farther than to the judge himself, or to his delegated master or auditor, if (as is usual) the cause is tried by chancery procedure. Finally, even where the claimant of the privilege is not a party charged with fraud, no privilege of secrecy should be recognized if the rights of possibly innocent persons depend essentially or chiefly, for their ascertainment, upon the disclosure in question. In other words, the privilege should be conceded in those cases only where the disclosure of the facts by the particular channel of the witness in question is but a subordinate means of proof, relative to the other evidence available in the case; for without some such limitation the general principle cannot be enforced (*ante*, § 2192) that testimonial duty to the community is paramount to private interests, and that no man is to be denied the enforcement of his rights merely because another possesses the facts without which the right cannot be ascertained and enforced. The simple expedient of restricting the disclosure to the judge or his delegate will usually prevent whatever detriment might otherwise be incurred by forcing a public revelation of the trade-secret:

1870, *Hatherley*, L. C., in *Moore v. Craven*, L. R. 7 Ch. App. 94, note: "The Court does not, when discovery is a matter of indifference to the defendant, weigh in golden scales the questions of materiality or immateriality; but where the nature of the discovery required is such that the giving of it may be prejudicial to the defendant, the Court takes into consideration the special circumstances of the case, and whilst, on the one hand, it takes care that the plaintiff obtains all the discovery which can be of use to him, on the other, it is bound to protect the defendant against undue inquisition into his affairs. The question of materiality must be tested by reference to the case made by the plaintiff's pleadings, and to what will be in issue at the hearing."

What the state of the law actually is would be difficult to declare precisely. It is clear that no absolute privilege for trade-secrets is recognized. On the other hand, Courts are apt not to require disclosure except in such cases and to such extent as may appear to be indispensable for the ascertainment of truth. More than this, in definition, can as yet hardly be ventured.¹

¹ It should be noted that in those of the ensuing cases which arose on interrogatories of discovery to a party the traditions of chancery might make more of a concession to the privilege than otherwise: *England*: 1726, *Shelling v. Farmer*, 1 Str. 646 (trespass against one

§ 2213. (4) *Official Secrets*. There must be a privilege for secrets of State, & matters whose disclosure would endanger the nation's relations of

who had been governor of a factory of the East India company; defendant called for the company's books to prove his orders; the company objected that "it might be of mischievous consequence if, in every action wherein the company is not concerned, they should be obliged to lay open the secrets of their trade," but "submitted to the directions of the Court"; Eyre, C. J., said he "would not oblige the company to produce them," and so left us to our liberty"; 1775, *Maharajah Nandocomar's Trial* (quoted ante, § 2193); 1834, *R. v. Webb*, 1 Moo. & Rob. 406, 413 (manslaughter by the use of a noxious pill; the proprietor of the pill, which was not patented, on being asked whether it contained gamboge, was not allowed to decline on the ground of keeping a trade secret, though the counsel was recommended to ask as little as "the ends of justice required"); 1856, *Tetley v. Easton*, 18 C. B. 643 (infringement of patent; discovery of names and addresses of "indees is not privileged merely because the customers may be exposed to action"); 1857, *British Empire S. S. Co. v. Somes*, 3 K. & J. 433 (action to recover money extorted on an excessive claim; the plaintiffs held entitled to discovery as to labor and materials entering into the cost, but not as to the accounts of wages actually paid to workmen); 1860, *Telford v. Ruskin*, 1 Dr. & Sm. 148 (bill for account against a surviving partner; discovery of the account-schedule in his answer, compelled, against the objection that the private affairs of his debtors would be disclosed); 1861, *The Don Francisco*, 31 L. J. n. s. Adm. 205 (injury to cargo; discovery as to letters, compelled, against the objection that they would disclose "the secrets of his business"); 1862, *Howe v. McKernan*, 30 Beav. 547 (action for selling machines falsely under the plaintiff's name; discovery of prices, profits, and customers' names, compelled, against the objection that the secrets of his trade would be disclosed); 1864, *Renard v. Levinstein*, 10 L. T. R. n. s. 94 (infringement; defendant compelled to answer as to his secret processes; "the Court will be able at the proper time to protect the defendant from any improper disclosure of his secret"); 1870, *Moore v. Craven*, L. R. 7 Ch. App. 94, note (like the next case); 1871, *Carver v. Pinto Letto*, ib. 90 (infringement of trademark; discovery as to defendant's customers' names, addresses, and prices, not required where it was "likely to be injurious to the defendant" and not likely to help the plaintiff's proof of his case); 1873, *Great Western Colliery Co. v. Tucker*, L. R. 9 id. 376 (bill founded on the defendant's agency for the plaintiff; discovery as to the defendant's sales and profits and other "private transactions" not compelled); 1875, *Hough v. Garrett*, 44 L. J. Ch. 305 (bill for account against an agent for the sale of a patent; discovery compelled as to quantities and prices of goods sold, but not as to customers' names and addresses); 1833, *Badische A. & S. Fabrik*, L. R. 24 Ch. D. 156, 157, 159, 169, 176 (infringement of

patent; the defendant objecting to a cross examination upon his secret process, "Mr. Justice Pearson considered this objection to be reasonable, and allowed the examination to be continued upon that principle"; afterwards the defendant elected to disclose, and the evidence was heard *in camera*; the shorthand notes were impounded, and the judge refrained from stating the process in his opinion; sensible opinion by Pearson, J.); 1890, *Ashworth v. Roberts*, L. R. 45 id. 628 (bill for account against the licensee of a patent, the defendant claiming non-user of the plaintiff's process and user of a secret process of his own; "the mere plea of secret process does not preclude an answer"; here he was compelled to answer as to his customers, though not as to his secret process); 1890, *Mistovski v. Mandleberg*, 6 Times L. Rep. 207 (action for breach of contract in improperly waterproofing cloth; answers to interrogatories compelled; Denman, J.: "It must not be supposed that there is an absolute privilege as to disclosure of a trade secret; it is a question of the exercise of judicial discretion; . . . the fact that it is a trade secret is not legally material"); 1900, *Saccharin Co. v. Chemicals & D. Co.*, 2 Ch. 557 (infringement of patent; disclosure compelled of names and addresses of customers); *Canada*: 1893, *Star Kidney P. Co. v. Greenwood*, 3 Ont. 280 (secret medical formula of plaintiff, held privileged, in an action on a note for the purchase price, the defendant setting up fraudulent representations as to the curative qualities of the goods; an instructive case and a careful opinion); *United States: Pa.*: 1881, *Tetlow v. Savournin*, 15 Phila. 170 (bill by a manufacturer of cosmetics to restrain the defendant from using his trademarks; answer, that the plaintiff's articles, being injurious, should not be protected; discovery by the plaintiff of the ingredients of his articles, not compelled under the circumstances); *U. S.*: 1886, *Robinson v. Philadelphia & R. R. Co.*, 28 Fed. 340 (corporation-books; "care must be exercised to avoid unnecessary and improper inquiry into private affairs"; an answer will be demanded only where it is likely to be relevant); 1888, *Moxie Nerve Food Co. v. Beach*, 35 id. 465 (a witness for the complainant was asked on cross-examination for the ingredients of the preparation; privilege allowed, because the commercial value of proprietary articles depended on the secrecy of their composition; *Tetlow v. Savournin*, *supra*, approved); 1889, *Dobson v. Graham*, 49 id. 17 (infringement of patent; the defendant's workmen not obliged to state wherein the defendant's machine differed from the plaintiff's, and inspection of the defendant's machinery not ordered; but otherwise, "if it were shown that these secrets were used as a cloak to cover an invasion of the plaintiff's right, or if there were reliable evidence tending to show it"); 1891, *Johnson Steel Rail Co. v. North Branch Steel Rail Co.*, 48 id. 191 (infringement of patent; the manager of a corporation not a party to

friendship and profit with other nations. This privilege, however, has been so often improperly invoked and so loosely misapplied that a strict definition of its legitimate limits must be made. In order to distinguish it from other principles justifying the exclusion of official documents, these various principles, superficially related, must be considered together and the precedents discriminated — in connection with the privilege for Communications between Government and Informer (*post*, §§ 2367-2376).

§ 2214. (5) *Theological Opinions.* That a privilege should be needed against the disclosure of one's theological opinions would have been maintainable two or three generations ago, more plausibly than it is to-day, when religious rancor is less marked and mutual toleration more general. Nevertheless, considering that the establishment of such matters can rarely be of value in the ascertainment of litigated facts, and that, whenever it is, the tenor of a man's opinions can usually be sufficiently ascertained from his voluntary extrajudicial professions, without putting him to his oath in court, it would seem wise to sanction the privilege, especially since the lack of it might lead to gratuitous attempts to annoy witnesses on cross-examination. The privilege can be recognized, subject to the judge's discretionary right to compel disclosure whenever it seems necessary to the ascertainment of the main facts in litigation :

1879, *Foster, J.*, in *Free v. Buckingham*, 59 N. H. 210, 225: "It is not customary in modern practice to permit an inquiry into a man's peculiarity of religious belief. This is not because the inquiry might tend to disgrace him, but because it would be a personal scrutiny into the state of his faith and conscience, contrary to the spirit of our institutions. A man is competent to testify who believes in the existence of God and that divine punishment, either in this life or the life to come, will be the consequence of perjury. No judicial tribunal is bound to inquire, nor ordinarily will inquire, whether a witness be a Protestant or Romanist, Trinitarian or Unitarian, a Shaker, Mormon, Jew, or Gentile, a Spiritualist or a Materialist."

As a matter of precedent, such facts were originally privileged from disclosure so far as they involved the witness in a crime or forfeiture, in the period when the Catholic religion brought its adherents within the intolerant penalties of

the suit was subpoenaed to produce certain drawings and templates; the defence being insufficiency of invention and public use, the Court held that the drawings in question were material as tending to prove this issue and that the witness must produce them); 1899, *Gorham Mfg. Co. v. Emery R. T. D. Co.*, 92 id. 774 (manufacturer seeking to enjoin the sale by the defendant of goods said by the plaintiff to be imitations of his goods, but said by the defendant to be genuine; the defendant not bound to give the name of the intermediate vendor, where the plaintiff's only use of the fact could be to decline to sell further to such vendor). The following odd case belongs perhaps under this principle: 1899, *Alvord v. Alvord*, 109 Ia. 113, 80 N. W. 306 (son's petition for guardian for a mother alleged to be insane; mother not bound to disclose the terms of a will made by her). Add the *Sugar Trust* case in Congress: U. S.

v. Chapman, *Smith's Digest of Precedents of Congress*, 1894, pp. 797, 810.

Distinguish the limitation of materiality in discovery by a party (*post*, § 2219), and the privilege for communications to an attorney, or to an expert witness acting as attorney (*post*, §§ 2301, 2307).

Distinguish the substantive law as to enjoining the unlawful disclosure of a trade secret: 1851, *Morrison v. Moat*, 9 Hare 241; 1857, *Gartside v. Outram*, 26 L. J. Ch. n. s. 113; 1903, *Stewart v. Hook*, — Ga. —, 45 S. E. 369; 1868, *Peabody v. Norfolk*, 28 Mass. 452; 1897, *Thum Co. v. Tloczynski*, 114 Mich. 149, 73 N. W. 140; 1908, *Stone v. Goss*, — N. J. —, 55 Atl. 738.

For the secrecy of statements to an assessor and of the details of an unfinished invention under caveat, see *post*, § 2374 (official secrets).

the law.¹ But the privilege was afterwards recognized, at least in the United States, upon the broad ground that theological opinions as such, were protected from self-disclosure.² Furthermore, under the constitutional provisions guaranteeing freedom of religious belief and competency as a witness irrespective of theological opinion, the Courts often prohibit inquiry into a witness' opinions; but whether this is done on the ground of the irrelevancy of the matter of inquiry, or on the ground of privilege, or of both, is usually not easily ascertainable from the judicial language.³

§ 2215. (6) *Political Votes*. In general, there is no need of a privilege against the disclosure of political *opinion*, because it is not for the interest of the community that such beliefs should remain secret. The formation of a sound public opinion, by discussion and comparison, is essential in all representative government; and there is no good reason why any citizen should be encouraged to go through life with mute secrecy upon his political views.

But the secrecy of his *vote* is a different thing. The community's interest is that the citizen's vote, the culminating act by which his opinion is made most effective, should be absolutely sincere, i. e. should represent accurately his opinion upon the persons or the propositions presented for choice. At the time of voting, especial danger exists that influences of oppression will prevail to coerce the elector into an insincere vote. This danger affects the welfare of the State itself, as dependent upon freedom of political action. While, therefore, there may be no warranty for sanctioning secrecy of political opinion as such, there is a need for securing secrecy of voting, in order that the vote may correctly represent the opinion. In short, the danger that the citizen himself may incur enmity or other detriment by the compulsory disclosure of his true opinion, at ordinary times or in court, is not to be regarded as worth attention; but the danger to the State, of obtaining a false index of his opinion, at the crucial moment of voting, is decidedly to be guarded against. The main expedient for this purpose is to provide such apparatus at the polls

¹ 1096, *Sir John Frazer's Trial*, 13 How. St. Tr. 17; 1743, *Craig v. Earl of Anglesea*, 17 id. 1347; 1781, *Lord Gordon's Trial*, 21 id. 519.

² *Eng.*: 1856, *Darby v. Ouseley*, 1 H. & N. 1, 10 (inquiries as to Catholic doctrines, held improper; "it is said that the answer would go to the witness' credit, but that is not so"); 1861, *Maden v. Catanach*, 7 id. 360 ("a witness who does not object to take the oath can be compelled to answer" on voir dire as to religious belief); *U. S.*: 1881, *Guiteau's Trial*, II, 1007 (District Attorney: "Do you believe in a God?" The Court: "You are not obliged to answer that question, doctor"; Dr. Spitzka: "I decline to answer it, on principle, as, from my point of view, an impertinent question in a country that guarantees civil and religious liberty"). 1891, *Searcy v. Miller*, 57 Ia. 613, 621, 10 N. W. 912 (witness not allowed to be cross-examined as to atheism); 1883, *Dedric v. Hopson*, 62 id. 562, 563, 17 N. W. 772 (similar); 1899, *Com. v. Bachelder*, *Thacher's Cr. C.* 197 (privilege recognized); 1854, *Com. v. Smith*, 2

Gray 516 ("The want of such religious belief must be established by other means than an examination upon the stand. He is not to be questioned as to his religious belief, nor required to divulge his opinions upon that subject in answer to questions put to him while under examination"); 1860, *Com. v. Burke*, 16 id. 33 (even after the statute making disbelievers competent and allowing religious belief to affect credibility); 1879, *Free v. Buckingham*, 50 N. H. 219 (quoted *supra*).

The privilege, it would seem, does not sanction a general refusal to be a witness: 1793, *Stansbury v. Marks*, 2 Dall. 213 (witness refusing to be sworn, because, being a Jew, "it was his Sabbath," fined for contempt).

³ *Ante*, § 1820 (oath). Compare also the cases on the question whether theological opinion may be proved by other testimony to affect his credibility (*ante*, § 935), and on the propriety of inquiring into theological belief for the purpose of ascertaining the most binding form of oath (*ante*, § 1820).

as secures permissive, and, under modern systems, compulsory secrecy.¹ But this expedient would be deficient if also the privilege were not conceded of being silent ever afterwards as to the tenor of the vote. Thus it is that the privilege of not disclosing, in a court of justice, a formal act of expression of the witness' political opinion done at a prior time comes to be recognized as a corollary of the secrecy of the ballot.

That a privilege exists not to disclose by the witness' own testimony the tenor of his vote, has not been doubted, either under the earlier American system of permissive secrecy at the polls or under the modern Australian system of compulsory secrecy:

1868, *Christiancy, J.*, in *People v. Cicott*, 16 Mich. 263, 267, 313: "The object of this [constitutional] requirement [providing that all votes be given by ballot], when considered with reference to the history of our country and the whole theory of popular government, where suffrage is practically universal, is too plain to be misunderstood. It was to secure the entire independence of the electors, to enable them to vote according to their own individual convictions of right and duty, without the fear of giving offense or exciting the hostility of others. And with this view the right is secured to every voter of concealing from all others, or from such of them as he may choose, the nature of his vote, or for what person or party he may have voted." *Campbell, J.*: "Our whole ballot system is based upon the idea that, unless inviolable secrecy is preserved concerning every voter's action, there can be no safety against those personal or political influences which destroy freedom of choice."²

But certain discriminations are necessary:

(a) If the vote was *illegal*, the privilege is not applicable, since no protection is needed for any but those entitled as electors to cast a vote.³ Nevertheless, an actual voter would be protected by the privilege against self-crimination (*post*, § 2250) from disclosing the fact of his illegal voting;⁴ though not from disclosing the tenor of the vote, if the fact of voting were otherwise evidenced.⁵

¹ Wignore, *Australian Ballot System*, 2d ed. 50.

² To the following cases, add those in the ensuing note: *Eng.*: 1872, St. 35 & 36 Vict. c. 33, § 12, Ballot Act ("No person who has voted at an election shall, in any legal proceeding to question the election or return, be required to state for whom he has voted"); *Can.*: these are like the English statute: B. C. Rev. Ed. 1897, c. 67, § 108; *Newf. Consol. St.* 1892, c. 3, § 107; N. Sc. Rev. St. 1900, c. 3, § 82; Ont. Rev. St. 1897, c. 9, § 158; c. 233, § 200 (municipal elections); St. 1903, c. 19, § 200 (same); *U. S.*: 1887, *Dixon v. Orr*, 49 Ark. 238, 242; *Haw. Civil Laws* 1897, § 1094 ("No person who has voted at any election shall in any legal proceeding be required to state for whom he voted"); 1887, *Pedigo v. Grimes*, 113 Ind. 148, 150, 13 N. E. 700; 1895, *Com. v. Barry*, 38 Ky. 594, 33 S. W. 400; 1892, *Attorney-General v. McQuade*, 94 Mich. 439, 444, 53 N. W. 244; 1895, *Schneider v. Bray*, 23 Nev. 273, 29 Pac. 327; 1863, *People v. Pease*, 27 N. Y. 45, 71, 81 per Selden, J., *semble*, and *Denio, C. J.*; 1851, *Kneass' Case*, Pa. Com. Pl., 2 Fars. Eq. Cas. 553, 585.

³ 1896, *Eggers v. Fox*, 177 Ill. 185, 52 N. E. 269 (but the opinion carelessly fails to discriminate between the privilege against self-crimination, and that of electoral privacy); 1899, *Gill v. Shurtleff*, 183 id. 440, 56 N. E. 164; 1901, *Sorenson v. Sorenson*, 189 id. 179, 59 N. E. 535; 1887, *Pedigo v. Grimes*, 113 Ind. 148, 151, 13 N. E. 700 (but the illegality of the vote must first be shown; here the decision followed a statute, reserving the question of the constitutionality of the statute); 1899, *Tunks v. Vincent*, — Ky. —, 51 S. W. 622; 1893, *Tulloch v. Lane*, 45 La. An. 333, 341, 12 So. 506; 1868, *Christiancy, J.*, in *People v. Cicott*, 16 Mich. 283, 314; 1890, *Boyer v. Teague*, 106 N. C. 576, 623, 11 S. E. 645 (the trial judge to determine whether the vote was illegal); 1890, *State v. Kraft*, 16 Or. 550, 556, 23 Pac. 663; 1861, *Thompson v. Ewing*, 1 Brewst. 67, 100; 1895, *Vallier v. Drakke*, 7 S. D. 343, 64 N. W. 181, *semble*; 1868, *State v. Hilmantel*, 23 Wis. 423, 425.

⁴ 1868, *State v. Olin*, 23 Wis. 309, 316.

⁵ 1901, *Black v. Pate*, 130 Ala. 514, 30 So. 434; 1868, *State v. Hilmantel*, 23 Wis. 423, 425.

(b) The elector may waive this privilege, either expressly at the trial or by conduct prior thereto.⁶

(c) It has been suggested that a due regard for the purpose of secrecy requires that even *other testimony* than the voter's shall also be excluded.⁷ Theoretically such a consequence might follow; but, under the improved systems of polling-apparatus nearly everywhere now required, it is virtually impossible, except in rare instances, to identify a particular voter with his ballot; so that the question is no longer a practical one, except as concealing the use of the voter's own *hearsay statements* of the tenor of his vote; these are without the present privilege, because they represent a voluntary waiver of it (*supra*, par. (2)), and the only question can be whether they are admissible under the Hearsay rule (*ante*, § 1712).

(d) Where a statute expressly requires the ballots to be destroyed unopened, except in the case of an election-contest, the question arises whether they can be examined for any other purpose in a judicial inquiry. Here, however, the present principle is not involved, for there is no attempt to identify the ballots with a particular voter, either by asking for his own testimony or otherwise. Hence, the decision should depend solely upon the implied effect of the statutory language.⁸

(e) Where the *certificates of an election board* is questioned as to its correctness of enumeration, the question arises whether it is to be deemed conclusive or may be overturned by a recount of the ballots or the tally-lists; this involves the principle of conclusive testimony (*ante*, § 1351).

§ 2216. (7) *Personal Disgrace or Infamy*. The common law recognized in some degree a privilege against disclosing facts involving one's own disgrace or infamy. This privilege has already been examined, both in its history and its present scope, in considering the subject of impeaching the character of witnesses (*ante*, §§ 984, 986, 987); for it is necessary to dis-

⁶ 1874, North Durham Case, 3 O'M. & H. 1 (question as to a voter's party, allowable if he has "held himself out as belonging to one party"); 1880, Harwich Case, ib. 61, 64 (same); 1901, Black v. Pate, 130 Ala. 514, 30 So. 434; 1848, Christianity, J., in People v. Cicott, 16 Mich. 263, 314 (by declaring at the polls his intention to make his vote public and by openly showing it); Mich. Comp. L. 1897, § 3722 ("the ballot of no person shall be inspected or identified" without his written consent, unless he has been convicted of false swearing therein or was unqualified as a voter); 1851, Kneass' Case, Pa. Com. Pl., 2 Para. Eq. Cas. 523, 525 (careful opinion). *Contra*: 1896, Major v. Barker, 99 Ky. 306, 310, 35 S. W. 543 ("If he were permitted to so testify, he could then be subjected to a moral compulsion from his party associates; one party might obtain from willing witnesses testimony which the other party would be powerless to rebut because unable to compel a statement of the truth").

⁷ 1868, Campbell and Christianity, JJ., in People v. Cicott, 16 Mich. 263 (in the opinions partly quoted *supra*). No other sanction for

this suggestion seems to have been given. The following case perhaps belongs here: 1765, R. v. Vice-Chancellor, 3 Burr. 1647, 1662 (voting for the High Steward of Cambridge University; Wilmet, J., said that the proctor's oath of secrecy "could not defend the taker of it from giving evidence before a court of justice").

⁸ *Allowed*: 1890, Re Massey, 45 Fed. 629 (grand jury's investigation of a false return by an election officer; held that the local statutes requiring the ballots to be preserved secret, unless in case of a contested election, did not prevent their disclosure in a judicial inquiry; the local constitution and the general principle of the ballot being the foundation for this conclusion); 1892, Com. v. Ryan, 157 Mass. 403, 33 N. E. 349 (similar). *Contra*: 1892, *Ex parte* Brown, 97 Cal. 33, 31 Pac. 840 (under a statute requiring the preservation of ballots unopened for a year, and then their destruction, except only when a contest occurs as to the result of the election, the ballots cannot be examined in a criminal proceeding against an election officer; the statute having in effect made an exclusive rule of evidence).

criminate between the judge's discretionary control over the subject of the questions to be put and the witness' privilege not to answer a question allowably put. Of this privilege (in such jurisdictions as still recognize its validity) it is enough here to recall that it does not apply to facts material to the issue, and that it does not extend to matters merely tending to disgrace i.e. matters not in themselves disgraceful; and in these respects it differs from the privilege against disclosing self-criminating facts.¹

It may be added that the term "scandal," as indicating matters which a party in equity, when subjected to a bill of discovery, need not answer, is not intended to correspond to the subject of the present privilege of a witness in common-law trials; it designates, by a peculiar distortion of meaning, the privilege against self-crimination.²

§ 2217. (8) *Party-Opponent in the Civil Suit at Bar; History and Policy of the Party's Privilege.* It is a little singular that the oldest and once the most firmly established of all the privileges should be also the most obscure in its history and precise mode of origin. That the party-opponent in a jury-trial at common law was not compellable to be a witness seems unquestioned, since the beginning of recorded trials, though it is not explicitly stated until the late 1700s.³ On the other hand, that a party-opponent in chancery was compellable to answer interrogatories under oath, like any witness, is equally clear, from the beginning of systematic chancery-practice.⁴ The absence of a privilege in chancery is easily explainable; because the Chancellor merely adopted the system of the ecclesiastical Courts, in this as in so many other respects; and the ecclesiastical practice regarded as compellable the party, no less than other persons.⁵ But why was this not done in common-law trials also? Before the statute of Elizabeth, which virtually created compulsory process for witnesses in jury-trials,⁶ it is easy to see that a party-opponent was not compellable to appear; but, after that time, from the middle of the 1500s, why were not parties summoned by subpoena like other desired witnesses, as they were in chancery? It might be thought that, under the then prevailing notions, the party's resort to his own oath, being regarded as an advantage offering too easy a mode of exoneration,⁷ the first party would not care to call his opponent, and thus the question would not arise. Yet, if this were the reason, why was there such a common resort to the opponent's compulsory testimony in chancery? There

¹ The detailed points in which its operation is to be discriminated from the self-crimination privilege are noticed under the latter head (post, § 2255).

For the witness' liability to expose his body, for evidential purposes, see ante, § 2194.

² 1831, Hoamer, C. J., in *Skinner v. Judeon*, 8 Conn. 522, 523 ("The term 'scandal,' that protects a person from making answer, has a meaning limited and technical. Fraud, in the established sense of the word, is not the scandal, but this epithet is applicable to crime only. Notwithstanding the answer of the defendant, by the discovery of a private fraud, may tend to cast great reproach on his conduct and charac-

ter, still he is compellable to make answer. But to the scandal and infamy arising from crime, he is never to be accessory by being compelled to make discovery").

³ Cases cited post, § 2218.

⁴ Tothill, 71, 83, 145, 146, temp. Elis., in the end of the 1500s.

⁵ Langdell, *Summary of Equity Pleading*, § 15.

⁶ Ante, § 2190.

⁷ E.g. in 1590, a judge offers the defendant liberty to speak on oath as a notable and exceptional favor; *Udall's Trial*, 1 How. St. Tr. 1262. Compare the explanations ante, § 573.

seems to be no certain clue yet discovered to the incongruity, in popular and professional conceptions, of conceding the privilege in one set of trials and ignoring it in the other. We may suppose that in some way, not now appreciable by us, the party's appearance as a witness in jury-trials was regarded as wholly inappropriate, and that his incompetence to testify for himself, which was plainly a fundamental notion (*ante*, § 575), was somehow associated with a privilege not to be called against himself. Nevertheless, how readily the two might have been severed, even at an early date, and the common-law practice have been grafted with the chancery rule, may be seen from the circumstance that this very measure was taken in Massachusetts by the colonists, two centuries before the general reform of the law in that direction.⁶

As to the policy of such a privilege, it is amazing that there should have been so long a continuance in its recognition. The very denial of it in chancery, alongside of its recognition at common law, was an anomaly and an absurdity; and this the great commentator himself had long ago pointed out:

1768, *Sir William Blackstone, Commentaries*, III, 382: "The principal defects [of the common-law trial system] seem to be, 1, The want of a complete discovery by oath of the parties. This each of them is now entitled to have by going through the expense and circuity of a court in equity. . . . It seems the height of judicial absurdity that in the same cause between the same parties in the examination of the same facts a discovery by the oath of the parties should be permitted on one side of Westminster Hall and denied on the other; or that the judges of one and the same court should be bound by law to reject such a species of evidence if attempted on a trial at bar, but when sitting the next day as a court of equity should be obliged to hear such examination read and to found their decrees upon it. In short, within the same country, governed by the same laws, such a mode of inquiry should be universally admitted or else universally rejected."

It could hardly be doubted which rule would have to yield when such a uniformity as was here recommended should come about. The benighted doctrine of the common-law Courts could not prevail, when the force of reason and common sense was once brought to bear. Yet that force was singularly slow in being put into motion. One cause, of course, was the general inertia of the end of the 1700s in the matter of legal reform,—an inertia preserved in part, no doubt, by the general and fulsome laudation of the common law in the pages of the same learned commentator who so cautiously disapproved of this particular feature of it. During that period, whatever progress was made showed itself solely in the realm of silent judicial development of principles, and not in manly legislative abolitions. The energies of the Legislature were absorbed in war and political affairs; moreover, its constitution could have afforded small play for reformers' notions.⁷ With the exception

⁶ 1641, *Mass. Body of Liberties* (Whitmore's ed.) § 26 (every man may have help in pleading his cause, but "this shall not exempt the parties himself from answering such questions in person as the court shall think meets to demand of him").

⁷ In the latter part of the period, to be sure (1800-1825), when the efforts of Romilly, Mackintosh, Taylor, and Williams might have had practical effects, it was to Lord Eldon's intolerant opposition that this failure was directly and chiefly due. "In the history of the uni-

of Fox's Libel Act (which, however, required a contest of twenty years' duration), no substantial improvement was made by statute for a century after Lord Hardwicke's time. After Lord Mansfield's powerful genius left the Bench, in 1788, the reactionaries under Lord Kenyon and Lord Eldon maintained almost unbroken control for more than a generation. But by the Reform Bill of 1832, when the legislative constitution was renovated, room was made for the long pent-up energy of reform.⁸ In the next quarter of a century, so many statutes of improvement were enacted that the face of the law was transformed almost beyond recognition. Meanwhile the thunders of Bentham had made it certain that the rules of evidence and procedure would be among the first to feel the effect of the new forces. Some of his arguments on the present subject, which deserved to the full his ironies, are contained in the following passage:

1827, Mr. *Jeremy Bentham*, *Rationale of Judicial Evidence*, b. IX, pt. IV, c. III (Bowring's ed., vol. VII, pp. 445 ff.): "The question is, not whether a man shall be bound to commence a suit against himself; nor yet whether, without being called (the suit being commenced by any other person), he shall be bound to come and give evidence against himself; but whether, being called, and questions being put to him, he shall be bound to make answer to such questions. . . . Let us now take a more detailed observation of the mischiefs flowing from it. 1. In the first place, in so far as it is to be had, it has already been stated as being (not only upon the face of it, but by the confession of those who, notwithstanding, have been in the habit of excluding it) the very best possible sort of evidence: the evidence the most completely satisfactory. . . . 2. Under the distress produced by the exclusion put upon the best evidence, recourse has been had (through a sense of necessity, and that the wound given to justice might not be past endurance) to bad evidence of various descriptions. . . . 3. The person whose bosom is the source of self-servicing evidence (the plaintiff, or more commonly the defendant, in the cause) is one person; that person is forthcoming of course. Whatever evidence is extractible from that source, is extractible on the spot, and without addition to the expense. . . . To the list of the uses rendered to justice by this best of all evidence, corresponds the list of the mischiefs produced by the exclusion of it: promoting, in two distinguishable ways, misdecision and failure of justice; making a factitious addition to the natural and necessary quantities of delay, vexation, and expense. To these mischiefs may be added another, the opposite of which could not so conveniently have been presented under the head of uses: I speak of the poison continually infused by the exclusionary rule into the moral branch of the public mind. . . . 'Hold nothing for base and mean, — or, holding your heads high, and speaking in a tone of firmness and defiance, maintain that to practise whatever is most base and mean, is among the Englishman's most honourable privileges. Deny your own handwriting in so many words, — or, denying it in deportment as significative as words, refuse or bear to recognize it: deny your written words; and when a question is put to you by words spoken, keep your lips close, lest the truth should make its escape, and justice be done.' Such is the exhortation which the exclusionary rule never ceases to deliver to the people. Such is the lecture delivered by the judge, by every judge, as often

verse, no man has the praise of having effected so much good for his fellow-creatures as Lord Eldon has thwarted" (*England under Seven Administrations*, I, 319; quoted in *Martineau's History of England*, III, 425).

⁸ "For twenty-five long years did Lord Eldon sit in that court, surrounded with misery and sorrow, which he never held up a finger to alleviate. The widow and the orphan cried to

him, as vainly as the town-crier cries when offered a small reward for a full purse; the bankrupt of the court became the lunatic of the court; estates mouldered away, and mansions fell down; but the fees came in, and all was well. But in an instant the iron mace of Brougham shivered to atoms this house of fraud and of delay" (*Sydney Smith's Speech on the Reform Bill, 1831*, Works, ed. 1869, p. 539).

as he marks with his approbation this flagitious rule. A man who, uninvested with any coercive power, should, in the character of a moral instructor — of a schoolmaster, a lecturer, or a divine — stand up and say to his auditors, 'If a man with whom you have a difference happens to have in his hands a letter or memorandum of yours that you apprehend would make against you, deny it, — do not own it, — put him to the proof of its being yours; and if he is not able, triumph over him as if he were in the wrong'; — if it were possible that a man without power for his protection should take upon him to preach such doctrines, he would be abhorred, and not without reason, as a corrupter of the public morals. What, then, shall be said of those by whom such baseness is not simply recommended, but efficaciously rewarded? Men sow vice, and then complain of its abundance! The same hands which are every day occupied in thus planting and propagating mendacity, are as constantly lifted up against it, and employed in punishing it. . . . The only sort of person to whom it is possible (speaking of suitors) to profit by the pretended tenderness of this rule, is the knavish and immoral suitor, who, being in the wrong, and knowing himself to be in the wrong, avails himself of the inability of the adversary to fulfil the conditions thus wantonly imposed upon him by the law, — avails himself of this misfortune to obtain a triumph over justice. It is for the purpose of rewarding and encouraging the iniquity of one knave of this description, that the useless burthen above delineated is fastened upon the shoulders of perhaps a hundred suitors."*

1844, Lord Langdale, M. R., in *Flight v. Robinson*, 8 Beav. 22, 33: "According to the general rule which has always prevailed in this [chancery] court, every defendant is bound to discover all the facts within his knowledge, and to produce all documents in his possession which are material to the case of the plaintiff. However disagreeable it may be to make the disclosure, however contrary to his personal interests, however fatal to the claim upon which he may have insisted, he is required and compelled, under the most solemn sanction, to set forth all he knows, believes, or thinks in relation to the matters in question. The plaintiff being subject to the like obligation, on the requisition of the defendant in a cross bill, the greatest security which the nature of the case is supposed to admit of is afforded, for the discovery of all relevant truth, and by means of such discovery, this Court, notwithstanding its imperfect mode of examining witnesses, has, at all times, proved to be of transcendent utility in the administration of justice. It need not be observed, what risks must attend all attempts to administer justice, in cases where relevant truth is concealed, and how important it must be to diminish those risks. . . . The arguments which have been used in some late cases, seem (as was observed by the counsel for the plaintiff) to have assumed, that concealment of the truth was, under the plausible names of protection or privilege, an object which it was particularly desirable to secure, forgetting, as it would seem, that the principle upon which this Court has always acted, is to promote and compel the disclosure of the whole truth relevant to the matters in question, and that every exception requires a distinct and sufficient justification."

§ 2218. Same: (a) Testimony on the Stand; Discovery in Chancery; Statutory Changes. In the common-law courts, the party-opponent was not compellable to be a witness at the demand of the other party; this much has never been doubted.¹

But in *chancery* the plaintiff (who might be identical with a defendant in

* Compare the arguments in Chief Justice Appleton's work on Evidence, c. V, p. 69.

¹ Besides the cases cited *post*, § 2223, which assume this principle, are the following: 1779, *Cox v. Whalley*, 10 East 399, note, *semble*; 1808, *R. v. Woburn*, 10 East 395, 403 (L. C. J. Ellenborough: "It is a long-established rule of evidence that a party to the suit cannot be called

upon against his will by the opposite party to give evidence"); 1812, *Fenn v. Granger*, 3 Camp. 177; 1831, *Worrall v. Jones*, 7 Bing. 395; 1827, *Mauran v. Lamb*, 7 Cow. 174, 178. The rule was even carried so far as to entitle one co-defendant to exclude the testimony of another: 1844, *Fraser v. Laughlin*, 6 Ill. 347, 360.

some pending suit at law) was not obstructed by this privilege; by a bill of discovery he could insist on testimonial answers from his opponent:

1836, Lord Langdale, M. R., in *Storey v. Lord Lennox*, 1 Keen 341, 350: "From the mode of proceeding at common law, a man with the full knowledge of facts which would show the truth and justice of the case may, by concealing those facts within his own breast and merely for want of disclosure or evidence, succeed in recovering a demand which he knows to be satisfied or in resisting a demand which he knows to be just. This conduct is by Courts of equity considered to be against conscience; and they accordingly enable the party in danger of being oppressed by it to obtain from his adversary a discovery of the facts within his knowledge or belief by filing a proper bill for the purpose; and by the general rule the defendant to a proper bill for discovery is bound to make a complete disclosure of everything he knows or believes in relation to the matter in question."²

The subject of this right of discovery was, nevertheless, limited to the facts which bore upon the plaintiff's own case; he could not compel answers upon facts affecting solely the opponent's own case. This limitation has been already examined in considering the right to discovery before trial (*ante*, § 1856); it is enough here to repeat that there is no reason for it, as applied to compelling testimony at the trial itself, nor is it apparently perpetuated under the statutory practice of to-day.

Finally, the common-law rule was abolished, by statutes dating from the second half of the 1800s, and in its stead was granted free scope for compulsory examination of the opponent as a witness.³ A few of these statutes, indeed, particularly in the Southern States and in special classes of litigation

² There was, however, this limitation (due to nothing but a kind of perverse ingenuity), that the defendant in equity could not in turn examine the plaintiff as a witness, but must go to the formality of filing a cross-bill of his own: 1785, *Hewatson v. Tooke*, Dick. 799, per L. C. Thurlow; repudiating *Troughton v. Getley*, lb. 382 (1766).

³ Eng.: 1851, St. 14 & 15 Vict. c. 99, § 2 (parties made compellable to testify); Can.: B. C. Rev. St. 1897, c. 52, § 124; Man. Rev. St. 1902, c. 40, Rule 387; N. Br. Consol. St. 1877, c. 46, § 2; Newf. Consol. St. 1892, c. 50, Rules of Court 28; N. W. Terr. Consol. Ord. 1890, c. 21, Rules 201-225; N. Se. Rev. St. 1900, c. 163, § 35; Rules of Court 1900, Ord. 30, Rule 1; Ont. Rev. St. 1897, c. 73, §§ 4, 16; Rules of Court 1897, §§ 439-462, 481; 1898, *Fleury v. Campbell*, 18 Ont. Pr. 110 (criminal conversation; defendant not compellable to be examined for discovery, under R. S. 1897, c. 73, § 7); P. E. I. St. 1873, c. 22, § 245; U. S.: Ala. Code 1897, §§ 1794, 1850; Ariz. Rev. St. 1901, §§ 2528, 2534; Ark. Stat. 1894, § 2914; Conn. Gen. St. 1897, §§ 1060, 1099 (but no party may compel an opponent both to give discovery before trial and to testify on trial); D. C. Comp. St. 1894, c. 71, § 1; Code 1901, § 1063; Del. Rev. St. 1892, p. 797, St. Feb. 18, 1899; Fla. Rev. St. 1892, §§ 1116, 1117; Ga. Code 1896, §§ 3269, 3954; Haw. Civ. L. 1897, §§ 1396, 1397, 1414; Ill. Rev. St. 1874, c. 51, § 6; Ind. Rev. St. 1897, § 522; Ia. Const. 1857, Art. 1, § 4; Kan. Gen. St. 1897,

c. 95, § 322; Ky. C. C. P. 1893, § 606, par. 10; La. C. Pr. 1894, § 349; Me. Rev. St. 1883, c. 8, § 93; Md. Pub. Gen. L. 1888, Art. 35, § 1; Mass. Pub. St. 1882, c. 167, §§ 49-54, 77, Rev. L. 1900, c. 173, §§ 57-63, 68; Mich. Comp. L. 1897, § 10211; Circuit Court Rules of 1884, Preamble, rule 48; Minn. Comp. St. 1894, § 5655; 1900, *Strom v. R. Co.*, 81 Minn. 346, 84 N. W. 46 (statute applied); Miss. Annot. Code 1892, §§ 1738, 1762; Mo. Rev. St. 1892, §§ 4654, 892; Nev. Gen. St. 1885, § 2399; N. H. Pub. St. 1900, c. 224, § 13; 1900, *Whitcher v. Davis*, 70 N. H. 237, 46 Atl. 486 (statute applied); N. J. C. St. 1896, Evidence § 11, Practice §§ 158-160; N. J. Rev. St. 1900, c. 150, § 7 (re-enacting the terms Gen. St. Evid. § 11); N. M. Comp. L. 1897, §§ 3017, 3022; N. Y. C. C. P. 1877, § 82; N. C. Code 1883, §§ 580, 1351; N. D. Rev. 1895, §§ 5646, 5653; Ok. Rev. St. 1898, § 524; Okl. Stat. 1893, C. C. P. § 333, Rev. Stat. 1900, C. C. P. § 310; 1898, *Re Abbr.*, 7 Okl. 78, Pac. 319 (applying C. C. P. § 333); Pa. P. & Dig., Evidence § 22; 1893, *Costello v. Costello*, 191 Pa. 379, 43 Atl. 240 (abolition of the privilege applies to divorce proceedings); S. C. C. P. 1893, §§ 391, 400, Code 1902, §§ 391, 400; S. D. Stat. 1899, §§ 6484, 6491; Tex. Rev. C. Stat. 1895, §§ 2271, 2293; Vt. Stat. 1894, c. 1246; Va. Code 1897, §§ 3345, 3350, 3353, 3359; Wash. C. & Stat. 1897, §§ 6008, 6747; Wis. Stat. 1896, § 4096; Wyo. Rev. St. 1891, § 1871.

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had before that date made the opponent compellable, but not competent, as a witness;⁴ but the great majority employed a single enactment to declare him both competent and compellable. On the other hand, in a few statutes, the party was merely made competent (*ante*, § 488) without being expressly declared compellable also; but, in virtue of the constant association of the two principles in the history of the subject (*ante*, § 575) the Courts usually interpreted the statute to imply also the abolition of the privilege.⁵ To-day no doubt would probably anywhere be entertained on this point.

It may be noted that the statutory enactments are usually of two sorts, corresponding to the two purposes that were to be accomplished. One of these was the recognition of the right to compel the opponent to *testify at the trial*; this was in most jurisdictions provided in express terms. The other was the securing of the right to *discovery* of his evidence *before trial*; this was usually accomplished by authorizing the filing of written interrogatories, and thus transferred to common-law courts the chancery method of a bill of discovery. But this latter measure virtually accomplished also, at the same time, the former purpose; for the answers to these interrogatories could be put in at the trial as his admissions, without actually calling him to the stand; hence, in a few jurisdictions, this latter mode remains as the only one, and is regarded as sufficiently attaining both ends. In most jurisdictions, both modes are provided for, as they should be, by separate statutes. The various enactments as to discovery before trial have been already considered (*ante*, § 1856). In their present aspect — that of the abolition of the opponent's privilege — they raise no question;⁶ it is only as to the limits of discovery before trial that any difficulty still remains.

§ 2219. *Same*: (b) *Production of Documents*. At *common law* this same privilege of the opponent not to bear testimony extended to the documents in his possession. Unless in Lord Mansfield's time,¹ there seems to have been no suggestion of its denial.² There were, to be sure, a few classes of

⁴ *E. g.* in Missouri, by a statute of 1835; noted in *Eck v. Hatcher*, 58 Mo. 235, 239 (1874). So also a Federal statute of Dec. 17, 1849, antecedent the English enactment.

⁵ *E. g.* in Alabama, for the Code of 1867, § 2704; interpreted in *Olive v. Adams*, 50 Ala. 376 (1873).

So also the California Code and its followers; the clauses quoted *ante*, § 488, should be consulted.

⁶ A few arguable points, independent of local statutory phrases, may still be raised (though their dependence on the adopted chancery methods places them without the present purview); for example, whether discovery can be had of an *infant*: 1890, *Mayor v. Collins*, L. R. 24 Q. B. D. 361; 1890, *Redfern v. Redfern*, Prob. 139, 146; and how discovery is to be obtained from a *corporation*: 1900, *Welsbach I. G. L. Co. v. New Sunlight I. Co.*, 2 Ch. 1, 8; 1901, *Toland v. Paine F. Co.*, 179 Mass. 501, 61 N. E. 52; 1901, *Robbins v. R. Co.*, 180 id. 51, 61 N. E. 265. For a careful examination of the

practice in Massachusetts, see Mr. F. W. Grinnell's article on *Discovery in Massachusetts*, 16 Harv. L. Rev. 110 (1902).

For the privilege of a party not to disclose knowledge founded on *information from his attorney*, see *post*, § 2318.

¹ 1769, *Roe v. Harvey*, 4 Burr. 2484 (plaintiff refused to produce a deed completing his title and then in court; all the judges agreed that the refusal could be left to the jury as evidence; three of the four agreed that the plaintiff could not be compelled to produce it; Mansfield, L. C. J., declared that the Court "will force parties to produce evidence which may prove against themselves, or leave the refusal to do it, after proper notice, as a strong presumption, to the jury").

² 1800, *Habershon v. Troby*, 3 Esp. 38 (Lord Kenyon, C. J., said that a party could not be compelled to produce his books); 1830, *Boyce v. Foster*, 1 Bail. 540; 1832, *Durkee v. Leland*, 4 Vt. 612, 615.

cases in which, before trial, one might, on motion or by demand of oyer, obtain the inspection and a copy of documents held by the opponent; and these constituted genuine exceptions to the rule, in so far as they virtually compelled the opponent to furnish to the first party the means of making proof of documents by copy at the trial; nevertheless, in form, there were apparently no exceptions to the rule that the opponent was privileged to refrain from any production or disclosure of documents at the trial.³

But, in *chancery*, as with oral testimony, so with documents, this privilege was not recognized. By bill of discovery, the production of documents was there compellable, — subject, indeed, to the same limitation (*ante*, § 2218) that only such documents as helped to prove the demandant's own case could be called for. In form, moreover, this was, for common-law purposes, a real nullification of the general rule, for it not only secured an inspection and copy, or an admission, before trial, of the document's contents, but it also secured, if desired, the production of the documents at the trial itself, in the hand of a court officer.⁴

By the middle of the 1800s,⁵ statutes began to be passed, in nearly every jurisdiction, effectually annulling the common-law privilege and providing a means for compelling disclosure. These statutes, like those compelling the opponent's oral testimony (*ante*, § 2218), of which indeed they were the historical associates, either directly required production at the trial, or authorized inspection before trial, in the manner of a bill of discovery, or made both these provisions. The effect was to destroy the common-law privilege entirely, except as far as the limitations of the chancery rule for discovery were in some statutes maintained.⁶ Under the principle of these statutes,

³ In *Goldschmidt v. Marryat*, 1 Camp. 559, 562 (1808), cited *ante*, § 1858, the production was at the trial itself; but this was unusual. The history and conditions of compelling inspection before trial have been already fully examined (*ante*, § 1858), and need not be here repeated.

⁴ Langdell, Summary of Equity Pleading, § 166. The conditions of production, under a bill of discovery, have already been examined (*ante*, § 1857), and need not be here repeated. It may be noted that the privilege to withhold title-deeds, accorded to third persons (*ante*, § 2211), gave way before the right of discovery in chancery from a party-opponent: 1855, *Adams v. Lloyd*, 3 H. & N. 351, 361 ("A man's title-deed is still protected, unless it tends to prove the case of the opposite party; if it does not, it is irrelevant").

⁵ Earlier than this, in some States, e. g. in Vermont: *Durkee v. Leland* (1832), cited *supra*, note 2.

⁶ These statutes, and the questions that arise thereunder, have been already fully examined (*ante*, § 1859), and need not be again set out here. The following citations of them will suffice: *Eng.*: 1851, St. 14 & 15 Vict. c. 99, § 6; *Can.*: B. C. Rev. St. 1897, c. 52, § 122; *Man. Rev. St.* 1902, c. 40, Rules 392-398, 408-425; *N. Br. Consol. St.* 1877, c. 37, §§ 178, 179, c. 49, § 40; *Newf. Consol. St.* 1892, c. 50, Rules of Court

38; *N. W. Terr. Consol. Ord.* 1898, c. 21, Rules 191-200, 207, 208; *N. Se. Rules of Court* 1900, Ord. 30, Rules 12-22; *Ont. Rules of Court* 1897, §§ 448-452, 463, 477; *P. E. I. St.* 1873, c. 22, § 244; *St.* 1853, c. 12, §§ 1, 9; *U. S.*: *Ala. Code* 1897, § 1859; *Alaska C. C. P.* 1900, § 490 (like *Or. C. C. P.* § 521); *Ariz. Rev. St.* 1901, § 2555; *Ark. Stats.* 1894, §§ 2896-2900; *Cal. C. C. P.* 1872, § 1000; 1902, *Morehouse v. Morehouse*, 136 Cal. 332, 68 Pac. 976 (party compelled to produce documents in her control, and to answer questions as to their possession, under C. C. P. § 1000); *Colo. C. C. P.* 1891, § 355; *Annot. Stats.* § 2414; *Conn. Gen. St.* 1888, §§ 1060-1062; *Del. Rev. St.* 1893, c. 107, § 13; *D. C. Comp. St.* 1889, c. 20, §§ 30, 31; 1901, *District of Col. v. Baker-Smith*, 18 D. C. App. 574, 580 (expounding the procedure against a municipal corporation); *Fla. Rev. St.* 1892, §§ 1039, 1115; *Ga. Code* 1895, §§ 5248-5254; *Ida. Rev. St.* 1887, § 4871; *Ill. Rev. St.* 1874, c. 51, § 6; c. 110, § 20; 1894, *Lester v. People*, 150 Ill. 408, 23 N. E. 387, 37 N. E. 1004 (scope of documents producible, considered); *Ind. Rev. St.* 1897, §§ 492, 493; *Ia. Code* 1897, §§ 4654, 4655; *Kan. Gen. St.* 1897, c. 95, § 380; *La. C. Fr.* 1894, §§ 140, 473; *Mass. Pub. St.* 1892, c. 167, §§ 2, 22, 28, 49-56; *Rev. L.* 1902, c. 173, §§ 6, 23, 35, 57-63; *Mich. Comp. L.* 1897, § 10074; *Circuit Court Rules* of 1864, Post's ed., rules 40-46; *Minn. Gen. St.*

It has usually and properly been held that the simple method of subpoena *duces tecum* (which was indeed the earliest proceeding for this purpose⁷), instead of the more formal motion to produce, may be used for compelling production of documents by the opponent at the trial.⁸

There could be no question about the need for these statutes and the propriety of the reform. Every argument that was maintainable for compulsory oral disclosure (*ante*, § 2218) applied with double force to the production of writings. There might be a doubt as to the conditions for requiring the discovery of evidence before the time of the trial; that involved the principle of preventing unfair surprise and promoting speedy settlement of controversies (*ante*, § 1847). But there could be no question that the party-opponent should be placed, at the trial itself, upon the same footing with witnesses in general; for the testimonial duty to disclose all facts within one's knowledge was particularly emphatic for the very party to the controversy. The anomalous condition of the law had been vainly commented on by Mr. Justice Blackstone, two generations before any change took place:

1766, Sir William Blackstone, Commentaries, III, 382: "A second defect [in the common-law mode of trial] is of a nature somewhat similar to the first [i. e. inability to compel an opponent to take the stand] the want of a compulsive power for the production of books and papers belonging to the parties. . . . In mercantile transactions especially, the sight of the party's own books is frequently decisive; as the day-book of a trader, where the transaction was recently entered as really understood at the time, though subsequent events may tempt him to give it a different color. And as this evidence may be finally obtained and produced on a trial at law by the circuitous course of filing a bill in equity, the want of an original power for the same purposes in the Courts of law is liable to the same observations as were made on the preceding article."⁹

1894, § 5750; *Miss. Annot. C. 1892*, § 927; *Mo. Rev. St. 1899*, §§ 737-741, 4653; *Mont. C. C. P. 1898*, § 1810; *Nebr. Comp. St. 1899*, §§ 5960, 5969; *Nev. Gen. St. 1895*, § 3448; *N. J. Gen. St. 1896*, Practice §§ 137, 158; *N. M. Comp. L. 1897*, § 2685, sub-sect. 54, 120-122; *N. Y. C. C. P. 1877*, §§ 803-809; *N. C. Code 1883*, § 578; *N. D. Rev. C. 1895*, § 5644; *Okla. Rev. St. §§ 5289-5292*; *Okla. Stat. 1893*, §§ 4211, 4256, 4259; *Or. C. C. P. 1892*, § 521; *Pa. St. 1799*, Feb. 27, P. & L. Dig., Evidence § 6; *R. I. Gen. L. 1896*, c. 244, § 47; *S. C. C. C. P. 1893*, § 389; *Code 1902*, § 389; *S. D. Stat. 1899*, § 6482; *U. S. Rev. St. 1878*, § 724; *Va. Code 1887*, § 3371; *Wash. C. & Stat. 1897*, § 6047; *Wis. Stat. 1890*, § 4183; *Wyo. Rev. St. 1887*, §§ 2637-2640.

From this common-law privilege and its statutory substitutes the following principles affecting the production of documents are to be discriminated: (1) The right to inspect an opponent's documents before trial (*ante*, §§ 1857-1859); (2) the permission to use a copy, if upon the opponent's failure to produce after due notice (*ante*, §§ 1199-1210); such a notice never had any compulsory effect, but merely served as an excuse for resorting to a copy; (3) the evidential inference as to the contents, from the opponent's failure to produce (*ante*, § 291); (4) the presumption of authenticity, resulting from production by an opponent under claim of title (*ante*,

§§ 1297, 1298, 2132); (5) the penalty of excluding a document, when not produced or shown on demand (*ante*, § 1210); (6) the right to use the whole of a document, when produced on demand and inspected by the party calling for it (*ante*, § 2125).

⁷ Langdell, Summary of Equity Pleading, § 166; and *ante*, § 2300.

⁸ 1853, *Bonesteel v. Lynde*, 8 How. Pr. 226, 231 (the object of the statute was "to place a party to an action in the same plight and condition with any other witness who is not a party, in relation to giving evidence at the instance of his adversary"); 1862, *People v. Dyckman*, 24 id. 222, 225; 1876, *Smith v. McDonald*, 50 id. 519; 1872, *Murray v. Elston*, 23 N. J. Eq. 212 ("Whoever before the statute could be a witness could be compelled by a subpoena *duces tecum* to attend the trial with the required instrument . . . ; the language of the statute removes all disabilities and makes all witnesses alike"); 1891, *Edison El. L. Co. v. U. S. El. L. Co.*, 44 Fed. 294, 45 id. 55. *Undecided*: 1894, *Kirkpatrick v. Pope Mfg. Co.*, 61 Fed. 46, 49 (for actions at law). Yet, for obtaining inspection before trial (*ante*, § 1859), a motion may be the more proper proceeding, since the conditions may be different: 1863, *Woods v. DeFiganlere*, 16 Abb. Pr. 159; 1876, *Smith v. McDonald*, 50 How. Pr. 519.

⁹ Quoted *ante*, § 2317.

But this gentle criticism might almost as well never have been uttered. Nothing was done, nor even thought of being done, until Bentham's righteous indignation lashed the time-honored crudities of the ancient privilege, and stirred up the young reformers of the 1800's to aggressive action. As a part of the general movement of reform, the privilege to conceal truth by withholding documents was cut away and went by the board, along with the rest of the party's privilege. The Benthamic utterances which led to this are typified in the following passage:

1827, Mr. *Jeremy Bentham*, *Rationale of Judicial Evidence*, b. VII, c. VI (Bowring's ed. vol. VII, pp. 193 ff.): "When the article of written evidence, which the party in question stands in need of, happens to be in the hands of a party on the other side; when an instrument which a plaintiff (for example) stands in need of, happens to be in possession of the defendant, the sort of shift that has been made is truly curious. Under a rational system of procedure, the course is plain and easy: the evidence acted upon is of the best kind imaginable. Both parties being together in the presence of the judge, the plaintiff says to the defendant, 'To make out my case, I have need of such or such an instrument,' describing it: 'you have it; have the goodness to produce it.' 'Yes,' says the defendant (unless his plan be to perjure himself,) 'and here it is'; or, 'I have it not with me at present; but on such a day and hour as it shall please the judge to appoint, I will bring it hither, or send it to you at your house, or give you access to it in mine.' Under the technical system, no such meeting being to be had, no such question can at any such meeting be put. But, at the trial (viz. under the common-law, alias non-equity, system, of which jury trial makes a part,) at the trial, that is, after half a year's, or a year's, or more than a year's, factitious delay, with its vexation and expense, — then it is, that, for the first time, a chance for procuring the production of a necessary instrument may be obtained. . . . Under the name of a *notice*, a sort of requisition in writing calling upon him to exhibit it, may be, and every now and then is, delivered. Of this notice to exhibit the instrument, what is the effect? That the defendant is under any obligation to exhibit it? No such thing. To produce any such effect would require nothing less than a suit in equity; whereupon the instrument would be exhibited or not: and if exhibited, not till the end of the greatest number of years to which the defendant (having an adequate interest) has found it in his power to put off the exhibition of it. To have enabled the party thus far to obtain justice without aid from equity, would have been robbing the Lord Chancellor and the Master of the Rolls, and the swarm of subordinates of whose fees the patronage part of their emolument is composed. What then is the effect? Answer: that, after this notice, if that best evidence which is asked for be not obtainable — not obtainable, only because those on whom it depends do not choose it should be obtained, — what is deemed the next best evidence that happens to be in the plaintiff's possession is admitted. . . . Good, all this, as far as it goes, — when so it is that a man's good fortune has put into his hands any such makeshift evidence. But if not, what in that case becomes of the notice? In that case, the wrongdoer triumphs; the party who is in the right loses his right, whatever it may be; and so the matter ends."

§ 2220. *Same: (c) Corporal Exhibition.* The duty to bear witness to the truth, by whatever mode of expression may be appropriate, includes necessarily the duty to exhibit the physical body, so far as the ascertainment of the truth requires it (*ante*, § 2194). When a civil party's privilege at common law is abolished, why does he not come within this application also of the general testimonial duty, and become compellable to disclose to the tribunal such facts as are ascertainable by inspection of his body? There is

no logical escape from this consequence. The only objection of principle could be that, since the statutory changes affected in terms only the party's oral testimony and the documents possessed by him, his privilege remained as to other forms of testimony. This objection might well be answered by appealing to a liberal interpretation of the principle of these statutes, whose object, as often judicially declared,¹ was "to place a party to an action in the same plight and condition with any other witness who is not a party." But it is not even necessary to resort to this answer; for, as it happens, the common law, while maintaining the civil opponent's privilege as to documents and oral testimony, did *not* recognize it in the particular respect of corporal exhibition; so that there was here nothing to abolish. In other words, the statutes expressly abolished that only which was before then plainly established; and no argument can be drawn from the statutes' failure to mention this other form of the privilege, because in this other form it had never become established. This prior absence of a privilege is to be gathered from two or three indubitable classes of instances. The circumstance that none others are recorded proves no more than that it had never arisen otherwise for adjudication, and does not alter the fact that in the extremest sort of instance, where with some plausibility a privilege might have been claimed, it was never sanctioned, and that the Courts conceived themselves to have the power, and were ready enough to exercise it, whenever truth and justice required.

(1) The first of these instances was the writ *de ventre inspiciendo*, available to facilitate the proof of heirship, whenever a supposititious birth was to be feared; it is thus described by the fathers of the profession:

1629, Sir Edward Coke, Commentary upon Littleton, 8 b: "When a man having lands in fee simple dieth, and his wife soon after marieth againe, and faines herself with child by her former husband, in this case, though she be married, the writ *de ventre inspiciendo* doth lie for the heire. . . . [But the heire apparent during the auncestor's life cannot have this writ, for divers causes, viz.,] fourthly, the inconvenience were too great if heires apparent in the life of their auncestor should have such a writ to examine and try a man's lawful wife in such sort as the writ *de ventre inspiciendo* doth appoint; and [= for] if she should be found to be with child, or suspect, then she must be removed to a castle and there safely kept until her delivery, and so any man's wife might be taken from him against the laws of God and man."

1736, M. Bacon, Abridgment of the Law, "Bastard," A: "To prevent this doubtfulness in heira, and to hinder the wife from putting false children upon her deceased husband, the law hath provided the writ *de ventre inspiciendo* for the husband's heir; and if the wife be found with child, or suspected to be so, she must be removed to a castle and there safely kept till her delivery; and by this writ the heir may take her away from her second husband; but it lies not for the heir apparent, who hath no interest in the estate, in the life of the ancestor. This power of removing the relict of the ancestor to a castle, in case she really is or is suspected to be with child, seems only to be used where the woman still continues unmarried; for if she takes another husband, and the sheriff returns that he caused her to be searched by such women and found her to be *ensient*, the course seems to be this, viz., for the husband to enter into a recognizance that she shall not remove from the house where they then inhabit; after which a writ is to be awarded

¹ E. g. in *Bonesteel v. Lynde*, cited *ante*, § 2219, note 3.

to the sheriff to cause her to be viewed every day till her delivery, by two at least of the said women returned by him, and that three or more of them shall be present with her at her delivery."

The compulsory nature of this inspection was never doubted; and its firm place in our law is shown by the six centuries of time through which the employment of the writ persisted.²

(2) On a bill for divorce, alleging impotency as the cause, it has always been regarded as lawful and proper to compel the party-opponent to submit to inspection for ascertaining the fact:

1820, *Sir William Scott (Lord Stowell)*, in *Briggs v. Morgan*, 2 Hagg. Cons. 324, 329: "The usual mode of proof [of impotence, *i. e.* by inspection] is without question liable to strong objections on the ground of indelicacy; but it is the only effectual mode of proof, and the Court has already observed that it cannot, from feelings of delicacy alone, turn aside from it, if necessary, for such a result."

1881, *Mr. Joel Prentiss Bishop*, *Marriage and Divorce*, 6th ed., II, §§ 590, 591: "In proper cases, to aid the proofs of impotence, the Court appoints professional persons to examine the private parts of the parties and report to it whether or not they are severally capable of marriage-consummation, and whether or not the woman presents indications of her having had connection with man. It requires them to submit to such examination. The examiners are under oath, and are *quasi* officers of the tribunal for the purpose. This is termed inspection of the person. The parts concerned in this controversy being always and properly concealed from public observation, if there was no method by which inspection could be compelled, justice would in many instances fail. Therefore, in England, Scotland, France, and probably every other country where this impediment to marriage is acknowledged, the Courts have required the parties, when necessary, to submit their persons to such an examination. . . . The necessity for this proceeding is in our States precisely the same as in England whence our laws are derived. Consequently it is adapted to our situation and circumstances; and, within the established rules, it should be deemed a part of our unwritten law. . . . The result is that it is acknowledged in every State from which we have decisions, except Ohio, and it may well be deemed to be American doctrine."³

² *Eng.*: *Circa* 1260, *Bracton, De Legibus*, i. c. 6^a (the various writs set out); *Britton*, f. 125 b (the procedure expounded); *Registrum Brevium*, 4th ed., 1687, f. 227 (writ set out); 1597, *Willoughby's Case*, *Cro. Eliz.* 566, *Moore* 523 (example of a writ granted against a widow not re-married); 1625, *Theaker's Case*, *Cro. Jac.* 686 (example of a writ granted against a widow who re-married within a week); 1731, *Ex parte Ainscough*, 2 P. Wms. 591 (example of a writ against a widow not re-marrying; the writ held "to be of common right," though no strong grounds for suspecting fraud were shown); 1786, *Ex parte Bellet*, 1 Cox Ch. 297 (writ grantable equally to a devisee by will as to an heir-at-law; "where there is *eadem ratio*, there should be *eadem lex*"); 1792, *Re Brown*, *Ex parte Wallop*, 4 Bro. Ch. C. 91 (writ granted against a widow re-married; writ not demandable of right, but only "wherever the justice of the case requires it": here a hesitation, because the property was settled by will of a stranger in tail-male upon such child as the woman might have); 1845, *Re Blakemore*, 14 L. J. Ch. N. S. 336 (writ granted to persons entitled to remainder of personality-trust, on a petition sug-

gesting that the representations as to pregnancy were false); an instance of the resort to a jury of matrons occurred as late as 1879, before Mr. J. Denman; in this case he in effect directed them to accept the testimony of the expert witness: 14 *Law Journ.* 439; *U. S.*: 1689, *Anon.*, *Pa. Col. Cas.* 83 (fornication and bastardy).

³ *Accord*: *Eng.*: 1613, *Countess of Essex's Case*, 2 How. St. Tr. 785, 803 (on the Countess' libel, charging the Earl's impotency, the Court ordered an inspection of herself by a committee of midwives and matrons; which was had); 1738, *Oughton, Ordo Judiciorum*, tit. 217, p. 330; 1820, *Briggs v. Morgan*, 2 Hagg. Cons. 324, 329 (quoted *supra*); *U. S.*: 1859, *Anon.*, 35 *Ala.* 226, 228 (trial Court's discretion refusing it, affirmed); 1889, *Anon.*, 89 *Id.* 291, 7 *So.* 100 (submission to examination by plaintiff and defendant, required); 1883, *Page v. Page*, 51 *Mich.* 88, 16 *N. W.* 245 (divorce for cruelty and non-support; compulsory examination of defendant by physicians, apparently unnecessary and without authority; testimony of examiners excluded); 1898, *Devanbagh v. Devanbagh*, 5 *Paige* 554, 558 (power of ordering inspection recognised); 1841, *Newell v. Newell*, 9 *Id.* 25

(3) A person sought to be restrained as *insane* is customarily subjected to medical inspection by order of the Court;⁴ and no one has ever claimed that there was a privilege against such an inspection, or that such orders transgressed the bounds of judicial power or propriety.

(4) For sundry other purposes — for example, identification — the inspection of a civil opponent's body, or some similar expedient, has been conceded to be properly demandable, and no recognition of a privilege of exemption has been made.⁵

(5) It has remained for such a privilege to be claimed, and in a few jurisdictions to be acknowledged, in a class of cases in which, above all, there is most detriment and least service in its existence, namely, actions for *corporal injuries*. Why should all analogies fail here, and an exemption be accorded to a plaintiff seeking to conceal from the tribunal the true nature and extent of his injury? Of what little argument has ever been advanced in defence of such a privilege, the following passage is representative:

1890, *Gray, J., in Union Pacific R. Co. v. Botsford*, 141 U. S. 250, 11 Sup. 1000: "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. . . . The inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow. To compel any one, and especially a woman, to lay bare the body, or to submit it to the touch of a stranger, without lawful authority, is an indignity, an assault and a trespass; and no order or process commanding such an exposure or submission was ever known to the common law in the administration of justice between individuals, except in a very small number of cases, based upon special reasons and upon ancient practice, coming down from ruder ages, now mostly obsolete in England, and never, so far as we are aware, introduced into this country."

On such a basis of assumptions, indeed, not even Iago's conclusion was more lame and impotent. "To lay bare the body, without lawful authority," we are told, "is a trespass." But this is wholly beside the point; it is precisely *with* lawful authority, to wit, that of the Court, that the plaintiff is to be

(same); 1862, *LeBarron v. LeBarron*, 35 Vt. 364, 368 (general power to order examination, affirmed).

⁴ Cases cited *ante*, § 1160. The following statutes carry out the principle: Cal. Pol. C. § 2214 (physicians "must make a personal examination" of a person brought for commitment as insane); R. I. Gen. L. 1896, c. 82, § 17 (commissioners may have "personal examination" of alleged insane person).

So also for the determination of age: N. Y. Laws 1882, c. 340 (Court may order personal examination of child by physician to determine age); compare § 1154, *ante*.

⁵ 1866, *Lloyd v. Lloyd*, L. R. 1 P. & D. 222 (divorce, with recrimination for adultery; order made for plaintiff to attend or give her address, in order that defendant's witnesses might identify her); 1871, *Tichborne v. Lushington*, Heywood's Rep. 398 (the presence of certain marks on the plaintiff's body being important for identification, the defendant claimed the right to

have his surgeons inspect the plaintiff, alleging that "applications of this kind are granted every day in cases of railway accidents"; Chief Justice Bovill conceded the correctness of this assertion, but as the plaintiff objected merely that the application for such examination was prematurely made, the decision was reserved); 1893, *Smith v. Klug*, 62 Conn. 515, 521, 26 Atl. 1059 (plaintiff compellable to write his name, on demand of opponent, for comparison; but in trial Court's discretion). Compare the rulings for a third person as witness (*ante*, § 2194).

The following ruling does not at least go upon the ground of privilege: 1889, *Kern v. Bridewell*, 119 Ind. 226, 21 N. E. 664 (slander charging the female plaintiff with fornication, pregnancy, and abortion; order for examination of plaintiff by medical experts refused, on the ground that the publisher of such assertions is not unfairly treated by restricting him to other sources of proof).

inspected. Moreover, there can be no fair question as to the Court's authority and power;⁶ for the immemorial practice *de ventre inspiciendo* and in divorce establishes at least the existence of this power. Again, the "inviolability of the person" from trespasses is appealed to. But when were there not recognized exceptions? If an assault is committed, the person attacked may defend himself by laying hands on the assailant; in the present case the defendant is merely asking a similar liberty, by a peaceable *molliter manus imponere*, to defend himself against fraud. So also an innocent person may be arrested, restrained, and searched, in the ordinary process of the Courts, for purposes of discovering crime and preventing flight. In truth, there is no "inviolability of the person" in any absolute sense; and an appeal to it is merely false rhetoric. We are further told that there are no instances of exercising this power in civil cases, except in a few cases "coming down from ruder ages, now mostly obsolete in England, and never introduced into this country." This slur upon the inherited principles of "ruder ages" would be equally applicable to the fundamental clauses of Magna Carta and the Bill of Rights — documents, be it noted, which an illustrious Court has been known to treat, in other connections, with even over-ready respect for their antiquity.⁷ Moreover, the significance of the writ *de ventre* — if that is the "rude" expedient referred to — is simply this, that in an epoch and a country where landed rights were a paramount and constant concern in litigation, the Courts were not deterred by a false delicacy from taking such measures as common sense required for determining the truth;⁸ and the moral is that, in our modern community, where the various mechanical applications of natural force have added a thousand dangers to life and limb, and where actions for personal injuries now fill the prominent place once occupied by *formedon in reverter* and *ejectio firmæ*, the same common sense of our fathers should be invoked to apply the same expedients amid our changed conditions. One might as well have argued, after Stephenson's steam monsters had first begun to travel their iron roads, that a person who was run over by a negligent driver of the new-fangled locomotives, would have no action on the case for his injuries, because there were no precedents, forsooth, except for injuries by ox-carts and hackney-coaches. There is and will be no end to the variety of frauds invented; and it will be an ill day for justice when the Courts cease to meet new frauds by new applications of old remedies. Quite apart from the general impolicy of granting to a party the license to conceal truth by any form of refusal, there is, in this class of cases, the added consideration that corporal injuries are to-day notoriously a subject of frequent fraud and misrepresentation; so that the

⁶ This was the chief objection in the Illinois, Massachusetts, and later New York cases, cited *infra*. It seems to be the least meritorious of all.

⁷ As, for example, in *Thompson v. Utah*, 1897, 170 U. S. 343, 18 Sup. 621, where the long exploded notion, that trial by jury is sanctioned in Magna Carta, was repeated and made

a reason for holding unconstitutional a trial by less than twelve.

⁸ As for the "obsolete" date of these practices, and the suggestion that they were "never introduced" into our own country, it is sufficient to point out that the above records of precedents demonstrate the contrary.

privilege to withhold the exhibition of the alleged injury may amount in such cases to nothing less than a judicial license for fraud.

These considerations, together with the absurdity of a judicial declaration that a Court lacks the power to control those who seek for their fraud the very aid of the law itself, have weighed emphatically with most of our Courts. Subject to certain restrictions not affecting the fundamental principle, they have repudiated the existence of such a privilege, and vindicated the power of the law to enforce in this particular form the general testimonial duty of all persons without exception:

1882, *Gunnison, P. J.*, in *Hess v. R. Co.*, 7 Pa. Co. Ct. 565, 566 (the plaintiff complained of an injury of the spine; and the defendant asked for an order of physical examination by means of electrical tests, etc.): "To grant the order prayed for is but to apply the principle of allowing the inspection of writings, fully recognized in this State, to another species of evidence. . . . The object of a trial in Court is that substantial justice may be done between the litigants. If a defendant is denied the reasonable opportunity of testing the truth of the plaintiff's allegations, who alleges an injury which can only be discovered upon an examination by experts, Courts of justice may be applied to and relied upon to assist in fraudulent and unjust recoveries upon the testimony of plaintiffs and of witnesses of their own selection, whose only knowledge may be derived from declarations made by the plaintiffs for the purpose of manufacturing evidence in their own favor. Impartial justice could not be expected in such cases at the hands of juries who were not permitted to know the truth and whose sympathies were aroused by the recitation of sufferings which could not be controverted. To permit such a practice would be to encourage perjury and properly subject Courts of justice to public contempt. On the other hand, if the plaintiff's claim is meritorious, if he has sustained the injuries he complains of, he has nothing to fear from the most searching examination. His case will only be strengthened by it."

1877, *Beck, J.*, in *Schroeder v. R. Co.*, 47 Ia. 375, 379: "Whoever is a party to an action in a Court, whether a natural person or a corporation, has a right to demand therein the administration of exact justice. This right can only be secured and fully respected by obtaining the exact and full truth touching all matters in issue in the action. If truth be hidden, injustice will be done. The right of the suitor, then, to demand the whole truth is unquestioned; it is the correlative of the right to exact justice. . . . To our minds the proposition is plain that a proper examination by learned and skilful physicians and surgeons would have opened a road by which the cause could have been conducted nearer to exact justice than by any other way. The plaintiff, as it were, had under his own control testimony which would have revealed the truth more clearly than any other that could have been introduced. The cause of truth, the right administration of the law, demand that he should have produced it. . . . It is said that the examination would have subjected him to danger of his life, pain of body, and indignity to his person. The reply to this is that it should not; and the Court should have been careful to so order and direct. . . . As to the indignity to which an examination would have subjected him, as urged by counsel, it is probably more imaginary than real. An examination of the person is not so regarded when made for the purpose of administering remedies; those who effect insurance upon their lives, pensioners for disability incurred in the military service of the country, soldiers and sailors enlisting in the army and navy, all are subjected to rigid examinations of their bodies; and it is never esteemed a dishonor or indignity. . . . If for this purpose [to show the nature of the injury] the plaintiff may exhibit his injuries, we see no reason why he may not, in a proper case and under like circumstances, be required to do the same thing for a like purpose upon the request of the other party."

1890, *Gordon, C. J.*, in *Leve v. R. Co.*, 21 Wash. 118, 57 Pac. 807: "It is said that is abhorrent to the principles of liberty to compel a party to submit to such an examination; that it invades the inviolability of the person, is an indignity involving an assault and a trespass, and an impertinence to which a modest woman would not submit. Courts should not sacrifice justice to notions of delicacy, and knowledge of the truth is essential to justice. The attainment of justice in the courts is of far greater importance than any merely personal consideration. . . . It is said by the majority in *H. Co. v. Botsford* that the reason for the exercise of such an authority in divorce actions is 'the interest which the public as well as the parties have in upholding or dissolving the marriage state.' But will it be said that the public has no interest in the attainment of justice between individuals? The admission that the Court has power to make the order whenever it is deemed requisite to ascertain the fact of incapacity in a divorce action seems to us an argument in favor of the existence of the power to make such an order in the present case. It exists by implication, and may be exercised in either case, whenever the demands of justice require it. Actions of this character have, in recent years, become so numerous that the question is of far greater importance than it could possibly have been twenty-five years ago, and it is not surprising that most of the cases in which the question has arisen or is discussed at all are of recent origin. In our State, counties, cities, and other municipal corporations are liable for negligence resulting in injury to the person, to the same extent as private corporations and individuals; and it becomes of the utmost importance that the question be determined with due regard for the public welfare."

1890, *Mitchell, J.*, in *Wanek v. Winona*, 78 Minn. 98, 90 N. W. 851: "[The trial Court has power] to order such an inspection, and to require the plaintiff to submit to it under the penalty of having his action dismissed in case he refuses to do so. We are aware that there are some eminent authorities to the contrary, but, with all due deference to them, we cannot avoid thinking that they base their conclusion upon a fallacious and somewhat sentimental line of argument as to the inviolability and sacredness of a man's own person, and his right to its possession and control free from all restraint or interference of others. This, rightly understood, is all true, but his right to the possession and control of his person is no more sacred than the cause of justice. When a person appeals to the State for justice, tendering an issue as to his own physical condition, he impliedly consents in advance to the doing justice to the other party, and to make any disclosure which is necessary to be made in order that justice may be done. No one claims that he can be compelled to submit to such an examination. But he must either submit to it, or have his action dismissed. Any other rule in these personal injury cases would often result in an entire denial of justice to the defendant, and leave him wholly at the mercy of the plaintiff's witnesses. In very many cases the actual nature and extent of the injuries can only be ascertained by a physical examination of the person of the injured party. Such actions were formerly very infrequent, but of late years they constitute one of the largest branches of legal industry, and are not infrequently attempted to be sustained by malingering on the part of the plaintiff, false testimony, or the very unreliable speculations of so-called 'medical experts.' To allow the plaintiff in such cases, if he sees fit to display his injuries to the jury, to call in as many friendly physicians as he pleases, and have them examine his person, and then produce them as expert witnesses on the trial, but at the same time deny to the defendant the right in any case to have a physical examination of plaintiff's person, and leave him wholly at the mercy of such witnesses as the plaintiff sees fit to call, constitutes a denial of justice too gross, in our judgment, to be tolerated for one moment."

* The cases and statutes are as follows: *England*: 1853, Rules of Court, Order 50, Rules 3-5 (quoted *ante*, § 1163); 1868, St. 31 & 32 Vict. c. 119, § 26, Railway Act ("An order may be made, directing that a person injured

by a railway accident be examined by a duly qualified medical practitioner, not being a witness on either side"); St. 1897, 60 & 61 Vict. c. 37, first schedule, § 3 (actions for compensation by an employee under this Act are to be

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§ 2110-2123] PARTY-OPPONENT; BODILY EXPOSURE

§ 2120

The exercise of this power should no doubt be subject to certain restric-
tions, on the principle (*ante*, § 2192) that the testimonial duty should not be

suspended if the claimant refuses on demand to submit to a medical examination; *Jama* (Unborn v. Vickers, 2 Q. B. 2 (St. 1897 applied); *Chenard*, 1891, *Rally v. London*, 14 Ont. Pr. 171 (order for inspection of the plaintiff, a woman, by the defendant's surgeons, refused, on grounds similar to those in *U. S. v. Boudford*; yet "there may no doubt be cases in which, upon the ground of plain and palpable fraud," the trial might be postponed until the plaintiff consented); 1891, *Ontario* 88, 84 Vict. c. 11 (con- sulting upon the preceding decision: "In any action brought to recover damages or other compensation for or in respect of bodily injury sustained by any person, a judge of the court wherein the action is pending, or any person who by consent of parties or otherwise has power to fix the amount of such damages - compensation, may order that the person in respect of whose injury, damage or compensa- tion is sought, shall submit to be examined by a duly qualified medical practitioner, who is not a witness on either side, and may make such order representing such examination, and the costs thereof, as he may think fit; provided always that the medical practitioner named in such an order shall be selected by the judge making the order, and provided, moreover, that such medical practitioner may afterward be a witness on the trial of any such action unless the judge before whom the action is tried shall otherwise direct"); 1895, *Clouse v. Coleman*, 16 Ont. Pr. 541 (statute applied; the plaintiff held not compellable to answer questions put by the medical examiner at the time of inspection, but only to submit to inspection); Ont. Rules of Court 1897, § 462 (in actions for "bodily injury," the Court may order the claimant to "submit to be examined by a duly qualified medical practitioner who is not a witness on either side," making such order as seems fit; the medical man, to be selected by the judge, may afterwards be called to testify, unless the trial-judge otherwise directs).

United States; *Alabama*; 1889, *McGuff v. State*, 58 Ala. 147, 152, 7 So. 35 (cases in other States noted; "the authority and soundness of these cases need not be challenged"; said *obiter*); 1890, *Alabama* G. S. R. Co. v. Hill, 90 id. 71, 8 So. 90 (personal injuries by nervous shock; order for examination of plaintiff by reputable disinterested physician, granted; the trial Court having a discretion to do so when the ends of justice require the disclosure or more certain ascertainment of facts which can only be brought to light or fully elucidated by such an examination, and when it can be made without danger to life or health and without serious pain; this phrasing is often quoted by other Courts); 1891, *Alabama* G. S. R. Co. v. Hill, 93 id. 514, 9 So. 723 (prior ruling affirmed; the personnel of the experts appointed is in the trial Court's discretion); 1893, *King v. State*, 100 id. 85, 14 So. 878, *semble* (plaintiff in civil cases, and injured witness in criminal cases, compellable to exhibit injury to the jury, where neces-

sary and not indecent); *Arkansas*; 1885, *Sibley v. Smith*, 46 Ark. 275 (internal injuries; order for examination of plaintiff by experts chosen in equal numbers by both sides, granted; the examination is of right, but the trial Court may in discretion refuse it if other expert testimony exists); 1895, *St. Louis* R. W. R. Co. v. Dob- bins, 60 id. 425, 30 S. W. 287 (preceding case approved); *Delaware*; 1899, *Mills v. R. Co.*, 1 Marv. (Super.) 366, 40 Atl. 1114 (injury to a leg while on the highway; plaintiff not com- pellable to exhibit his leg so that a physician testifying could explain the injury); *Florida*; *St. 1899*, c. 4719, § 1 (in actions for personal injuries "it shall be discretionary with the trial Court, upon motion of the defendant, to require the injured party, if living, either before or at the time of the trial of the cause, to submit to such physical examination of his or her person as shall reasonably be sufficient to determine physical condition at the time of trial and the nature and extent of the alleged injuries"); § 2 ("the physical examination provided for in § 1 of this Act shall be made by a phy- sician to be named by the Court, in the presence of one or more physicians or attend- ants of the injured party, if the same desire to be present"); *Georgia*; 1890, *Richmond & D. R. Co. v. Childress*, 53 Ga. 719, 9 S. E. 602 (injuries in the chest; order for examination by physicians appointed by the Court, grantable in the discretion of the trial Court; generally, a request should be made of the plaintiff before trial); 1896, *Savannah*, F. & W. R. Co. v. Wain- wright, 99 id. 255, 25 S. E. 632 (order refused, because not requested till too late); 1900, *Bag- well v. R. Co.*, 109 id. 611, 34 S. E. 1018 (action by a father for loss of a minor daughter's ser- vices; her refusal after majority to submit to a physical examination, held not sufficient cause for dismissing the suit); *Illinois*; 1882, *Parker v. Enslow*, 108 Ill. 272, 279 (action on a note for an injury to the eyes by explosion of powder substituted for tobacco in the plaintiff's pipe; order for examination of the eyes by a physician in the jury's presence, refused, because of the supposed lack of power); 1887, *Chicago & E. R. Co. v. Holland*, 122 id. 461, 466, 15 N. E. 145 (personal injuries; refusal of an order for an examination by two named physicians, held not a material error, since the examination was later consented to); 1891, *St. Louis Bridge Co. v. Miller*, 139 id. 465, 471, 28 N. E. 1091 (injury to the nervous system, kidneys, etc.; order for examination by medical experts, refused, be- cause the necessity was not shown; general principle as to power to make the order, left undecided; no precedent cited); 1892, *Joliet* S. R. Co. v. Caul, 143 id. 177, 28 N. E. 389 (no power to compel submission to examination by a physician; here it was not even claimed to be necessary); 1893, *Peoria*, D. & E. R. Co. v. Rice, 144 id. 237, 33 N. E. 951 (exhibition of an injured member to medical experts, not com- pelable; general principle distinctly reappraised); *Indiana*; 1889, *Kern v. Bridwell*, 119 Ind. 275,

enforced any further than is necessary with relation to the ends of truth. Of such restrictions, the following seem to be those recognized by judicial

31 N. E. 664 (slander by charging the plaintiff with unchastity and abortion; the trial Court's refusal to order a medical inspection of the plaintiff, held proper, as against a defendant not able to prove the truth of his statement by other evidence); 1889, *Hess v. Lowrey*, 122 id. 225, 23 N. E. 156 (malpractice by a physician; order for examination of the plaintiff by the defendant's experts, refused, the application being too late and the plaintiff consenting to an examination in the presence of experts on both sides or of the jury; the opinion acknowledging the trial Court's power and discretion to make the order); 1891, *Terre Haute & I. R. Co. v. Brunner*, 128 id. 542, 553, 26 N. E. 178 (injury to the lungs; order for examination by medical experts, on a tardy application, held properly refused in discretion); 1891, *Pennsylvania Co. v. Newmeyer*, 129 id. 401, 409, 28 N. E. 860 (injury by a railroad accident; order for examination of the plaintiff by surgeons appointed by the Court, refused; the power to order it, independently of statute, expressly denied); 1901, *South Bend v. Turner*, 156 id. 418, 60 N. E. 271 (examination held improperly refused on the facts); 1903, *Aspy v. Botkins*, 160 id. 170, 66 N. E. 462 (inspection of a knee in court, held not improperly refused on the facts); *Iowa*: 1877, *Schroeder v. R. Co.*, 47 Ia. 375, 376 (injury to nerves, bowels, etc.; order for examination by physicians and surgeons; defendant is not entitled as of right, but the trial Court has discretionary power to order it; quoted *supra*; this case has been the leading one against the privilege); 1896, *Hall v. Manson*, 99 id. 698, 66 N. W. 922 (injury to the ankle; the testimony being conflicting, a measurement by experts in the presence of the jury was held properly demandable by the opponent; such compulsory examination not being invariably demandable, but only according as it may be useful and important; Robinson, J., dissenting, on the ground that the trial Court's refusal to order an examination was on the facts not an abuse of discretion); *Kansas*: 1883, *Atchison T. & S. F. R. Co. v. Thul*, 29 Kan. 466, 468 (personal injuries; order for inspection by a medical expert of the opponent, grantable; the trial Court to exercise discretion); 1896, *Southern K. R. Co. v. Michaels*, 57 id. 474, 46 Pac. 938 (an examination tardily applied for, held not improperly refused in the trial Court's discretion); 1901, *Ottawa v. Gilliland*, 63 id. 165, 65 Pac. 252 (Court may in discretion order examination by physicians appointed by Court; good opinion by Greene, J.); *Kentucky*: 1898, *Belt E. L. Co. v. Allen*, 102 Ky. 551, 44 S. W. 89 (action for personal injuries; plaintiff may be compelled to submit to examination; "the conclusions which the various Courts and some of the text writers have reached are these. (1) That trial courts have the power to order surgical examination by experts of the person of a plaintiff who is seeking to recover for personal injury; (2) that the defendant has no absolute right to have an order made to that end, but that a motion there-

for is addressed to the sound discretion of the Court; (3) that the exercise of that discretion will be reviewed on appeal, and corrected in case of abuse; (4) that the examination should be ordered and had under the direction and control of the Court, whenever it fairly appears that the ends of justice require the disclosure or more certain ascertainment of facts which can only be brought to light or fully elucidated by such an examination, and that the examination may be made without danger to the plaintiff's life or health, and without the infliction of serious pain"); 1898, *Belle of N. D. Co. v. Riggs*, 104 id. 1, 45 S. W. 99 (trial Court's discretion in refusing an examination, sustained); 1900, *Illinois C. R. Co. v. Clark*, — id. —, 55 S. W. 699 (examination held not improperly refused in trial Court's discretion); 1902, *South Covington & C. S. R. Co. v. Stroh*, — id. —, 66 S. W. 177 (examination held inadmissible on the ground of an informality of procedure); 1903, *Louisville R. Co. v. Hartlege*, — id. —, 74 S. W. 742 (trial Court's refusal in discretion, held not improper); *Massachusetts*: 1900, *Stack v. R. Co.*, 177 Mass. 155, 58 N. E. 686 (corporal injury; Court has no power to compel submission to inspection by an opposing expert witness; "we put our decisions not upon the impolicy of admitting such a power, but on the ground that it would be too great a step of judicial legislation to be justified by the necessities of the case"); *Michigan*: 1893, *Graves v. Battle Creek*, 95 Mich. 266, 268, 54 N. W. 757 (plaintiff's injured arm compelled to be exhibited to a physician in the presence of the jury; compulsion not proper, in the trial Court's discretion, where no necessity exists, or where it would give no material aid, or where it would be cumulative only, or where delicacy would forbid); 1895, *Strudgson v. Sand Beach*, 107 id. 496, 65 N. W. 616 (where the use of anesthetics for the examination would be necessary, to order it would be an abuse of discretion); *Minnesota*: 1885, *Hatfield v. R. Co.*, 33 Minn. 190, 22 N. W. 176 (injury said to have rendered the plaintiff lame; order by the Court for the plaintiff to walk across the room, granted; general principle of inspection, in trial Court's discretion, apparently conceded); 1899, *Wittenberg v. Onsgard*, 78 id. 342, 81 N. W. 14 (submission to the X-ray photographic process, held not compellable, "until it is so well established as a fact in science that the process is harmless that the Courts will take judicial notice of it"); 1899, *Wanek v. Winona*, 78 id. 98, 80 N. W. 851 (in the discretion of the trial Court, physical examination may be ordered, upon reasonable application, and under proper safeguards; quoted *supra*); 1901, *Aske v. R. Co.*, 83 id. 197, 85 N. W. 1011 (approving *Wanek v. Winona*); *Missouri*: 1873, *Loyd v. R. Co.*, 53 Mo. 509, 512, 515 (personal injuries; order for examination by two physicians and surgeons, refused, as "unknown to our practice and to the law," and not in the Court's power); 1885, *Shepard v. R. Co.*, 85 id. 629, 632 (spinal injuries; order asked for examination by physicians and surgeons, selected one-

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§§ 2210-2223] PARTY-OPPONENT; BODILY EXPOSURE.

§ 2220

authority: (a) The exhibition of the body need not be directly to the tri-
bunal, first, because the jury could often not comprehend the appearances

half by each party, these to choose another if they desire; the power held to exist, the trial Court's discretion to control; here held unneces- sary, as the plaintiff had offered to consent to an examination by one person); 1887, *Sidekum v. R. Co.*, 93 id. 400, 463, 4 S. W. 701 (personal injuries; order grantable in discretion of the trial Court); 1888, *Owens v. R. Co.*, 95 id. 169, 177, 8 S. W. 350 (same); 1894, *Haynes v. Tren- ton*, 123 id. 326, 335, 27 S. W. 622 (the plaintiff, having voluntarily exhibited his injured leg to the jury, was held compellable to submit to ex- amination by the defendant's expert witnesses); 1897, *Fullerton v. Fordyce*, 144 id. 519, 44 S. W. 1033 (personal injuries; order of medical inspec- tion granted, and no objection raised); *Nebraska*: 1864, *Sioux C. & P. R. Co. v. Finlayson*, 16 Nebr. 578, 588, 20 N. W. 860 (personal injuries; order for inspection by medical experts of the opponent, not granted, because not needed on the facts; general principle undecided); 1885, *Stuart v. Havens*, 17 id. 211, 214, 22 N. W. 419 (personal injuries; order for inspection by med- ical experts of the opponent, refused, because the proposed inspectors were not to be selected by the Court); 1894, *Ellsworth v. Fairbury*, 41 id. 881, 60 N. W. 336 (order appointing a board of physicians to examine the plaintiff at his house, held improperly made at chambers; whether a general common-law power exists, not decided; but "the weight of authority in this country fully sustains the power"); 1895, *Chadron v. Glover*, 43 id. 732, 62 N. W. 63 (un- decided; but the application for an order must be made before trial); *New Jersey*: 1890, *Rice v. Rice*, 47 N. J. Eq. 559, 21 Atl. 286 (divorce; the defendant in chancery was held not compell- able at the master's order to remove the veil from her face so as to be identified by a witness; but the ruling was based on the limited function of a master under the local statute; conceding that the possession of such a power by "every court of judicature as an indispensable attribute . . . would not seem in any degree question- able"); St. 1896, c. 202 ("On or before the trial of any action brought to recover damages for injury to the person, the Court before whom such action is pending may from time to time on application of any party therein order and direct an examination of the person injured as to the injury complained of by a competent phys- ician or physicians, surgeon or surgeons, in order to qualify the person or persons making such examination to testify in the said cause as to the nature, extent, and probable duration of the injury complained of; and the Court may in such order direct and determine the time and place of such examination; provided this act shall not be construed to prevent any other per- son or physician from being called and exam- ined as a witness as heretofore"); 1899, *Mc- Govern v. Hope*, 63 N. J. L. 76, 42 Atl. 830 (statute applied, and held constitutional; com- mon-law power to order examination impliedly sustained); St. 1900, c. 180, § 19 (re-enacts St. 1896, *supra*); *New York*: 1868, *Walsh v. Sayre*,

52 How. Pr. 334 (Superior Court, malpractice by a surgeon; order for the plaintiff to submit to inspection by the defendant and skilful sur- geons selected by him, granted, on the principle of the power of compelling discovery, as given to Courts of common law; this case was for some time a leading one on the subject); 1865, *Beckwith v. R. Co.*, 64 Barb. 299, 307 (Supreme Court; right to inspection affirmed); 1880, *Shaw v. Van Rensselaer*, 60 How. Pr. 143 (Common Pleas Court; *Walsh v. Sayre* ap- proved); 1883, *Roberts v. R. Co.*, 29 Hun 154 (Supreme Court; order for inspection and ex- amination by questions, refused; *Walsh v. Sayre* disapproved); 1884, *Neuman v. R. Co.*, 18 Jones & Sp. 412 (Superior Court; order for inspection refused); 1889, *McSwyny v. R. Co.*, 27 N. Y. St. R. 363, 367, 7 N. Y. Suppl. 456 (Supreme Court; order for inspection, refused); 1891, *McQuigan v. R. Co.*, 129 N. Y. 50, 29 N. E. 235 (Court of Appeals; order for inspection by surgeons ap- pointed by the Court, refused, as not being within the power of the Court apart from statute); Laws 1893, c. 721, amending C. C. P. 1877, § 873 (in actions for personal injury, the Court may order a physical examination of the plain- tiff before trial by one or more physicians or surgeons designated by the Court, under such restrictions as seem proper; where the defendant claims ignorance of the nature of the injury, the examination is a matter of right; if the plaintiff is a female, the examiners are to be of her sex); 1894, *Lyon v. R. Co.*, 142 N. Y. 298, 37 N. E. 113 (under the statute, the physical examination must always be incidental to an oral examina- tion taken by order); 1899, *Cole v. Fall Brook C. Co.*, 159 id. 59, 53 N. E. 670 (common-law rule of *McQuigan v. R. Co.* affirmed for a case arising before the statute; a refusal to submit to examination does not authorize the Court to strike out the testimony of the plaintiff's wit- nesses; whether plaintiff could be compelled to step upon a model, held to be in the trial Court's discretion); *North Dakota*: 1903, *Brown v. Chi- cago M. & St. P. R. Co.*, — N. D. — , 95 N. W. 153 (personal injuries; medical examination of the plaintiff, held improperly refused; good opinion by *Cochrane, J.*); *Ohio*: 1881, *Miami & M. T. Co. v. Bailly*, 37 Oh. St. 104, 107 (order for inspection by a medical expert of the opponent, held not improperly refused on the facts; the power to make the order, affirmed, but the appli- cation must come seasonably); *Pennsylvania*: 1893, *Dimenstein v. Richardson*, 34 W. N. C. 395 (good opinion by *Biddle, J.*, citing previous similar rulings in the lower Courts of *Pennsyl- vania*; compulsory examination held proper); 1892, *Hess v. R. Co.*, 7 Pa. Co. Ct. 565, 567 (Gunnison, P. J.: "Compliance with such an order has sometimes been enforced by dismissing the plaintiff's case entirely, upon his refusal to comply; and it has been said that the refusal is a contempt of Court; . . . [but] it is sufficient, to ensure that justice be done, that the Court refuse to try the case until a compliance is had with the order"; a form of order is given here;

without expert explanation, and, secondly, because the public exposure might be unnecessarily embarrassing. Accordingly, the exhibition is usually ordered to be made before *expert medical witnesses*. These are preferably to be appointed by the Court. Nevertheless, if there has been other testimony by experts who speak from inspection and who appear as partisans of the plaintiff, it may be fair to authorize similar inspection by experts called for the defendant; the trial Court's discretion should determine. But, in any case, an exhibition directly to the judge and the jury may properly be ordered, if neither of the two considerations above mentioned are deemed by the trial Court to prevent. (b) The exhibition need not be ordered at all, if in the trial Court's opinion *no sufficiently valuable evidence* is to be expected from it, having regard to the kind of injury involved, the amount of other evidence, and the inconvenience, shame,¹⁰ or risk to health that may be involved. Nevertheless, this refusal should not be decided upon without extreme caution, for it is seldom possible, even for the opponent, to know beforehand how valuable the results of the inspection may be; and the presumption should always be against a refusal on this ground. (c) The party demanding inspection may fairly be required to give *prior notice*, in order that convenient arrangements may be made and a due selection of expert examiners be feasible. (d) If the plaintiff

the opinion is quoted *supra*); *South Carolina*: 1901, *Easler v. R. Co.* 60 S. C. 117, 38 S. E. 258 (physical examination of the plaintiff refused, because of no statutory power to order it); *Tennessee*: 1900, *Arkansas River P. Co. v. Hobbs*, 105 Tenn. 29, 56 S. W. 278 (not decided); *Texas*: 1885, *International & G. N. R. Co. v. Underwood*, 64 Tex. 463, 466 (order for inspection by three disinterested surgeons and physicians appointed by the Court, not granted, because an inspection had been submitted to; general question reserved); 1898, *Missouri P. R. Co. v. Johnson*, 72 id. 95, 101, 10 S. W. 325 (order for examination by the opponent's physician, the plaintiff refusing to submit for him, but consenting to submit to a joint examination by his own and any other physician, not granted on these facts; general question reserved); 1899, *Gulf C. & S. F. R. Co. v. Norfleet*, 78 id. 321, 324, 14 S. W. 703 (order for inspection by physicians appointed by the Court, refused, since the plaintiff did submit to an examination in court; general question reserved); 1898, *Chicago R. I. & T. R. Co. v. Langston*, 19 Civ. App. 562, 47 S. W. 1027, 48 S. W. 510 (a plaintiff who has exhibited his limb to the jury may be compelled to submit it to inspection by defendant's expert witness); 1899, *Chicago R. I. & T. R. Co. v. Langston*, 22 Tex. 709, 50 S. W. 574, 51 id. 331 (defendant is entitled to inspection by experts selected by himself, the plaintiff having exhibited his injuries and offered medical testimony about them); 1903, *Austin & N. W. R. Co. v. Cluck*, — Civ. App. —, 73 S. W. 568 (*R. Co. v. Botsford*, U. S. followed); 1903, *Gulf C. & S. F. R. Co. v. Brown*, — id. —, 75 S. W. 807 (same); *United States*: 1890, *Union Pacific R. Co. v. Botsford*, 141 U. S. 250, 11 Sup. 1000 (action for injuries by concussion of the brain, etc.; order requiring the plaintiff to submit to an examination in a proper manner,

the defendant alleging that he had no other evidence of the plaintiff's condition, refused; the plaintiff's person is to be maintained inviolate, and no inspection can be compelled; the precedents of impotence and *de ventre* conceded, but treated as obsolete or not based on general principle; quoted *supra*); 1897, *Illinois Cent. R. Co. v. Griffin*, 25 C. C. A. 413, 80 Fed. 278 (rule in the *Botsford* case, applied); 1899, *Camden & S. R. Co. v. Stetson*, 177 U. S. 172, 20 Sup. 617 (*Botsford* Case approved; but here the New Jersey law allowing compulsory examination was held applicable to a Federal trial there); *Vermont*: 1896, *Bagley v. Mason*, 60 Vt. 175, 37 Atl. 285 (order refused, because not asked for till after the evidence was closed); *Washington*: 1899, *Lane v. R. Co.*, 21 Wash. 119, 57 Pac. 367 (examination by experts appointed by the Court, in trial Court's discretion, may be ordered; quoted *supra*); 1901, *Myrberg v. Baltimore & S. M. & R. Co.*, 25 id. 364, 65 Pac. 539 (examination not ordered, because not seasonably asked for); *Wisconsin*: 1884, *White v. R. Co.*, 61 Wis. 536, 540, 21 N. W. 524 (order for inspection by medical experts of the opponent, granted; general power affirmed); 1898, *O'Brien v. LaCrosse*, 99 id. 421, 75 N. W. 81 (examination cannot be required as of right, but is within the trial Court's discretion; here, a refusal to order an examination of the urine and bladder by catheter-insertion was sustained); 1899, *Boelter v. Ross Lumber Co.*, 103 id. 324, 79 N. W. 243 (plaintiff had submitted to one examination by X-ray process, and had been accidentally burned; held, no error in not compelling a second similar examination).

Distinguish the question whether a plaintiff may voluntarily exhibit his injury (*ante*, § 1158).

¹⁰ The so-called "indecent" of the exhibition is of itself no obstacle (*ante*, § 2160).

refuses to submit to the examination, the usual process of contempt appropriate for a recalcitrant witness may be employed.¹¹ But a simpler and no less effective expedient is to order the suit dismissed; for this sufficiently prevents the party from reaping any benefit from his contumacy.¹² Furthermore, if the Court takes neither of these measures (although no Court ought for a moment to overlook in such a way so flagrant a contempt), the usual inference (*ante*, §§ 289, 291) may be advanced by counsel and drawn by the jury, from the failure to produce this evidence in the plaintiff's power, that the defendant's allegations about it are true.¹³

Under some such limitations as these, the compulsory exhibition of the party's body will now be ordered in the greater number of jurisdictions. Had it not been for the singular notions of judicial impotence early advanced in New York, and the prestige of the Court whose majority pronounced the opinion in *U. S. v. Botsford*, there would perhaps to-day have been a unanimous concurrence in this doctrine.

§ 2221. *Same*: (d) *Inspection of Premises and Chattels*. The testimonial duty for witnesses in general requires disclosure of facts in any and every feasible form, including such evidence as is available through inspection of the witness' premises and chattels, either by the tribunal itself or by other witnesses under order of the Court (*ante*, § 2194). There is no reason why a party should be privileged more than other persons in this respect. Not only, as in the case of corporal exhibition (*ante*, § 2220), is the absence of such a privilege deducible by implication from the statutes making parties compellable generally; but also it may be maintained (as in the case of corporal exhibition) that no privilege in this respect was ever established at common law:

1867, *Baldwin, J., in Thornburgh v. Savage M. Co.*, 7 Morris Min. R. 667, 680: "Ought a Court of equity, in a mining case, when it has been convinced of the importance thereof for the purposes of the trial, to compel an inspection and survey of the works of the parties, and admittance thereto by means of the appliances in use at the mine? All the analogies of equity jurisprudence favor the affirmative of this proposition. The very great powers with which a Court of chancery is clothed were given it to enable it to carry out the administration of nicer and more perfect justice than is attainable in a court of law. That a Court of equity, having jurisdiction of the subject-matter of the action, has the power to enforce an order of this kind, will not be denied. And the propriety of exercising that power would seem to be clear, indeed, in a case where, without it, the trial would be a silly farce. Take, as an illustration, the case at bar. It is notorious that the facts by which this controversy must be determined cannot be discovered except by an inspection of works in the possession of the defendant, accessible only by means of a deep shaft and machinery operated by it. It would be a denial of justice, and utterly subver-

¹¹ Sanctioned in *Schroeder v. R. Co., Ia.*, *supra*.

¹² Sanctioned in *Schroeder v. R. Co., Ia.*, *Shepard v. R. Co., Mo.*, *Miami & M. T. Co. v. Baily, Oh.*, *Hess v. R. Co., Pa.*, *supra*. It may be added that the postponement of the trial, until the plaintiff consents (as suggested in one case cited *supra*) is a half-hearted method which is wholly indefensible. If the plaintiff is really privileged, it is a denial of justice to postpone

the trial; if he is not, the Court has just as much power to dismiss the suit as to postpone it.

¹³ 1901, *B. v. B.*, Prob. 39 (nullity of marriage); 1880, *Union Pacific R. Co. v. Botsford*, U. S. (cited *supra*, note 9); 1874, *Durgin v. Danville*, 47 Vt. 95, 105. *Contra*: 1903, *Austin & N. W. R. Co. v. Cluck*, — Tex. Civ. App. —, 73 S. W. 548 (purporting to follow *R. Co. v. Botsford*, U. S.).

sive of the objects for which Courts were created, for them to refuse to exert their power for the elucidation of the very truth — the issue between the parties. Can a Court justly decide a cause without knowing the facts?"

There are numerous instances in which the chancery practice plainly denied any privilege, and sanctioned the inspection of the party-opponent's premises and chattels, against his objection.¹ On the other hand, in the common-law courts proper, there was an inclination to refuse such orders, apparently on the same feeble excuse of lack of power put forward by a few Courts for refusing to compel corporal exhibition.² There is even more reason for denying a privilege in the present class of cases; and it would be regrettable if any modern Court should palter with justice by recognizing it. Occasionally statutes have come to the aid of the Courts.³

§ 2222. (9) *Facts against One's Interest as a Witness Interested but not a Party to the Suit.* When the party's privilege not to take the stand against himself prevailed in common-law courts (*ante*, § 2218), the question naturally arose whether in civil causes a person not a party, but interested in the event of the cause, and therefore disqualified to testify for himself (*ante*, § 576), was also, like a party, privileged from being called against himself; in other words, whether the privilege was coextensive in all respects with the disqualification, or extended to parties only. After some uncertainty in the English practice, caused by Lord Mansfield's attempt to restrict the limitations of such privileges,¹ it was finally settled in the United States, that an interested wit-

¹ 1814, *Earl of Macclesfield v. Davis*, 3 Ves. & B. 16 (motion allowed to have inspection of a chest containing heirlooms, in order to identify and describe the articles); 1819-21, *Kynaston v. East India Co.*, 3 Swanst. 248; *East India Co. v. Kynaston*, 3 Bligh 153 (quoted *ante*, § 1862; opinion by L. C. Eldon). Numerous other cases impliedly or expressly negating such a privilege will be found *ante*, § 1862 (Inspection before Trial). § 1162 (View by Jury), § 2312 (Trade Secrets), § 2194 (Testimonial Duty).

Distinguish the question whether an officer's entry upon a party's premises or a seizure of a chattel, for preservation as evidence, under a warrant, is a *justifiable trespass*: 1895, *Newberry v. Carpenter*, 107 Mich. 567, 65 N. W. 530, (impounding an exploded boiler pending trial of the liability for the explosion).

² Add the cases cited in the cross-references *supra*, note 1: 1848, *Twentyman v. Barnes*, 2 DeG. & Sm. 225 (inspection by experts of an alleged altered document; refused, upon an undertaking to produce at trial); 1840, *Leach v. Swallow*, 8 Dowl. Pr. 201 (work and labor on a house; order for plaintiff's witnesses to inspect the work, held not proper against the defendant's consent); 1895, *Martin v. Elliot*, 106 Mich. 130, 65 N. W. 998 (sending a veterinary surgeon to examine on the plaintiff's premises a horse said to have been warranted sound, held improper); 1860, *Hunter v. Allen*, 35 Barb. 42 (warranty of a watch; order to produce the watch, refused; "it would be a new feature in our jurisprudence;" this unenlightened utterance was made forty years after the above ruling by Lord Eldon,

the most conservative judge who ever sat on the bench). *Contra*: 1879, *Grangers' Ins. Co. v. Brown*, 57 Miss. 308 (insurance upon the plaintiff's husband; to show whether his skull had been trephined, a compulsory exhumation held proper if necessary; here held unnecessary); 1869, *Com. v. Twitshell*, 1 Brewst. Pa. 551, 561 (bloody clothing, etc., offered by the prosecution; defendant held entitled to have his expert witnesses inspect the articles in the presence of an officer of Court; useful opinion); 1896, *Groundwater v. Washington*, 92 Wis. 56, 65 N. W. 871 (seat of a wagon injured in a highway; inspection held allowable in trial Court's discretion).

Distinguish the following: 1883, *McDonel v. State*, 90 Ind. 320, 321 (motion for production in Court, before trial, by the prosecuting attorney, of articles in the State's possession as evidence, refused for lack of the usual affidavit).

³ The statutes, which usually provide also for a view by the jury or an inspection before trial, or both, are collected under those heads (*ante*, §§ 1163, 1862). Some of the statutes and of the rulings construing them point out expressly the absence of a privilege.

¹ 1702, *Title v. Grevett*, 2 Ld. Raym. 1008 ("a man that conveys lands may be a witness to prove he had no title, . . . but he is not compellable to give such evidence"); 1779, *Cox v. Whalley*, cited 10 East 399 (action against four persons for a dinner bill; another of the diners, being called by the plaintiff to prove the services rendered, claimed a privilege as interested, but L. C. J. Mansfield "disallowed the objection"). Then followed, in 1795, Lord Kenyon's ruling,

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ness, as such, had not the privilege of a party;³ though a few Courts accorded the privilege where under reformed pleadings he was the "real party in interest,"⁴ and though a few Courts, conversely, recognized the privilege where he was a nominal party though not really interested.⁴ The question has no importance to-day, since the statutes abolishing disqualification by interest (*ante*, § 576) and making parties compellable (*ante*, § 2218); but it needs to be mentioned in order to distinguish it from the larger doctrine examined in the next section.

§ 2223. (10) Facts involving a Civil Liability in general, independent of the Suit at Bar. There is also to be considered a doctrine, now completely repudiated, which once threatened to insinuate itself into the law, and survives only as a source of misunderstanding for the decisions of a century ago. That doctrine was that a privilege existed not to disclose facts involving a civil liability of any sort. On the one hand, this is to be distinguished from the two preceding forms of privilege, namely, that of a party-opponent in a civil cause, and that of a witness interested in the cause. Those two might exist without the present one; yet the recognition of the present one would in-

in *Bain v. Hargrave*, partly to the contrary, (cited in the next section); and then Lord Melville's Case and the statute (cited in the next section), which restored Lord Mansfield's ruling in effect; in later cases the question could rarely be raised: 1842, *Doe v. Date*, 3 Q. B. 608, 617, per L. C. J. Denman (privilege denied); 1848, *R. v. Vickery*, 12 id. 478 (collecting earlier cases at common law, and intimating that the interest of a taxable inhabitant of a parish made him privileged; here held compellable under a statute).

³ *Connecticut*: 1787, *Storrs v. Wetmore*, Kirby 203 (joint owner, interested, held not compellable); 1797, *Starr v. Tracy*, 2 Root 528 (similar; but an interest voluntarily acquired does not protect); *Kentucky*: 1823, *Gorham v. Carroll*, 3 Litt. 291 (assignor of note in suit, held not privileged); 1823, *Black v. Crozier*, ib. 226; 1827, *Robinson v. Neal*, 5 T. B. Mour. 212, 216; 1827, *Conover v. Bell*, 6 id. 157; *Maryland*: 1826, *City Bank v. Bateman*, 7 H. & J. 104, 110, *semble* (president of a bank, a stockholder and nominally a party in his corporate capacity, held not privileged); 1828, *Stoddert v. Manning*, 2 H. & G. 147, 157 ("interest in the event of the suit" gives no privilege); *Massachusetts*: 1809, *Webster v. Lee*, 5 Mass. 334, 336, *semble* (an interested witness may object to testifying against that interest); 1810, *Appleton v. Boyd*, 7 id. 131, 134 (an assignor of a mortgage, and a partner, not compelled to testify against the mortgagee, as persons interested in the event of the cause; no authority cited); 1827, *Devoll v. Brownell*, 5 Pick. 448 (trustee of personality, compelled to answer on *scire facias*); 1830, *Bull v. Loveland*, 10 id. 9, 12 (action on a note; one holding it as security for advances, held compellable to testify against his interest; repudiating *Appleton v. Boyd*; but not clearly distinguishing between the privilege of a civil party and the privilege against self-crimination); 1839, *Com. v. Willard*,

22 id. 476 (preceding case approved); *Pennsylvania*: 1818, *Baird v. Cochran*, 4 S. & R. 397, 400 (interested witness, not a party, not privileged); 1821, *Nass v. Vanswearingen*, 7 id. 192, 195 (same); 1842, *Ralph v. Brown*, 3 W. & S. 395, 400 (same); *South Carolina*: 1818, *Lott v. Burrell*, 2 Mill Const. 167 (privilege denied); *Tennessee*: 1808, *Cook v. Corn*, 1 Overt. 340 (interested witness, held privileged with hesitation, upon the literal words of the Constitution exempting him from giving "evidence against himself," though the clause "was particularly intended for criminal cases"); 1809, *Stewart v. Massengale*, ib. 479 ("An interested witness cannot be compelled to swear; it is a privilege as to himself, which he has a right to claim"); 1812, *Tatum v. Lofton*, *Cooke* 115 (foregoing doctrine held not applicable to a witness who had by his own act become interested, though at first not interested); 1834, *Zollicoffer v. Turney*, 6 Yerg. 297 (interested witness held not privileged, on the authority of Lord Melville's Case, *post*, § 2223; *Cook v. Corn* repudiated, as not being a direct decision); *Vermont*: 1828, *White v. Everest*, 1 Vt. 181, 189, *semble* (no privilege); 1843, *Ward v. Sharp*, 15 id. 115, 118 (same); 1844, *Stevens v. Whitcomb*, 16 id. 121, 123 (same). *Contra*: 1849, *Holmes v. Holloman*, 13 Mo. 536 (privilege recognized). *Undecided*: 1827, *Mauran v. Lamb*, 7 Cow. 174, 177 (action on a check, for the benefit of R; R held not compellable, as "the real plaintiff"); 1828, *People v. Irving*, 1 Wend. 20 ("real parties in interest," held not compellable); 1843, *Henry v. Bank of Salina*, 5 Hill N. Y. 523, 526, 541 (approving *Mauran v. Lamb*); 1828, *White v. Everest*, 1 Vt. 181, 189; 1844, *Stevens v. Whitcomb*, 15 id. 121, 123.

⁴ 1833, *Owings v. Low*, 5 G. & J. 134, 148; 1852, *Watts v. Smith*, 24 Miss. 77, 78; 1843, *Tenney v. Evans*, 14 N. H. 343, 348.

clude the preceding ones, i. e. a privilege for facts involving a civil liability would exempt not only an ordinary witness from answers on incidental facts of that nature, but also a party and an interested witness from any answers in the cause. As a matter of history, the privilege for a civil party was fully recognized at common-law, as also to a limited extent the privilege for an interested witness; but the privilege for facts of civil liability independent of the suit at bar never prevailed anywhere. On the other side, this supposed privilege is to be distinguished from the privilege against facts involving a criminal liability (*post*, § 2254); indeed, it may be supposed that historically it was first suggested as a sort of extension of the latter privilege. The notion of criminal liability was well settled to include not only the liability to imprisonment or fine in a prosecution under the name of the Crown or the State, but also such other liabilities as were in fact though not in form penal,—as, for example, liability to a penalty recoverable by an informer, or to a forfeiture prescribed by statute or by contract (*post*, §§ 2256, 2257); and a willing judicial mind might easily see an opportunity here for extension by analogy. The present pretended doctrine might indeed be sufficiently disposed of by treating it in the definition of matters which the crimination-privilege does not include. Nevertheless, whatever its origin in judicial thought, the relation in principle and precedent between this and the privileges of civil parties and interested witnesses mark it off as a separate thing. It falls naturally on the border line between the long-abolished common-law privilege of a civil party and the still vigorous privilege against self-crimination. It is to be thought of as a shadow which once hovered over this line, but has long since been dissipated.

What, then, was the history of this wraith, and when and how did it arise? This much is fairly certain, that it was never seen or heard of till the end of the 1700s. By that time, the privilege against disclosing self-criminating facts had been a century under way (*post*, § 2250) and was matter of elementary knowledge; it was understood to include in its scope the protection against disclosure of matters of forfeiture (*post*, § 2256). But of any extension of this idea of punitive forfeiture, to include the idea of ordinary civil liability to perform a contract or pay damages for a tort, or the like, no trace whatever appears until 1795, when Lord Kenyon, then Chief Justice of the King's Bench (since 1788, when Lord Mansfield had retired), came forth with a broad pronouncement to that effect.¹ It does not appear that he had any authority for this notion. But naturally his view produced some effect;

¹ 1795, *Bain v. Hargrave*, Peake, Evidence, 184, note (assumpsit against a collecting agent; on an issue of payment, the payee, not a party but a fellow-clerk of the defendant, was asked whether some money was not due from some person—meaning the witness—to the plaintiff; and, on objection, Lord Kenyon said "that he would not oblige him to answer any question which might tend to charge himself with a debt; a man might come voluntarily and charge himself with a debt, but he could not be compelled to charge himself civilly, any more than

to make himself liable to a criminal prosecution"; no precedent cited); in the next year, he hedged slightly: 1796, *Doxon v. Haigh*, 1 Esp. 409, 411 (L. C. J. Kenyon "said that generally a witness being subjected to a civil right, in consequence of an answer to a question put to him, would not warrant him in refusing to answer, as the rule was rather confined to a criminal one; but a witness should not be asked a question which might charge himself obliquely by his answer, where there could otherwise be no direct evidence or charge against him").

and that effect was increased upon the printing, in 1801 (the year before Lord Kenyon's death), of this ruling of his in Mr. Peake's influential treatise on Evidence, — the only work of its kind in England since Mr. Justice Buller's book of forty years before. Before long, however, this novel notion was fortunately forced upon the attention of the judges of England as a whole. This happened through an investigation, in 1806, by impeachment in the House of Lords, into the financial scandals connected with Lord Melville (Mr. Dundas) and the management of the war. Upon the introduction of a bill to compel answers from witnesses and to hold them harmless so far as their privilege was thus taken away — an expedient often used to annul the self-crimination privilege (*post*, § 2281) —, the question naturally arose whether there existed any privilege which thus stood in the way of requiring answers on matters involving merely a civil liability. Upon this question the opinion of all the judges was formally asked.² Their answers were divided; but the majority of nine in fourteen included the most weighty names, together with that of Lord Eldon, then temporarily out of office but sitting as peer;³ and the three of longest experience took occasion to express emphatically their polite astonishment at the pretension to this new privilege:

1806, L. C. Erskine, in the *Debate on Lord Melville's Case*, Hans. Parl. Deb. 1st ser., VI, 249, said that "he had been for seven-and-twenty years engaged in the duties of a laborious profession, and while he was so employed, he had the opportunity of a more extensive experience in the courts than any other individual of his time." It was true that in the profession there had been, and there now were, men of much more learning and ability than he would even pretend to; but success in life often depended more upon accident, and certain physical advantages, than upon the most brilliant talents and profound erudition. It was very singular that, during these twenty-seven years, he had not for a single day been prevented in his attendance on the courts by any indisposition, or corporeal infirmity. Within much the greater part of this period, he had been honoured by a gown of precedence, and in consequence of this privilege, had not only been engaged in every important cause, but had conducted causes of this description during that period in the court of King's Bench. . . . Although his experience was equal not only to any individual judge on the bench, but to all the judges, with their collective practice; yet, he never knew a single objection to have been taken, to an interrogatory proposed, because the reply to it would render the witness responsible in a civil suit. It was true, that in Mr. Peake's book, which had been frequently cited on the present occasion, there was a note by which it should appear that an objection of this kind had been taken by the late

² 1806, Lord Melville's Trial, Peake, Evidence, 184, note (Questions put to the judges: "1. Whether according to law a witness can be required to answer a question relevant to the matter in issue, the answering which has no tendency to accuse himself, but the answering which may establish or tend to establish that he owes a debt recoverable by civil suit? 2. Whether according to law a witness can be required to answer a question relevant to the issue, the answering of which would not expose him to a criminal prosecution, but might expose him to a civil suit at the instance of His Majesty for the recovery of profits derived by him from the use or application of public money contrary to law?")

³ 1806, Feb. and Mar., Lord Melville's Case, VOL. III. — 67

Witnesses' Indemnity Bill, Hansard's Parl. Debates, 1st ser., vol. VI, pp. 170, 222, 234, 243 (to the questions just quoted the answer was "Yes," by eight judges, Sutton, B., Graham, B., Chambre, J., Le Blanc, J., Heath, J., Macdonald, C. B., Ellenborough, C. J. of K. B., Erskine, L. C., with Lord Eldon; and "No," by five judges, Grose, J., Lawrence, J., Rooke, J., Thompson, B., and Mansfield, C. J. of C. P.; the opinions of this majority seem to have been treated as carrying conclusive weight; their tenor was, in general, that the privilege extended only to "such questions as would expose him to a criminal prosecution or to a penalty or forfeiture").

⁴ Erskine's amiable egotism may be seen in this exordium.

Chief Justice Kenyon; but, notwithstanding his high opinion of the minute accuracy and great learning of that reporter, he thought he had, in this instance, been guilty of a mistake, on two grounds; 1st, because he [Erskine] himself had been counsel in the cause, and had no recollection of the circumstance; 2dly, because, if that note were correct, Lord Kenyon must have been guilty of an obvious contradiction of his own principles and sentiments, as they appeared even on the face of the same report. . . . Notwithstanding some difference of opinion among high authorities, among persons for whom he had the greatest veneration, yet he could not help thinking that the law itself was unembarrassed from these contradictions. He considered it so far precise, clear, and perspicuous, that it was necessary no new law should be promulgated, otherwise than in the form of a declaratory law, by which it should be announced what had been the law, what was the law, and what ought to be the law, and what shall be the law of the land as to this important particular."

These deliverances before the House of Lords disposed forever in England of the sprouting heresy.⁵ Though a statute was immediately passed to remove the doubt,⁶ it was plainly understood to be declarative of the law, and not alterative, and has always been so treated.⁷

In the United States, the news of the doubt came naturally enough to the Courts of some jurisdictions in the early days;⁸ but, with practical unanimity, the same reception was given to it, and the pretended privilege was wholly repudiated.⁹ For the past two generations, this has been a settled

⁵ The truth seems to have been that the minority, the supporters of this supposed privilege, reflected merely the prejudice of that reactionary and jealous portion of the profession which, led by L. C. J. Kenyon, had set itself stiffly against any doctrine bearing the approval, or put forward as settled by the sanction of Lord Mansfield; his liberal views on this subject are seen in *Cox v. Whalley* (cited *ante*, § 222, note 1); this attitude of Lord Kenyon has been elsewhere noticed (*ante*, § 1858). In this instance, it would seem that when Lord Kenyon, in the case of *Bain v. Hargrave* (*supra*, note 1), had committed himself, probably without much reflection, to the privilege in question, his followers, notably Justices Grose, Lawrence, and Rooke, came to stand by it obstinately, as if the credit of Lord Kenyon's memory, and of the movement he represented, were involved.

⁶ Sir Samuel Romilly's argument for this bill, set forth in his diary (*Life*, 3d ed., II, 9) was a forceful one.

⁷ The act was offered as a "Bill for Declaring the Law with respect to Witnesses being Liable to Answer" (*Hans. Parl. Deb.*, 1st ser., VI, 401, 421, 438, 502, 523, 753, 768). The statute was as follows: 1806, St. 46 Geo. III, c. 37 ("Whereas doubts have arisen whether a witness can by law refuse to answer a question relevant to the matter in issue, the answering of which has no tendency to accuse himself or to expose him to any penalty or forfeiture, but the answering of which may establish or tend to establish that he owes a debt or is otherwise subject to a civil suit at the instance of His Majesty or of some other person or persons, Be it therefore declared, That a witness cannot by law refuse to answer a question relevant to the matter in issue, the answering of which has no

tendency to accuse himself or to expose him to penalty or forfeiture of any nature whatsoever, by reason only or on the sole ground that the answering of such question may establish or tend to establish that he owes a debt or is otherwise subject to a civil suit either at the instance of His Majesty or of any other person or persons"); 1806, R. v. Woburn, 10 East 393 (pauper settlement; an inhabitant of the defendant parish, refusing to testify for the plaintiff parish, held not compellable; the statute declared not to apply to the party's privilege, and the inhabitant being in substance a party).

Similar statutes exist in Canada: Can. Evidence Act 1893, § 5, as amended by St. 1893, c. 53 (no person is to be excused on the ground that his answer "may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person"; remainder as quoted *post*, § 2261); Man. Rev. St. 1902, c. 37, § 5 (like Can. St. 1893, c. 31, § 5); N. Br. Consol. St. 1877, c. 46, § 1 (similar to St. 46 Geo. IV).

⁸ The questions and the answers in Lord Melville's Case became known to the profession in America by their publication in Hall's *Journal of American Law*, I, 223; they appear not to have been elsewhere printed at the time, except in later editions of Peake on Evidence.

⁹ *Ky.*: 1823, *Gorham v. Carrol*, 3 Litt. 221 (liability on a note); 1827, *Robinson v. Neal*, 5 T. B. Monr. 212, 216; *La.*: 1819, *Planters' Bank v. George*, 6 Mart. 670, 673 (no privilege for matters involving liability to a civil suit); *Md.*: 1816, *Taney v. Kemp*, 2 H. & J. 348 (no privilege as to answers which "may expose him to a civil action"); 1826, *City Bank v. Bateman*, 7 id. 104, 111 (same); 1828, *Stoddert v. Manning*, 2 H. & G. 147, 157 (same); 1829, *Naylor v. Semmes*, 4 G. & J. 273, 276 (same); *Mass.*:

point in the law of evidence. That this is as it should be, cannot be doubted. The recognition of such a privilege would be not only an unendurable obstruction to the search for truth, but also a gross anomaly in principle:

1880, *Ruffin, J.*, in *Jones v. Lanier*, 2 Dev. 490: "Since the jurisdiction of equity hath arisen to enforce discovery, the privilege [of a party at common law] not to testify against one's self is nominal, so far as respects mere liabilities for debts. Discoveries thus obtained by compulsion and on oath are constantly used in trials at law, as other admissions of the party; and the only limitation or discovery in equity is that it shall not extend to crimes, nor to charge one with a penalty nor incur a forfeiture. If then a person may be compelled to testify indirectly against himself in a suit at law then actually pending, would it not be strange that he should be protected from doing so against another because he might thereby expose himself to a future civil action? That would make the protection operate quite differently from the original purpose of it. . . . The effect would be that when the protection can be of immediate and direct service to him for whom it was created, it shall be unavailing; but when it operates chiefly to the advantage of a third person, it shall be in force. This is a complete perversion of the principle, and shows that the rule of exclusion ought not to exist."

1827, *Devoll v. Brownell*, 5 Pick. 448 (trustee of personality, compelled to answer as to a fraudulent conveyance, on *scire facias*, since the privilege "does not relate to questions of property"); 1830, *Bull v. Loveland*, 10 id. 9, 12 (St. 46 Geo. III, treated as a declaratory act; a witness held compellable to answer any matter that may "adversely affect his pecuniary interest," otherwise than to "expose him to criminal prosecution or tend to subject him to a penalty or forfeiture"); 1839, *Com. v. Willard*, 22 id. 476 (preceding case approved); *N. H.*: 1825, *Copp v. Upham*, 3 N. H. 159 (no privilege as to liability to a civil suit; here, the fact of a debt); *N. Y.*: 1837, *Maaran v. Lamb*, 7 Cow. 174, 177 (approving the statute 46 Geo. III. as declaratory); *N. C.*: 1830, *Jones v. Lanier*, 2 Dev. 490 (no privilege for matters involving liability to a civil suit); 1845, *Harper v. Burrow*, 6 Ired. 30, 33 (*Jones v. Lanier* approved); *Oh.*: 1828, *Cox v. Hill*, 3 Oh. 411, 424 (liability to a civil action is not the subject of a privilege); *Pa.*: 1818, *Baird v. Cochran*, 4 S. & R. 397, 400, *semble* (no privilege for liability to a civil suit); 1821, *Nass v. Vanswearingen*, 7 id. 192, 195 (same); 1842, *Ralph v. Brown*, 3 W. & S. 393, 400 (same); *Tenn.*: 1834, *Zollicoffer v. Turney*, 6 Yerg. 297, 301 (no privilege for matters involving liability to a civil suit); *Vt.*: 1843, *Ward v. Sharp*, 15 Vt. 118, 118 (Lord Melville's Case approved). *Contra*: 1821, *Benjamin v. Hathaway*, 3 Conn. 528, 532 (privilege not to testify to a debt, recognized; going upon the mistaken authority of the rulings as to interested

witnesses, ante, § 3223; here the witness, a sheriff, was asked for testimony as to his liability to a penalty for a false return, and the Court's remark was *obiter*); 1827, *Northrop v. Hatch*, 6 id. 361, 364 (preceding case approved).

Statutes have sometimes covered the subject: *Alaska C. C. P.* 1900, § 675 (like Or. Annot. C. § 847); *Cal. C. C. P.* 1872, § 2065 (no privilege for a question whose "answer may establish a claim against himself"); *Ida.* Rev. St. 1887, § 6091 (like Cal. C. C. P. § 2065); *La.* Code 1897, § 4611 (no privilege for an answer merely subjecting to "civil liability"); *Mich.* Comp. L. 1897, § 10179 (no privilege for an answer tending to establish "that such witness owes a debt or is otherwise subject to a civil suit"); *Mo.* Rev. St. 1899, § 4660 (no privilege from answering a relevant question on the ground that the answer may tend to establish "that such witness owes a debt or is otherwise subject to a civil suit"); *Nebr.* Comp. St. 1899, § 5910 (no privilege "upon the mere ground that he would thereby be subjected to a civil liability"); *Nev.* Gen. St. 1885, § 3416 (like Cal. C. C. P. § 2065); *N. Y. C. C. P.* 1877, § 837 ("A competent witness shall not be excused from answering a relevant question on the ground only that the answer may tend to establish the fact that he owes a debt or is otherwise subject to a civil suit"); *Or.* Annot. C. 1892, § 847 (like Cal. C. C. P. § 2065); *Utah* Rev. St. 1898, § 3431 (like Cal. C. C. P. § 2065); *Wis.* Stats. 1898, § 4077 (substantially like N. Y. C. C. P. § 837).

TOPIC A (continued): PRIVILEGED TOPICS.

SUB-TOPIC II: PRIVILEGE FOR ANTI-MARITAL FACTS
(HUSBAND OR WIFE TESTIFYING AGAINST THE OTHER).

CHAPTER LXXVII

1. In general.

- § 2227. History of the Privilege.
- § 2228. Policy of the Privilege.

2. Who is prohibited as Husband or Wife.

- § 2230. Paramour; Void Marriage.
- § 2231. Bigamous Marriage; Disputed Marriage.

3. What is prohibited as Testimony.

- § 2232. Extrajudicial Admissions of Wife or Husband; Agent's Admissions.
- § 2233. Hearsay; Production of Documents.

4. What Testimony is Anti-Marital.

- § 2234. Testimony against Husband or Wife not a Party; General Principle.
- § 2235. Same: Sundry Applications of the Rule (Bankruptcy, Adultery, etc.).
- § 2236. Same: Co-indictees and Co-defendants.

- § 2237. Testimony against Husband or Wife Deceased or Divorced.

5. Anti-Marital Testimony admitted Exceptionally.

- § 2238. At Common Law, by Necessity (Injuries to the Spouse, by Battery, Abduction, Adultery, Fraud, and the like; Divorce; "Crimes against the Other").
- § 2240. Under Statutory Exceptions (Separate Estate, Agency, etc.).

6. Exercise of the Privilege.

- § 2241. Whose is the Privilege.
- § 2242. Waiver of the Privilege.
- § 2243. Inference from Exercise of the Privilege.

7. Statutory Changes.

- § 2245. Statutory Abolition, Express or Implied.

§ 2227. *History of the Privilege.* The history of the privilege not to testify against one's wife or husband is involved, like that of civil parties (*ante*, § 2217), in a tantalizing obscurity. That it existed by the time of Lord Coke is plain enough; but of the precise time of its origin, as well as the process of thought by which it was reached, no certain record seems to have survived. What is a little curious is that it comes into sight about the same time as the disqualification of husband and wife to testify on one another's behalf (*ante*, § 600); for the two have no necessary connection in principle, and yet they travel together, associated in judicial phrasing, from almost the beginning of their recorded journey.

This much, however, may be fairly assumed, that the privilege existed before the disqualification; for in what is apparently the earliest explicit ruling, in 1580, the wife's testimony on her husband's behalf is treated as receivable, while his privilege to keep her from testifying against him is apparently sanctioned.¹ Moreover, the privilege is recognized more than once in the next half century;² but there appears no ruling upon a wife's disqualifi-

¹ 1580, *Bent v. Allot*, Cary 135 (a defendant having examined his wife in chancery, the plaintiff was allowed a subpoena against her, the examination for the husband to be sup-

pressed if he did not suffer her examination for the plaintiff).

² 1613, *Anon.*, 1 Brownlow 47 ("By the common law she shall not be examined" against

eration during that whole period, nor for some time thereafter.³ In searching for analogies to throw light upon this treatment of marital testimony, we are left without significant traces. The rules for dead-witnesses afford no precedents. The ordinary witness, who had only within two generations become a common figure in jury-trials, was plainly not subject to any disqualifications whatever before this same period of the Elizabethan reign (*ante*, § 575), though he was not compellable (*ante*, § 2190), so that it is not strange that no clue is to be found in this field. Moreover, in the testimonial rules of the ecclesiastical law, which in general obtained in chancery, and might thus have been naturally drawn upon for analogies, the disqualifications of witnesses included not only a wife but also all members of the family, together with dependents and servants;⁴ yet the practice of the Chancellor and of the common-law judges never disqualified any but the wife,⁵ and never privileged any but the wife.⁶ To suppose, therefore, a borrowing of the ecclesiastical rule is to suppose that its naturally connected details were deliberately separated and were in part rejected; and this again compels us to account for the discrimination against a wife.

Possibly the true explanation is, after all, the simplest one, namely, that a natural and strong repugnance was felt (especially in those days of closer family unity and more rigid paternal authority) to condemning a man by admitting to the witness-stand against him those who lived under his roof, shared the secrets of his domestic life, depended on him for sustenance, and were almost numbered among his chattels. In a day when the offence of petit treason by a wife or a servant — violence to the head of the household — was still recognized, it would seem unconscionable that the law itself should abet (as it were) a testimonial betrayal which came close enough to petit treason, and should virtually permit a wife to cause her husband's death.⁷ This process of thought (though it leaves unexplained the compellability of a son) is at least consistent with several features of the situation namely, with the half-recognition of a privilege against servants' testimony, with the fact that the early cases all deal with the privilege for a wife's testimony against her husband (not the husband's against the wife),

him; here, in bankruptcy proceedings). In 1623, the St. 21 Jac. I, c. 19, § 6, expressly altered this; and its language seems to show that the privilege is a new thing: ("And whereas by the former laws . . . some doubt hath been made whether the commissioners have power to examine the wives of bankrupts touching the same [concealment of goods], . . . for clearing therefore the said doubt and avoiding the inconveniences aforesaid, . . . [the commissioners may] examine upon oath the wife and wives (!) of all and every such bankrupt for the finding out and discovery of the estate [concealed by them] . . . [and the wife] shall incur such danger and penalty for not coming before the said commissioners [as other persons do].")

³ Coke mentions it in 1628 (quoted *infra*); but there are no rulings for some time there-

after, beginning about Charles II's reign: *ante*, § 600; *infra*, notes 8-12.

⁴ *Ante*, § 600.

⁵ *Ante*, § 600.

⁶ 1613, Anon., 1 Brownlow 47 (a son is bound to reveal his father's treason; but a wife is not bound to discover her husband's). The following case seems to stand alone: 1631, Lord Audley's Trial, 3 How. St. Tr. 401, 402 (by the judges, "in like manner [to a wife], a villain might be a witness against his lord in such cases [of injury done to him by the lord]"; Lord Audley in his speech exclaims, "Woe to that man, whose servants should be allowed witnesses to take away his life!").

⁷ Compare Lord Audley's exclamation, quoted *supra*, and the general notion then prevalent as to a privilege for confidential matters (*post*, §§ 2285, 2290).

and with the fact that the privilege is recorded for half a century before the disqualification is mentioned.

The disqualification is not found until Coke's treatise appears. Whether its subsequent career is to be credited wholly to his creation in perhaps a matter for speculation.⁸ At any rate, in 1628 he couples in the same sentence both privilege and disqualification:

1628, Sir Edward Coke, Commentary upon Littleton, 6 b: "He that loseth *littem legem* becometh infamous and can be no witness; or if the witness be an infidell, or of non-sane memory, or not of discretion, or a partie interested, or the like. But oftentimes a man may be challenged to be of a jury that cannot be challenged to be a witness, and therefore, though the witness be of the nearest alliance or kindred, or of counsell, or tenant, or servant to either partie, or any other exception that maketh him not infamous, or to want understanding or discretion, or a partie in interest, though it be proved true, shall not exclude the witness to be sworne. . . . Note, it hath been resolved by the justices that a wife cannot be produced either against or for her husband, *quia sunt dum animæ in carne unæ*; and it might be a cause of implacable discord and dissection between the husband and the wife, and a meane of great inconvenience; but in some cases women are by law wholly excluded to bear testimony, as to prove a man to be a villain."

In Coke's pronouncement, the privilege is stated in absolute terms. Nevertheless, it was already well understood to be subject to some exceptions in criminal cases.⁹ In civil cases, it appears to have been generally assumed to be already conceded;¹⁰ although some sort of doubt hung over it in this respect for more than a century.¹¹ By the end of the 1600s, the existence of the privilege in general is plain enough in both civil and criminal cases;¹² and the doubt, after all, never had any chance of surviving in the face of Coke's authority, and has left no mark upon the law and no serious controversy in the records. On the whole, then, the privilege may be said to have been understood to exist in some shape before the end of the 1500s, and to have been firmly established by the second half of the 1600s.

⁸ Because he cites as authority a ruling of 10 Jac. 1, i. e. 1613, which, however, was apparently the case in Brownlow, cited *supra*, and asserted the privilege alone.

⁹ 1631, Lord Audley's Trial, 3 How. St. Tr. 401, 403, 414 (the judges resolved that the wife might be a witness against her husband for rape upon her, instigated by him; "for she was the party wronged; otherwise she might be abused"; "in civil cases the wife may not [witness against him], but in a criminal cause of this nature, where the wife is the party aggrieved and on whom the crime is committed, she is to be admitted a witness against her husband"). In the following report of this case, the privilege is denied for criminal cases in general: 1631, Lord Audley's Case, Hutton 115 ("It was resolved that in case of a common person between party and party she could not [be a witness], "but between the King and the party, upon an indictment, she may, although it concerns the *feme* herself"). This explains the meaning of the doubts later expressed (*post*, § 2239) by some judges as to the law of Lord Audley's Case.

¹⁰ 1590, Best v. Allot; 1613, Anon.; 1631, Lord Audley's Trial; cited *supra*.

¹¹ 1784, Bentley v. Cooke, 3 Doug. 422 (accusant by woman as *feme sole*; R., being called by defendant to prove her married to him, was excluded, by three judges, on the ground that there was a general rule for all cases; Buller, J., doubted, because "as to the general rule, I find it only in criminal cases").

¹² Cases cited *post*, § 2239, and the following: 1684, L. C. J. Jeffreys, in Lady Ivy's Trial, 10 How. St. Tr. 555, 644 ("By the law the husband cannot be a witness against his wife, nor a wife against her husband, to charge them with anything criminal; except only in cases of high treason. This is so known a common rule that I thought it could never have borne any question or debate"); 1693, Cole v. Gray, 3 Vern. 79 (bill for account by children of the defendant's wife by a former husband; the wife was examined for the plaintiff as to the amount of her first husband's estate; but L. C. Jeffreys "disallowed her evidence and declared the wife could not be a witness against her husband").

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§ 2228. *Policy of the Privilege.* The record of judicial ratiocination defining the grounds and policy of this privilege forms one of the most curious and entertaining chapters of the law of evidence. It is curious, because the variety of ingenuity displayed, in the invention of reasons *ex post facto*, for a rule so simple and so long accepted, could hardly have been believed, but for the recorded utterances. It is entertaining (if any error in the law can ever be ascertaining), because of its exhibition of the subtle power of cant over reason, and of the solemn absurdity of explanations which do not explain and of justifications which do not justify, and because of the fantastic spectacle of a fundamental rule of evidence, which never had a good reason for existence, surviving none the less through two centuries upon the strength of certain artificial dogmas, — pronouncements wholly irreconcilable with each other, with the facts of life, and with the rule itself, and yet repeatedly invoked, with smug judicial positiveness, like magic formulas, to still the spectre of forensic doubt. No one of these supposed reasons was ever logically carried out in the enforcing of the rule; no one of them represented a sound cause for its existence; and no one of them, in all probability, reproduced the motives or sentiments which actually served for the original acceptance of the rule in the 1500s. Yet they passed current, — one here and one there; one for this judge, another for that judge. They did not tally, to be sure; but they were identical in this, that they were put forth as dogmas, and were always expected to be unhesitatingly accepted. That the rule of privilege existed, all were agreed. That it had some good reason for existence, all were equally agreed. To name that good reason precisely was a matter of much less consequence. Perhaps the question did not deserve a plain answer. And so, after all, the inquisitive little Peterkin at the bar, questioning too rashly the postulates and the platitudes of the Caspars of the profession, had to be satisfied with what was vouchsafed.

This singular condition of the law may perhaps be laid to the blame of Lord Coke. He it was who struck the first false note. He mouthed a few Latin words of mediæval scholasticism, and suggested a consideration doubtful in its morality and narrow in its view of human nature; and his successors seem to have been satisfied not to improve upon this example. Uninstructed by worthy judicial suggestions, professional and public opinion has been slow to appreciate and to repudiate the fallacies of the rule. The various reasonings by which the support of the rule has been attempted have of course had different vogues, — some rather at one time and in one court, some in others. But almost every one of the chief arguments had appeared in England by the early 1800s; after that time, there is usually mere repetition. The following passages will serve fairly to represent the leading types of argument:

1680, *Hale*, L. C. B., *Pleas of the Crown*, II, 279: "[Man and wife] are disabled in respect of the civil unity of their persons."

1696, *Sir John Fenwick's Trial*, in the *House of Commons*, 13 *How. St. Tr.* 552; *Sir T. Povey* (for the accused): "Now what any man's wife says cannot be made use of

against him, as nothing that she says or does can be made use of for him; and by the same rule of justice it cannot be made use of against him, for otherwise the rule would be unequal." Sir B. Shower (for the accused): "The actions of a wife cannot be evidence for nor against her husband, . . . and that for the economy, the danger might follow in cases of matrimony and families."

1786, *Hardwicks*, L. C. J., in *Barker v. Dixie*, Lee cas. t. *Hardwicks*, 264: "The reason why the law will not suffer a wife to be a witness for or against her husband is to preserve the peace of families."

1767, *Buller, J.*, *Trials at Nisi Prius*, 286: "Husband and wife cannot be admitted to be witness for each other, because their interests are absolutely the same; nor against each other, because contrary to the legal policy of marriage."

1768, Sir William Blackstone, *Commentaries*, I, 448: "If they were admitted to be witnesses for each other, they would contradict one maxim of the law, *nemo in propria causa testis esse debet*; and if against each other, they would contradict another maxim, *nemo tenetur seipsum accusare*."

1792, *Kenyon, L. C. J.*, in *Davis v. Dinwedy*, 4 T. R. 678: "Their being so nearly connected, they are supposed to have such a bias on their minds that they are not to be permitted to give evidence either for or against each other."

1839, *Irvine, J.*, in *Mills v. U. S.*, 1 Pinney 73, 75 (excluding a husband called on a charge of his wife's adultery): "The fact here sought to be proved by the husband, to wit, the marriage of himself and the accused (or plaintiff in error) was so important that without it the prosecution must fail, and his wife though once accused would then stand acquitted before the world. But suffer or compel him to testify, and indelible disgrace may be fixed upon his family and he be made the subject of the deepest mortification which a sensitive being can endure. . . . Is a policy so fraught with mischief to those delicate relations of society to be established? Surely not."

1867, *Campbell, J.*, in *Knowles v. People*, 15 Mich. 408, 418: "It is very manifest that the rule which prevents a wife from being compelled to testify against her husband is based on principles which are deemed important to preserve the marriage relation as one of full confidence and affection; and that this is regarded as more important to the public welfare than that the exigencies of lawsuits should authorize domestic peace to be disregarded for the sake of ferreting out some fact not within the knowledge of strangers. . . . The power of declining to call such a witness is not reserved to protect from awkward disclosures, but out of respect to the better feelings of humanity, which impel all right-minded persons to shrink from any needless exposure to the ordeal of a public examination of persons who would be unnatural and unworthy if they did not feel a very strong bias in favor of their consorts."

1868, *Sharswood, J.*, in *Pringle v. Pringle*, 50 Pa. 281, 288: "Nothing is better settled than that wherever the wife is interested, the husband cannot be a witness; not on the score of his interest, for he may preclude himself from any by a release, or may have done so by a settlement to her separate use; but entirely on the ground of public policy. It is necessary to preserve family peace and maintain that full confidence which ought to subsist between husband and wife."

1875, Mr. *Evarts*, arguing, in *Tilton v. Beecher*, N. Y., *Abbott's Rep.* II, 49 (objecting to the admission of the plaintiff in an action of criminal conversation): "The common law has said, great as is the interest of the administration of justice, all-powerful as it should be, to draw into court all evidence that can speak the truth within the rules of evidence, yet the administration of justice was made for society, not society for the administration of justice; and there are certain institutions of society lying at the base of our civilization, sustaining the whole fabric of its prosperity, its purity, its dignity, and its strength, which must not be undermined, or corrupted, or disfigured, or defiled, under the notion that in the administration of justice the truth must be sought in every quarter and from every witness. Thus the great minds, legislative and judicial, the great moralists, the great religious teachers, have all combined to say that there are certain limits

imposed by the nature of human society in the fabric as it is constituted, for our defense and protection, that cannot be overpassed. . . . When the common law says that a man and his wife are one, or, in Lord Coke's language, 'two souls in one person' — it is said no man shall put asunder those who are thus joined together, and, least of all, in the name of law, shall the administration of justice pull and tear asunder this conjugal relation by the step of the sheriff or the precept of the judge that compels one to come and betray the other. It is not, when the question comes before the Court, so much the interest, or the duty, or the particular circumstances of the individual case of marriage that are thus brought up for attention, as the institution itself."

Most of these reasons do not call for particular dissection; their very statement is void of force. Some of these utterances, such as the invocation, by Lord Coke and Lord Hale, of the unity and identity of married persons, are merely appeals to a fiction, which cannot serve as a reason. Others, such as the phrase of Mr. Justice Buller about the "legal policy of marriage," are nothing but definitions of *ignotum per ignotius*. Still others are irrelevant, — such as Mr. Justice Blackstone's reference to the privilege against self-crimination. Others, again, confuse the present privilege with the disqualification, and also with the privilege for confidential communications. The disqualification of husband and wife to testify in each other's behalf rests on reasons wholly independent of their privilege not to testify against each other (*ante*, § 601), and yet many of the earlier judges put forward some reason for the not testifying "for or against each other," as though the two rules were identical in policy. So, too, the privilege for confidential communications is not only quite different in scope, but stands upon its own sufficient grounds (*post*, § 2332); and yet the reason for it is often advanced as if it supported the present privilege.

Of the reasons which call for serious consideration, there seem to be distinguishable no more than two. (a) The first of these is the argument so often repeated in the more modern opinions (though ranging back also among the oldest of the arguments), namely, the *danger of causing dissension* and of "disturbing the peace of families." Of this it may be premised, to be sure, that no manner of attempt was ever made by any Court to enforce this reason logically, and thus to test the accuracy of its utterance. For example, in the very case¹ in which Mr. Justice Grose purported by this rule to safeguard the ineffable domestic peace, the husband had long before absconded and married another wife; so that the learned judge's application of this reason exposed him to the citation of a proverbial expression about stable-doors. But, if we are to ignore the futility of appealing to a reason which is never allowed in practice to be logically applied, and are to treat it as a serious argument, the answer is, first, that the peace of families does not essentially depend on this immunity from compulsory testimony, and, next, that so far as it might be affected, that result is not to be allowed to stand in the way of doing justice to others. When one thinks of the multifold circumstances of life that contribute to cause marital dissension, the liability to give unfavorable testimony appears as only a casual and minor one, not to be

¹ 1789, R. v. Cliviger, 2 T. R. 263, 269.
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exaggerated into a foundation for so important a rule. It is incorrect to assume that there exists in the normal domestic union an imminent danger of shattering an ideal state of harmony solely by the liability to testify unfavorably. Moreover, the significance of the argument is that if Doe has committed a wrong against Roe, and Doe's wife's testimony is needed for proving that wrong, Doe, the very wrongdoer, is to be licensed to withhold it and thus to secure immunity from giving redress, because, forsooth, Doe's own marital peace will be thereby endangered, — a curious piece of policy, by which the wrongdoer's own interests are consulted in determining whether justice shall have its course against him. This alone, without further following into the details of the reasoning, will serve to exhibit that argument's fallacy. (b) A second reason, having some plausibility, and well expressed in the language of Mr. Justice Irvin and Mr. Justice Campbell, comes in substance to this, that there is a *natural repugnance* in every fair-minded person to compelling a wife or husband to be the means of the other's condemnation, and to compelling the culprit to the humiliation of being condemned by the words of his intimate life-partner. This reason, if we reflect upon it, is at least founded on a fact; and it seems after all to constitute the real and sole strength of the opposition to abolishing the privilege. Let it be confessed, then, that this feeling exists, and that it is a natural one. But does it suffice as a reason for the rule? In the first place, it is not more than a sentiment. It does not posit any direct and practical consequences of evil. It is much the same reason that any one might give for abolishing the office of hangman in the jail or the business of spies in a war.² In the next place, it exemplifies that general spirit of sportsmanship which, as elsewhere seen,³ so permeates the rules of procedure inherited from our Anglo-Norman ancestors. The process of litigation (many learned judges agree) is a noble kind of sport; and certain rules of fair play should never be overstepped.⁴ One of these is to give something of a start to the victim of the chase, to follow him by certain rules, and to respect his feelings so far as may be. This complicates the sport, and adds zest for the pursuers by increasing the skill and art required by them for success. The expedient of convicting a man out of the mouth of his wife is (let us say) poor sport, and we shall not stoop to it. Such is the theory and the sentiment of sportsmanship. The answer to it is the answer that has had to be made for all the instances of its invocation, namely, that litigation is not a game, and that the law can never afford to recognize it as such; that the law, moreover, does not proceed by sentiment, but aims at justice. This generality would perhaps never be disputed; but in actual argument the constant tendency is to confuse sentiment with reason. A learned judge, for example,⁵

² One may note here the inconsistency of the law in conceding the privilege for the testimony of wife or husband against each other, but in ignoring it for the testimony of parent and child, brothers and sisters, which equally involve the tender sentiments of domestic life.

³ *Ante*, § 1845, *post*, § 2251.

⁴ Such was the language of Mr. (later L. C. J.) Denman, quoted *post*, § 2251.

⁵ In *Knowles v. People*, quoted *supra*.

refuses to compel this testimony for the mere sake of "ferreting out" the facts. Why sneer at the investigation of truth, by the innuendo of "ferreting," as though some petty and dishonorable practice were involved? This argument by innuendo is typical enough of much of the reasoning in support of the present privilege. Let us face the fact that when a party appears in a court of justice, charged with wrong or crime, the unavoidable and solemn business of the Court and the law is to find out whether he has been guilty of the wrong or the crime; that the State and the complainant have a right to the truth; and that this high and solemn duty of doing justice and of establishing the truth is not to be obstructed by considerations of sentiment, in this respect any more than in others. So far as any recorded utterance has yet been found, no logical argument advanced for the present privilege has ever risen to a higher level than an appeal to these same considerations of sentiment.

It is with Jeremy Bentham that we begin to find (in this instance as in so many others) the reaction appearing against this illogical and unfounded doctrine of the common law; and his arguments have not failed to find (though more slowly than in most other instances) a deserved acceptance in enlightened professional opinion. The following passages serve to illustrate the variety of reasoning that has helped thus far to bring about the abolition of the privilege in a moderate number of jurisdictions:

1827, Mr. *Jeremy Bentham*, *Rationale of Judicial Evidence*, b. IX, pt. IV, c. V (Bowring's ed. vol. VII, pp. 491 ff.): "'Hard,' 'hardship,' 'policy,' 'peace of families,' 'absolute necessity,'—some such words as these are the vehicles, by which the faint spark of reason that exhibits itself is conveyed. There are the leading terms, and these are all you are furnished with; and out of these you are to make an applicable, a distinct and intelligible proposition, as you can. . . . [As to the 'policy' of the situation, it is precisely the opposite; for] if a man could not carry on schemes of injustice, without being in danger, every moment, of being disturbed in them, and (if that were not enough) betrayed and exposed to punishment by his wife, injustice in all its shapes, and with it the suits and the fees of which it is prolific, would, in comparison with what it is at present, be rare. Let us, therefore, grant to every man a licence to commit all sorts of wickedness, in the presence and with the assistance of his wife; let us secure to every man in the bosom of his family, and in his own bosom, a safe accomplice; let us make every man's house his castle; and, as far as depends upon us, let us convert that castle into a den of thieves! Two men, both married, are guilty of errors of exactly the same sort, punishable with exactly the same punishment. In one of the two instances (so it happens) evidence sufficient for conviction is obtainable, without having recourse to the testimony of the wife. While the one suffers—capitally, if such be the punishment,—to what use, with what consistency, is the other to be permitted to triumph in impunity? . . . A rule like this, protects, encourages, inculcates fraud. For falsehood, positive falsehood, is but one modification of fraud; concealment, a sort of negative falsehood, is another; I mean, concealment of any facts of which, for the protection of their rights, individuals or the public have a right to be informed. . . . By authorizing an individual to conceal it, in a case in which it is not so much as pretended that its mischievousness is in the smallest degree less than in other cases, it at once protects and encourages two different acts, of the mischievousness and criminality of which it shows itself sufficiently sensible

* For the history of the legislation, see post, § 2245.

on other occasions; — the principal crime, and that concealment of it, which, when the act so concealed is criminal, is itself a crime. . . . [As to the danger of 'dissension,'] if the dissension were, in the nature of the case, so implacable as the argument supposes, it should, consistently speaking, operate as a motive with the law to prescribe, rather than exclude, this source of information. 'If I attempt this crime, it may happen to my wife, from whom I cannot hope to conceal it, to be called upon to bear witness against me; and then, — even if I should escape from the punishment of the law, — the pain of seeing, in the partner of my bed, the once probable instrument of my destruction, will never leave me. . . . Oh! but think what must be the suffering of my wife, if compelled by her testimony to bring destruction on my head, by disclosing my crimes!' — 'Think?' answered the legislator: 'Yes, indeed I think of it; and, in thinking of it, what I think of besides, is, what you ought to think of it. Think of it as part of the punishment which awaits you, in case of your plunging into the paths of guilt. The more forcible the impression it makes upon you, the more effectually it answers its intended purpose. Would you wish to save yourself from it? it depends altogether upon yourself; preserve your innocence!' To the legislators of antiquity, the married state was an object of favour; they regarded it as a security for good behaviour; a wife and children were considered as being (what doubtless they are in their own nature) so many pledges. Such was the policy of the higher antiquity. The policy of feudal barbarism, of the ages which gave birth to this immoral rule, is to convert that sacred condition into a nursery of crime. The reason now given was not, I suspect, the original one. Drawn from the principle of utility, though from the principle of utility imperfectly applied, it savours of a late and polished age. The reason that presents itself as more likely to have been the original one is the grimgribber nonsensical reason, — that of the identity of the two persons thus connected. Baron and Feme are one person in law. On questions relative to the two matrimonial conditions, this quibble is the fountain of all reasoning."

1853, *Commissioners of Common Law Procedure*, Second Report, 13: "A more difficult question [than that of admitting them in each other's favor] arises when we proceed to consider whether it should be made competent to an adverse party to call a husband or wife as witness against one another. The case would no doubt be of rare occurrence; when it did, it would in the greater number of instances be where husband and wife have separated and are on bad terms with one another. In such cases the mischief apprehended from the interruption of domestic happiness becomes out of the question. But suppose the husband and wife living together on the usual terms; here the identity of interest between them will deter an adverse party from calling one against the other, except under very peculiar and pressing circumstances and when the fact to be proved is certain in its character and clearly within the knowledge of the witness. . . . But if there be such a fact in the knowledge of one of two married persons, so material to the cause of the adverse party as to make it worth his while to run the risk of calling so hostile a witness, it becomes matter of very serious consideration whether justice should be allowed to be defeated by the exclusion of such evidence. It is clear that nothing but an amount of mischief outbalancing the evil of defeated justice can warrant the exclusion of testimony necessary to justice. What, then, is the mischief here to be apprehended? The possibility of resentment of a husband against a wife for testifying to facts prejudicial to his interest. But it is obvious that such resentment could only be felt by persons prepared to commit perjury themselves and to expect it to be committed in their behalf. Such instances, we believe, would be very rare; and we do not think that a regard to the feelings of individuals of this class, or the amount of mischief likely to arise from a disregard of them, is sufficient to compensate for the loss which in many cases may result from the exclusion of the evidence. . . . The conclusion to which the foregoing observations leads us is that husband and wife should be competent and compellable

† Mr. Bentham's arguments have been repeated in Chief Justice Appletton's treatise on Evidence, c. IX (1840). Another of his disciples

makes also a powerful presentation: circa 1823, Edward Livingston, *Introductory Report to the Code of Evidence* (Works, ed. 1872, I, 456 ff.).

to give evidence for and against one another on matters of fact as to which either could now be examined as a party in the cause."

1875, Mr. Beach, arguing for the defendant, in *Tilton v. Beecher*, N. Y., Abbott's Rep., II, 87 (answering the argument of Mr. Evarts, quoted *supra*): "I agree, sir, that the law cherishes with tenderness the family and the home; and well it is, sir, that it should; for I agree too with my learned friend that upon them rests the true foundation of every well-regulated society and government. . . . I agree that no society or government can stand — virtually stand — except upon the maintenance of the sanctity and the virtue of the domestic circle. So I agree too, sir, that there is much of beauty and sacredness in the idea of unity attached to the marriage relation. . . . But are we to forget that in what is called the progress of civilization that idea has been mangled and defaced? Are we to be blind to the legislation of the present? Are we to ignore the fact that all these ideas have been exploded and destroyed by what I deem the vandalism of modern legislation? In 1848 that unity was effectually impaired [by the property statutes]. . . . Now she may get out into the world and barter and trade and tussle with the energies of commercial and business life. Once her true sphere was in the domestic circle and around the hearthstone, cultivating those tender sentiments and qualities which were at once her grace and glory, but to-day by the voice and power of legislation she is ushered into the busy scenes of life, and becomes an active and independent actor in all its struggles. The counsel says this idea of unity, this consecration of the domestic circle, can not be torn by the rude hand of the law. Sir, it has been mangled and torn! That identity of interest, that union of soul, has been separated, not only by the voice of legal theory, but by the practical application of it to the ordinary concerns of life. My learned friends have produced here, sir, a wonderful mass of authorities gathered from adjudications under the ancient law both in England and the States of this country. . . . What need to gather those ancient authorities pronounced under a rule and a policy inapplicable to the present condition of our society, and asserting none of the rights which, by modern legislation, have been conferred mutually upon husband and wife? My lords have been digging the fossils of a past generation. They are gathering here the carcasses of exploded theories and adjudications, and confronting them in ghastly contrast with what professes to be the improvement of modern times. Sir, we are not governed by them."

2. Who is Prohibited as Husband or Wife.

§ 2330. *Paramour; Void Marriage.* The policy of the privilege, whatever it may be, applies at any rate to those only who profess to maintain towards each other the legal relation of husband and wife. There is therefore no privilege to withhold the testimony of a mere *paramour* or mistress.¹ Furthermore, the lofty object of protecting from invasion the sanctity of marital peace is deemed to extend to those only who legally and technically *are* husband and wife, whatever their honest and innocent belief may have been as to the validity of their relation. Hence there is no privilege to persons whose marriage is *void*; ² their domestic peace may be shattered at any liti-

¹ The first rulings on this point in England were contradictory: 1782, *Anon.*, 3 C. & P. 238, 1 Price 83, note (by Lord Kenyon, C. J.; mistress falsely held out as wife, excluded); 1795, *R. v. Bramley*, 6 T. R. 330 (pauper settlement; persons cohabiting for 30 years; wife admitted to deny the marriage); 1814, *Campbell v. Twemlow*, 1 Price 81 (point not decided). But the privilege was then finally repudiated; 1828, *Bathews v. Galindo*, 4 Bing. 610, C. P. (a woman held out as a wife, but not lawfully so; repudiating the doubt in *Campbell v. Twemlow*; and

the *nisi prius* ruling of Best, C. J., in the case at bar, reported in 3 C. & P. 238). So also the rulings in the United States: 1868, *Robertson v. State*, 42 Ala. 509; 1864, *People v. Anderson*, 24 Cal. 129, 133; 1880, *People v. Alvino*, 55 id. 230, 232.

² 1831, *Wells v. Fletcher*, 5 C. & P. 12 (the woman having married supposing erroneously that her first husband was dead); 1851, *R. v. Young*, 5 Cox Cr. 396 (wife of one who had illegally married his deceased wife's sister); 1901, *Hoxie v. State*, 114 Ga. 19, 39 S. E. 244 (a woman

gant's discretion. Again, as the innocent unmarried are not deemed to deserve the benefit of the rule, so too, conversely, its benefits are not lost by the ingenious wrongdoer who brings himself within its formal terms by marrying the witness after service of subpoena and thus creating *ad hoc* a domestic peace which is to be jealously safeguarded.²

§ 2231. **Bigamous Marriage; Disputed Marriage.** It follows, furthermore, that a second, bigamous, or plural wife, is not a person whose testimony is of the privileged class; and that, although the exposure of this marital fraud may long before have *de facto* dispelled, from the presence of all parties, the mystic halo of domestic peace which the law so strives to preserve, or although the *pax conjugalis* may really now exist for the second purporting wife, while a state of belligerency may prevail for the first wife, nevertheless these actualities count for nothing, in the theory of the law, and *de jure* the hypothesized halo surrounds all the relations with the first wife, and never has existed for the relations with the second. Hence, in a case involving an alleged bigamy, the party alleging it is met by the privilege, if against the husband he calls the *first wife*, who is upon his own assumption the lawful one;¹ yet he is obstructed by no privilege, if he calls the *second wife*.²

It is true that the husband may, on the facts of the case, be disputing not the second marriage but the first one, and thus, by the husband's claim of facts, the second wife would be the lawful and therefore the privileged one; and hence the denial of the privilege as to her in that case would seem to beg the question by assuming in advance the very fact in issue; so that Courts, being hard put to it in such a situation, have occasionally allowed the claim of privilege.³ Yet this solution, after all, merely begs the question in the converse manner, for it equally assumes the disputed fact, namely, that there was no first marriage; and it commits the solecism of recognizing the privilege, not because the witness is the party's wife but because she is

may testify that she is not a wife, though reputed as such); 1836, *State v. Samuel*, 3 Dev. & B. 177 (slave wife).

On this and the preceding point, compare the rulings upon a wife's *disqualification on the husband's behalf* (ante, § 605). Compare also the cases concerning *abduction* (post, § 2239), which were sometimes placed on the ground that the marriage was void.

¹ 1839, *Pedley v. Wellesley*, 3 C. & P. 556; 1903, *Moore v. State*, — Tex. Cr. —, 75 S. W. 497 (after process begun); compare the Georgia statute cited post, § 2239, note 11.

² 1673, *R. v. Griggs*, T. Raym. 1 (here a husband); 1803, *East*, Pl. Cr. I, 460; 1870, *Williams v. State*, 44 Ala. 24, 28; 1893, *State v. Ulrich*, 110 Mo. 350, 364, 19 S. W. 646. *Contra*: 1897, *State v. Melton*, 120 N. C. 591, 592, 26 S. E. 933 (under Code § 588). For the statutory exception for "crimes against the other," as including bigamy, see post, § 2239.

³ 1690, *Hale*, Pleas of the Crown, I, 693; 1878, *Johnson v. State*, 61 Ga. 305, 306 (murder); 1894, *Wrye v. State*, 95 id. 466, 23 S. E. 373 (mur-

der); 1894, *Cole v. Cole*, 153 Ill. 585, 589, 38 N. E. 703 (dower); 1903, *Barber v. People*, 203 id. 543, 68 N. E. 93 (cited *infra*, note 3); 1846, *Kelly v. Drew*, 12 All. 107, 109 (replevin); 1867, *State v. Johnson*, 12 Minn. 476, 486; 1867, *Shank's Estate*, 4 Brewst. 305, 306; 1859, *Finney v. State*, 3 Head 544, 546. Compare the rulings on a wife's *disqualification on the husband's behalf* (ante, § 605).

⁴ 1903, *Barber v. People*, 203 Ill. 543, 68 N. E. 93 (second wife held admissible to prove the second ceremony, after other evidence of the first ceremony, but not to prove the first ceremony, even after other evidence thereof); 1890, *Miles v. U. S.*, 109 U. S. 304, 313 (bigamy; C., charged and admitted to be defendant's wife, not allowed to prove his prior marriage to E.; "it is only in cases where the first marriage is not controverted, or has been duly established by other evidence, that the second wife is allowed to testify"); 1874, *Friel v. Wood*, 1 Utah 160 (a "plural" wife, excluded on the facts, no issue as to the validity of the first marriage being raised; McKean, C. J., diss.).

claimed to be. The truth is that the very nature of this privilege leads to such inextricable dilemmas, in other issues⁴ as well as in that of bigamy; and with such unifying quibbles is it pretended to pursue this seductive cynosure of conjugal concord.

3. What is prohibited as Testimony.

§ 2232. *Extrajudicial Admissions of Wife or Husband.* That which is privileged is testimony in any form, by the wife or husband against the other. Extrajudicial admissions are a sort of testimony (*ante*, § 1048); hence, they are equally privileged with testimony on the stand. The same result, to be sure, may be reached by another principle, for since the wife or husband is not ordinarily an agent for the other (*ante*, § 1078), the former's extrajudicial statements are mere hearsay assertions and therefore inadmissible. Which-ever theory the judicial rulings may have had in mind, it is settled that such admissions are not receivable, either when the spouse making them is a third person as to the litigation,¹ or when he or she is a party to the cause;² in the latter case, they are receivable as against the maker alone.

But in the application of this principle, several things are to be discriminated. (1) If the wife (for example) has in fact acted, for the matter in hand, as *agent* of the husband, or has a joint property-interest, and while agent or interested has made admissions or done acts creating a liability in contract or tort, those admissions and acts are receivable against him, as against any other principal or owner (*ante*, §§ 1078, 1080);³ for not only is

¹ 1784, *Bentley v. Cooke*, 3 Doug. 422 (assumpsit as *feme sole*; R., being called by the defendant to prove the plaintiff married to R., was excluded, although it was objected that to concede R. incompetent as husband was to assume the very fact alleged by the defendant; and yet, to admit and to believe him would have been to declare him incompetent).

² *Eng.*: 1799, *Kelly v. Small*, 2 Esp. 716 (assumpsit for money lent by one of the plaintiffs before marriage; her admissions excluded, as going "to the prejudice of the husband"); 1841, *Hassay v. Elrod*, 2 Ala. 339 (wife's admissions as to a battery on her); 1853, *Funkhouser v. Pogue*, 13 Ark. 295 (wife's admissions as to trespass done by her); *U. S.*: 1861, *People v. Simonds*, 19 Cal. 275; 1900, *Cedar Rapids N. Bank v. Lavery*, 110 Ia. 575, 81 N. W. 775 (wife's admissions as to a fraudulent conveyance, excluded; a statutory change not being operative at the trial); 1869, *Simmons v. Norwood*, 21 La. An. 421; 1894, *Dalton v. Dregge*, 99 Mich. 250, 58 N. W. 57 (crim. con.; wife's admissions excluded; but her letters received by defendant are receivable as his admissions); 1874, *State v. Arnold*, 55 Mo. 89; 1902, *Baty v. Elrod*, — Neb. —, 92 N. W. 1032 (husband, as to the separate estate); 1866, *Deck v. Johnson*, 1 Abb. App. Cas. 497, 500; 1848, *May v. Little*, 3 Ired. 27; 1834, *Smith v. Scudder*, 11 S. & R. 325, 326; 1837, *Barrell v. Uncapher*, 117 Pa. 353, 362, 11 Atl. 619; 1889, *Martin v. Ratt*, 127 Id. 320, 323, 17 Atl. 993 (husband's

admissions as to goods levied on as his but claimed by her); 1893, *Evans v. Evans*, 155 Id. 572, 577, 26 Atl. 755 (similar); 1898, *La Master v. Dickson*, 91 Tex. 593, 45 S. W. 1 (by a husband, after a perfected gift to the wife by her father, excluded); 1844, *Churchill v. Smith*, 16 Vt. 560. *Contra*, 1899, *State v. Bertoch*, — Ia. —, 79 N. W. 378, *semble*.

³ 1796, *Alban v. Pritchett*, 6 T. R. 680 (action by wife as executrix and husband jointly; her admissions not receivable against him); 1797, *Denn v. White*, 7 Id. 113 (wife's admission of a trespass, not received in an action against them jointly); 1837, *Com. v. Briggs*, 5 Pick. 429 (husband and wife jointly indicted; wife's admissions receivable against herself alone); 1897, *Broderick v. Higginson*, 169 Mass. 482, 48 N. E. 269 (separate actions for personal injuries by husband and wife, tried together; admissions of one not to affect the other).

⁴ *Eng.*: 1732, *Anon.*, 1 Stra. 527 (Pratt, C. J., "allowed the wife's declaration, that she agreed to pay 4s. a week for nursing a child, was good evidence to charge the husband; this being a matter usually transacted by the woman," i. e. so that she was his agent); 1783, *Palshop v. Furnish*, 2 Esp. 511 (the promise of a wife managing the defendant's business removes the bar of the statute of limitations); 1794, *Emerson v. Blonden*, 1 Id. 142 (assumpsit for rent, the defendant's wife having made the bargain; Lord Kenyon, C. J., said "that where a wife acts for her husband in any business or department, by

the privilege against a wife's testimony not violated (since the person here has a double capacity), but otherwise the husband could always shield himself from liability whenever he chose to make his wife an agent to transact business. (2) Again, when statements are made by the wife in the husband's presence, under such circumstances that his silence would be equivalent to an admission of their truth (*ante*, § 1071), the statements are receivable, as would be those of any other person; for they are not offered as hers, but as his by assent and adoption;⁴ provided, of course, that third persons were present or that in some other way the privilege against confidential communications (*post*, § 2336) is obviated. (3) Upon a bill in chancery against a husband and a wife, the wife's answer, so far as it contains testimonial admissions by way of discovery, is inadmissible against the husband, because of this privilege;⁵ yet, so far as an answer is a pleading, it can of course be

his authority and with his assent, he thereby adopts her acts, and must be bound by any admission or acknowledgment made by her respecting that business in which by his authority she has acted for him"); 1808, *Gregory v. Parker*, 1 Camp. 394 (statute of limitations); 1814, *Carey v. Adkins*, 4 id. 92; 1817, *Anderson v. Sanderson*, 3 Stark. 204, *Holt* 591 (like *Palshop v. Furnish*); 1823, *Clifford v. Barton*, 1 B. & P. 199 (admissions of a wife tending shop, received); 1825, *Petty v. Anderson*, 3 Bing. 170 (similar); 1842, *Tindal, C. J.*, in *O'Connor v. Marjoribanks*, 4 M. & Gr. 435, 441 ("In an action against the husband, you might prove the agency of the wife *aliunde*, and then give her admissions or acts in evidence against the husband; . . . acts and admissions of the wife must be proved *aliunde*, not by herself"); 1843, *Meredith v. Footner*, 11 M. & W. 203 (*Alderson*: "A wife cannot bind her husband by admissions, unless they fall within the scope of the authority which she may reasonably be presumed to have derived from him"); *U. S.*: 1871, *Magnee v. Walker*, 26 Ark. 470; 1823, *Turner v. Coe*, 5 Conn. 94 (here excluded, because no agency appeared); 1842, *Barton v. Osborn*, 6 Blackf. 145; 1853, *Dubois v. Ferrand*, 8 La. An. 373; 1869, *Leon v. Bouillet*, 31 id. 651; 1869, *Robichaux v. Bouillet*, ib. 681 (the agency must first be evidenced by other testimony); 1900, *Barker v. Mackay*, 175 Mass. 465, 56 N. E. 614 (the agency is a question of fact for the jury); 1810, *Boyles v. M'Ewen*, 3 N. J. L. 499; 1813, *Fenner v. Lewis*, 10 John. 32, 44 (here the husband had agreed that the wife should receive goods, and her admission of their receipt was admitted); 1834, *Thomas v. Hargrave*, *Wright* Oh. 595 (but the agency must first be otherwise proved); 1871, *Goodrich v. Tracy*, 43 Va. 314, 319; 1862, *Birdsall v. Dunn*, 16 Wis. 235, 238; 1867, *Shaddock v. Clifton*, 22 id. 114, 116 (husband's admissions received in a joint action for the wife's injuries, since he had a joint property-interest in the claim); 1874, *Bach v. Parmely*, 35 id. 238 (wife's agency of necessity to buy necessities). *Contra*: 1901, *Duncan v. Landie*, 45 C. C. A. 666, 106 Fed. 839, 859 (Pennsylvania St. 1867 held to allow no exception for a spouse acting as agent).

Distinguish the statutes and rulings under the privilege for communications (*post*, §§ 2338, 2340), which expressly make an exception to the common-law privilege by allowing testimony on the stand from one who has acted as agent.

⁴ 1872, *People v. Murphy*, 45 Cal. 137, 143; 1879, *People v. Knapp*, 42 Mich. 269, 3 N. W. 987 (defendant in a prosecution for adultery; that defendant's wife had complained against the other woman for the adultery, held not to have been by the implied assent of the defendant, and hence not an admission); 1894, *Dalton v. Dregge*, Mich., cited *supra*, note 1; 1810, *Boyles v. M'Ewen*, 3 N. J. L. 499; 1867, *M'Kee v. People*, 36 N. Y. 113, 116 (remarks of the accused's wife); 1860, *Queener v. Morrow*, 1 Coldw. 123 (wife's statements, in husband's presence, as to money claimed to have been taken by him, admitted; "the statements of the wife are not received or treated as evidence against the husband, but merely as inducement to the responsive admissions, declarations, or acts of the husband at the time; . . . an admission may be presumed, not only from the declarations of a party, but even from his acquiescence or silence"). *Contra*: 1898, *State v. Burlingame*, 146 Mo. 207, 48 S. W. 72.

⁵ 1719, *Rutter v. Baldwin*, 1 Rq. Cas. Abr. 226 (money borrowed by a married woman as *feme sole*, the marriage being concealed with the husband's connivance; in a bill to charge the husband and wife with the mortgage, a divorce having in the meantime been obtained, the wife's answer was received as evidence; but the ruling was disapproved by Lord Eldon in *Le Texier v. Anspach*, 15 Ves. Jr. 166; 1800, *Le Texier v. Anspach*, 5 Ves. Jr. 322, 329, 15 id. 159, 166 (bill for discovery of contract made by the wife as agent for the husband; the agency was admitted, and the bindingness of her acts done, but her testimony in discovery was excluded); 1803, *Cartwright v. Green*, 8 id. 405 (bill against husband and wife for discovery as to goods appropriated; wife's discovery excluded); 1814, *Barron v. Grillard*, 3 Ves. & B. 165 (bill for discovery against husband and wife, concerning her ante-nuptial debt; discovery not compellable, because "the wife shall not give evidence against her husband").

compelled, and its use as a pleading is to be distinguished from its use as an admission. (4) So far as the husband, for example, is a party in a *representative capacity* only, the admissions of the wife, as the person beneficially concerned, are receivable against herself.⁶ (5) So far as the wife's statements as to *ownership of property* are offered, not as a wife's admissions, but as *declarations of a grantor or possessor*, they may be received, if they satisfy the principles of that subject, already examined (*ante*, §§ 1082, 1086, 1778, 1779).

§ 2233. *Hearsay; Production of Documents.* The privilege applies to testimony in any form. Hence the production of documents from the wife or husband against the other is within the privilege.¹ So, too, it would seem that hearsay declarations by the wife or husband, such as would ordinarily be receivable under some exception to the Hearsay rule, should be excluded when offered against the other spouse;² nevertheless, the early practice appears not to have gone to this extent.³

4. What Testimony is Anti-Marital.

§ 2234. *Testimony against Husband or Wife not a Party; General Principle.* If the fear of causing marital dissension or disturbing the domestic peace were genuinely the ground of the privilege (*ante*, § 2228), then the privilege should apply to testimony which in any way disparages or disfavors the other spouse, irrespective of his being a party to the cause; for the wife's public assertion of a husband's fraud or perjury (for example) must tend plainly to that apprehended effect, even though the husband be not legally charged at the moment. On some such ground, it was early attempted to apply the privilege to all testimony thus attributing misconduct to the other spouse, or, as it was phrased, "tending" to accuse the other, *i.e.* making statements which, by exposing the misconduct, tended towards the formal institution of a suit or a prosecution:

1788, *R. v. Clitiger*, 2 T. R. 263; pauper settlement of M. as J.'s wife; in proving a prior marriage of J. to E., which J. had denied on the stand, E. was called in contradiction; it was argued for admission that the husband and wife were not parties nor interested in the settlement issue, and that "nothing that the woman could say could affect her husband; no prosecution could be grounded on her testimony"; this was disapproved; Ashurst, J.: "I lay all consideration of interest out of the case. . . . But the ground of her incompetency arises from a principle of public policy, which does not permit husband and wife to give evidence that may even tend to criminate each other. The objection is not confined merely to cases where the husband or wife are directly accused of any crime, but even in collateral cases, if their evidence tends that way, it shall

⁶ 1831, *Humphreys v. Boyce*, 1 Moo. & Rob. 140 (admitted in an action against the husband as her administrator).

¹ 1897, *State v. Durham*, 121 N. C. 546, 28 S. E. 22. The following ruling, verging upon absurdity, may be noted here: 1894, *Fratini v. Casiani*, 66 Vt. 273, 276, 29 Atl. 252 (action for alienation of wife's affections; to prove the husband's assault upon the wife, a record of conviction was excluded, because, unless upon plea of guilty, it was based probably on the wife's testimony, incompetent in the present case).

² 1835, *Tacket v. May*, 3 Dana 80 (wife's declarations as indicating husband's knowledge of a horse's unsoundness); 1899, *National Germ. Am. Bank v. Lawrence*, 77 Minn. 262, 79 N. W. 1016.

³ 1806, *Aveson v. Kinnaird*, 6 East 128 (cited *ante*, § 1718).

Compare the declarations admitted and excluded under the exceptions to the privilege (*post*, § 2239).

not be admitted. Now here the wife was called to contradict what her husband had before sworn, and to prove him guilty of perjury as well as bigamy; so that the tendency of her evidence was to charge him with two crimes. However, though what she might then swear could not be given in evidence on a subsequent trial for bigamy, yet her evidence might lead to a charge for that crime and cause the husband to be apprehended."

1846, *Tenney, J.*, in *State v. Welch*, 26 Me. 30, 32 (excluding the husband of one with whom the defendant was charged to have committed adultery): "If there is soundness in the reason which is given in the books for holding incompetent the husband or wife to give against each other evidence, because it may be the 'means of implacable discord and dissension between them,' it is certainly difficult to perceive how that discord and dissension will fail to arise when in collateral proceedings testimony should be given by one which charges directly upon the other the same crime for the commission of which the party on trial is indicted."

But this application of the privilege was soon disowned in England; and its scope was restricted to such testimony only as disfavors the other spouse's *legal interests in the very case* in which the testimony is offered. It is not to be regretted that thus the attempt to be logical with an illogical reason came to failure, and that the privilege was wholesomely kept within some sort of bounds:

1817, *Ellenborough, L. C. J.*, in *R. v. All Saints*, 6 M. & S. 195, 199: "If we were to determine, without regard to the form of proceeding, whether the husband was implicated in it or not, that the wife is an incompetent witness as to every fact which may possibly have a tendency to criminate her husband, or which connected with other facts may perhaps go to form a link in a complicated chain of evidence against him, such a decision, as I think, would go beyond all bounds"; *Bayley, J.*: "There was no objection arising out of the policy of the law because by possibility her evidence might be the means of furnishing information and might lead to inquiry and perhaps to the obtaining of evidence against her husband. It is no objection to the information that it has been furnished by the wife. . . . I am not sure that the import of the expression 'tendency to criminate' was very accurately defined in that case [of *R. v. Cliviger*]. It was probably not understood as meaning that the wife's evidence could be used against her husband, for we know that this could not be so. . . . Nothing which the wife proved on this occasion could be the direct means of founding a prosecution against her husband, although it might afford the means of procuring evidence against him; but such a collateral consequence is not a sufficient objection"; *Abbott, J.*: "It may properly be said of her evidence that it has not any tendency to criminate him, provided that expression be understood with the limitation which I affix to it, that is, to criminate him in the course of some proceeding in which a crime is imputed to him."

1806, *Roane, J.*, in *Baring v. Reader*, 1 Hen. & M. 154, 155: "I take the rule on this subject to be that, in civil actions where the husband is no party, the wife may be called as a witness even to facts which if proved in another action to which her husband is a party, and by evidence other than her own, may go to charge him. The unavailing testimony of the wife in such a case, entirely impotent as it relates to the husband, producing him no loss, and consequently exciting in him no displeasure, will not violate the reason of that policy which, in respect to the harmony to be desired in the marriage state, has given rise to the rule in question."

1869, *Durfee, J.*, in *State v. Briggs*, 9 R. I. 351, 355: "Upon principle, we find no satisfactory ground for the distinction [between direct and indirect crimination]. The supposed disqualification of husband and wife to give, in collateral cases, testimony directly criminative of each other, is said to rest on the policy of avoiding dissensions between husband and wife; and, if so, the disqualification ought to be complete; for such dissen-

sions, differing only in degree of violence, would be likely to result from testimony which tends to criminate as well as from that which is directly criminative. There are logically only two alternatives, either to exclude the testimony entirely, or to admit it to any extent in collateral proceedings provided that no use can afterwards accrue therefrom in any direct proceeding; we think it the better rule subject to such proviso to admit the testimony. . . . Neither can we perceive that any special mischief will be likely to result from it; for the testimony, being given in a collateral proceeding, could have effect only as information against the husband or wife, there being no contradiction between them, and there is but slight reason for supposing that the witness would willingly communicate under oath any information which would otherwise be withheld; generally, indeed, it is pretty well known, either from the witness himself or otherwise, what he can testify before he takes the stand. If we accord to the witness the privilege of objecting to testify on the ground that the testimony if given will criminate or tend to criminate a husband or wife, we think that in a proceeding which can never be used against the husband or wife there is no sound principle of public policy which requires that we should go still further, and put it in the power of a third person, by objecting when the witness does not object, to defeat (it may be) a just claim or escape a merited punishment."

1893, *Sharpsstein, J.*, in *People v. Langtree*, 94 Cal. 256, 259, 30 Pac. 513: "When may she be said to be examined for or against him? . . . No one is said to be examined for or against one not a party to the action or proceeding in which such witness is called to testify. And the testimony of a witness is not evidence for or against any one not a party to the action or proceeding in which such testimony is given."

Of these reasons, two may be noted as particularly strong. One of them is that the exclusion of a wife on the ground that her testimony may reveal his misconduct, and thus "tend" to charge him, rests on the assumption, false to fact, that her testimony on the stand would in any sense be a revelation, an unsealing of that which was secret.¹ Nothing prevents her from revealing her knowledge out of court; in most instances she has in fact done so. It would be mere hypocrisy to sanction her silence on the stand on the pretext that the husband was thus really safeguarded from her disclosure. The other argument is found in the general principle (*ante*, § 2196), that a party cannot, as such, take advantage of a witness' privilege; in other words, an opponent cannot claim that the wife of a third person should be excluded because of the privilege of her husband, so long as neither husband nor wife claims the privilege.

In examining, then, the application of the rule in this respect, it is to be understood that by the orthodox view the privilege applies only in favor of a person against whom as a party to the cause the testimony of a wife or husband is offered.

§ 2235. *Same: Sundry Applications of the Rule (Bankruptcy, Adultery, etc.).* In the application of the rule to the great variety of facts that naturally present themselves, not much is profitable in the way of generalization.

¹ It is to be noted that the phrase "tend to criminate," as here used, is to be distinguished in meaning from the same phrase as used for the privilege against self-crimination. In that place (*post*, § 2260), it signifies that facts not being in themselves criminal, yet forming with other facts the elements of a crime, are within the privilege; and so here also, assuming the

husband to be a party, the privilege concededly covers facts "tending" in that sense to charge him (*L. C. J. Tenterden*, in *R. v. Bathwick*, *supra*). But when he is not a party, and the question is whether the privilege covers facts directly involving a charge, the phrase "tend to criminate" is used, in *R. v. Cliviger*, *supra*, as also describing that totally distinct problem.

For one thing, in *bankruptcy* proceedings, the testimony of the wife of the bankrupt, so far as it is called for by the creditors, has always been deemed privileged, whatever the status of the husband as a party may be deemed to be.¹ In *pauper-settlement* cases, the town or other corporation is in strictness the party charged, and the testimony of the wife of the pauper or of any other person could not properly be the subject of a privilege; the authority of the contrary ruling in *R. v. Cliviger* (above quoted) was practically repudiated by the principle laid down in *R. v. All Saints* (above quoted).² In a case involving a charge of *adultery*, the testimony of the wife or husband of the person, not a party, with whom the adultery is charged, is not the subject of a privilege, on the principle of *R. v. All Saints*; but here there is a decided opposition in the judicial views.³ Where the testimony offered does no more than *discredit the character* or disparage the veracity of the witness' husband or wife not being a party, the case is clearly without the privilege,⁴ although a few Courts chivalrously proclaim here also a privilege.⁵

¹ 1813, *Anon.*, 1 Brownl. 47 ("By the common law she shall not be examined"); 1719, *Ex parte James*, 1 P. Wms. 610 (wife excluded; the statute of 21 Jac. I. quoted *ante*, § 2237, extending only to the concealment of goods and no further); 1899, *Re Jefferson*, 96 Fed. 826 (wife not compellable); 1899, *Re Mayer*, 97 id. 328 (wife not compellable to testify against a bankrupt husband, by Wisconsin law); 1903, *Re Worrell*, 128 id. 159 (U. S. St. 1903, applied; inquiry into the facts allowed to determine whether the business was the wife's separate business or not). Compare the statutes cited *ante*, § 489, and the cases under the self-crimination privilege, *post*, § 2232.

² 1788, *R. v. Cliviger*, 3 T. R. 263 (pauper settlement of M. as J.'s wife; E. was called to prove that she was married to J. prior to his marriage to M.; J. had already testified denying the prior marriage; it was argued that this showed J.'s commission of bigamy and perjury, though J. was not a party; the wife was excluded; quoted *supra*); 1817, *R. v. All Saints*, 6 M. & S. 195 (pauper settlement of E., married to W.; to show this marriage void, A. was admitted to prove her prior marriage to W., W. not having testified, and the husband not being a party nor contradicted as a perjurer; quoted *supra*); 1831, *R. v. Bathwick*, 3 B. & Ad. 639 (pauper settlement of E.; after C.'s testimony to his marriage with E., the opponent, to prove the marriage invalid, called M. to prove C.'s prior marriage to her; admitted, because "the present case is not a direct charge or proceeding against her husband . . . [neither] has any interest in the decision of the question"; whether if C. had denied such a marriage, and thus the wife testified to his perjury, the result would be otherwise, left undecided; *R. v. Cliviger* disapproved); 1814, *Canton v. Bentley*, 15 Mass. 441 (pauper settlement; husband's testimony to wife's adultery, to prove illegitimacy, doubted).

³ Not privileged: 1902, *Boerner v. Darrach*, 65 Kan. 599, 70 Pac. 597 (alienation of affections of plaintiff's wife; plaintiff admitted to

testify); 1857, *State v. Marvin*, 35 N. H. 22, 26; 1845, *Van Cort v. Van Cort*, 4 Edw. Ch. 421, 423 (divorce for adultery with X; X's husband admitted for the complainant, because adultery was not a crime in New York, and he was therefore not criminating his wife); 1902, *State v. Wiseman*, 130 N. C. 798, 41 S. E. 294 (husband held admissible to prove fornication between a third person and the witness' wife, the defendant, charged as committed before their marriage, the charge against the wife having been withdrawn; Douglas, J., diss.); 1876, *State v. Bridgman*, 49 Vt. 202, 206 (adultery with C.; C.'s husband allowed to testify for the prosecution, his wife not being a party); 1853, *State v. Dudley*, 7 Wis. 644 (former husband of W., admitted to prove her adultery with defendant, because his testimony "would be inadmissible in support of an indictment against her"); 1903, *State v. West*, 118 id. 465, 95 N. W. 521 (preceding case approved). Privileged: 1798, *State v. Gardner*, 1 Root 493 (adultery with A.; A.'s husband not admitted for the prosecution); 1844, *State v. Welch*, 39 Me. 30 (adultery with A.; A.'s husband excluded); 1903, *Graves v. Harris*, 117 Ga. 817, 45 S. E. 239 (alienation of affections, with an allegation of crim. con.; plaintiff husband held disqualified); 1843, *Com. v. Sparks*, 7 All. 594 (adultery with D.; D.'s husband not admitted for the prosecution; by a majority, following *State v. Welch*, Me., *supra*); 1899, *People v. Fowler*, 104 Mich. 442, 63 N. W. 572 (husband of A. not admitted, on a charge of defendant's adultery with A.); 1864, *State v. Wilson*, 31 N. J. L. 77, 81 (husband not admitted to prove adultery of his wife with defendant, though the wife had been acquitted). Compare the cases involving co-defendants, *post*, § 2236, and crimes against the other (*post*, § 2239, par. 3), which sometimes involve adultery in other aspects.

⁴ 1871, *Ware v. State*, 35 N. J. L. 553, 555 (husband allowed to testify against wife's character for veracity as a witness).

⁵ 1858, *Keaton v. Greenwood*, 24 Ga. 217, 223 (wife's testimony discrediting that of husband

Further than this, it seems unsafe to attempt to classify the rulings, since so much depends upon the facts of each case.⁶ On which side lies the weight

not a party, excluded; following *R. v. Cliviger* "with extreme reluctance and dissatisfaction"; 1899, *Rein v. Bowman*, 13 Fed. 309, 391 (wife not admitted to testify that her deceased husband, who had testified, had admitted that he was bribed; placed partly on *R. v. Cliviger*, partly on the ground of confidential communications); 1898, *Smith v. Proctor*, 37 Vt. 304, 306 (widow said to be inadmissible to "transact transactions affecting the character of the husband"); 1878, *White v. Perry*, 14 W. Va. 68, 81 (wife not admissible to prove facts "affecting the character" of her husband, though he is not a party; here, testimony to his admission of a false statement, excluded).

Sundry rulings in the various jurisdictions are as follows; compare the statutes cited post, § 3243: *Ang.*: 1884, *Lady Ivy's Trial*, 10 How. St. Tr. 555, 681, 689, 644 (Mrs. D. testified that her husband, now deceased, an agent of the defendant, had helped the defendant in forging certain title-deeds offered by the defendant; on objection that she could not "swear it upon him here," L. C. J. Jefferys answered: "That is not against him, man; he is out of the case; but against my Lady Ivy"; yet he forbade the husband's oath to be used to discredit the wife as witness); 1717, *Williams v. Johnson*, 1 Stra. 804, King, C. J. (action against a husband for goods supplied to the wife; to prove for the defendant that the goods were supplied on the credit of the wife's father, the testimony of the wife's mother, who was present at the purchase, was admitted); 1806, *Vowles v. Young*, 13 Ves. Jr. 140, 144 (issue of legitimacy on a bill of redemption by heirs; a husband's declarations as to the wife's illegitimacy, admitted, there being "no interest in the husband"); 1828, *Henman v. Dickinson*, 5 Bing. 183 (wife of the drawer, to prove a forged alteration by her husband, in an action by an indorsee against the acceptor of a bill; *R. v. Cliviger* doubted); 1833, *R. v. Glead*, Bell Cr. C. 258, note, Littledale and Taunton, J.J. (larceny; E.'s wife not admitted to prove that E. was present at the stealing; since "her evidence cannot but facilitate an accusation against her husband"); 1843, *Langley v. Fisher*, 5 Beav. 443 (bill to reach the wife's separate estate; co-defendant's husband excluded); 1860, *R. v. Halliday*, Bell Cr. C. 257 (Court for Crown Cases Reserved; false pretences made with T.'s wife, with a count for conspiracy by the two, but the latter count was not tried; T. admitted to testify against defendant, though "his evidence tended to show that his wife had acted unlawfully and criminally"); *Can.*: 1884, *Millette v. Little*, 10 Ont. Pr. 265 (husband held not compellable to criminate his wife as co-defendant in libel); *Ark.*: 1884, *Nolen v. Harden*, 43 Ark. 307, 315 (the rule "does not extend to collateral suits between third parties"); *Ill.*: 1882, *Lincoln Ave. & N. C. G. R. Co. v. Madans*, 103 Ill. 417, 431, *semble* (similar); *Kan.*: 1874, *Farrow v. Chapin*, 13 Kan. 107, 112 (wife admitted in action of replevin against an officer seizing goods as her

husband's); 1877, *Higbee v. McMillan*, 18 Id. 132, 135 (wife of a vendor admitted for the vendee in replevin claiming goods against another vendee; the vendor not being a party not concluded by the judgment); *Ag.*: 1831, *Higdon's Heirs v. Higdon's devisees*, 1 J. J. Marsh. 48, 54 (husband not admitted where wife was a co-opponent); 1877, *Milton v. Hunter*, 13 Bush 163, 169 (husband of an heir not a party, not admitted on behalf of the proponent of a will); *Mass.*: 1814, *Fitch v. Hill*, 11 Mass. 284 (surety's wife admissible in action against the maker of a note, the liability being contingent only); *Mich.*: 1896, *Michigan E. & P. Co. v. Coll*, 116 Mich. 261, 74 N. W. 475 (bill against real estate owned by husband and wife as joint tenants; husband not admitted as against his own interest in the estate, because the estate was inseparable); *Miss.*: 1897, *Lockwood v. Lockwood*, 67 Miss. 476, 70 N. W. 764 (wife admissible in her suit against the husband's father and mother for alienation of affections); 1905, *Evans v. Steele*, 89 Id. 283, 92 N. W. 951 (the wife is compellable, if a party, where the husband is not a party); *Miss.*: 1901, *Virden v. Dwyer*, 78 Miss. 763, 20 So. 45 (not admitted upon creditors' bill against husband and wife to set aside conveyance); *Nebr.*: 1893, *Buckingham v. Roar*, 45 Nebr. 244, 63 N. W. 398 (admissible, where the other spouse is a nominal party only; here in an action to cancel a deed of dower); *N. J.*: 1840, *Doe v. Johnson*, 18 N. J. L. 87, 90 (suit for land, between creditor and vendee of debtor; debtor's wife admissible for three lots as to which her husband was no longer interested in the event of the suit, even though her testimony charged him with fraud; but not as to a lot in which he was interested, nor in any case to testify directly to his crime); 1895, *Woolverton v. Van Nyeckel*, 57 Id. 393, 31 Atl. 603 (the wife defaulted in an action against a firm to which she belonged, and the husband was admitted in the action against the other partner); 1899, *Munyon v. State*, 62 Id. 1, 43 Atl. 577 (attempting to produce a miscarriage; wife's testimony held on the facts not to incriminate the husband assisting the defendant); *N. C.*: 1878, *State v. Parrotty*, 79 N. C. 616 (on trial of W. for assaulting P., W. may call P.'s wife, P. not being "interested in the result"); *Pa.*: 1870, *Rowley v. McHugh*, 66 Pa. 269 (ejection by husband and wife for land claimed to be the wife's, against one claiming under a judgment sale against the husband; wife admitted for the plaintiff, because the husband did not warrant defendant's title); 1877, *Greenawalt v. McMuley*, 65 Id. 352 (title depending on a child's legitimacy; widowed mother admitted to testify to the date of her marriage and the child's birth); 1886, *Pleasanton v. Nutt*, 115 Id. 266, 269, 8 Atl. 63 (replevin by a wife against the husband's vendee; the husband being interested as warrantor, the wife was not admitted for herself, nor he against her); 1887, *Burrell v. Uncapher*, 117 Id. 353, 362, 11 Atl. 619 (action in joint names for the wife's per-

of authority in general, for the broader or the narrower view of the privilege, it would be difficult to say, since the individual Courts are not always consistent with themselves. But no Court ought to-day to lend its sanction to any expansion of the limits of this undesirable rule of privilege; and there is at least ample authority for the most rigid restriction.

§ 2236. *Same: Co-indictees and Co-defendants.* When one spouse is charged by indictment with the same crime as a party against whom the other spouse is offered as a witness, the application of the preceding principle is determined by a special set of rules. The looser view of the privilege, it is true (*ante*, § 2234), might serve to extend it to any case in which (for example) a wife's testimony involved in the crime a husband not being in any way a party to the formal charge. Nevertheless, in this field, the looser view seems to have been given little sanction, and the result is reached by following the stricter interpretation and applying the general rules which determine whether the person is technically a party to the cause. Thus, the special body of rules which served to determine whether Doe, indicted with Roe, was qualified as a witness on Roe's behalf, are also followed in passing upon the admission of Doe's wife to testify for the prosecution against Roe; just as they were also employed (*ante*, § 609) to determine whether Doe's wife was admissible on Roe's behalf. Those rules have been already examined in detail (*ante*, § 580). It is enough here to refer to their connection, and to note their application to the present privilege.

Under those rules, then, it is generally held that the privilege covers the case of the wife of a *co-defendant now on trial*; ¹ but not the case of the wife

sonal injury; the husband not admissible against the wife); 1893, *Johnson v. Watson*, 157 *id.* 454, 456, 27 *Atl.* 772 (the husband not admitted against his wife in replevin); *R. I.*: 1869, *State v. Hriggs*, 9 *R. I.* 361 (abortion; the father of the child had procured the defendant to operate, but had afterwards married the woman; both were admitted for the prosecution; that the testimony of each charged the other with a crime did not exclude it, since it could not be used against them in another proceeding); *S. C.*: 1830, *Jackson v. Heath*, 1 *Bail.* 355 (wife admitted for the claimant of notes bequeathed to her husband by the defendant's testator); 1848, *Edwards v. Pitts*, 3 *Strobh.* 140 (husband, an idiot ward of the defendant, sued as his trustee; wife excluded); 1869, *Leaphart v. Leaphart*, 1 *S. C.* 199, 201, 204 (wife admitted to prove a first marriage of her husband not a party, by which his second became bigamous); *S. D.*: 1903, *Aldous v. Olverson*, — *S. D.* —, 95 *N. W.* 917 (supplementary proceedings against a husband; the wife's testimony not admitted against him); *Vt.*: 1835, *Williams v. Baldwin*, 7 *Vt.* 505, 507 (wife admitted to prove receipt of money by her deceased husband as agent, his estate being settled as insolvent, and not being a party to the suit); *Va.*: 1806, *Baring v. Reeder*, 1 *Hen. & M.* 154, 157, 164, 171 (wife admissible to prove title not in her husband, who was not a party though he had been

in possession of the goods and had sold them); 1830, *Robin v. King*, 2 *Leigh* 140 (widow not admitted to prove disclaimer of title by her husband, a grantor under whom defendant claimed; but here put on the ground of confidential communications); 1873, *Murphy v. Com.*, 23 *Gratt.* 960, 966 (assault; the wife of the injured party offered to prove him the aggressor; not decided); *Wash.*: 1899, *Frankenthal v. Solomonson*, 20 *Wash.* 440, 55 *Pac.* 754 (creditors' proceeding against wife as holding property of insolvent debtor; debtor not privileged to exclude the wife's testimony for creditors).

² 1775, *R. v. Rudd*, 1 *Leach Cr. L.*, 4th ed., 115, 128, 132 (co-defendant's wife excluded, but not the wife of a principal already convicted, even though she hopes for a pardon for her husband if the present defendant is convicted); 1860, *R. v. Halliday*, 6 *Cox Cr.* 298; 1895, *Republic v. Kahakauila*, 10 *Haw.* 28 (adultery; husband of one of the defendants, held improperly admitted to prove the marriage); 1871, *Miner v. State*, 55 *Ill.* 59 (adultery; co-indictee's husband, excluded); 1838, *State v. Burlingham*, 15 *Me.* 104, 107 (wife of co-defendant charged with conspiracy, excluded). *Contra*: 1669, *R. v. Backworth*, 2 *Keb.* 403 (perjury; "the husband of one of the defendants may be admitted to prove the issue, . . . albeit not to prove or excuse his wife's subornation of the other defendant"; by two judges).

of a co-defendant whose interest has been removed from the record by conviction,³ or by acquittal,³ or by *nolle prosequi*;⁴ nor of the wife of a co-indictee who by severance has obtained a *separate trial*;⁵ nor, of course, of the wife of one *separately* indicted though for the same offence.⁶

§ 2237. *Testimony against Husband or Wife Deceased or Divorced.* Can there be dissension with the *manes* of a departed? Is there for married pairs a posthumous peace, capable of fracture by service of subpoena upon the survivor, and therefore fit to be forefended by the law? If so, then the privilege should extend a *post mortem* protection. But unless we assume such a theory, the privilege ceases upon the death of a spouse. It is true that, among the varying reasons for the privilege, one of them does suggest a rational extension beyond the life of the parties, namely, that policy of fairness which aims to exempt husband and wife from the repugnancy of being the means of condemning the other (*ante*, § 2228, p. 15); for this repugnance must exist also, in some degree, to a condemnation of the memory of the departed one. But (apart from the argument that this reason has by no means been a generally accepted one) the answer is that a detriment of such exiguous delicacy could not with propriety be allowed to stand in the way of the judicial establishment of truth. Moreover, looking back at the principle which defines testimony "against" a spouse as testimony against a spouse who is a party to the cause (*ante*, § 2234), it is obvious that, since a deceased person cannot be a party, testimony concerning the deceased person can never be said to be testimony "against" a spouse.

And what is to be said of a divorced spouse? Does the privilege there also

³ 1775, *R. v. Rudd*, *supra*; 1836, *R. v. Williams*, 8 C. & P. 284 (wife of a co-principal already convicted on another indictment).

⁴ 1896, *State v. Goforth*, 136 Mo. 111, 37 S. W. 801 (wife of one who had been jointly indicted but acquitted).

⁵ 1884, *Woods v. State*, 76 id. 35 (joint-indictee's wife, admissible, where he ceases to be a party to the record, by virtue of a *nolle prosequi*); 1876, *Ray v. Com.*, 12 Bush 397 (wife of co-indictee against whom a *nolle prosequi* had been entered); 1898, *Rios v. State*, 39 Tex. Cr. 675, 47 S. W. 987 (separately indicted for the same offence; wife here called for the prosecution; allowed, because of an agreement by the district-attorney to dismiss the indictment against the husband). Distinguish the following: 1876, *Dill v. State*, 1 Tex. App. 278, 283 (wife of co-indictee jointly tried, inadmissible, though a *nolle prosequi* was entered as to her husband afterwards before trial ended).

⁶ 1902, *Campbell v. State*, 133 Ala. 158, 32 So. 635 (husband admitted to prove adultery of C. with his wife, jointly indicted but separately tried); 1882, *Williams v. State*, 69 Ga. 13, 20, 30 (wife admissible of one indicted for the same offence but not on trial, though probably she need not incriminate her husband; the result placed on the authority of *Stewart v. State*, 58 Ga. 577, 581, though not there decided); 1885, *Whitlow v. State*, 74 id. 819 (same); 1885, *Aske*

v. State, 75 id. 357 (wife of an accomplice not on trial, admitted); 1903, *Rivers v. State*, — id. —, 44 S. E. 859 (husband of a co-indictee separately tried, admitted); 1887, *State v. Ransbarger*, 71 Ia. 746, 747, 31 N. W. 865 (wife of one indicted for same crime though not on trial, admitted); 1878, *Hunter v. State*, 40 N. J. L. 495, 519, 545 (wife of accomplice, indicted and not yet tried, but testifying for the prosecution, allowed to corroborate him as to a fact not in itself criminal); 1899, *Munyon v. State*, 62 id. 1, 42 Atl. 577 (wife of a joint indictor tried separately is admissible for the prosecution); 1903, *State v. West*, 118 Wis. 469, 95 N. W. 521 (adultery with F., tried separately; F.'s husband, admitted for the prosecution to prove his marriage with F.). *Contra*: 1855, *State v. Bradley*, 9 Rich. 168, 171 (wife of co-indictor, not on trial, not admitted for defendant to testify that her husband alone was guilty).

⁷ 1877, *Powell v. State*, 58 Ala. 362 (wife of accomplice not indicted, admissible); 1883, *People v. Langtree*, 64 Cal. 256, 30 Pac. 813 (wife of one charged by separate information, admitted, though she incriminated her husband); 1900, *Fuller v. State*, 109 Ga. 809, 35 S. E. 296 (wife of one separately indicted for the same offence, admitted); 1893, *Bluman v. State*, 35 Tex. Cr. 43, 58, 21 S. W. 1027, 26 S. W. 75 (but here the husband had already testified for the State as a party to the crime).

continue? After the grave cause for dissolution — adultery, desertion, crime, or the like — has come to pass, and the parties have been not only alienated in spirit, but also solemnly freed, by judicial decree, from the obligations of mutual concord and concession, is there any longer, either in fact or in policy, a marital peace which must be kept inviolable? Or is the legal fiction so elastic and so artificial that it can afford to dispense with even a modicum of fact for its support, and can be deemed to exist even after the bonds of matrimony have been loosed? There ought to be no doubt that this would be carrying too far the fantasies of legal pretence:

1802, *Messrs. Best and Peake*, arguing, in *Monroe v. Twinton*, Peake Add. Cas. 219: "It is true, a wife cannot, while she remains so, . . . [testify against her husband]. . . . The law precludes every inquiry from either which might break in upon the comfort and happiness of the married state. . . . But the reason why she should then have been incompetent no longer exists. The bond of marriage is broken [by divorce] and at an end; and the policy of the law no longer requires that terms of amity and friendship should subsist between them any more than between utter strangers."

1832, *Johnson, J.*, in *Caldwell v. Stuart*, 2 Bail. 574 (admitting the widow against her husband's estate): "Neither the rule, nor any of the reasons upon which it proceeds, have any the most remote application here. The husband is no party; he has ceased to have any interest in temporal concerns. The defendant, the executor, represents the interests of the creditors, legatees, or distributees, as the case may be, and not the husband's. There is no danger of matrimonial discord; nor is there any violation of confidence."

1850, *Kent, J.*, in *Walker v. Sanborn*, 46 Me. 470, 472: "There seems to be a distinction between the testimony of a wife and a widow, based on the different relations that exist. The fundamental reason for the rejection of the wife's testimony is the promotion of domestic harmony, and the danger that it may be disturbed between husband and wife if they are allowed to testify. This reason ceases on the death of one of the parties."

There is no privilege, then, which prevents the surviving spouse from testifying, after the death of the other, in disparagement of the conduct or the property of the deceased;¹ nor is it material that the testimony relates to

¹ *Eng.*: 1723, *Dale v. Johnson*, 1 Stra. 568 (wife of a deceased plaintiff, admitted for the defendant to prove the death); 1824, *Beveridge v. Minter*, 1 C. & P. 364, *Abbott, C. J.*, (wife allowed to testify to admissions of debt by the deceased husband, because "she is appearing against her own interest"); *U. S.*: 1902, *Graves v. Graves*, 70 Ark. 541, 69 S. W. 544 ("A widow is a competent witness against the executor of her deceased husband"); 1856, *Jack v. Russey*, 8 Ind. 180 (maker's wife admitted against a co-maker of a note, the maker being deceased and his estate insolvent); 1864, *Pratt v. Delavan*, 17 Ia. 307, 309 (widow admitted for the plaintiff in an action on a note made by the deceased husband; "testifying for or against herself and the heirs, after the death of the husband, is manifestly not the same thing as testifying for or against her husband if alive"); 1887, *Parcell v. McReynolds*, 71 Id. 623, 33 N. W. 139 (similar; *Beck, J. diss.*); 1841, *McGuire v. Maloney*, 1 B. Monr. 224 (wife's testimony against the husband's administrator

in favor of the husband's vendee, admissible); 1881, *Ames' Succession*, 33 La. An. 1317, 1327 (husband testifying to a debt against wife's estate); 1859, *Walker v. Sanborn*, 46 Me. 470, 472; 1859, *Jackson v. Barron*, 37 N. H. 494, 500 (wife of a deceased partner, admitted in an action against the surviving partner for a firm debt); 1835, *Hester v. Hester*, 4 Dev. 228 (widow admitted to testify for the contestants of a will, as to the husband's declarations, the widow having claimed dower against the will); 1851, *Gaskill v. King*, 12 Ired. 211, 215 (widow admitted for one claiming by deed of chattels against the husband's administrator); 1855, *Stoher v. McCarter*, 4 Oh. St. 513, 516 (wife admitted to charge husband's administrator with a debt of the estate); 1799, *Pennsylvania v. Stoops*, Addis. 361, 362, *semble*; 1811, *Wells v. Tucker*, 3 Binn. 366 (widow admitted for a claimant of the husband's chattels by gift against his administrator; no doubt raised); 1846, *Cornell v. Vanartsdalen*, 4 Pa. St. 364, 374, *semble*; 1861, *Robb's Appeal*, 39 Id. 501,

matters which occurred during the marriage. The few rulings taking the contrary view³ are misled by the analogy of a different privilege, namely, that which prohibits the disclosure of marital confidential communications. It is a legitimate corollary of that privilege (*post*, § 2341) that it prevails even after the death of one spouse. But the two privileges are entirely distinct; the former, for example, has been in many jurisdictions abolished, while the latter has been nowhere abolished. The reason of the former privilege ceases with death; that of the latter does not. Each has a separate scope; for example, a wife might be prevented from revealing a confidential communication, even though not testifying against her husband; and she might be prevented from testifying against her husband, though her testimony involved no confidences. Thus it is that a wife, after the husband's death, is not privileged to withhold facts involving disparagement of his conduct or estate during life, so long as she does not violate the other and distinct privilege against disclosing confidential communications.³

So, too, after *divorce*, there is no privilege to withhold the testimony of either;⁴ although in a few courts⁵ the same confusion has here also appeared between the present privilege and the privilege for confidential communications.

502 (widow admitted for a claimant of a debt against the husband's administrator); 1881, *Stephens v. Cotterell*, 99 id. 188, 192 (widow admitted for defendant in an action by the husband's administrator); 1832, *Caldwell v. Stuart*, 2 Bail. 574 (widow admitted for a claimant by gift against the husband's executor); 1851, *Hay v. Hay*, 3 Rich. Eq. 384, 393, 397 (similar); 1833, *Edgell v. Bennett*, 7 Vt. 534 (widow admitted for a creditor to prove a transfer by her husband fraudulent); 1835, *Williams v. Baldwin*, ib. 503, 507, *semble* (widow of an agent, admissible to prove his receipt of money); 1855, *Smith v. Proctor*, 27 id. 304 (widow admitted for a claimant against the deceased husband's estate).
³ 1842, *O'Connor v. Marjoribanks*, 4 M. & Gr. 435 (trover by G.'s representatives; G.'s wife not admitted for the defendant to prove his rightful receipt of the goods as pledgee, by testifying that her deceased husband "had authorized her" to dispose of his goods; the opinions show a complete confusion of the distinct reasons for the rules about testifying against the husband and about revealing confidential communications; this ruling has done much harm in the law); 1895, *Emmons v. Barton*, 109 Cal. 662, 42 Pac. 305 (under C. C. P. § 1881, the wife cannot be examined after the husband's death). In the following jurisdictions the rulings leave an uncertainty: *Massachusetts*: 1850, *Dickerman v. Graves*, 6 Cush. 308, 309 (wife inadmissible even after dissolution of marriage); 1861, *Dexter v. Booth*, 2 All. 559 (wife admitted in an action against the husband's executor for the husband's debt); *Virginia*: 1811, *Braxton v. Hilyard*, 2 Munf. 49, *semble* (widow admitted to prove infancy of a surety on her deceased husband's bond); 1855, *William & Mary College v. Powell*, 12

Gratt. 372 (*contra*); 1882, *Smith v. Bradford*, 76 Va. 753, 765 (same).

³ The statutes, in some of the Codes particularly (*ante*, § 488), have sometimes given a sanction to this confusion; so that the error has there passed beyond the power of judicial correction.

⁴ 1888, *Long v. State*, 86 Ala. 36, 43; 1898, *Irman v. State*, 65 Ark. 508, 47 S. W. 558; 1900, *Hitt v. Sterling-Gould Mfg. Co.*, 111 Ia. 458, 82 N. W. 919; 1867, *Storms v. Storms*, 3 Bush 77, 79; 1878, *People v. Marble*, 38 Mich. 117, 123; 1893, *French v. Ware*, 65 Vt. 338, 344, 26 Atl. 1096 (including matters during marriage); 1870, *Cook v. Henry*, 25 Wis. 569; 1890, *Bigelow v. Sickles*, 75 id. 427, 429, 44 N. W. 761.

⁵ 1802, *Monroe v. Twistleton*, Peake Add. Cas. 219 (assumpsit for board and lodging supplied to the defendant's child; to prove the contract, S.'s wife, who had been the defendant's wife at the time of the contract, but had been divorced and had remarried, was not admitted; the opinion confusing the question with that of confidential communications); 1856, *Tulley v. Alexander*, 11 La. An. 628 (excluded, even though they live apart); 1850, *Dickerman v. Graves*, 6 Cush. 308 (cited *supra*, note 2); 1900, *State v. Kodat*, 158 Mo. 125, 59 S. W. 73 (divorced wife not allowed to testify against the husband on a prosecution for assault on K. made during the marriage and arising out of a quarrel with the wife); 1897, *State v. Raby*, 121 N. C. 682, 28 S. E. 490 (excluded, as to adultery during marriage; no change made by the Code); 1903, *State v. Phelps*, 3 Tyler 374 (divorced wife, not admitted against defendant on a charge of adultery during marriage; Tyler, J., diss.).

5. Anti-Marital Testimony Admitted Exceptionally.

§ 2239. At Common Law, by Necessity (Injuries to the Spouse, by Battery, Abduction, Fraud, Adultery, and the like; Divorce; "Crimes against the Other"). The common law did not fail to recognize that the rule of privilege was subject to some sort of exception. That exception was commonly placed on the ground of necessity, — that is, a necessity to avoid that extreme injustice to the excluded spouse which would ensue upon an undeviating enforcement of the rule.¹ The notion of necessity, indeed, might commendably have been a broader one; the necessity of doing justice to other persons in general, when the spouse's testimony was indispensable, would have been at least as great. But the common lawyers here kept their eyes upon the ground, and did not allow their survey to exceed the range of immediate and unavoidable vision. Any one could see that an absolute privilege in a husband to close the mouth of the wife in testimony against him would be a vested license to injure her in secret with complete immunity; and this much the common lawyers saw, and were willing to concede. Just how far the concession went, in concrete cases, was never precisely settled. It was given varying definition at different times; it certainly extended to causes involving corporal violence to the wife; and it certainly did not extend to all wrongs done to the wife.² In modern statutes the spirit of the exception has usually been invoked to establish the exception for both husband and wife in all causes involving a "crime against the other," or a "personal wrong."³

But before noting the extent of this exception in detail, it is worth while to observe that the common-law cases and the statutory rules, applying this exception, are also equally open to explanation as instances in which the very reason of the privilege — at least the reason most frequently advanced (*ante*, § 2228) — is lacking. That is to say, if the promotion of marital peace, and the apprehension of marital dissension, are the ultimate ground of the privilege, it is at least a generous assumption that the wife who has been beaten, poisoned, or deserted, is still on such terms of delicate good feeling with her spouse that her testimony must not be enforced lest the iridescent halo of peace be dispelled by the breath of disparaging testimony. And if there were, conceivably, any such peace, would it be a peace such as

¹ 1794, Mansfield, L. C. J., in *Bentley v. Cooke*, 3 Doug. 422 ("That necessity is not a general necessity, as where no other witness can be had, but a particular necessity, as where for instance the wife would otherwise be exposed without remedy to personal injury").

² 1767, Buller, *Trials at Nisi Prius*, 287 ("for a personal tort done to herself"); 1765, Blackstone, *Commentaries*, I, 443 ("where the offence is directly against the person of the wife, this rule has been usually dispensed with"); 1806, Evans, *Notes to Pothier*, II, 266 ("I believe that the evidence of a wife against her husband upon a charge for personal ill-treatment is in practice now admitted"); 1803, East, *Pl. Cr.* I, 455 ("I conceive it to be now settled that in all cases of personal injuries

committed by the husband or wife against each other, the injured party is an admissible witness against the other"); 1864, Crompton and Blackburn, JJ., in *Reeve v. Wood*, 8 Cox Cr. 58 ("personal wrongs to the wife"; an injury which "touches the person of the wife").

³ These statutes have been placed *ante*, § 486, with the statutes affecting qualifications of witnesses; except the following, which with the Arkansas and Georgia statutes cited *infra*, notes — —, were inadvertently displaced: Ark. St. 1903, No. 81 ("In any criminal prosecution a husband and wife may testify against each other in all cases in which an injury has been done by either against the person or property of the other").

the law could desire to protect? Could it be any other peace than that which the tyrant secures for himself by oppression? And could the law pretend to regard the effect produced by a wife's testimony in her own redress as being worth consideration on behalf of a husband who has already grossly violated his marital duties? If there had been any reason at all for the privilege, that reason surely fell away in such cases. The common lawyers, more creditably to themselves, in point of consistency as well as humanity, might better have placed these cases upon this ground, instead of upon that of necessity; and it is satisfactory to find that this reasoning has by some judges been appealed to for that purpose:

1828, *Mellen, C. J., in Soule's Case*, 5 Greenl. 407, 408: "From the general rule some exceptions have been established, founded on the necessity of the case. For instance, if a wife could not be admitted to testify against the husband as to threatened or executed violence and abuse upon her person, he could play the tyrant and brute at his pleasure, and with perfect security beat, wound, and torture her at times and in places when and where no witnesses could be present nor assistance be obtained. Reasons of policy do not certainly extend so far as in such cases to disqualify her from being a witness against him. . . . So far as the general incompetency of the wife is founded on the idea that her testimony, if received, would tend to destroy domestic peace, and introduce discord, animosity, and confusion in its place, the principle loses its influence when that peace has already become wearisome to a passionate, despotic, and perhaps intoxicated husband, who has done all in his power to render the wife unhappy and destroy all mutual affection."

In view of the unsettled extent of the exception in the orthodox common law, and of the broad possibilities of the principle last mentioned, and also by reason of the frequent statutory enlargement of the exception, there has been a decided variation in judicial rulings upon specific cases. Moreover, there has too often been exhibited a narrow illiberality in not seizing the opportunities for carrying out this exception to its widest scope of principle. (1) It seems certain that in all causes involving an *assault* or a *battery* or other *corporal violence* to the wife, or husband, committed by the other (including actions to bind over by articles of peace), the spouse alleged to be injured could not be excluded.⁴ So, too, an attempt to *kill by poison* is

⁴ Where statutes obtain (they are collected *ante*, § 486), making an exception for "crimes against the other" or "personal injuries," the statute is noted below: *Eng.*: 1701, *Pocock v. Thornercroft*, 13 Mod. 454 ("a wife shall be admitted to swear the peace against her husband, because a matter concerning her person"); 1725, *R. v. Azir*, 1 Stra. 633, *Raymond, C. J.*, (assault; wife admitted); 1743, *Lord Vane's Case*, 3 id. 1202 (articles of the peace exhibited by the wife against the husband; *semble*, the wife admissible); 1758, *R. v. Mead*, 1 Burr. 542 (*habeas corpus* by the husband against the wife; *semble*, the wife admissible); 1758, *R. v. Earl Ferrers*, 1 Burr. 631, 634 (articles of the peace by the wife against the husband; *semble*, the wife admissible); 1787, *R. v. Bowes*, 1 T. R. 696, 699, *semble* (same); 1789, *R. v. Woodcock*, 1 Leach Cr. L., 4th ed., 500

(wife's dying declarations, admitted against a husband charged with her murder); 1790, *R. v. Johns*, ib. 504 note (same); 1810, *R. v. Doherty*, 13 East 171, *semble* (like *R. v. Bowes*); 1813, *Heyn's Case*, 2 Ves. & B. 182 (wife's affidavit, received on articles of the peace against him); *U. S.*: 1898, *Clarke v. State*, 117 Ala. 1, 23 So. 671 (husband charged with the murder of a child by beating the wife before its birth; wife admitted, under statute); 1885, *Stevens v. State*, 76 Ga. 96 (wife admitted, under statute, in a prosecution against the husband for a battery upon her); 1881, *Turnbull v. Com.*, 79 Ky. 495 (wife's malicious wounding of a husband; the husband not admitted, the exception being ignored; no precedents cited); 1890, *Com. v. Sapp*, 90 id. 590, 586, 14 S. W. 834 (statutory exception recognized, for "a crime against the person of the wife"; wife here

clearly within the exception.⁶ It would seem plain that a rape of the wife, committed by the husband or at his instigation, was plainly an offence of corporal violence; and at the earliest stage of the law, the privilege was held not to apply, in the notorious case of Lord Audley.⁶ But this ruling was more than once doubted;⁷ and, although the doubt was apparently due to very different reasons,⁸ it was duly perpetuated without regard to its grounds; and, partly in consequence of this, there appear, in modern records, a few singular rulings in which it is maintained that a rape is not "a crime against the wife" nor a "personal wrong."⁹ Whether the procuring of an abortion comes within the spirit of the exception may perhaps be doubted, so far as the consent of the wife may be assumed.¹⁰ An abduction and forcible marriage, or a seduction before marriage, would be a crime against the woman and sometimes also a corporal wrong; but in this instance other complications arise, first, because the marriage may be void and thus the privilege is inapplicable (*ante*, § 2230), and next, because the statutory offence may sometimes not involve violence or forcible abduction as an ingredient.¹¹

allowed to testify on a charge of attempting to kill her by poison); 1828, *Soule's Case*, 5 Greenl. 407 (assault and battery on the wife); 1887, *People v. Sebring*, 66 Mich. 706, 33 N. W. 906 (assault with intent to do bodily harm on the wife; wife admitted, under statute); 1845, *People v. Green*, 1 Denio 614 (wife's dying declarations, admitted, on a charge of murdering her); 1853, *State v. Hussey*, Busbee 123, 126 (wife not competent in a prosecution for assault and battery where no "lasting injury or great bodily harm" was inflicted or threatened); 1877, *State v. Davidson*, 77 N. C. 523 (similar; these two rulings are now probably outlawed by the existing statute); 1877, *Whipp v. State*, 34 Oh. St. 67 (husband competent in a prosecution of the wife for an assault upon him, though the statute expressly makes no such exception); 1799, *Pennsylvania v. Stoops*, Addis. 381 ("in cases of secret personal injury" the wife is admissible; here, her dying deposition, on a prosecution for murdering her); 1811, *State v. Davis*, 3 Brev. 3 (assault and battery by the husband on the wife; wife admitted; *Grimke, J., diss.*); 1903, *Goodwin v. State*, 114 Wis. 318, 90 N. W. 170 (assault with intent to kill).

⁶ 1796, *R. v. Wason*, 1 Cr. & O. 197 (by all the Irish judges; administering poison to the defendant's wife; the wife admitted); 1890, *Com. v. Sapp*, Ky., *supra*, note 4; 1901, *Davis v. Com.*, 99 Va. 638, 38 S. E. 191 (indictment for poisoning a well with intent to kill "S. and others"; the defendant's wife, being one of the others using the well, admitted under statute, as one against whom the crime was committed).

⁷ Quoted *ante*, § 2227; this peer of the land employed his servants as his nefarious instruments, and stood by while they executed his commands.

⁸ 1674, *Hale, C. B.*, in *R. v. Brown*, 1 Vent.

243 (doubted); 1661, *R. v. Griggs*, T. Raym. 1 (denied); 1725, *Raymond, C. J.*, in *R. v. Asir*, 1 Stra. 633 (approved); 1734, *Probyn, J.*, in *R. v. Reading*, *Lee cas. t. Hardwicke* 79, 83 (approved). In *R. v. Jellyman*, 8 C. & P. 604 (1838), the wife was admitted to prove an unnatural crime upon her.

⁹ As pointed out *ante*, § 2227.

¹⁰ 1896, *People v. Schoonmaker*, 117 Mich. 190, 75 N. W. 439 (rape of a woman under sixteen, being also the defendant's wife; the woman not competent against the defendant, under statute). Where the rape was before marriage, the question is arguable; but Courts have strained a point in favor of the wrongdoer: 1902, *People v. Curiale*, 137 Cal. 534, 70 Pac. 468 (construing the statute); 1899, *State v. Frey*, 76 Minn. 526, 79 N. W. 518 (the statute does not include a charge of rape on the woman before marriage); 1896, *State v. Evans*, 135 Mo. 116, 124, 39 S. W. 462 (rape on the wife before marriage; wife excluded; "a wife is only admitted to testify concerning criminal injuries to herself as a wife"). To hold that the offence, when committed, was not done to the wife, so as to be a "crime against the other," is to misread the statute. The woman's consent to marriage cannot remove the crime, however much it may discredit her testimony.

¹¹ Not privileged: 1871, *State v. Dyer*, 59 Me. 303, 306 (wife admitted against husband charged jointly with attempting an abortion on her); 1899, *Manyon v. State*, 62 N. J. L. 1, 42 Atl. 577 (attempting to produce a miscarriage, held a personal injury, within the statutory exception). Privileged: 1897, *Miller v. State*, 37 Tex. Cr. 575, 577, 40 S. W. 318 (wife not admitted against husband on a charge of abortion done before marriage).

¹² *Eng.*: 1636, *Fulwood's Case*, Cro. Car. 482 (indictment for abduction and forcible mar-

(2) The husband's *desertion* or *failure to support* is plainly a wrong to the wife; but inasmuch as the fact often comes in issue in a proceeding not directly between husband and wife, this has sometimes sufficed as a loophole for escaping the application of the exception.¹² Nevertheless, in principle, this distinction should have no effect; and, in orthodox practice, in proceedings involving the *custody of children*, where the issue depends partly on the husband's misconduct, the wife's testimony, at least by affidavit, was conceded to be admissible.¹³

(3) At common law, in the early practice, the notion of an injury to the wife was not regarded as including much more than those corporal brutalities which satisfied most gross and elementary conceptions of wrong. But as times have gone on, more refined distinctions have been countenanced; especially under the statutory exceptions for "crimes against the other," it

riage; the woman testified apparently without question); 1885, *R. v. Brown*, 1 Ventr. 243, 3 Keb. 193 (indictment for abduction and for unlawful marriage procured by duress; the woman was admitted, though "she was his wife *de facto*, though not *de jure*," first, because she was married by duress, secondly, because "so heinous a crime would go unpunished, unless the testimony of the woman should be received," thirdly, on the authority of Fulwood's case, *supra*); 1702, Swendsen's Trial, 14 How. St. Tr. 559, 575 (forcible abduction and marriage; the woman admitted without question); 1828, *R. v. Serjeant*, Ry. & Moo. 352, Abbot, C. J. (conspiracy by a prostitute and others to procure S. to marry her on false pretence; the husband excluded, on a false theory that the rule was the same for testimony either for or against the other spouse); 1837, *R. v. Wakefield*, 2 Lew. Cr. C. 1, 30, 379 (conspiring to marry an heiress against her will; the woman was admitted for the prosecution, whether the marriage was forcible or fraudulent, and whether or not it was legally void; Hullock, B.: "A wife is competent against her husband in all cases affecting her liberty and person; . . . it would be unreasonable to exclude the only person capable of giving evidence in certain cases of injury. Our law recognises witnesses *ex necessitate*, and it would be strange indeed that the husband should be allowed to exercise every atrocity against the wife and her evidence not be admitted"); 1839, *R. v. Yore*, 1 Jebb & S. 563 (fraudulent enticement of heiress to marriage; the woman admitted, following *R. v. Wakefield*); *U. S. v. Ark. St.* 1899, Feb. 20 No. 22 (wife admitted against her husband, in certain cases, on a prosecution for seduction before marriage); *Ga. St.* 1899, Dec. 30, p. 42 (Code § 6747, allowing a prosecution for seduction to be stopped by marriage, amended by adding: "In case the defendant fails to comply with the provisions of this section [as to supporting the wife and children], the wife shall be a competent witness against the husband"; the amendment not to apply to cases pending); 1903, *Barnett v. State*, 117 *Ga. St.* 296, 43 S. E. 730 (St. 1899, Dec. 30, p. 42, does not apply against one who at the

time of the marriage was arrested but not under indictment for the seduction); *Ky.*: 1903, *Barclay v. Com.*, — *Ky.* —, 76 S. W. 4 (mock marriage, held to be within the exception of necessity).

¹² 1864, *Reeve v. Wood*, 10 Cox Cr. 56 (charge of desertion, preferred by the parish; wife not receivable against him, because "it is only a crime against the parish, and it is the fact of her becoming chargeable to the parish that makes the husband liable"); 1898, *Wood v. Lentz*, 116 Mich. 275, 74 N. W. 462 (action for loss of support by selling liquor to the plaintiff's husband; the husband not admitted against plaintiff, under the statute); 1899, *People v. Malach*, 119 id. 112, 77 N. W. 635 (failure to support; interpreting the act of 1899, as affecting Act No. 136 of 1893, and 3 How. Annot. St. § 7544); 1901, *Travis v. Stevens*, 127 id. 687, 87 N. W. 85 (action for support furnished to defendant's wife; wife not admitted for plaintiff, under the statute); 1874, *Bach v. Parmely*, 35 Wis. 238 (wife admitted, for a claimant charging the husband with necessities supplied to her, to prove the husband's acts of cruelty, "on the ground of necessity").

¹³ 1804, *De Manneville v. De Manneville*, 10 Ves. Jr. 52, 55 (a mother's petition against the father for the child's custody; her affidavit admitted; L. C. Eldon: "This may be compared to the common case where affidavits of ill-treatment are read to prevent the husband's taking the interest of money in court the property of the wife; . . . it is almost of necessity in such a case [as this] that the wife's affidavit should be read, the circumstances generally taking place in no other presence than that of the husband"); 1836, *People v. Chagaray*, 18 Wend. 637, 642 (custody of children; the wife's affidavit against the husband, doubtfully received); 1839, *People v. Marcelin*, 8 Paige 47, 53 (similar cause; the wife's testimony admitted to prove the husband's cruelty as justifying her living separately).

The following ruling was over-strict: 1799, *Sedgwick v. Watkins*, 1 Ves. Jr. 49 (wife's writ *ne exeat regno* against husband; L. C. Thurlow: "For security of the peace, indeed, she may make an affidavit against him; but can-

has become possible for the Courts to take a broader view. That *adultery* by one spouse is an offence against the other is plain enough in morals, and ought to be plain in law.¹⁴ The argument may be made, to be sure, that adultery by the husband (with an unmarried woman, at least,) was not a crime at common law, and ought not to be a crime; but that is a mere evasion; whenever it is made a criminal offence, then if any crime at all can be a crime, not only against the State, but also a "crime against the other," adultery is certainly one of those crimes. So, too, is *incest*.¹⁵ So, equally, is *bigamy*.¹⁶ Nevertheless, judges have been found who dispute this; it has been argued, in skilful word-fencing, that a bigamous marriage is a crime "against the marital relation," but not "against the wife."¹⁷ The following passage may serve as a reply to that and all similar attempts to restrict the application of the statutory principle:

1887, *Zane, C. J.*, in *U. S. v. Bassett*, 5 Utah 181, 186, 13 Pac. 287: "Is then polygamy a crime against the lawful wife? It certainly is a breach of the implied if not of the express terms of the marriage contract; . . . and because it is a breach of that contract, most hurtful in its consequences, it is declared to be a crime. Whenever the act or the conduct which constitutes a public offense or crime consists in a direct violation of the rights of an individual, the crime is against that individual as well as against the public. The law recognizes the marital rights of a woman or man as well as their rights to life, liberty, and security from personal violence; and the breach thereof by a second marriage or by cohabitation with another woman as a wife is often more injurious to the feelings of the lawful wife (as well as in other respects) than would be a deprivation of personal security or of personal liberty, — more injurious than the shake of a fist coupled with a threat or an attempt to commit a bodily injury. . . . The ground upon which the exclusion of the wife or husband rests is that it would destroy confidence and produce discord. A man in the bed of a strange woman is in a very unfavorable situation to insist upon preserving inviolate the sacred concord of marriage and harmony and confidence on the part of his wife."

not sustain an indictment; . . . I have always taken it to be a rule that a wife can never be evidence against her husband, except in the case I have alluded to").

¹⁴ *Accord*: 1870, *State v. Bennett*, 31 Ia. 24; 1874, *State v. Hazen*, 39 Id. 648; 1885, *Lord v. State*, 17 Nebr. 528, 23 N. W. 507. *Contra*: 1860, *State v. Armstrong*, 4 Minn. 335, 343; (even under a statute making the complaint by the injured spouse the necessary basis of prosecution); 1866, *State v. Berlin*, 43 Mo. 572, 577, *semble*; 1862, *Compton v. State*, 13 Tex. App. 271 (cited in the next note); 1839, *Mills v. U. S.* 1 Pinney 73; 1898, *Crawford v. State*, 98 Wis. 623, 74 N. W. 337. But in some States the statute (*ante* § 488) expressly sanctions the privilege in proceedings "founded on adultery," and this provision controls: 1894, *Hanselman v. Dovel*, 102 Mich. 508, 60 N. W. 978 (husband not admitted for himself, in crim. com., even after divorce); 1896, *People v. Isham*, 109 Id. 72, 67 N. W. 819 (adultery); 1896, *People v. Ives*, 110 Id. 230, 68 N. W. 187 (same); 1890, *De Meli v. De Meli*, 120 N. Y. 483, 492, 24 N. E. 996 (adultery).

¹⁵ 1893, *State v. Chambers*, 87 Ia. 1, 2, 53 N. W. 1090 (wife competent against a husband

charged with incest); 1897, *State v. Hurd*, 101 Id. 391, 70 N. W. 613. *Contra*: 1905, *State v. Burt*, — S. D. —, 94 N. W. 409 (incest with daughter; defendant's wife excluded); 1879, *Morrill v. State*, 5 Tex. App. 447 (adultery; husband admitted); 1880, *Rowland v. State*, 9 Id. 277 (same); 1883, *Compton v. State*, 13 Id. 271 (incest; wife excluded; overruling the preceding cases).

¹⁶ *Accord*: 1880, *State v. Sloan*, 55 Ia. 217, 220, 7 N. W. 516; 1882, *State v. Hughes*, 58 Id. 165, 168, 11 N. W. 706; 1901, *Hills v. State*, 61 Nebr. 589, 85 N. W. 836 (to hold otherwise "would be to impute to the Legislature a useless purpose, since the common law was then in force except where modified by statute"); 1887, *U. S. v. Bassett*, 5 Utah 181, 184, 13 Pac. 287 (polygamy; first wife admitted against the defendant; quoted *supra*). *Contra*: 1892, *People v. Quansstrom*, 93 Mich. 254, 53 N. W. 165 (Morse, C. J., and Grant, J., diss.); 1894, *Boyd v. State*, 33 Tex. Cr. 470, 473 (lawful wife not admitted to testify to the fact of her marriage); 1890, *Bassett v. U. S.*, 137 U. S. 496, 508, 11 Sup. 143.

¹⁷ *Brewer, J.*, in *Bassett v. U. S.*, *supra*.

In a petition for *divores*, the petitioner should be admitted, under the spirit of the present principle, to testify to such causes of divorce as consist plainly of personal wrongs — for example, maltreatment or desertion —, and perhaps (since divorce presupposes in general some sort of injustice to the petitioner) to other causes; and this view has sometimes been taken in applying the statutory exception for "personal wrong or injury."¹⁹ But, needless to say, the common law recognized no such exception; and since, in many of the jurisdictions retaining the privilege, there has been an express reservation of it for divorce causes,²⁰ there is in those jurisdictions no opening, on this pretext, for the admission of husband or wife by implication from their competence as parties to the suit.²¹ In an action for *criminal conversation*, or for *enticement*, or for *alienation of affections*, or for *seduction*, so far as misconduct on the part of (for example) the plaintiff-husband to the wife becomes a part of the issue, in excuse or in mitigation of damages, it would seem that the wife should be admissible against the husband to prove this on the analogy of the doctrine already noted (*supra*, par. 2);²² but ordinarily this has not been judicially recognized.²³ To ignore it is at least to cast discredit on the supposed reason of the privilege; for, in an action for alienation of affections, of what use is it to pretend any longer by a rule of evidence to preserve those affections?

(4) In a few instances, a *deprivation or injury of property*²⁴ has been

¹⁹ 1890, *Stebbins v. Anthony*, 5 Colo. 342, 341 (divorce for desertion; the petitioner is competent under such a statute); 1889, *Spitz's Appeal*, 56 Conn. 184, 14 Atl. 776 (quoted *infra*, par. 4); 1883, *Bardette v. Bardette*, 13 D. C. 469 (parties in divorce suits a *vinculo* are incompetent; but by Equity Rule 98 the petitioner for separation may testify to cruel or inhuman treatment taking place when no other witness was present); 1900, *Gardner v. Gardner*, 104 Tenn. 410, 58 S. W. 342 (admissible in a petition for divorce on the ground of cruelty). Moreover, under the statute making parties in general competent, the same result is sometimes reached; the cases are noted *post*, § 2244.

²⁰ The statutes are collected *ante*, § 488.

²¹ In the following cases, the parties were held not admissible: 1901, *Fightmaster v. Fightmaster*, — Ky. —, 60 S. W. 918 (divorce for cruelty; wife not admissible to prove acts of cruelty); 1901, *Lambert v. Lambert*, — id. —, 63 S. W. 614 (neither admissible); 1903, *Boring v. Boring*, — id. —, 71 S. W. 431 (wife not admissible against husband in her suit for divorce); 1880, *Dillon v. Dillon*, 32 La. An. 643, 645; 1880, *Daupit v. Ehringer*, *ib.* 1174, 1176; 1859, *Dwelly v. Dwelly*, 44 Me. 377. In the following cases, on one ground or another, the parties were held admissible: 1871, *Castello v. Castello*, 41 Ga. 613; 1873, *Barringer v. Barringer*, 69 N. C. 179 (divorce for impotence); 1902, *Broom v. Broom*, 130 *id.* 562, 41 S. E. 673 (under a statute rendering a spouse not "competent or compellable to give evidence for or against the other," the wife, in the husband's suit for divorce for adultery, may testify in de-

nial of the adultery); 1895, *Seitz v. Seitz*, 170 Pa. 71, 32 Atl. 578.

²² 1839, *Gilchrist v. Rale*, 3 Watts 355, 357 (enticement of the plaintiff's wife; the wife's declarations of ill-treatment by the husband, admitted).

²³ 1745, *Winmore v. Greenbank*, Willes 577, 578 (enticement of a wife; her declarations not admitted against the plaintiff; no reason given); 1895, *Rice v. Rice*, 104 Mich. 371, 379, 62 N. W. 833 (wife's action for alienation of the husband's affections; the latter not admitted against her); 1880, *Huet v. Wise*, 37 Minn. 68, 6 N. W. 68 (the wife, in an action by the husband for her enticement, not admitted under the statutory exception for "crimes against the other"). Compare the cases cited *ante*, § 2235. In the cases cited *ante*, § 1730, where the wife's letters are admitted under the Hearnay exception, this question does not seem to have presented itself.

²⁴ 1888, *Spitz's Appeal*, 56 Conn. 184, 14 Atl. 776 (rule not applicable "to actions as law in which the husband and wife have conflicting interests and are opposing parties, as petitions for divorce or suits by the wife seeking protection against the husband, and has no application to suits in equity relating to the wife's separate estate"; a wife here allowed to testify, against creditors of an estate assigned by the husband, as to a claim for her separate property included therein); 1900, *Hach v. Rollins*, 158 Mo. 182, 59 S. W. 232 (widow's bill to set aside a deceased husband's conveyance in fraud of the wife's dower and homestead; the widow admitted to testify to the fraud, under the common law exception "ex necessitate as to conversations be-

brought within the common-law exception, and the same liberality might have been shown for *defamation*.³¹

(5) As a part of the common-law exception, but resting on the supposed extreme necessity for the State, and not for the wife individually, the privilege has sometimes been said to cease in a trial for *treason*.³² But this was not the early tradition.³³

§ 2240. Under Statutory Exceptions (*Separate Estate, Agency, etc.*). In almost all the jurisdictions which retain the privilege in general, new statutory exceptions, unknown to the common law, have been added.¹ The most common one is that which admits either spouse against the other in proceedings involving a "personal wrong or injury," or a "crime against the other"; this is merely a generalized extension of the common-law exception, and its interpretation has already been considered in that connection (*ante*, § 2239). Another exception, less common, admits either spouse in controversies concerning the wife's *separate estate*;² another, in cases where either has been *acting as agent* for the other;³ and still another, in *proceedings supplementary to execution*, i. e. for reaching a debtor's fraudulent conveyances.⁴ These seem to be the statutory exceptions that have most often called for judicial interpretation.⁵ In effect, such statutes are sometimes equivalent to those abolishing the privilege, in part or entirely (*post*, § 2245).

6. Exercise of the Privilege.

§ 2241. Whose is the Privilege. If we consult the reason most commonly advanced in support of the privilege, namely, the prevention of mari-

tween them, in order to expose a fraud that was perpetrated by the husband on the wife"). *Contra*: 1875, *Overton v. State*, 48 Tex. 616, 618 (wife excluded in a prosecution of the husband for stealing her mule). Compare the statutory exception for *separate estate*, *post*, § 2240.

³¹ *Contra*: 1838, *State v. Burlingham*, 15 Me. 104, 107 (wife not admitted against a husband conspiring to charge her with adultery; the rule is "confined to cases seeking security of the peace and cases of personal violence"); 1895, *Bohner v. Bohner*, 46 Nebr. 304, 64 N. W. 700 (slander).

The following ruling seems correct: 1871, *Taulman v. State*, 37 Ind. 353 (wife not admitted on a charge against the husband of carrying concealed weapons).

³² 1767, *Baller*, Trials at Nisi Prius 206.

³³ 1613, *Anon.*, 1 Brownl. 47 ("the wife is not bound in case of high treason to discover her husband's treason"); 1480, *Hale*, Pleas of the Crown, I, 301.

¹ The statutes are collected *ante*, § 483.

² The following rulings apply such a statute: *Mich.*: 1884, *Hunt v. Eaton*, 55 Mich. 362, 365, 21 N. W. 429; 1894, *Eaton v. Knowles*, 61 id. 625, 633, 28 N. W. 740; 1891, *Blanchard v. Moore*, 85 id. 380, 395, 48 N. W. 542; 1894, *Berles v. Adsit*, 102 id. 495, 60 N. W. 967; 1899, *Dowling v. Dowling*, 116 id. 346, 74 N. W. 523 (wife admitted against husband, in

an action by her to recover a loan to him). For cases of the same sort under the common-law principle, see *ante*, § 2240. For rulings applying the same statutes where the qualification of one spouse on behalf of the other is in question, see *ante*, § 614.

³ The following rulings apply such a statute: *Mo.*: 1873, *Paul v. Leavitt*, 53 Mo. 593, 597; 1873, *Chesley v. Chesley*, 54 id. 347; 1877, *Haerle v. Kreiba*, 65 id. 292, 296; 1892, *Leete v. State Bank*, 115 id. 184, 204, 31 S. W. 788; *Wis.*: 1886, *Habon v. Gilchrist*, 67 Wis. 38, 48, 29 N. W. 230. Compare the rulings cited *ante*, § 616, applying the same statutes to the question of admitting one spouse on behalf of the other.

⁴ The following rulings apply such a statute: *Minn.*: 1890, *Wolford v. Farnham*, 44 Minn. 159, 164, 46 N. W. 296; 1899, *National Germ. Am. Bank v. Lawrence*, 77 id. 282, 79 N. W. 1016.

⁵ The following rulings apply an exception for spouses "joined as parties and having a separate interest": *La.*: 1866, *Call v. Herwig*, 18 La. An. 315, 319; 1873, *Phillips v. Stewart*, 24 id. 153; 1890, *Hennes v. Hacker*, 32 id. 648; 1896, *Cooley v. Cooley*, 38 id. 193, 197. Add the following: 1881, *Zane v. Flak*, 18 W. Va. 693, 744 (former statutory exception for suits between husband and wife, applied). Upon these various statutes, compare also the rulings cited *ante*, § 617, interpreting the same statutes as applied to qualify one spouse to testify on behalf of the other.

tal dissension (*ante*, § 2228), it would seem to attribute the privilege to the marital party only, and not to the marital witness. That is, if the husband is the defendant, and the wife is called against him as a witness, exclusion is here directed to prevent ill-feeling against her on the husband's part, for her revelation of the truth; and thus, if that ill-feeling of his were obviated, it would seem that no concern of hers was involved. But taking the other suggested reason for the privilege, namely, immunity from the repugnant situation of being condemned by one's spouse or of becoming the instrument of a spouse's condemnation (*ante*, § 2228), the privilege seems to be equally that of husband and of wife. In other words, while the defendant-husband is entitled to be protected against condemnation through the wife's testimony, the witness-wife is also entitled to be protected against becoming the instrument of that condemnation,—the sentiment in each case being equal in degree and yet different in quality.

The latter view seems generally to be accepted, by implication underlying the various judicial utterances; but precise rulings are naturally rare, and depend much on the wording of statutes. It is established in some Courts that at least the privilege belongs to the *party*-spouse against whom the other is offered as a witness.¹ Rarely is the privilege denied to belong to the *witness*-spouse;² and rarely also is it denied to belong to the *party*-spouse,³ although the loose phraseology of the popular Code-section on this subject requires literally such an interpretation.⁴ In any case, if the husband is not a party, and the wife is called to testify against his interest, a case in which the privilege is by some Courts held applicable (*ante*, § 2235), the privilege may be waived by husband and wife, without regard to the party-opponent; for, upon the general principle (*ante*, § 2196), the privilege is personal to them and does not concern the party.⁵

§ 2242. *Waiver of the Privilege.* (1) If Lord Coke's fantastic reason (*ante*, § 2228) had been the real one for the privilege, then indeed it would have been no privilege, in any true sense, and therefore there could have been no waiver; for privilege implies option (*ante*, §§ 2175, 2196, 2197). A privilege without a waiver becomes a vain use of words, and means no more

¹ 1890, *Ward v. Dickson*, 26 Ia. 708, 65 N. W. 997; 1894, *People v. Gordon*, 100 Mich. 518, 590, 59 N. W. 323; 1895, *Liha v. Liha*, 44 Nebr. 143, 62 N. W. 487.

² 1892, *Turner v. State*, 60 Minn. 351 (assault and battery on the wife; the wife compellable to testify, though unwilling, the husband not having here a privilege; and even if the wife had, the husband could not raise the objection, on the principle of § 2196, *ante*).

³ 1871, *State v. McCord*, 8 Kan. 322 (the wife being entitled as a party to testify); 1878, *State v. Buffington*, 20 id. 599, 616; 1892, *State v. Geer*, 48 Kan. 752, 754, 30 Pac. 236 (the wife may consent, though not compellable, to testify against husband).

⁴ *E. g.* Cal. C. C. P. § 1861, which provides that neither can be examined for or against the other, "without the other's consent."

The following ruling is plainly correct in any case: 1883, *Dumas v. State*, 14 Tex. App. 464, 473 (if the wife is qualified on the husband's behalf, she is compellable on his behalf, even against her will).

⁵ 1862, *Wright, J.*, in *Russ v. Steamboat War Eagle*, 14 Ia. 363, 375 ("The prohibition is not founded on interest, but (on) the interruption which the allowance of such a practice might produce in the domestic harmony of the parties on grounds of policy appertaining to the domestic relation. Such considerations are addressed to the husband or wife, and not to their adversary. The privilege is a personal one; and therefore, if the husband is ready to waive the right, and the wife does not object, it is not for the other party to stand guardian over the domestic quiet and welfare").

nor less than an absolute rule of exclusion, of a very different type (*ante*, § 2175). But on no other reason than Lord Coke's could this result be reached; for, by either of the main and popular reasons, the object of the privilege is to protect from the consequences of ill-feeling or from a repugnant situation (*ante*, § 2238); and this implies necessarily that a spouse not apprehending such consequences, or not desiring to be protected, may waive the protection which is optionally granted. Nevertheless, the application of the privilege has tended to be obscured by the use of the term "incompetency" for both the disqualification to testify on the spouse's behalf and the privilege not to testify against the spouse. The former is plainly an absolute rule of law, not left to the party's option (*ante*, § 604); the latter is a mere privilege. The common phrase, declaring them "incompetent to testify for or against the other," by associating the former with the latter, has sometimes led, by confusion, to the extension of the idea of absoluteness from the one to the other. In a few instances, it has been denied or doubted that the privilege can be waived.¹ But this doubt is entirely unfounded, and is repudiated not only by occasional decision,² but also by implication in most of the modern statutes which declare the one inadmissible against the other "without the consent of the other."³

(2) *Who may waive* the privilege depends upon whose privilege it is, — a question already considered (*ante*, § 2241).

(3) *What constitutes a waiver* is usually not difficult to answer. Nothing done before trial could have the effect of a waiver.⁴ On the other hand, a failure to object, upon the calling of the spouse to the stand, must be equivalent to consent.⁵ In a few jurisdictions, it is expressly enacted that the taking of the stand by a party shall constitute a waiver as to his privilege for his wife's testimony.⁶ The usual case presented is that of a party who calls his wife on his own behalf and then attempts to claim his privilege to prevent her cross-examination. Argument is scarcely needed to demon-

¹ 1736, *Barker v. Dixie*, Lee cas. t. Hardwick 364 (case too confusedly reported to be of any value); 1883, *Clark v. Krause*, 13 D. C. 559, 573 (privilege cannot be waived; said *obiter*); 1908, *Harber v. People*, 308 Ill. 543, 68 N. E. 93 (calling the first wife, in a prosecution for bigamy; waiver not allowed); 1875, *Tilton v. Beecher*, N. Y., Official Report, III, 313, 355, 925 (crim. con.; Mrs. Tilton was not offered by the defendant, but the plaintiff expressed his consent and waiver of objection to the defendant calling her; the judge was not obliged to render a decision, but the defendant and the plaintiff respectively contended that a waiver was and was not sufficient to render the wife admissible; and the plaintiff argued that an inference might be drawn from the defendant's failure to call her); 1903, *Brock v. State*, 44 Tex. Cr. 335, 71 S. W. 30 (neither the testifying spouse, nor the one testified against, can waive).

² 1829, *Beet, C. J.*, in *Padley v. Wellesley*, 3 C. & P. 558; 1865, *Russ v. Steamboat War Eagle*, 14 Ia. 362, 375 (under a statute expressly

sanctioning a waiver); 1885, *Blake v. Graves*, 18 Id. 312, 319 (same; by a majority); 1890, *Estey v. Fuller I. Co.*, 83 Id. 678, 682, 46 N. W. 1098, *semble* (same). Add the cases cited in notes 4-6, *infra*.

³ The statutes are collected *ante*, § 486.

⁴ 1878, *Hubball v. Grant*, 39 Mich. 641, 643 (consent not implied from failure to object to discovery under oath). But no doubt a stipulation, in the nature of a judicial admission (*post*, § 2590) would suffice.

⁵ 1883, *Benson v. Morgan*, 80 Mich. 77, 79, 14 N. W. 705 (consent implied from attendance in court and failure to object). Compare the rules for objections (*ante*, §§ 18, 486).

⁶ As in the Codes of California, Oregon, etc., quoted *ante*, § 486; construed in the following case erroneously: 1899, *State v. McGrath*, 35 Or. 109, 57 Pac. 321 (under C. C. P. § 713, a defendant by taking the stand in a criminal case does not consent to the examination of his wife by the prosecution; a singular reading out of an express provision).

strate the unfairness and the logical inconsistency of such a proceeding; it involves of course a waiver,⁷ and yet this has in at least one Court been denied.⁸

§ 2243. *Inference from Exercise of the Privilege.* If the spouse against whom it is desired to call the other as a witness takes advantage of the privilege and thus causes the rejection of the witness, how far may this circumstance be taken as permitting the inference that the excluded testimony would be unfavorable to the party-spouse? The established principle (*ante*, § 286) permits such an inference ordinarily, from the suppression of available testimony, or the failure to utilize it. Must it yield in this instance as being inconsistent with the full exercise of the privilege? This question has usually been answered in the affirmative:

1887, *Campbell, J., in Knowles v. People*, 18 Mich. 408, 418: "If the omission to call the wife upon the stand is to be treated as warranting the conclusion that her testimony would be adverse, then the privilege is entirely destroyed and she will have to testify in all events. . . . The law, in permitting husbands and wives to testify on behalf of each other, cannot have contemplated that any moral coercion should enable others to force them into the witness-box."

1885, *Arnold, J., in Johnson v. State*, 63 Miss. 313, 317: "If the failure of the husband to call his wife as a witness in his behalf is to be construed as testimony or as a circumstance against him, his privilege and option in the matter would be annulled, and he would be compelled in all cases to introduce her or run the hazard of being convicted on a constrained, implied confession or admission, or to make explanations for introducing her which might involve the sacred privacy of domestic life."¹

Whether this conclusion is inevitable is at least open to argument. The argument against it is that there is no actual coercion and no actual denial of the privilege, but merely a dilemma and an option, which are created, not

⁷ 1899, *National Germ. Am. Bank v. Lawrence*, 77 Minn. 282, 80 N. W. 349 (a husband's permission of the wife's testimony "completely waives his statutory privilege" for purposes of her cross-examination); 1897, *Danley v. Danley*, 179 Pa. 170, 36 Atl. 285 (a plaintiff-wife admitted after examination at the opponent's demand, although her husband was a co-defendant); and some of the statutes quoted *ante*, § 488.

⁸ 1899, *Griffin v. State*, 32 Tex. 164, 166; but this ruling did not long remain: 1870, *Creamer v. State*, 34 id. 173 (preceding case repudiated; but the prosecution may not examine to new matter); 1876, *Hampton v. State*, 45 id. 154, 156 (cross-examination to her statements on the preliminary examination, allowed); 1884, *Washington v. State*, 17 Tex. App. 197, 304 (like *Creamer v. State*); 1889, *Johnson v. State*, 28 id. 17, 25, 11 S. W. 667 (same); 1893, *Bluman v. State*, 33 Tex. Cr. 43, 64, 21 S. W. 1027, 26 S. W. 75 (same); 1895, *Hoover v. State*, 35 id. 342, 345, 33 S. W. 337 (same).

Distinguish the question (*ante*, § 1885) whether in general a witness may be cross-examined on the subject of the whole case or only on the subject of the direct examination.

¹ Accord: 1898, *R. v. Cooley*, 80 N. Sc. 330, 332; 1887, *Knowles v. People*, 18 Mich. 408,

418 (quoted *supra*); 1899, *National Germ. Am. Bank v. Lawrence*, 77 Minn. 282, 79 N. W. 1016; 1895, *Johnson v. State*, 63 Miss. 313 (the wife being here competent, but the husband-defendant being privileged not to call her; quoted *supra*); and several of the statutes quoted *ante*, § 488. *Contra*: 1883, *People v. Hovey*, 92 N. Y. 554, 558 (inference allowable from the failure of the defendant to call his wife, an eye-witness, who was not compellable to testify against him, but was competent for him); 1899, *Griffin v. State*, 32 Tex. 164, 166. *Uncertain*: 1896, *State v. Hatcher*, 39 Or. 309, 44 Pac. 584 (left doubtful, though erroneously treated as involved in the privilege, on the same principle as in the privilege against self-implication; but held that in any case the failure shows nothing unless it appears that the wife was within the jurisdiction, and that she was willing to waive her privilege); 1893, *Graves v. U. S.*, 150 U. S. 118, 120, 14 Sup. 40 (a woman was present with the murderer; the defendant's failure to have his wife in court, so that it could be seen whether she was the woman, and the party thus identified, not allowed as ground for inference, partly because he was not bound to anticipate the need, partly because she was incompetent to testify for him; *Brewer, J., diss.*).

by any direct attempt to break into the privilege, but by the accidental coincidence, upon the same piece of testimony, of two independent principles of law, neither one of which should be made to yield rather than the other. This argument is nearly the same as that which applies to the privilege against self-implication (*post*, § 2272), and need not be further noticed here.²

It must be noted that, when the privilege does not exist,³ or where it has been waived,⁴ the inference is permissible; and, furthermore, that, in any event, upon the same principle as under the privilege against self-implication (*post*, § 2272), the party desiring to compel the spouse to testify may at least call for the testimony, and is not to be deprived of it until the party-spouse formally objects and claims the privilege.⁵

7. Statutory Changes.

§ 2245. *Statutory Abolition, Express or Implied.* The progress of acceptance of Bentham's reasoning, in its effect on this privilege, has not been as rapid as with most others of his proposed reforms. The disqualification of interested persons has been removed, as well as that of parties in civil cases and of defendants in criminal cases (*ante*, §§ 576, 577, 579). The privilege of parties in civil cases has been swept away (*ante*, § 2218). The disqualification of husband or wife on the other's behalf has disappeared in a majority of jurisdictions (*ante*, § 602). But their privilege has been removed in only a minority of jurisdictions.¹ Many and large inroads, however, have been made upon it by statutory exceptions in almost every jurisdiction;² and in some States the statutory alteration of the privilege — for example, by denying it in civil cases — has risen beyond the degree of an exception to that of a partial abolition. The consequence of these numerous express changes, and of the enactment of the other statutes dealing with parties and interested persons, has been to require more or less judicial interpretation to determine the effect of the legislation upon the privilege. These rulings depend largely upon the phrasing of the individual statutes; but some of the questions presented have general features, which may here be noticed.

(a) The statutes declaring that no person should be "excluded" or "incompetent" by reason of being a party to the cause might well be argued to have the effect of abolishing the disqualification of a husband or wife, when a party, to testify for the other;³ but they could not have the

² It may be added that the present question must be distinguished from that which arises when the witness-spouse is *disqualified* on the other's behalf, and not merely privileged, because then it is impossible to use the testimony under any conditions, and no inference could arise even if there were no privilege; this is an ordinary deduction from the general principle affecting such inferences, and the rulings have been already noted thereunder (*ante*, § 2266).

³ 1873, *Alley's Trial*, Mass., Pamph. Rep. 144 (that the defendant's wife was not called to explain his whereabouts, allowed to be considered); 1902, *Richardson v. State*, 44 Tex. Cr.

211, 70 S. W. 330. *Contra*: 1903, *Moore v. State*, — Tex. Cr. —, 75 S. W. 497, *semble* (Henderson, J., diss.).

⁴ 1870, *Creamer v. State*, 34 Tex. 173 (the husband's refusal to allow cross-examination of the wife; inference permissible).

⁵ 1895, *Com. v. Weber*, 167 Pa. 153, 31 Atl. 491. *Contra*: 1903, *Moore v. State*, — Tex. Cr. —, 75 S. W. 497 (Henderson, J., diss.).

¹ The statutes are all placed, for convenience' sake, *ante*, § 488.

² Already examined *ante*, § 2240.

³ This effect has been already examined (*ante*, § 613).

effect of abolishing the privilege — namely, of making the one compellable against the other — unless the notion of incompetency were given its larger and looser meaning (*ante*, § 2242) of disqualification and of privilege also. Such a meaning was given to it by some Courts, because it was commonly construed as abolishing for parties both disqualification and privilege; so that when the husband and the wife were parties, neither could prevent the other being called on the opposite side;⁴ and this effect was sometimes conceded for suits for divorce⁵ and other suits where they were the sole parties and on opposite sides.⁶ But no such consequence could plausibly be deduced from the statutes abolishing *interest* as a disqualification;⁷ for there was here no privilege to be abolished (*ante*, § 2222). A statute, it may be noted, making husband or wife "competent" would of course (by the same construction above mentioned) make the person compellable also.⁸ These problems of interpretation, however, arose chiefly under the earlier statutes. Successive revisions have left few of them to survive for judicial ruling.

(b) The codification of many jurisdictions has given the criminal and the civil procedure a separate treatment, and thus it is necessary sometimes to resort to construction to determine how far a given rule applies in common to *civil and criminal cases*. Moreover, in the earlier steps of legislation, the privilege was sometimes abolished for the former class of cases but expressly retained for the latter; and thus the question has often arisen how far the abolition of the privilege has been carried by the Legislature. This question depends, of course, entirely on the wording of the local statutes; and it has therefore received varying answers, — sometimes that the privilege is in criminal cases retained⁹ or abolished,¹⁰ or that in civil cases it is

⁴ 1877, *Sutherland v. Hankins*, 58 Ind. 343, 351 (contested will, the wife being an heir, but withdrawing as a plaintiff and joining as a defendant; husband compellable to testify for the heirs); 1871, *Richards v. Burden*, 31 Ia. 305, 310; 1861, *Chamberlain v. People*, 23 N. Y. 83, 88; 1869, *Re O'Brien*, 24 Wis. 547 (wife compellable to answer in proceedings to reach property of a judgment debtor, her husband); 1883, *Carney v. Gleisner*, 58 id. 674, 17 N. W. 398 (but not when the witness is interested, if not a party; here a wife was not admitted for the bailee of her separate property sued in replevin by her husband); 1884, *Blabon v. Gilchrist*, 67 id. 38, 45, 29 N. W. 230 (proceedings against a judgment debtor; his wife not examinable, because not a party; distinguishing *Re O'Brien*, *supra*, where a different procedure then prevailed).

⁵ 1872, *Moore v. Moore*, 51 Mo. 118, 119; 1873, *Berlin v. Berlin*, 52 id. 151; 1861, *Chamberlain v. People*, 23 N. Y. 85, 88; 1865, *Hays v. Hays*, 19 Wis. 183. Compare the same result reached by another road in the rulings cited *ante*, § 2239.

⁶ 1874, *Darrier v. Darrier*, 56 Mo. 222, 234 (controversy of land-title).

⁷ 1883, *Burdette v. Burdette*, 13 D. C. 469; 1883, *Clark v. Krause*, ib. 559, 572; 1896, *Ward*

v. Dickson, 96 Ia. 708, 65 N. W. 998, *semble*; 1860, *Breed v. Gove*, 41 N. H. 452, 454. *Contra*: 1873, *Rowland v. Plummer*, 50 Ala. 182, 193, *semble*. But it was held in one jurisdiction that the real party, being a spouse, became compellable to testify, when the other was but a nominal party: 1867, *Metler's Adm'r v. Metler*, 18 N. J. Eq. 270, 277; 1868, *Patrick v. Ashcroft*, 19 id. 339, *semble*.

⁸ 1872, *Southwick v. Southwick*, 49 N. Y. 510.

⁹ 1894, *State v. Willis*, 119 Mo. 485, 490, 24 S. W. 1008.

¹⁰ 1875, *Jackson v. State*, 53 Ala. 472; 1894, *Everett v. State*, 33 Fla. 661, 664, 15 So. 543 (St. 1891, c. 4029, and Rev. St. 1892, § 2863, taken together, make the wife admissible in criminal cases against the husband); 1890, *Mercer v. State*, 40 id. 216, 24 So. 154; 1892, *Com. v. Dill*, 156 Mass. 226, 228, 30 N. E. 1016; 1895, *Com. v. Hayden*, 163 id. 453, 456, 40 N. E. 846; 1897, *State v. Reynolds*, 48 S. C. 384, 26 S. E. 679 (since the omission in 1882 of a clause specifically limiting the section's application to civil cases, the section applies equally to criminal cases; thus disposing of *State v. Belcher*, 1880, 13 id. 459, and *State v. Dodson*, 1881, 16 id. 460, decided under the original statute).

retained¹¹ or abolished,¹² and sometimes that it is in both civil and criminal cases alike retained¹³ or alike abolished.¹⁴ The time ought soon to come when these rulings are outlawed by reform (as some of them even now are). Doubtless, before the centenary of Bentham's death, no vestige of the privilege will remain.

¹¹ 1884, *Stephenson v. Cook*, 64 Ia. 265, 268, 20 N. W. 182; 1893, *Niland v. Kalish*, 37 Nebr. 47, 49, 55 N. W. 295; 1894, *Skinner v. Skinner*, 38 id. 756, 760, 57 N. W. 534 (nor do the statutes removing married women's property disabilities affect the statute upon evidence); 1894, *Greene v. Greene*, 42 id. 624, 628, 60 N. W. 987 (same).

¹² 1892, *Williams v. Riley*, 68 Ind. 290, 296;

1895, *Jordan v. State*, 142 id. 422, 425; 1874, *Westerman v. Westerman*, 25 Oh. St. 500, 507.

¹³ 1879, *Byrd v. Sims*, 37 Miss. 248; 1890, *Anon.*, 56 id. 15; 1881, *Leach v. Shelby*, ib. 681, 683; but under the Code of 1892, see *Saffold v. Horne* (1894), 73 id. 470, 482, 18 So. 433.

¹⁴ 1879, *Brown v. Norton*, 67 Ind. 434; 1879, *Hutchason v. State*, ib. 449; 1881, *Smith v. Smith*, 77 id. 80, 82.

TOPIC A (continued): PRIVILEGED TOPICS.

SUB-TOPIC III: PRIVILEGE FOR SELF-CRIMINATING FACTS.

CHAPTER LXXVIII.

1. In general.

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- § 2282. Same: (2) Statutes forbidding Use of Testimony.

1. In general.

§ 2250. *History of the Privilege.*¹ The history of the privilege against self-crimination has something more than the ordinary interest of a rule of evidence,—not only because the privilege has been given a constitutional sanction in nearly every one of our jurisdictions; nor merely because the

¹ The substance of the history here set forth was first printed in 5 *Harvard Law Review* 71. Since that time, a wider survey of the sources and the collection of much additional material has made it possible to trace the story more fully. The present account was printed in 18 *Harv. Law Rev.* 610 (1902); it has since been revised by taking note of the corroborative researches of Emslein, Hinschius, Perille, and Tanon. The first of these has once for all settled the early history of the subject on this Continent. Their works cited herein are: Ems-

lein, 1882, *Histoire de la procédure criminelle en France, et spécialement de la procédure inquisitoire*; 1896, *Le serment des inculpés en droit canonique* (reprinted by Leroux, Paris, from vol. 7, *Bibliothèque de l'école des hautes études, sciences religieuses*); Hinschius, 1860-1897, *System des katholischen Kirchenrechts mit besonderer Rücksicht auf Deutschland*; Perille, 1900, *Storia del diritto italiano*, 2d ed., vols. I-VI; Tanon, 1900, *Histoire des crimes dans de l'inquisition en France*.

tracing of its origin takes us so far afield, in our survey, as the administrative policy of William the Conqueror, and the criminal procedure of Louis XIV and the French Revolution; but particularly because the web of its long story is woven across a tangled warp composed in part of the inventions of the early canonists, of the momentous contest between the Courts of the common law and the church, and of the political and religious issues of that convulsive period in English history, the days of the dictatorial Stunsts. To disentangle these various elements, while keeping each in sight and embrace, is a complicated task.

To begin with, two distinct and parallel lines of development must be kept in mind,— the one an outgrowth of the other, succeeding it, and yet beginning just before the other comes to an end. The first is the history of the opposition to the *ex officio* oath of the ecclesiastical courts; the second is the history of the opposition to the criminating question in the common-law courts, i. e. of the present privilege in its modern shape. Let us remember that there is, in the first part of this history, no question whatever of the subject of the second part, and that the second part has not yet begun to exist. The first part begins in the 1200s, and lasts well into the 1600s; the second part begins in the early 1600s, and runs on for another century.

I. Under the Anglo-Saxon rule, the bishops had sat as judges and entertained suits in the popular courts. But William the Conqueror, before 1100, had put an end to this. His enactment required the bishops to decide their causes according to the ecclesiastical law; whence sprang up a separate system and a double judicature.³ By a century later, the papal power and the regal power were in hot conflict over the delimitation of their jurisdictions; in the great Constitution of Clarendon, in 1164, Henry II temporarily gained the advantage.⁴ By another century, Stephen and John had lost ground; and under Henry III the influence of the leaders of the church, foreign born and foreign educated, was in the ascendant.⁵ When Henry married his French wife, in 1236, there came over four uncles with her, one of whom, by name Boniface, was placed in the see of Canterbury as archbishop (or perhaps archdeacon). In the same year, 1236 (Matthew Paris said 1237), there came over also a Cardinal Otho. These two men were active in developing the local church law of England.⁶ First to be noted is a constitution of Otho, promulgated at a Pan-Anglican council in London, 1236: "*Jusjurandum calumnie in causis ecclesiasticis et civilibus de veritate dicenda in spiritualibus, quo ut veritas facilius aperiat et causam celerius terminetur, statuimus præstari de cetero in regno Angliæ secundum canonicas et legitimas sanctiones, obstant consuetudine in contrarium non obstant.*"⁷ Next, in 1272, came a similar constitution from Boniface: "*Statuimus quod laici, ubi*

³ Stubbs, Sel. Chart. 83, Const. Hist. II, 171; Pollock & Maitland, Hist. Eng. Law, I, 66, 67, 483.

⁴ Poll. & Mait. I, 104 ff., 430 ff.

⁵ Stubbs, Const. Hist. II, 57-65; Poll. & Mait. I, 100; Gneist, Const. Hist. I, 246.

⁶ Poll. & Mait. I, 93, 94, 103; Gilman's

Codex Jur. Eccl. Angl. 1011; Lindwood's Provinciale, preface to parts I and II: Jura Ecclesiastica, II, 90; Coke, 12 Rep. 26; 2 Inst. 599, 597.

⁷ Lindwood, pt. II, p. 60; Gilman, 1011; 12 Rep. 26.

de subditorum peccatis et excessibus corrigendis per prelatos et iudices ecclesiasticos inquiritur, ad præstandum de veritate dicenda juramentum per excommunicationis sententias, si opus fuerit, compellantur."⁷ Meanwhile, the general struggle between papal and royal claims of jurisdiction had gone on. Under Edward I, the statute of *Circumspecto Agatis* (1285) favored the former's rights.⁸ But by the early 1300s the statute *De Articulis Cleri*⁹ set fairly definite limits; it was enacted that the royal officers should not permit "quod aliqui laici in balliis suis in aliquibus locis convenient ad aliquas recognitiones per sacramenta sua facienda, nisi in causis matrimonialibus et testamentariis." Such are the preliminary data at the opening of this first part of the history. What was their significance for the relation of the parties to the contest?

First of all, we may note that the opposition therein reflected had nothing to do with any objection to the general process of putting a man on his oath to declare his guilt or innocence; they concerned only the questions (a) *who* should have the right to do this, and (b) *how* it should be done. Moreover, the former of these things is alone at first concerned; later, the second comes to dominate in importance. Three stages are fairly well marked, namely, (1) to Elizabeth's time, (2) to Charles I's, (3) and afterwards.

1. a. Who should have the rights of jurisdiction? This was in the 1200s and 1300s the great question. The statute *De Articulis Cleri* settled the line of ecclesiastical jurisdiction over laymen by confining it to causes matrimonial and testamentary; and this in substance prevailed till the end of church courts in England.¹⁰ The forms of writs of prohibition were thereafter based on this statute.¹¹ A century later, in 1402, under Henry IV, the papal or clerical power obtained some sort of enlargement of its "liberties and privileges";¹² but under Henry VIII this foreign and papal domination was repudiated, and in 1533¹³ all canons "repugnant to the customs, laws, or statutes of this realm" were forbidden to be enforced. Under Mary, for a moment, in 1554,¹⁴ the statute of Henry was repealed; but Elizabeth, in 1558,¹⁵ took care promptly to restore it. Thenceforward the struggle of jurisdiction is against Elizabeth's own High Commission Court, and not against a foreign and papal power.

b. In the other important respect, namely, how the church courts should proceed, there is, as yet in the 1200s and 1300s, apparently no interference

⁷ Lindwood, pt. I, p. 100; 22 Rep. 26. In the notes to Lindwood, it is added that the laymen, "cuncti potestate temporalium dominorum, in huiusmodi inquisitionibus citati subiacent iuramento de veritate dicenda."

⁸ Statutes of the Realm (Cay), I, 101.

⁹ Statutes, I, 209; 2 Inst. 280. The date given by the editors, Cay and Tomlins, is *tempore incerto* before the end of Edward II's reign (1327). Coke attributes it to the first few years of Edward I; but this, for several reasons, is improbable. In 9 Edward II (1316), certain *Articuli Cleri* had been presented by the clergy

in a futile protest against the narrowness of their powers: Statutes, I, 171; Lindwood, pt. III, p. 37; 2 Inst. 601, 618.

¹⁰ With sundry detailed variations, noted in Roll. & Mait. I, 105 ff.

¹¹ Reg. Brev. 26 b; Fitzh. Nat. Brev. 41 A; Nichols' Britton, f. 254.

¹² St. 4 H. IV, c. 3.

¹³ St. 25 H. VIII, c. 19; a statute "for the submission of the clergy to the king's majesty."

¹⁴ St. 1 & 2 P. & M. c. 2.

¹⁵ St. 1 Eliz. c. 1, §§ 4, 10.

or hostile feeling at all, in relation to the methods that here concern us. It does not appear that the decrees of Otho and Boniface, above quoted, authorizing certain oaths to be employed, met with any more opposition than other acts done in assertion of the church's jurisdiction. The oath was plainly permitted, by the statute *De Articulis Cleri*, in causes matrimonial and testamentary; there was no objection to it as such. How could there be, in a community where the compurgation system was still in full force in the popular and the royal courts, and men might be forced to clear themselves by their oaths with oath-helpers, — where they even struggled for the privilege of it, for centuries afterward, against the innovation of jury trial?¹⁶ The writs of prohibition, set forth by Britton and Fitzherbert,¹⁷ mentioned an oath, to be sure; but, in the first place, this might equally be the compurgation oath (not the *juramentum calumnie* or *de veritate*); and, in the next place, and chiefly, it was mentioned simply as a descriptive feature of the forbidden jurisdiction, — as if one should forbid writs of *habeas corpus* to be issued by a probate judge, not meaning in the least to strike at that sort of writ, but at the particular judge's power and jurisdiction. There is no reason whatever to believe that the statute *De Articulis Cleri* had among its motives any animus against the church's imposition of an oath as such.¹⁸

Nevertheless (though the king's lawyers cared nothing about it) this procedure of Otho's and Boniface's, the *juramentum de veritate dicenda* (which

¹⁶ Thayer, Preliminary Treatise, 25, 27.

¹⁷ Cited *supra*.

¹⁸ The only suggestion ever made to this effect has come from Coke, who claimed (12 Rep. 28) that in this respect Otho's constitution of 1236 was "against the law and custom of England," and that the statute 25 H. VIII, c. 14, cited *infra* (which he re-writes to suit his claim), merely restored the common law. His only authority is the concluding clause of Otho's above-quoted decree of 1236, "*obstante consuetudine in contrarium non obstantis*." This clause, however, plainly applies, not to English custom, but to the church's own law; for not only was the use of the inquisitorial oath *de veritate* a new thing at that time in the church's procedure (as explained later), but this particular *juramentum calumnie* was in the 1200s being much enlarged in its application. It had been in 1125-30 not yet usable, in the church's practice, for clerical persons and in spiritual causes: Corp. Jur. Canon., Decretal. II, 7, *de jur. calum.* c. 1, 2; so, too, in 1145-53 "*in usitatum est*": ib. c. 4; by 1161 it was authorized for the clergy, "*consuetudine non obstantis*": ib. c. 5; and finally, by 1294-1303, under Boniface VIII, it was prescribed in all spiritual causes: Sexti Decretal. II, 4, *de jur. calum.* c. 1, 2; compare also Lindwood, II, 60; Hineschius, V, pt. 1, p. 354, note 7; Salvioi, *Juramentum de Calumnia* (printed in the Omagrio del Circolo Giuridico di Palermo alla Università di Bologna, 1886); Ramein, *Le serment*, p. 15, Hist. de la proc. crim., 68, 69. All this shows plainly enough what Otho meant in prescribing it for spiritual causes in England, in 1236, by his "*obstante con-*

consuetudine in contrarium non obstantis"; and Coke's argument falls to the ground.

There is, to be sure, an apparently opposing passage (not cited by Coke) in the Constitution of Clarendon, c. 6, of 1164 (Stubbs, Sel. Chart. 280): "*Laici non debent accusari nisi per certum et legitimum accusatorem et testes in presentia episcopi, ita quod archidiaconus non perdat jus suum*." But this could not refer to Otho's new oath of 1236, for the simple reason that the latter did not come in, nor anything of the kind, until the next century (as appears in the citations *infra*). Moreover, this particular Clarendon clause (whatever it meant) seems not to have been opposed to the church's claims, for in a Vatican MS. of that constitution, it is said, while two other clauses are marked "*toler.*" and the rest "*damm.*" this clause 6 is ignored entirely: Glöckler, *Eccles. Hist.*, Hull's ed., 1857, III, 65; Smith's Hull's ed., 1857-58, II, 266 (the contrary statement, in Poll. & Mait. I, 437, that "the pope seems to have condemned this constitution as a whole," is based upon authorities not here accessible for comparison). Probably the Clarendon clause was aimed at some sort of reform in the compurgation system, which was then degenerate (as noted later); moreover, who could be an "*accusator*" was then a much discussed question in church law: Decretal. II, 7, *de accus.* Or it may have concerned the then changing judicial relation between the archdeacon and the episcopal ordinary: Hineschius, V, pt. 1, p. 432, § 386; Schulte, *Kathol. Kirchenrecht*, § 59, III; Lea, *Inquisition*, I, 306. The remark has been made in Poll. & Mait. I, 131, that the bearing of this clause is "very obscure."

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we may call the inquisitional oath, as distinguished from the compurgation oath),¹⁹ was then, for the church, an innovation. Hitherto, the trial by compurgation, or formal swearing of the party with oath-helpers, and the trial by ordeal, had been the common methods of ecclesiastical trial and decision. But in the early 1200s, under the organizing influence of Innocent III, one of the first great canonists in the papal chair (1198-1216), new ideas were rapidly germinating in church law.²⁰ The trial by ordeal was formally abolished by the church in 1215.²¹ The trial by compurgation oaths "was already becoming little better than a farce."²² There was a decided need of improvement in method. One of the marked expedients in this improvement was the inquisitional or interrogatory oath, introduced and developed in the early 1200s, chiefly by the decretals of Innocent III.²³ The time-worn compurgation oath had operated as a formal appeal to a divine and magical test or *Gottesurtheil*; there was no interrogation by the tribunal; the process consisted merely in daring and succeeding to pronounce a formula of innocence, usually in company with oath-helpers.²⁴ But the new oath pledged the accused to answer truly,²⁵ and this was followed by a rational process of judicial probing by questions to the specific details of the affair, after the essentially modern manner. The former oath operated of itself as a decision, through the party's

¹⁹ The word *inquirere* is the typical word in the passages of the Decretals issued under the new procedure.

²⁰ Hinschius, V, pt. 1, § 284, pp. 337, 348, 350; Pertile, VI, pt. 2, p. 3; Schulte, *Katholisches Kirchenrecht*, 1873, 3d ed., § 100, III; Poll. & Mait. I, 426; Lea, *Inquisition*, I, 300; Glosser, *Eccles. Hist.*, Hall's ed., III, 157. This new movement was part of a general one, affecting also the substantive law of the church; on the procedure side, the rise of the papal inquisition of heresy, in the late 1300s, was another related phase.

²¹ Thayer, *Prelim. Treatise*, 37; Lea, *Superstition and Force*, 4th ed., 419.

²² Poll. & Mait. I, 423, 426, II, 653.

²³ The first appearance of it, as administered to a party accused, seems to occur in Innocent's decretals of 1205 and 1206 (Decretal V, 1, *de accusationibus*, c. 17, 18), where, as the "*forma juramenti*," the persons charged "*meram et plenam dicant inquisitoribus veritatem*"; so also in 1206: ib. II, 37, *de contentis*, c. 23 (an instructive case). As still a secondary resort, it appears, soon afterwards, under Honorius III, in 1216 (ib. II, 24, *de iurjurando*, c. 32); and by the time of Gregory IX, in 1239, Innocent IV, in 1245, and Boniface VIII, 1294-1303, it comes to be the usual requirement and the typical mode of procedure (Sexti Decretal. I, 1, *de iudiciis*, c. 1; II, 4, *de jur. calum.* cc. 1, 3; II, 10, *de testibus*, c. 2). As late as the Lateran Council of 1315, the old compurgation oath had still prevailed as the regular mode of trial for heresy: Decretal. V, 7, *de hereticis*, c. 13 (= c. 3 of Concil. Lat.); Hinschius, V, pt. 1, § 284, p. 346; but by the middle of that century the new oath became the customary instrument in the papal inquisition of heresy; which indeed owed its

effectiveness largely to the new methods: Lea, *Inquisition*, I, 306, 313, 337, 411, 539; Hinschius, V, pt. 1, § 297, p. 484, VI, pt. 1, p. 373. The entire passing away of the old *purgatio canonica*, by the late 1500s, is described in Hinschius, VI, pt. 1, p. 71.

M. Fournier (*Les officialités au moyen âge*, p. 276; 1890) had declared that the oath *de veritate* was no part of the ordinary *ex officio* procedure, and that the texts of the Decretals had been misconstrued. M. Esmein answered this, in 1896, in the pamphlet above cited, and showed conclusively that the oath was a natural historical development, explaining the various causes and aspects. M. Tanon (*L'inquisition*, p. 348) had meanwhile refused to accept the correctness of M. Fournier's assertion.

²⁴ Brunner, *Deutsche Rechtsgeschichte*, I, 396, 437, 433, 435. For the church's compurgation oath, as distinct both in name and in substance from the inquisition or interrogatory oath, see good examples in Decretal. V, 34, *de purg. canon.* cc. 5, 12, 16; Decret. Pars II, causa V, qu. V, cc. 12, 13, 17, 19 (A. D. 1130-1148).

²⁵ "You swear that you shall make true answers to all things that shall be asked of you"; thus it was banded down in the 1600s. In the 1200s, its nature is well illustrated in a case of 1239, under Gregory IX: Sexti Decretal. II, 10, *de testibus*, c. 2: "*recepto juramento de veritate dicenda, iuvengas dictis abbati et priori [the opposing parties], ut tam ponendo quum respondendo dicant veritatem quam super positionibus [i. e. specific allegations of fact] tibi sub bulla nostra transmissis ipsi veniant et illos intelligant in quorum animas iuraverunt. Preterea, sigillatim super quolibet articulo in quolibet positione contento facias a partibus sufficienter adinonem responderi.*"

own act; the latter merely furnished material for the judge with which to reach a personal conviction and decision. This was an epochal difference of method. Indeed, the radical part played, for the progress of English procedure, by the new jury trial in the 1200s and 1300s, was paralleled, in a near degree, not only for ecclesiastical procedure but also for the secular criminal procedure of the Continent, by this inquisitorial oath of the 1200s.²⁶ There were, to be sure, as time went on, several varieties of form to the oath. The chief forms were the simple *juramentum de veritate dicenda*, used in Boniface's English constitution of 1272 (quoted *supra*), and the broader *jururandum calumnie de veritate dicenda*, used in Otho's English constitution of 1236 (quoted *supra*);²⁷ but their unity consisted in the subjection of the accused to a rational specific interrogation for the purpose of informing the judge.

Yet there was a distinction of real consequence (upon which everything came later to turn), regarding the different preliminary conditions upon which a party could be put to this or any other oath. There must be some sort of a presentment, to put any person to answer. But must that come from accusing witnesses or private prosecutors or the like (corresponding to our notion of a *qui tam* or a grand jury)? Or might it be begun by an official complaint (somewhat like our information *ex relations* by the attorney-gen-

²⁶ One of the great facts of the 1300s-1300s on the Continent was the breaking down of the old *laissez faire* system of private prosecution by the injured party, and the consequent prevalence and increase of un punished crime. Something had to be done for remedying this. It was a time of various new methods (Schroeder, *Deutsche Rechtsgeschichte* 775; Siegel, *D. Rechtsg.* 552-556), among which were the *Rügerverfahren*, and the celebrated *Vehmgerichte* in Germany (described in Sir Walter Scott's *Anne of Gelestein*). The ultimate result was the rise of a system of public or State prosecutors, now for the first time known on the Continent, and of grand juries, the English equivalent (Poll. & Mait. II, 639-657). These public prosecutors, acting *ex officio*, laid hold of the weapon just invented by the canon lawyers, the compulsory oath to the accused *de veritate dicenda*, and applied it in their secular criminal procedure. The public prosecutor, indeed, as an institution, "slipped in," as Kemein puts it (*Hist. de la proc. crim.* pp. 100, 101) "by the opening provided by the procedure *per inquisitionem* in canon law." The influence, therefore, of the canon-law expedient upon continental legal history may be said to have been epochal. Its development in this respect in France and Italy may be further seen in Kemein, *ubi supra*, 136, 142, 229; Pertile, *ubi supra*, 3-12, 24-25, 145; Glanville, *Hist. du droit et des institutions de la France*, VI, 628, 629, 630 (1895); Tanon, *ubi supra*, Introd. i. In Germany, the rules of the *inquisitio* (as noticed later) may be seen directly adopted in the great criminal code of 1832 which so long dominated that country: *Constitutio Criminalis Caroli*, Art. 6 (when a

person on suspicion is "durch die oberkeit vom amptthalben [*i. e. ex officio*] angenommen wurde, der soll doch mit *peinlicher frage* nit angegriffen werden, es sey dann zuvor redlich und derhalb genuegung anzeigung und vermutung von wegen derselben missethat auff jnen glaubwirdig gemacht" (1895, Siegel, *Deutsche Rechtsgeschichte*, 565).

²⁷ The difference between these two forms needs a little explanation. The *jururandum calumnie* was primarily a general pledge that the cause was a just one; and originally it had been used independently in civil cases long before the old compurgation procedure had ceased to exist,—that is, as early as the 1100s: Decretal. II, 7, *de jur. cal.*, c. 1. But, as time went on, it came to include a clause *de veritate dicenda*, or at any rate to be associated with that oath as a preliminary to every cause; this appears from 1345 onwards: Sexti Decretal. II, 1, *de iudiciis*, c. 1; II, 9, *de confessis*, c. 2; II, 4, *de jur. cal. ec.* 1, 2; Lindwood, II, 60; Salvio, *Jururandum Calumnie*, passim; Kemein, *Le serment*, 13. Thus it became associated with and equally significant of the new inquisitorial oath-procedure by the time of Boniface's English constitution, *supra*. The typical feature of that procedure, however, whether as a separate oath or as a clause in a larger oath, was the requirement *de veritate dicenda*, *i. e.* an answer specific interrogatories. For forms of this, see Lea, *Inquisition*, I, 399. For other forms of oath, see Burn, *Eccles. Law*, "Oaths," who is, however, not clear on the present subject. Glanville, *Codex Jur. Eccl. Angl.* 1011, has something, but not very helpful.

eral)? Or might the judge *ex officio mero* summon the accused and put him to answer, in hopes of extracting a confession which would suffice? And in the last method, must the charge at least be brought first to the judge's notice *per famam*, or *per clamoralem insinuationem*, "common report" or "violent suspicion"? Such were the questions of procedure which later formed the essential subject of dispute.²⁹ The last question became in the subsequent history the most important one; and it was apparently to be answered, in the strictness of the law, in the affirmative. Nevertheless, the matter was complicated by the varieties of detail in procedure, and there were differences of phrasing in the various decretals that served as authority. It is enough here to note that the third method of trial — the *inquisitio*, or proceeding *ex officio mero* — became a favorite one for heresy trials; and that its canonical lawfulness in some shape was supported by clear authority.³⁰ About the year 1600, there came to be in England much pamphleteering anent this; and a formal opinion of nine canonists declared the lawfulness of putting the accused to answer on these conditions: "*Licet nemo tenetur seipsum prodere [i. e. accusare], tamen proditus per famam tenetur seipsum ostendere utrum possit suam innocentiam ostendere et seipsum purgare.*"³¹ Thus, on the one hand, it was easily arguable that, in ecclesiastical law, the accused could not be put to answer *ex officio mero* without some sort of witnesses or presentment or bad repute;

²⁹ This triple classification of the preliminary procedure, — *accusatio*, *denunciatio*, *inquisitio*, — which became the foundation of later discussions (Lea, *Inquisition*, I, 310, 401; Schulte, *Kathol. Kirchenrecht*, § 100), is sometimes said to have been founded on c. 8 of the canon of the Lateran Council of Innocent III, in 1215 (Hefele, *Conciliengeschichte*, 2d ed., V, 385); and so it was. But Innocent composed that canon by adopting part of the language of two of his earliest decretals, of 1199 and 1206 (Decretal. V, 3, *de simonia*, c. 31, *licet aeli*, to the Prior of St. Victor; ib. V, 1, *de accus.* c. 17, *qualiter et quando*, to the Bishop of Verwallles), and the "*tribus modis*" of the former of these appear later as the classification in V, 1, *de accus.* c. 24, identical with the Lateran Council's canon. Esmelin (*Le serment*, p. 4) finds the earliest instances of the *inquisitio* procedure in 1193, Decretal. III, 12 *ut eod. benef.*, c. 1, X, and in 1199, ib. V, 32, *de purg. canon.* c. 10, X. But Tanon (*L'inquisition*, p. 284) and Hinschius (V, pt. 1, § 284, p. 380) concur with the foregoing statement in regarding those Decretals as the first references to the *inquisitio* as a generic method.

The phrase *ex officio*, destined to become so famous in England, in connection with the third mode, seems taken from the same c. 31, *de simonia*, of 1199: "*nos frequentibus clamoribus amittit, ex officio nostro volumus inquirere de perversitate*"; so again, also in 1199, ib. V, 32, *de purg. canon.* c. 10: "*licet contra eum nullus accusator legitimus appareret, ex officio tuo tamen, forma publica deferenda, volumus plenius inquirere veritatem.*"

³⁰ As to the conditions precedent to an *ex officio* inquisition lawfully putting a party to his

oath, the foregoing extracts in note 28, *supra*, suggest something of the original orthodox practice; as also the following passages: ib. V, 1, *de accusationibus*, c. 31, A. D. 1212: "*inquisitio fieri debeat eodem modo super illis de quibus clamores aliqui processerunt*"; ib. c. 34, A. D. 1215: "*debet inquisitionem clamorosa insinuat[i]o praevenire*"; see also ib. cc. 17, 19, 20, 23, 24; V, 34, *de purg. canon.* cc. 1, 3, 6, 10, 12, 15; *Sexti Decretal.* V, 1, *de accus.* c. 2; Lindwood, I, 109: "*a principio ubi inquisitio sit generalis [i. e. a roving commission, without specific accusation], non debet exigi iuramentum per quod aliquis peccatum alicujus occultum prodere cogatur; ex quo tamen crimina sine iuramento corrigenda, poterit inquisitor super his exigere iuramentum*"; I, 17: "*Inquisitio preparatoria fit sine exactione iuramenti*"; and the statements of Hinschius, V, pt. 1, § 284, p. 351, § 297, pp. 493, 496, and of Pertile, VI, pt. 2, pp. 6, 7, 144. This much is worth noticing in detail, because it is this precise point of procedure in the canon law which led ultimately to so different a thing as our modern privilege against self-criminating testimony.

³¹ Strype's *Life of Whitgift*, 339, App. 136 *et passim*; compare Conset's *Practice of the Spiritual Courts* (1749), p. 384, pt. VII, cc. 1, 6; p. 100, pt. III, c. 3, § 2. Compare this statement with Lindwood's, quoted *supra*, antedating it by several centuries. The uncertain phrasing of the later custom and law in the church is seen in Archbishop Whitgift's claim, in 1584 (Strype, 157, App. 63), when using the above formula, that if a man is "*proditus per denunciationem alterius, sive per famam*," he is bound "*seipsum ostendere ad evitandum scandalum et seipsum purgare.*"

and in this sense an oath *ex officio* (as it came to be called) might be claimed (as it was claimed) to be a distinct thing from the same oath when exacted on proper conditions, and to be therefore canonically unlawful. But, on the other hand, it is plain to see, also, how, in the headlong pursuit of heretics and schismatics under Elizabeth and James, the *ex officio* proceeding, lawful enough on Innocent III's conditions about *clamores insinuatii* and *fama publica*, would degenerate into a merely unlawful process of poking about in the speculation of finding something chargeable.⁸¹ In short, the common abuse, in later days, of the *ex officio* proceeding led to the matter being argued, in English courts and in popular discussion, as if this oath were either wholly lawful or wholly unlawful;⁸² though, in truth, by the theory of the canon law, it *might* be either, according to the circumstances of presentment.

But (to take up again the story of Otho's and Boniface's decrees) all these distinctions, it must be clearly understood, did not trouble the lay powers in their controversy of earlier days with the church on English soil. At the time of Edward's statute *De Articulis Cleri*, in the early 1300s, the royal power is not at all concerned, in this respect, with the method of ecclesiastical procedure, but only with the limits of that jurisdiction. Otho's and Boniface's constitutions of the 1200s were issued under a new and improved procedure in the church; if the king's lawyers had thought about it at all, they would probably have welcomed the better methods, for they certainly were dissatisfied with the church's old-fashioned compurgation methods.⁸³ But the jurisdictional controversy was the vital one, as the *Articuli Cleri* show in every paragraph. Wherever the king and his counsellors concede this jurisdiction, there they are found ready enough to concede to the fullest the usual ecclesiastical procedure. In this very statute, indeed, *De Articulis Cleri*, they concede the church's oath-procedure where jurisdiction is conceded, i. e. in matrimonial and testamentary causes. As time goes on and the church becomes occupied with heresy trials, the same complaisance is equally plain. Towards the end of Richard II's time, during the Lollard agitation, the church began, in 1382,⁸⁴ to receive temporal sanction for its claims in the field of heresy, and finally, in 1401,⁸⁵ a statute gave to the church the punishment of heretics; these were to be arrested and detained by the diocesan when "defamed or evidently suspected," until they "do

⁸¹ "The tendency of the jurists was to permit an *ex officio* proceeding, in the form of an inquisition, without the original requirements" (Hinschius, vol. VI, pt., 69, 70, writing of the 1600s).

⁸² In the *Mirror of Justices* (circa 1290), B. V, par. 114 (Seld. Soc. Pub. VII, 173), it is said: "It is an abuse that a man is accused of matters touching life or limb *quasi ex officio*, without suit and without indictment."

⁸³ Poll. & Mait. I, 426, giving numerous examples. These learned and distinguished authors' incidental suggestion that "very possibly the lay courts would have prevented the prelates from introducing in criminal cases any newer or more rational form of trial" is opposed

to what is above advanced; yet, for lack of the reference to a plain authority, is still open to respectful dissent.

⁸⁴ Stat. & Rich. II, 2d sess. c. 5. This statute, however, was spuriously placed upon the statute-book, and its immediate repudiation by the Commons was omitted therefrom; for the interesting history of it, see Coke's Rep. XII, 58; Stephen, Criminal Law, II, 444; Campbell, Lives of the Chancellors, I, 247; Law and Lawyers, II, 247.

⁸⁵ Stat. 2 H. IV, c. 15. In 1414, Stat. 2 H. V, c. 7, another statute provided for delivering indicted heretics to the ordinary, to be tried by the church's procedure.

canonically purge him or themselves," the diocesan to "determine that same business according to the canonical decrees." Here is no objection to the oath or to the *ex officio* procedure, but a sanction of the church's usual rule. Under this statute Archbishop Arundel, with renewed vigor, conducted his campaigns against heretics;³⁰ and under it were all subsequent prosecutions conducted for more than a century.

After a long period, however, there finally appears the little rift within the lute. In 1533, the statute of Henry IV, of 1401, was repealed³¹ by a statute which did not take away the church's jurisdiction over heresy, nor yet oppose its power to put the accused on inquisitional oath, but did insist on something more than *ex officio* proceedings; it provided that "every person presented or indicted of any heresy, or *duly accused by two lawful witnesses*, may be . . . committed to the ordinary [of the church] to answer in open court." Here was the first portent of the new phase of the contest. Under the brief liberality of Edward VI, in 1547, this whole jurisdiction over heresy was taken away;³² but under Mary, in 1554, the extreme statute of Henry IV was revived.³³ Then, Mary's statute was in turn repealed, in 1558, by Elizabeth,³⁴ who at the same time took into her own hands the church's powers, and, with the Court of High Commission, introduced new features into the controversy.

2. a. Under Elizabeth and James, and to the end of the story, there appears no further doubt (material to us now) as to the jurisdiction of the ordinary church courts; it was confined, in its control of laymen, to causes "matrimonial and testamentary"; and it was constantly prohibited from holding them to answer in other classes of cases. So also the Court of High Commission in Causes Ecclesiastical,³⁵ which Elizabeth, as head of the church, now constituted, in 1558, as an extraordinary instrument for carrying out her church policy, worked under similar limitations, though it constantly strove to exceed them, and though it perhaps had jurisdiction over heresy. So, too, that offshoot of the Privy Council, known as the Court of the Star Chamber (first sanctioned by statute in 1487, but not beginning until Elizabeth's time to exercise actively its great and for some time useful powers), had by its charter so broad a jurisdiction that little dispute could be made on that score.³⁶

b. Thus, the emphasis of controversy now shifted. It had in the 1300s concerned jurisdiction; it now concerned methods. The objection portended in 1533, in the statute of 25 H. VIII, c. 14 (above quoted), was now to be

³⁰ Stubbs, Const. Hist. II, 488; III, 32, 357-365; Lindwood, I, 298; Hinschius, V, pt. I, § 281, p. 311. Archbishop Arundel was several times Chancellor, and his influence was strongly felt in the administration of this period.

³¹ St. 25 H. VIII, c. 14.

³² St. 1 Edw. VI, c. 12, § 2.

³³ St. 1 & 2 P. & M. c. 6.

³⁴ St. 1 Eliz. c. 1, § 15. Whether thus the statute of Henry VIII was revived would be a question; Coke cites it as if in force: 12 Rep. 27; see the Case of the Bishops, 12 Rep. 7. It

did not much matter, since Elizabeth's High Court claimed even ample powers.

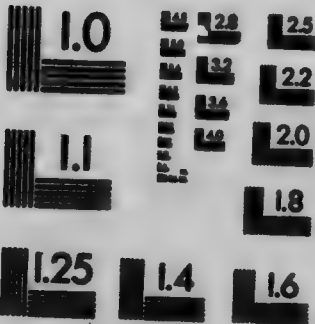
³⁵ St. 1 El. c. 1; Gneist, Const. Hist. II, 170, 240; Coke, 4 Inst. 324, 12 Rep. 19.

³⁶ St. 3 H. VII, c. 1; Gneist, II, 183, 245, 287; Coke, 4 Inst. 60; Stephen, Hist. Crim. Law, I, 173; Leadam's Select Cases in the Star Chamber, Seld. Soc. Publ. vol. XVI, Introduction. Mr. Leadam has shown that its powers were exercised before this statute, and were apparently not restricted to the statutory enumeration.



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the vital one. The Court of High Commission of course followed ecclesiastical rules; the Court of Star Chamber did likewise, in what concerned the procedure of trial.⁴³ No one is going yet to object to their general process of putting the accused to answer upon oath; but there is to be much opposition to the preliminary methods, to the lack of a presentment, to charging a person *ex officio mero*. There was here some room (as we have seen) for uncertainty as to the proper canonical methods; and these courts were to strain all the possibilities, and even to exceed them.

The Court of Star Chamber seems to have raised no special antagonism during the 1600s, nor until James' time, in the next century. Nor did the Court of High Commission, under the first five commissions. But in 1583, the sixth was issued, with Archbishop Whitgift at the head,—a man of stern Christian zeal, determined to crush heresy wherever its head was raised. He proceeded immediately to examine clergymen and other suspected persons, upon oath, after the extreme *ex officio* style. From this time onwards there is much concerning this oath.⁴⁴ That it was canonically and statutorily lawful was at least arguable.⁴⁵ The repealed statute of Henry VIII, c. 14, in 1533 (quoted above), which might otherwise have been urged against its methods, was now of doubtful validity.⁴⁶ Furthermore, the royal Courts of common law, early in the agitation, had plainly declared these things lawful on certain conditions. In 1589, the question had been first raised in the Common Pleas, in *Collier v. Collier*.⁴⁷ In 1591, in Dr. Hunt's case,⁴⁸ the King's Bench refused to sustain an indictment for administering the oath on a charge of incontinency, since "the oath cannot be ministered to the party but where the offence is presented first by two men, *quod fuit*

⁴³ The Star Chamber Court, though its membership fluctuated, usually included the chancellor and the two chief justices; so that there was no lack of legal learning in it.

The historical continuity between the canon-law oath *de veritate dicenda* and the later methods of "discovery" in chancery may be traced in the indorsement on a bill in chancery in Henry VI's time: "*juratus et examinatus ad veritatem dicenda de materia in hac billa contenta*" (Leadam's Select Cases in the Star Chamber, *ubi supra*, p. xxxi).

⁴⁴ Hallam, *Const. Hist.* I, 300 ff.; Neal, *History of the Puritans*, 1st ed., I, 274, 277, 281-286; Strype's *Life of Whitgift*, App. 49. Neal remarks that this was the first Commission to use the oath in *ex officio* manner.

⁴⁵ In 1583, certain ministers, under examination by Whitgift, had applied to Lord Burleigh to protect them; he mildly expostulated with the Archbishop, protesting that "this is not a charitable way"; but the Archbishop firmly answered that "it is so clear by law that it was never hitherto called in doubt"; and the matter ended (Neal, *History of the Puritans*, 1st ed., I, 281-286; Strype's *Whitgift*, 157, 160, App. 49, 63).

⁴⁶ Note 40, *supra*.

⁴⁷ 4 Leon. 194; Cro. El. 201; Moor 906; charge of incontinency; according to *some* report,

no decision was reached; by two others, the prohibition was granted. Coke was counsel for the petitioner, and cited the writs on the jurisdictional statute *de articulis cleri*, claiming that "*nemo tenetur seipsum prodere in such cases*," but only "in causes testamentary and matrimonial."

The king's judges were evidently new to the question, for in 1590, when the dissenting preacher Udall was being examined before (probably) the High Commission Court as to the authorship of the Martin Marprelate books, and refused to answer, saying, "to swear to accuse myself or others, I think you have no law for it," Anderson, J., of the King's Bench, bade Egerton, Solicitor-General (afterwards Lord Chancellor), tell Udall what the law was, and Egerton declared: "Your answers are like the seminary priests' answers, for they say there is no law to compel them to take an oath to accuse themselves"; and afterwards, when Udall again said he was not bound to answer, Anderson, J., replied, "That is true, if it concerned the loss of your life," but "you ought to answer in this case" (1 How. St. Tr. 1371, 1374). This remark of Anderson does not in terms fit any of the supposed rules; yet in the very next year, in Dr. Hunt's case, *infra*, he concurs in laying down the strict ecclesiastical rule; so that his views were as yet in formation.

⁴⁸ Cro. El. 263.

concessum; and it was said, it was so in this case." So also, in the same year, when the case of the preacher Cartwright and his followers, for refusing to take Whitgift's oath and make answer, was brought up for a final settlement, all the chief judges and law officers gave it as their opinion that the refusal was unlawful.⁶⁰ Up to this time, then, it would seem that the stricter ecclesiastical rule was conceded by the highest authorities to be unimpeachable by common-law courts. When James I came to the throne, in 1603, the church's claim was, if anything, strengthened; for James, in his own conceit, was as good a canonist as theologian, and would be prone to favor so useful an engine against heretics as the proceeding *ex officio*. In the first scenes of his career, he appears plainly vouching for it.⁶¹ So, too, when Bancroft succeeds Whitgift as Archbishop, bringing a like zealotry to the office, the common-law judges seem to have been still complaisant.⁶²

But in 1606 Sir Edward Coke comes to be Chief Justice of the Common Pleas, and a change begins gradually. Coke had been counsel for Collier in 1589,⁶³ and had perhaps thus acquired his convictions. It is well known that he set himself, as judge, against the ecclesiastical Courts' pretensions in general. At first, however, he avoided a direct issue on the *ex officio* oath. His first case, in 1609, he decided on other points.⁶⁴ His next, in 1615, was allowed to drag on for a year or more, with repeated adjournments and other expedients intended to induce either the accused or the High Court of Commission to yield a point and avoid the direct issue.⁶⁵ The plain opinion of Coke, and, apparently, the final decision of the Court, was that the oath was improperly put by the ecclesiastical Court; yet the objectionable thing seemed

⁶⁰ Styrpe's Whitgift, 338, 360, App. 138; Neal, Puritans, 2d ed., I, 337 ff.; the officers were the two Chief Justices, the Chief Baron of the Exchequer, Sergeant Puckring, and the Attorney-General and Solicitor-General.

⁶¹ Jan., 1604, Conference on Church Reformation, Neal's Puritans, 2d ed., I, 402, 3 How. St. Tr. 70, 86 (a Lord: "The proceedings in that Court [of the High Commission] are like the Spanish Inquisition, wherein men are urged to subscribe more than law requireth, and by the oath *ex officio* forced to accuse themselves"; Whitgift, Archbishop of Canterbury: "Your lordship is deceived in the manner of proceeding, for if the article touch the party for life, liberty, or scandal he may refuse to answer"; Egerton, Lord Chancellor: "There is necessity and use of the oath *ex officio* in divers courts and causes"; His Majesty, James I., "here soundly described the oath *ex officio*, for the ground thereof, the wisdom of the law therein, the manner of proceeding thereby, and profitable effect of the same"). But the prelates were weakening; Whitgift, twenty years before, in his passage at arms with Burleigh (cited *supra*, note 45), had never made the concession here recorded, or anything like it.

⁶² 1605, Bancroft's Articali Cleri, and the Judges' Answer, 3 How. St. Tr. 131, 135 (*Objection* [by the clergy, that the Judges issue a prohibition to the clergy on the ground] "that the

party ought to have a copy of the articles being called in question *ex officio*, before he should answer them"; Answer [by the Judges]: "Yet ought they to have the cause made knowne unto them, for which they are called *ex officio*, before they are examined, to the end that it may appear unto them, before their examination, whether the cause be of ecclesiasticall cognizance; otherwise they ought not to examine them upon oath").

⁶³ *Supra*, note 47.

⁶⁴ 1609, Edwards' Case, 13 Rep. 9 (Coke, C. J., and three others; prohibition granted against the High Court of Ecclesiastical Causes, in putting Edwards to his oath, on a charge of libel, as to his meaning in the words uttered; resolved on three grounds, first, the matter was temporal, not ecclesiastical; secondly, it was not for this special court; thirdly, "in cases where a man is to be examined upon his oath, he ought to be examined upon acts or words, and not of the intention or thought of his heart; and if any man should be examined upon his oath what opinion he holdeth concerning any point of religion, he is not bound to answer the same"; nothing was mentioned by party or judges, as to a privilege against matter involving a penalty, nor is the *ex officio* oath declared unlawful).

⁶⁵ Dighton v. Holt, 3 Bulstr. 48; briefly reported in Moor 840, 3 Cro. 388, 1 Rolle 387, Jura Eccles. 348, pl. 2.

to be, not that the accused should be compelled to answer, but that he should be charged *ex officio*, in a cause not testamentary or matrimonial but penal.⁵⁵ In the meantime (in 1610, 1611, and 1615), three other cases had come before the common-law Courts, presumably the King's Bench, and from their imperfect reports it may be inferred that a similar view was now prevailing there.⁵⁶ The change had thus substantially been effected.⁵⁷ Archbishop Abbot, a man of less rabid views, had in 1610 succeeded Bancroft; ⁵⁸ Coke had carried his views to the King's Bench, as Chief Justice, in 1613; and the matter seems to have been so far settled (in respect to the ecclesiastical claims) that no more cases occurred,⁵⁹ until in 1640, the statute (quoted later) put an end, for the time, to further doubt.

But the Star Chamber claims remained still to be faced. What had been settled was (in effect) merely that the ecclesiastical Courts (including that of High Commission) could not, as a matter of jurisdiction and procedure, put laymen to answer, *ex officio*, to penal charges. But this did not touch the Court of Star Chamber. Its conceded jurisdiction was ample enough to fine and imprison for almost any offence that it chose to pursue.⁶⁰ The very statute that sanctioned it, in 1487, expressly vested in it the authority to examine the accused on oath in criminal cases, without naming even such restrictions as the ecclesiastical law conceded; ⁶¹ and its right to examine in this fashion, wherever the case was within its jurisdiction, seems to have been conceded under Henry VIII and Elizabeth, all through the 1500s.⁶² But as James' reign went on, and its practices became arrogant and obnoxious, so its use of the *ex officio* oath came to share the burden of criticism and discontent which that procedure in the ecclesiastical Courts excited.⁶³ The common-law Courts seem to have found no handle against its oath-procedure,

⁵⁵ In 12 Rep. 26, "Oath Ex Officio," is given by Coke an opinion, said by him to have been rendered by himself, as Chief Justice, as early as 1607, to the Common, on their request; in this he plainly declares that in the ecclesiastical courts "no layman may be examined *ex officio*, except in two causes," matrimonial and testamentary. But the above date is doubtful; the volume was not printed until after his death, and its authority is not of the best.

⁵⁶ 1610, Mansfield's Case, Rolle's Abr., "Prohibition," (T) 4 (a clergyman was allowed to be examined on oath for preaching heresy); 1611, Clifford v. Huntly, ib. (T) 6, Jura Eccles. 427, pl. 7 (a woman was not allowed to be examined as to a forfeiture); Huntley v. Cage, 2 Brownl. 14 (apparently the same case); 1615, Bradston's Case, Rolle's Abr., "Prohibition," (T) 1, Jura Eccles. 355, pl. 9 (a layman was not bound to answer as to an offence involving forfeiture). All these, of course, are cases of prohibitions issuing to the ecclesiastical Court.

⁵⁷ In Spendlow v. Smith, Hob. 84, Jura Eccles. 428, probably late in 1615, a plain ruling was made; in a suit in the church court for dilapidation, charging a lease for years and fraud, the defendant was put to his oath as to the fraud; this was held unlawful, "for though the original cause belong to their cognizance, yet the covin

and fraud is criminal, and . . . punishable both in the Star Chamber and by the penal laws of fraudulent gifts, and not to be extorted out of himself by his oath."

⁵⁸ Neal, Puritana, I, 450.

⁵⁹ Except Jenner's Case, in 1621 (Jura Eccles. 427, pl. 6, Rolle's Abr., "Prohibition," (T) 6, briefly reported; in accord with Edwards' Case, *supra*); and Letters v. Smeax, undated, but before 1616 (Noy 151).

⁶⁰ *Supra*, note 42.

⁶¹ St. 3 H. VII, c. 1.

⁶² 1589, Rither's Case, Cro. El. 148, *scntle*; 1591, Buckley v. Wood, Cro. El. 248.

⁶³ That the contest over compulsory disclosure was becoming a matter of popular professional interest is indicated by the great dramatist's allusion to it in Hamlet, first printed in quarto in 1608; in Act III, Sc. 3, the King soliloquises:

"In the corrupted currents of this world
Offence's gilded hand may shove by justice;
And oft 'tis seen the wicked prize itself
Buys out the law. But 'tis not so above;
There is no shuffling; there the action lies
In his true nature, and we ourselves compelled,
Even to the teeth and forehead of our faults,
To give in evidence."

even after Coke's accession to the bench.⁶⁴ But though there was no explicit judicial condemnation, there was, after a time, more than one formal questioning of it.⁶⁵ The analogy of the doctrine already settled by Coke in 1607-1616, for the ecclesiastical Courts, was naturally invoked. Towards the end of its career, it would seem that some impression was being made on the Court's own theory of orthodoxy.⁶⁶

3. But its time in the kingdom was now drawing to an end; and the trial which seems to have precipitated the crisis came in 1637, — a case full of instruction for our present history. John Lilburn, an obstreperous and forward opponent of the Stuarts (popularly known as "Freeborn John"), constituted somewhere between a patriot and a demagogue, had the obstinacy to force the issue. A decade later, he came into a similar collision with the Parliament's government; but he makes his entrance as a victim of the King's Star Chamber:

1637-1645, *Lilburn's Trial*, 3 How. St. Tr. 1315; John Lilburn was committed to prison by the Council of the Star Chamber, including the Chief Justice of the King's Bench, on a charge of printing or importing certain heretical and seditious books; on examination, while under arrest, by the Attorney-General, having denied these charges,

⁶⁴ In the following three cases, Coke himself, at the very time when he was opposing from the bench (as already observed) the *ex officio* oath of the High Commission Court, appears as a consenting party to the enforcement of the even looser practice of the Court of Star Chamber:

1610, *Andrew v. Ledsam*, 2 Brownl. 49 (A. exhibited his bill in the Star Chamber against L., a broker, for defrauding him by forging deeds to represent the investments made by him with A.'s money; "L. had forged and counterfeited them, as he hath confessed upon his examination, upon interrogatories administered by the plaintiff in this court"; the only question was whether, among his punishments, he should lose one ear or both; "and these doubts were resolved by Coke, Chief Justice of the Common Bench, — where they were moved, — and Fleming, Chief Justice of the King's Bench, that L. should lose but one ear"); 1613, *Countess of Shrewsbury's Case*, 12 Co. 24, 2 How. St. Tr. 769 (before a council, including the Chancellor, the two Chief Justices, Coke being one, and the Chief Baron, probably the Star Chamber in substance; the Countess of Shrewsbury, being brought before the Council and "required to declare her knowledge" as to the escape of Lady Arabella Stuart, which the Countess was said to have abetted, declined to answer, first, because she had made a vow to God to keep the matter secret, and next, because she was privileged as a peer not to testify, except before her peers; both these claims were totally repudiated, and she was adjudged in high contempt; nothing was said, by either the party or the judges, of the procedure or the present privilege; yet it was certainly involved, if it had existed); 1613, *Lord Sanchar's Case*, 9 Co. 114, 121 (Lord Sanchar, accused of murdering his fencing-teacher, was "particularly examined touching certain articles special and pertinent,"

and "being prest thereupon by the questions, he discovered a long and inveterate malice which he had had, with all the occasions and material circumstances of this murder").

⁶⁵ 1629, *Stroud's Trial*, Cobbett's Parl. Hist. II, 504, 526, 3 How. St. Tr. 235, 237 (certain members, including Hollis, Eliot, and others, having been arrested and examined by the king's order, and having refused "to answer out of parliament what was said and done in parliament" concerning treasonable utterances, the judges, being asked whether this refusal was not a high contempt, answered all "that it is an offence, punishable as aforesaid, so that this do not concern himself but another, nor draw him to danger of treason or contempt by his answer"; this was an equivocal utterance); 1644, *Archbishop Laud's Trial*, 4 id. 315, 385, 397 (being charged with unlawfully tendering the oath *ex officio*, some years before, he answers that "that was the usual proceeding in that court [i. e. Council of the Star Chamber]"; it was "then the common, and for ought I yet know, then the legal course of that court").

⁶⁶ Ante 1635, *Hudson, Treatise of the Court of Star Chamber*, in Hargr. Collect. Jurid. I, 206 ("Neither must it question the party to accuse him of a crime. . . . But the great question hath been, whether a witness which in examination will not give any answer shall be compelled to make answer to the interrogatories. . . . Therefore, if a witness conceive that the answering of a question may prejudice himself, it seemeth that he need not to answer; for he is produced to testify betwixt others, and not to prejudice himself"); 206 ("neither must it question the party to accuse him of a crime, for it is an high contempt to make the justice of this court an instrument of malice"). But Lilburn's case, *post*, shows plainly that the practice was very different from Hudson's exposition.

he was further asked as to other like charges, but refused, saying: "I am not willing to answer you to any more of these questions, because I see you go about by this examination to ensnare me; for, seeing the things for which I am imprisoned cannot be proved against me, you will get other matter out of my examination; and therefore, if you will not ask me about the thing laid to my charge, I shall answer no more; . . . and of any other matter that you have to accuse me of, I know it is warrantable by the law of God, and I think by the law of the land, that I may stand upon my just defence and not answer to your interrogatories." Afterwards, "some of the clerks began to reason with me, and told me every one took that oath, and would I be wiser than all other men? I told them, it made no matter to me what other men do." Then, when examined before the Chamber itself, he again refused, saying, "I had fully answered all things that belouged to me to answer unto," but as to things "concerning other men, to insuare me, and get further matter against me," he was not bound "to answer such things as do not belong unto me; and withal I perceived the oath to be an oath of inquiry," i. e. *ex officio*, "and of the same nature as the High Commission oath," which was against the law of the land, the Petition of Right, and the law of God as shown in Christ's and Paul's trials; yet, "if I had been proceeded against by a bill, I would have answered." Then the Council condemned him to be whipped and pilloried, for his "boldness in refusing to take a legal oath," without which many offences might go "undiscovered and unpunished"; and in April, 1638, 13 Car. I, the sentence was executed. On Nov. 3, 1640, he preferred a complaint to Parliament; and on May 4, 1641, the Commons (having not yet abolished the Star Chamber Court) voted that the sentence was "illegal and against the liberty of the subject," and ordered reparation. But, the petition going for a while no further, he applied once more, and on Feb. 13, 1645 (1646), the House of Lords heard his petition by counsel, Mr. Bradshaw urging for him the sentence's illegality, "the ground whereof being that Mr. Lilburn refused to take an oath to answer all such questions as should be demanded of him, it being contrary to the laws of God, nature, and the kingdom, for any man to be his own accuser"; and Mr. Cook arguing that, without an information, "to administer an oath was all one with the High Commission," whereon the Lords ordered that the said sentence "be totally vacated . . . as illegal, and most unjust, against the liberty of the subject and law of the land and Magna Charta"; and on Dec. 21, 1648, he was finally granted £3000 in reparation.

Lilburn's case, together with those of Prynne and Leighton (whose grievances were of another sort), were sufficiently notorious to focus the attention of London and the whole country. The Long Parliament (after eleven years of no Parliament) met on Nov. 3, 1640. Lilburn was on the spot that day with his petition for redress. In March, 1641, a bill was introduced to abolish the Court of Star Chamber, as well as (then or shortly after) a bill to abolish the Court of High Commission for Ecclesiastical Causes.⁶⁷ These were both passed July 2-5 of the same year;⁶⁸ and in the latter statute was inserted a clause which forever forbade, for any ecclesiastical Court, the administration *ex officio* of any oath requiring answer as to matters penal.⁶⁹ This clause was in substance reenacted as soon as the Restoration of the Stuarts was effected.⁷⁰

⁶⁷ Cobbett, Parliamentary History, II, 722, 762, 855.

⁶⁸ St. 16 Car. I, cc. 10, 11.

⁶⁹ 1641, St. 16 Car. I, c. 11, § 4 (no person "exercising spiritual or ecclesiastical power, authority, or jurisdiction," shall "*ex officio*, or at the instance or promotion of any other whatsoever, urge, enforce, tender, give, or minister" to any person "any corporal oath, whereby he or they shall or may be charged or obliged to make

any presentment of any crime or offence, or to confess or to accuse himself or herself of any crime or offence, delinquency, or misdemeanor, or any neglect, matter, or thing, whereby or by reason whereof he or she shall or may be liable or exposed to any censure, pain, penalty, or punishment whatsoever").

⁷⁰ 1661, St. 13 Car. II, c. 12, § 4 (no person "having or exercising spiritual or ecclesiastical jurisdiction" shall tender to any person "the

But was the oath hereby *totally* abolished in ecclesiastical Courts, — that is, was it the *ex officio* proceeding only that was abolished, and could a man still be put to answer in a penal matter, in a cause lying within the Court's jurisdiction and begun by proper canonical presentment? This question fairly remained open under the first statute, though less plausibly under the second one. During the next twenty years after the enactment of the second statute, the matter came often before the Courts, in applications for prohibitions. The various rulings are hardly to be reconciled.⁷¹ But, by the end of the 1600s, professional opinion apparently settled against the exaction of an answer under any form of procedure, in matters of criminality or forfeiture. Such, at any rate, beginning with the 1700s, was the application of the law ever after, without question.⁷² The statutes had abolished, in those courts, all obligation to answer on oath to such matters, without regard to the form of presentment or accusation.

II. But what, in the mean time, of the common law, and of jury trial? Thus far the controversy here examined has been purely one of ecclesiastical jurisdiction and ecclesiastical methods of presentment. The common-law Courts have concerned themselves with it simply by virtue of their superior authority to keep the church Courts and other Courts to their proper boundaries. In their enforcement of these restrictions, one thing seems plain: There is no feature of objection to the compulsion, in itself, of answering on oath; the objection is as to *who* shall require it, and *how* it shall be required. On the very eve of the statute of 16 Car. I, and of the disappearance of the Star Chamber forever, John Lilburn, the stoutest of recusants, is willing to answer all matters properly charged against him, and objects only to "such things as do not belong unto me." He seems to have known no broader defensive principle to fall back upon, more substantial or inclusive than a conceded rule of ecclesiastical procedure. Was there in fact, at the time, any available principle known in the common-law Courts in jury trial?

oath usually called the oath *ex officio* or any other oath," etc., in effect as in the prior statute).

⁷¹ 1665, R. v. Lake, Hardr. 364, 365 (prohibition against exacting an oath on articles apparently involving a criminal charge; apparently granted, but upon another point); 1665, Scurr v. Burrell, 1 Sid. 282 (prohibition against a charge of exacting the oath in *ex officio* proceedings for sitting in church with the hat on; adjourned, and apparently not decided); 1669, Goulson v. Wainwright, 1 Sid. 374 (prohibition granted against exacting an oath on *ex officio* articles for "matters which are criminal"); 1669, Taylor v. Archbishop of York, 2 Keb. 352 (prohibition lies against exacting the oath in criminal charges); 1671, Grove v. Elliot, 2 Vent. 41 (prohibition against exacting oath on charge of keeping conventicles, etc.; argued that "no man ought to be proceeded against without due presentment"; held, that it did not appear to be a proceeding "merely *ex officio*," and due presentment must be presumed, and hence the prohibition was refused); 1680, Farmer v. Brown, 2 Lev. 247, T. Jones 123; s. c. Horne v. Brown, 1 Vent. 339

(prohibition against requiring an answer to a charge of not paying a church tax; apparently treated as a civil case, and not within the statute's prohibition; after a division of the court and adjournment, the prohibition was refused unanimously).

⁷² 1750, L. C. Hardwicke, in *Brownword v. Edwards*, 2 Ves. Sr. 243, 245 (refusing to compel discovery of an incestuous marriage punishable in the ecclesiastical court: "I am afraid, if the Court should overrule such a plea, it would be setting up the oath *ex officio*, which then the Parliament in the time of Charles I would in vain have taken away, if the party might come into this court for it"); 1752, *Finch v. Finch*, ib. 491, 493 ("as to the first objection to it, that it will subject him to ecclesiastical censures and that the court will not compel him to answer on oath, which is like an oath *ex officio*, that is true"); 1822, *Schultes v. Hodgson*, 1 Add. 105 (prosecution for adultery, etc.; "this is a criminal suit"; and none of the articles were required to be answered).

1. Down to the early 1600s, at any rate, it was certainly lacking. If we look at what the common law had to build upon, before then, there is nothing of the sort. The generations which forced an accused to the ordeal and the compurgation oath had plainly no scruple against such compulsion.⁷³ Compurgation, under its later name of "wager of law," was enforced in the 1500s without objection. Jury trial came to be approved as a trial so much more effective that the defendant's oath in wager of law became, indeed, rather a privilege than a burden.⁷⁴ In jury trial, to be sure, the oath was not administered to the defendant, because it would, in those days, still be regarded as a decisive thing,⁷⁵ and as a method of summary self-exoneration which would be entirely too facile; it was the jurors' oaths that were to "try" him, not his own; and so, in jury trial proper, either in civil or in criminal cases, the oath of the party does not appear. But wherever, in other proceedings, it was thought appropriate to have the defendant's oath, there was no hesitation in requiring it. All through the 1500s the statute-book records the sanction of oaths to accused persons. The Star Chamber statute of 1487 (3 H. VII, c. 1) had expressly sanctioned the examination of the accused on oath at the trial, because "little or nothing may be found by inquiry" of the ordinary sort. The statute of H. VIII, in 1533, authorized the common-law officers to turn over indicted heretics for examination by the ordinaries upon oath.⁷⁶ Wherever a party is committed to jail by the judges for fraud or other misconduct done in the course of trial, by forging writs or the like, he appears to have been put to his examination on oath to disclose it.⁷⁷ Persons charged as bankrupts,⁷⁸ as Jesuits,⁷⁹ as abusers of warrants,⁸⁰ were to be examined on oath by common-law officers. Most notably, every accused felon was required to be examined by the justices of the peace, and his examination to be preserved for the judges at the trial;⁸¹ and, so far as appears, not a murmur was ever heard against this process till the middle of the

⁷³ Rather was it to be regarded as surprising that the inquisitional method, conquering the rest of Europe, failed in England alone; but "the escape was a narrow one" (Pollock & Maitland, *Hist. Eng. Law*, II, 655); an instance of the direct questioning of the accused (*circa* 1268) may be seen in Maitland's *Court Baron*, Selden Soc. Publ. IV, 62.

⁷⁴ Thayer, *Prelim. Treatise*, 29.

⁷⁵ "All such persons to be tried by their oaths," is a phrase of 1543 in the Court of Requests: *Seld. Soc. Publ. XII*, lxxxv. The reason for this attitude toward the oath is sufficiently explained in the history of the numerical system (*ante*, § 2032). Compare also the history of the disqualification of parties in civil cases (*ante*, § 575).

⁷⁶ *Supra*, note 37.

⁷⁷ 1565, *Whitacres v. Thurland*, Dyer 242 a; *Dawbeny v. Davie*, ib. 244 a; *Thurland's Case*, ib. 244 b.

⁷⁸ 1570, St. 13 Elis. c. 7, § 3.

⁷⁹ 1593, St. 35 Elis. c. 2, § 11 (any person suspected to be a Jesuit, etc., who "being examined by any person having lawful authority . . . shall refuse to answer directly and truly whether

he be a Jesuit," shall be committed "until he shall make direct and true answer" to the said questions").

⁸⁰ 1601, St. 43 Elis. c. 6, § 1 (persons charged with abuse of warrants are to be sent for by the judges "and be examined thereof upon their oaths," and if the offence be confessed by them or otherwise proved, they are to be committed to jail).

⁸¹ 1553, St. 1 & 2 P. & Mar. c. 13, § 4; 1555, St. 2 & 3 P. & Mar. c. 10 (inasmuch as the preceding statute did not extend to cases where the prisoner was not bailed, "in which case the examination of such prisoner, and of such as bring him, is as necessary, or rather more, than where such prisoner shall be let to bail," so it is extended to the latter case also); the defendant was here not put on oath, though the witnesses were (*ante*, § 849), but the reason for this was merely as before, that the oath was thought to give to the accused's statements a solemnity and weight which would be too great an advantage. As late as 1709 (*R. v. Derby*, 19 How. St. Tr. 1011, 1013, note) a judge says of this proceeding, "To have him examined is a privilege."

1700s;⁸² and no statutory measure was taken to caution the accused that his answer was not compellable, until well on in the 1800s.⁸³ The everyday procedure in the trials of the 1500s and the 1600s, and almost the first step in the trial, was to read to the jury this compulsory examination of the accused; in 1638, the year after Lilburn's imprisonment, in the very next recorded trial, the accused's previous examination before the Chief Justice was offered and read at the outset, without a shadow of objection.⁸⁴ Furthermore, as the trial goes on, the accused, in all this period of 1500-1620, is questioned freely and urged by the judges to answer; he is not allowed to swear, for the reasons already noted, but he is pressed and bullied to answer.⁸⁵ A striking example is found in the jury trial of Udall, in 1590, for seditious libel; and the significant circumstance is that Udall, who before the ecclesiastical High Commission Court, a few months previous,⁸⁶ had plainly based his refusal on the illegality of making a man accuse himself by inquisition, has here, before a common-law jury with witnesses charging him, no such claim to make:

1590, *Udall's Trial*, 1 How. St. Tr. 1271, 1275, 1289: Udall pleaded not guilty; and after argument made and witnesses testifying, Judge Clarke: "What say you? Did you make the book, Udall, yes or no? What say you to it, will you be sworn? Will you take your oath that you made it not?" declaring this to be a favor; Udall refused, and the judge finally asked: "Will you but say upon your honesty that you made it not?" Udall again refused; Judge Clarke: "You of the jury consider this. This argueth that, if he were not guilty, he would clear himself"; then, to Udall: "Do not stand in it; but confess it."

The same features appear still in 1606, in the Jesuit Garnet's trial for the Gunpowder Plot; called before the Council inquisitorially, he denies his liability to answer;⁸⁷ but, tried on indictment before a common-law jury and the chief common-law judges, he is questioned and urged, he answers or refuses to answer, as it suits him, but says never a word of the illegality of such questions or an immunity from answer.⁸⁸ And such indeed, beyond a reasonable doubt, was the common law, as well as the common practice, of the time.⁸⁹

It is true that precedents apparently to the contrary have been alleged to exist, — by Coke, for example, who invokes two common-law cases to support

⁸² *Ante*, § 848.

⁸³ *Ibid.*

⁸⁴ 3 How. St. Tr. 1369, 1373.

⁸⁵ 1535, Sir Thomas More's Trial, 1 How. St. Tr. 386, 389; 1554, Throckmorton's Trial, *ib.* 862, 873; 1571, Duke of Norfolk's Trial, *ib.* 958, 972 ("then being ruled over by the Lord High Steward that he should answer directly to that question, he answered"); 1588, Knightley's Trial, *ib.* 1248, 1267. Mr. Justice Stephen's summary of the proceedings at this period is in agreement with what is above said: *Hist. Crim. Law*, I, 325; so also, for 1565, Smith, *Com. of England*, II, c. 26, quoted in Thayer, *Prelim. Treatise*, 137.

⁸⁶ *Supra*, note 47.

⁸⁷ 1606, Garnet's Trial, 2 How. St. Tr. 218.

⁸⁸ 344 (Garnet: "When one is asked a question before a magistrate, he is not bound to answer before some witnesses be produced against him, '*quia nemo tenetur prodere seipsum*'"); note that this is a reference to the ecclesiastical rule of presentment, as already examined, not a refusal to answer at all events.

⁸⁹ *Ibid.*, *passim*.

⁹⁰ If anything further were needed, the prevalence of torture as an aid to confession, upon the examination of political offenders, was absolutely inconsistent with the recognition of a privilege against self-crimination; and it is highly significant that the last recorded instances of torture (*note*, § 818) and the first instances of the established privilege (*infra*, note 105) coincide within about a decade.

his ambiguous and shifting arguments. But neither these, nor any others hinted at, indicate in any way the existence of any common-law rule.⁹⁰ Even Coke himself, whose writings have since served as the chief source of information on this subject, does not actually go so far as to apply his arguments to any effect but the limitation of the ecclesiastical Courts' proceedings.⁹¹ He is willing to stop them from requiring answers "which may be an evidence against him at the common law upon the penal statute"; but he says nothing about a common-law illegality; indeed, this argument of his seems rather to assume the contrary. He freely quotes, in mutilated form, the canon-law phrase (whose origin has been examined above) "*nemo tenetur seipsum prodere*"; but there is nothing to show, down to the end of his life, that he believed in or knew of any privilege of refusal in the king's common-law proceedings.

The only source of doubt that can be found arises from certain scantily reported chancery rulings of the late 1500s. Some of these, at first sight, might be supposed to indicate the existence, as early as Elizabeth's reign, of a general privilege against self-crimination. Other explanations, however, lie open with fair plainness. In the first place, it is a long-established maxim of jurisdiction that equity will not lend its aid, even by relief, apart from discovery, to enforce a forfeiture; on this ground (and remembering that an "answer" in chancery is a pleading as well as testimony) are explainable the cases refusing to compel an answer as to a forfeiture.⁹² In the next place, the Chancellor had almost no jurisdiction over criminal charges;⁹³

⁹⁰ *Hinde's Case*, 1558, Dyer 175 b; cited by Coke (12 Rep. 27; 3 Bulstr. 49) to show that a person need not answer in the church court questions that bring him in danger of a penal law. Hinde's case in fact was this: The king had appointed a commission to examine the title of Skrogs, a justice's clerk, to his office, with power to commit him if he refused to answer; he refused, demurring to the jurisdiction, and was committed; then he was released on *habeas corpus* by the judges of the Common Pleas, because "he was a person of the court, and a necessary member of it"; and the reporter adds: "*Simile*, M. 18, by Hind, who would not take an oath before the ecclesiastical judges for usury."

Leigh's Case, 1568, is cited by Coke (*ubi supra*) as that of an attorney committed by the High Court for refusing to swear as to attendance at mass, and delivered on *habeas corpus* by the Common Pleas, because "they ought not in such case to examine upon his oath." There is nothing to show that this was not an application of the ordinary ecclesiastical rule, examined *supra*. In *Anon.*, 2 Brownl. 271 (1609), occurs a case similar to *Skrogs*'.

In *Attorney-General v. Mico*, cited *post*, other alleged precedents, unreported and scantily mentioned, were bandied back and forth by counsel; but there is nothing to show that they really involved the present question.

⁹¹ In 4 Inst. 60, 324, on the Star Chamber and High Commission Courts, he says nothing of the oath. In 2 Inst. 657, and 12 Rep. 26, he

has much against the oath, but substantially upon the ground of jurisdiction alone. In *Dighton v. Holt* (cited *supra*, note 84), he advances frequently the argument *nemo tenetur* (he had first used it in *Collier v. Collier*, cited *supra*, note 47); but this was an invocation of the canon-law rule taken from the canon lawyers. In *Edward's Case* (cited *supra*, note 53), he is concerned entirely with the jurisdiction, and does not even criticise the *ex officio* oath as such, though in his opinion in 12 Rep. 26, said by him to have been solemnly given two years before, he attacks the oath with great plainness. No two of his various expositions coincide in argument; to reconcile all of his passages is impossible. Add to this his inconsistent attitude in the three cases cited *supra*, note 64. His proneness to maltreat precedents in supporting his views has already been noticed (*ante*, § 2036).

⁹² Such are the following cases: 1587, 1598, *Cromer v. Penston*, Cary 13 (bill against the survivor of a joint tenancy, suggesting a secret severance during lifetime; "the Lord Keeper overruled, that the defendant should not answer," — whatever this may mean); 1595, *Wolgrave v. Coe*, Toth. 18 (bill against one covenanting to deliver deeds; "the opinion of the Court was, the defendant needed not to answer, because he should thereby disclose cause of forfeiture of the bond"); 1600, Toth. 7 ("Mildmay was not enforced by answer to the bill of Cary and Cottingham, to discover a forfeiture to his own hurt"); see also Toth. 10.

⁹³ 1585, *Wakeman v. Smith*, Toth. 12 ("al-

hence, in cases of this nature, cognizance might be declined, by refusing to compel an answer.⁵⁴ But, where this jurisdiction was not disputable, there seems to have been no objection to compelling the answer.⁵⁵ Finally, the chancery practice is to be interpreted by the rule of the ecclesiastical Courts, already examined. The Chancery was forming his procedure (hardly organized until Bacon's time, in the early 1600s) almost precisely after that of the ecclesiastical Courts.⁵⁶ So far as he could take cognizance at all of a case involving a criminal fact, he would of course employ this ecclesiastical rule, as he did others, and not require the defendant to answer without due accusation by two witnesses or by presentment; that is to say, a plaintiff, upon his unsworn bill alone, could not put the defendant to answer to a criminal fact. The close affinity between the Chancellor's and the Church's Courts makes it plain that we need not look to the former for light upon the common-law notions of the time — especially when that practice stands out plainly in the full and abundant reports throughout this whole period.

2. For nearly a generation onwards, in the 1600s, there is no acknowledgment of any privilege in common-law trials. Under Coke's leadership, from 1607 to 1616, the ecclesiastical Courts had been kept within bounds; but there were as yet no bounds in common-law proceedings. With 1620 begin indications that some impression was being transferred into that department.⁵⁷ Nevertheless, in the parliamentary remonstrances to Charles I, and the discussion over ship-money and forced loans and the Petition of Right, in the Parliament which ended in 1629, there is nothing about such a privilege.⁵⁸

though criminal cases are not here to be tried directly for the punishing of them, yet incidentally for so much as concerneth the equity of the cases, they are to be answered").

⁵⁴ This perhaps explains the following case, undated, but probably before 1600: Vice-Chancellor Montague's Case, Cary 12 (seignement of a ward; upon a bill of discovery brought, "it seemed," as to the defendants, "they should not answer to charge themselves criminally, especially in this case, where so great a punishment as abjuration may follow").

⁵⁵ 1570, Anon., Dyer 288 a (examination on oath in chancery to answer a charge of perjury; held, by C. P., to be allowable if the Chancery Court had jurisdiction over perjury); 1631, *Winn v. Swayne*, Toth. 12 ("a commission to answer bribery and corruption").

⁵⁶ "Equity followed the ecclesiastical courts almost literally in its mode of taking the testimony of witnesses and requiring each party to submit to an examination under oath by his adversary" (Langbein, *Equity Pleading*, § 47); and note 43, *supra*.

⁵⁷ 1620, Sir G. Mompesson's Trial, 3 How. St. Tr. 1119, 1123 (the Lords' Committee reported "that they had examined many witnesses, . . . that the Lords' Committee urged none to accuse himself"; but their proceedings were probably inquisitorial, and came rather under the ecclesiastical rule); 1631, Fitzpatrick's Trial, 3 How. St. Tr. 419, 420 (Fitzpatrick had

testified, at Lord Audley's trial, to a rape committed by F. at A.'s instigation; at F.'s own trial, he then protested against the use of his former testimony, since "neither the laws of the kingdom required nor was he bound to be the destruction of himself"; and Chief Justice Hyde replied, "it was true, the law did not oblige any man to be his own accuser," yet here the testimony could be used).

It was in 1628 that the judges unanimously declared, in Felton's case, the murderer of the Duke of Buckingham, that "he ought not by the law to be tortured by the rack"; nevertheless, when Felton was examined before the Privy Council (3 How. St. Tr. 371), "the Council much pressed him to confess who set him on," and Bishop Laud told him "if he would not confess, he must go to the rack." Though the rack was declared unlawful, yet nothing is recorded as to the unlawfulness of urging a confession.

⁵⁸ The suggestion by Lilburn's counsel, in 1637 (3 How. St. Tr. 1356), that the *ex officio* oath was "directly contrary to the Petition of Right in 3 Car." is referred, apparently to par. iii and x of the Petition of Right of 1628 (3 How. St. Tr. 222; *infra*), which protested against being "called to make answer or take such oath." This, perhaps, meant a political promissory oath of conformity or obedience in connection with the refusal to pay ship-money, — an entirely different thing. On the other

3. Finally, however, in 1637-41, comes Lilburn's notorious agitation;¹⁰⁰ and in 1641, with a rush, the Courts of Star Chamber and of High Commission are abolished, and the *ex officio* oath to answer criminal charges is swept away with them.¹⁰¹ With all this stir and emotion, a decided effect is produced, and is immediately communicated, naturally enough, to the common-law Courts. Up to the last moment, Lilburn had never claimed the right to refuse absolutely to answer a criminating question; he had merely claimed a proper proceeding of presentment or accusation.¹⁰² But now this once vital distinction comes to be ignored. It begins to be claimed, flatly, that no man is bound to incriminate himself, on any charge (no matter how properly instituted), or in any Court (not merely in the ecclesiastical or Star Chamber tribunals).¹⁰³ Then this claim comes to be conceded by the judges, — first in criminal trials, and even on occasions of great partisan excitement;¹⁰⁴ and afterwards, in the Protector's time, in civil cases, though not without ambiguity and hesitation.¹⁰⁵ By the end of Charles II's reign, under the Restoration, there is no longer any doubt, in any court;¹⁰⁶ and by this period, the

hand, however, it may have referred to a really inquisitorial oath. The circumstances were these: Darnel, E. Hampden, and others, in 1627, on being required to make a loan to the king, and being examined to disclose their estates, declined to pay or to disclose, and applied for release under a *habeas corpus*, which was refused by the judges (3 How. St. Tr. 1); on which the Petition of Right was passed: 1628, 3 Car. I, c. 1, §§ 3, 16 (after reciting that persons refusing to make loans to the king "have had an oath administered unto them not warrantable by the laws or statutes of this realm." Parliament petitions "that none be called to make answer or take such oath," or be confined "for refusal thereof"; and the king accords the petition).

¹⁰⁰ *Supra*, note 67.

¹⁰¹ *Supra*, note 69.

¹⁰² *Supra*, p. 2081.

¹⁰³ 1641, Twelve Bishops' Trial, 4 How. St. Tr. 63, 75 (on being asked whether they had subscribed the treasonable petition, they refused to answer, because they were not "bound to accuse themselves").

¹⁰⁴ 1649, King Charles' Trial, 4 How. St. Tr. 933, 1101 (one Holden objected to answering, and the Court, "perceiving that the questions intended to be asked him tended to accuse himself, thought fit to waive his examination"); 1649, Lilburn's Trial, *ib.* 1269, 1280, 1292, 1343 (Lilburn, on a trial under the Commonwealth for treason, claimed that his former counsel, Bradshaw, now Lord President of the Council, had tried to make him criminate himself just as the Star Chamber Court had formerly done; he here refused on his trial to do so; Lord Keble: "You shall not be compelled"; Lilburn: "I am upon Christ's terms, when Pilate asked him whether he was the Son of God, and adjured him to tell him whether he was or no; he replied, 'Thou sayest it.' So say I: Thou, Mr. Pridesaux, sayest it, they are my books. But prove it"; Judge Jermin: "But

Christ said afterwards, 'I am the Son of God.' Confess, Mr. Lilburn, and give glory to God"; see also p. 1445).

¹⁰⁵ 1655, The Protector v. Lord Lumley, Hardr. 23 (Exchequer; bill to discover defendant's estate, "for that he was outlawed whereby his goods and the profits of his lands were forfeited; the defendant's demurrer, *quia nemo tenetur prodere seipsum*," is overruled, because "the outlawry is in the nature of a gift to the king or a judgment for him"; thus the general principle is apparently assumed valid; though, as already seen *supra*, note 92, the equitable rule against aiding a forfeiture may have been the reason); 1658, Attorney-General v. Mico, Hardr. 139, 145 (Exchequer; bill for relief and discovery, for evading customs laws and attempting to bribe; demurrer, that the bill contained charges involving penalties and forfeitures; the defendant evidently cites most of his authorities from Coke's works, which had now been published; there was no decision; nor yet in the case of Att'y-Gen'l v. —, *ib.* 301, in 1662, probably the same case).

¹⁰⁶ 1660, Seroop's Trial, 5 How. St. Tr. 1034, 1039 (L. C. B. Bridgman: "You are not bound to answer me, but if you will not, we must prove it"); 1662, Crook's Trial, 6 *id.* 301, 305 (the defendant, refusing to take the oath of allegiance, claimed that he ought not to accuse himself, for "*nemo debet accusare seipsum*"); 1670, Penn's and Mead's Trial, *ib.* 931, 957 (on a question being put to Mead, he refused to answer; "It is a maxim in your own law, '*Nemo tenetur accusare seipsum*,' which, if it be not true Latin, I am sure it is true English, 'that no man is bound to accuse himself'"); 1673, Pearce v. Parker, Finch 75 (bill for counsel's fees; demurrer allowed, that an answer would "draw him under a penal law"); 1676, Jenkes' Trial, 6 How. St. Tr. 1189, 1194 (defendant: "I desire to be excused all farther answer to such questions, since the law doth provide that no man be put to answer to his

extension of the privilege to include an ordinary witness, and not merely the party charged, is for the first time made.¹⁰⁶ It is interesting to note, in passing, that the privilege, thus established, comes into full recognition under the judges of the restored Stuarts, and not under the parliamentary reformers.¹⁰⁷

Nevertheless, the novelty and recentness of it all in common-law proceedings is apparent, not only in the doubts which the Court of Exchequer, in 1658, so long entertained, and in the very gradual progress of the recognition in criminal trials after 1641, but also in the fact that it remained an unknown doctrine for this whole generation in the colony of Massachusetts,—a colony not only familiar enough with common legal proceedings, but knowing enough to send over for Sir Edward Coke's reports and other law books to inform its Court and keep abreast of the times. In this colony the privilege which began its career after the departure of its founders from England was unrecognized till at least as late as 1685; more, they formally sanctioned the ecclesiastical rule by which the inquisitorial oath was allowed.¹⁰⁸

own prejudice"; and no further questions were put); 1679, Reading's Trial, 7 *id.* 259, 296 (dates, for the prosecution, is not allowed to be asked questions to accuse himself); 1679, Whitebread's Trial, *ib.* 311, 341 (defendant's witness is not allowed to be asked whether he was a priest, because it would "make him accuse himself"); 1679, Langhorn's Trial, *ib.* 417, 435 (dates is not allowed to be asked about "a criminal matter that may bring himself in danger"); 1680, Castlemaine's Trial, *ib.* 1097, 1098 (similar, for answers to "bring him in danger of his life"); 1680, Earl of Stafford's Trial, *ib.* 1293, 1314 (a question whereby a witness "shall accuse himself" is objected to); 1681, Plunket's Trial, 8 *How. St. Tr.* 447, 481 (a witness is not bound to answer questions that "may tend to accuse himself"); 1682, Bird v. Hardwicke, 1 *Vern.* 109 (bill of discovery, charging compounding a fraud; a plea is allowed, that the answer would "subject him to a forfeiture"); 1682, Anon., 1 *Vern.* 60 (defendant's argument that "A court of equity ought not to assist a man in recovering a penalty, nor compel a discovery of a forfeiture," is apparently conceded); 1684, Rosewell's Trial, 10 *How. St. Tr.* 147, 169 (witnesses are not bound "to charge themselves with any crime" or "subject themselves to any penalty"); 1685, Oates' Trial, *ib.* 1079, 1099, 1123 (witness is not compellable to make himself "obnoxious to some penalty"); 1691, African Co. v. Parish, 3 *Vern.* 244 (principle conceded); 1700, Firebrams' Case, 2 *Salk.* 550 (bill against a ranger for discovery of deer-killing; answer as to "what is to make him forfeit his place," is not compelled).

¹⁰⁶ Reading's Trial, *supra*, in 1679.

¹⁰⁷ While this was passing in England, the precisely contemporary struggle, across the Channel, is in marked contrast, with its fatally opposite results; for the Council of Louis XIV, then upon the draft of the great criminal Ordon-

nance of 1670, was fixing, for a century to come, the French rule of compulsory self-crimination. Hitherto this had rested simply on traditional practice (*supra*, note 26); now it was confirmed by statute (Esmein, *Hist. de la proc. crim.* 229). The arguments of the opposing councillors in the debate employ language identical with our own privilege: "Nul n'est tenu de se condamner soi-même par sa bouche."

In the Continental canon law the oath *de veritate dicenda* was practically abolished not long after this (Salvioli, *Interdum calumnias*, p. 82; Hinschius, VI, pt. 1, pp. 70, 112, quoting a decree of 1725 of the Roman provincial council: "*nec juramentum huiusmodi a reis eisdem, nisi ut testes quoad alios examinentur, in futurum . . . exigatur*").

¹⁰⁸ 1642, Bradford's History of the Plymouth Plantation, 465 (answers by one of the ministers to a letter of inquiry from the Governor of Boston: "Quest.: How farr a magistrate may extracte a confession from a delinquent to accuse himselfe of a capitall crime, seeing *Nemo tenetur prodere seipsum*"); 'Ans.: A majestrate cannot without sin neglecte diligente inquisition into the cause brought before him. If it be manifeste that a capitall crime is committed, and that common report, or probabilitie, suspicion or some complaints (or the like) be of this or that person, a magistrate ought to require and by all due means to procure for the person (so farr already bewrayed) a naked confession of the fact . . . ; for though *nemo tenetur prodere seipsum*, yet by that which may be known to the magistrat by the forenamed means, he is bound thus to doe; or else he may betray his countrie and people to the heave displeasure of God").

This deliverance is corroborated by the following series of enactments, which exhibit the spirit of the times:

1641, Massachusetts Body of Liberties, Whitmore's ed., § 45 ("No man shall be forced by

Moreover, the privilege as yet, until well on into the time of the English Revolution, remained not much more than a bare rule of law, which the judges would recognize on demand. The spirit of it was wanting in them. The old habit of questioning and urging the accused died hard, — did not disappear, indeed, until the 1700s had begun.¹⁰⁹

The privilege, too, creeping in thus by indirection, appears by no means to have been regarded as the constitutional landmark that our own later legislation has made it. In all the parliamentary remonstrances and petitions and declarations that preceded the expulsion of the Stuarts, it does not anywhere appear.¹¹⁰ Even by 1689, when the Courts had for a decade ceased to question it, and at the English Revolution the fundamental victories of the past two generations' struggle were ratified by William in the Bill of Rights,¹¹¹ this doctrine is totally lacking. Whatever it was worth to the American constitution-makers of 1789, it was not worth mentioning to the English constitution-menders of 1689. It is a little singular that the later body, who had themselves suffered nothing in this respect, and could herein aim merely to copy the lessons which their forefathers of a century ago had handed down as taught by their own experience, should have incorporated a principle which those forefathers themselves, fresh from that experience, had never thought to register among the fundamentals of just procedure.¹¹²

torture to confess any crime against himself nor any other unless it be in some capital case where he is first fully convicted by clear and sufficient evidence to be guilty. After which, if the cause be of that nature that it is very apparent there be other conspirators or confederates with him, then he may be tortured, yet not with such tortures as be barbarous and inhumane"; § 61 ("No magistrate, juror, officer, or other man, shall be bound to inform present or reveal any private crime or offence, wherein there is no perill or danger to this plantation or any member thereof, when any necessary tie of conscience binds him to secrecy grounded upon the word of God, unless it be in case of testimony lawfully required"); 1660, Revised Laws and Liberties, "Punishment," "Jurors" (repeats in substance the foregoing); "Innkeepers" (parties may be examined by the magistrate, for offences against the liquor law); 1673, General Laws and Liberties, same titles (repeats in substance the foregoing; no changes are made as late as 1683).

No attempt has been made to discover the progress of the principle in the other colonies; but their records would doubtless disclose interesting material. It appears, for example, that the Bill of Rights in the first Maryland Constitution, of 1776, gave to the principle so loose a recognition as the following: Art. 20: "No man ought to be compelled to give evidence against himself in a court of common law or in any other court, but in such cases as have been usually practiced in this State or may hereafter be directed by the Legislature." The proviso was not omitted until the Constitution of 1854.

¹⁰⁹ The following are merely a few examples

at random: 1656, Naylor's Trial, 5 How. St. Tr. 801, 806; 1660, Scroop's Trial, ib. 1034, 1039; Carew's Trial, ib. 1048, 1054; 1663, Twyn's Trial, 6 id. 513, 532; 1679, Reading's Trial, 7 id. 259, 303; 1692, Harrison's Trial, 13 id. 595; 1702, Swendsen's Trial, 14 id. 559, 580, 581; 1702, Baynton's Trial, ib. 598, 621-625. Sir J. Stephen (Hist. Crim. Law, I, 440) says that the practice of questioning the prisoner "died out soon after the Revolution of 1688"; but this is perhaps giving too early a cessation. Lord Holt died in 1710, and "to the end of his life he persevered in what we call 'the French system' of interrogating the prisoner during his trial" (Campbell's Lives of the Chief Justices, II, 174).

So, too, in Choice Cases in Chancery, 1652-1672, containing a short treatise on chancery practice, there is no mention of the privilege, among the rules for witnesses or for parties' answers.

¹¹⁰ *Supra*, note 98; Cobbett's Parl. Hist. II, *passim*. In 1641, Parliament itself was trying its hand at inquisitorial examinations: ib. 666, 671.

¹¹¹ 1689, 1 W. & M. 2d sess. c. 2.

¹¹² The real explanation of the Colonial conventions' insistence on it would seem to be found in the agitation then going on in France against the inquisitorial feature of the Ordinance of 1670 (*supra*, note 107). There appears no allusion, in Elliot's Debates on the Constitution, to the contemporary French movement; but the delegates who had been over there must have known of it. The proposals of reform laid before the French Constitutional Assembly from the Provinces, in 1789, show how strong was the popular agitation. The Third Estate

But, after all, the still more interesting question is, How did the result come about in England itself? How did a movement, which was directed, originally and throughout, against a method of procedure in ecclesiastical Courts, produce in its ultimate effect a rule against a certain kind of testimony in common-law Courts? The process of thought, popular and professional, is to be accounted for. For our history of legal ideas we do not ordinarily expect to go to Bentham. But he was the first to search into this history, and to maintain that this common-law privilege did not antedate the Restoration;¹¹⁸ and, in this instance, his explanation of the process of thought by which the transmutation took place seems fairly to represent the probabilities. That explanation (as indeed the foregoing details exhibit) lies in the principle of the association of ideas,—an association which began to operate immediately in the reactionary period of the Restoration and the Revolution, when the growth and ascendancy of Whig principles involved all the Stuart practices in one indiscriminate and radical condemnation. Read in the light of the foregoing details, the great reformer's words serve as a correct analysis of motives and a fitting summary to the history:

1827, Mr. *Jeremy Bentham*, *Rationale of Judicial Evidence*, b. IX, pt. IV, c. III (Bowring's ed., vol. VII, pp. 456, 460): "Of the Court of Star Chamber and the High Commission Court taken together, . . . the characteristic feature was that by taking upon them to execute the will of the king alone, as made known by proclamations, or not as yet known so much as by proclamations, they went to supersede the use of parliaments, substituting an absolute monarchy to a limited one. In the case of the High Commission Court, the mischief was aggravated by the use made of this arbitrary power in forcing men's consciences on the subject of religion. In the common-law Courts, these enormities could not be committed, because (except in a few extraordinary cases), convictions having never, in the practice of these Courts, been made to take place without the intervention of a jury, and the bulk of the people being understood to be adverse to these inno-

in every district, in their *cahiers* sent up to Paris, had voted to abolish compulsory sworn interrogation of the accused, and the Clergy in ninety-one districts had done the same. The decree of 1789 (though keeping the interrogation) abolished the oath *de veritate*; Art. 12: "For this interrogatory, and for all others, the oath shall not be required from the accused"; and the Instructions of 1791 added: "Mere good sense suffices to convince of the uselessness and immorality of such an oath" (*Kamein, Hist. de la procéd. crim.* 405).

But the privilege, as we understand it, has not yet been established in France. The Code d'Instruction Criminelle of 1808 retained the interrogatory, without the oath, it would seem (1898, *Dalloz*, *Les Codes Annotés*, Code d'Instr. Crim. § 310, App. note 30, Art. 93, notes 69-74; and the quotation from Stephen, *supra*, § 2351). The new draft Code of 1878-80, had this article covering the preliminary hearing only: Art. 85. "The committing magistrate shall establish the identity of the accused, acquaint him with the charge, and receive his statements, after informing him that he is at liberty not to answer the questions that are put to him." This provision has since been adopted by the law of Dec. 8,

1897, Art. 3 (*Dalloz*, *ubi supra*, App. to Livre I, p. 248²): "Upon the preliminary arraignment of the accused, the magistrate is to establish his identity, to notify him of the facts charged against him, and to receive his statements, after warning him that he is at liberty not to make any. This warning must be recorded in the magistrate's report."

In Germany such a provision for the committal proceedings has apparently been introduced: Löwe, *Die Strafprozessordnung für das deutsche Reich*, 10th ed., § 136, p. 427. But both in France and Germany there would be no doubt as to drawing inferences from the accused's refusal to answer.

¹¹⁸ Mr. Justice Stephen has outlined the true history of the privilege in 1897, in his essay in the *Juridical Society's Papers*, I, 456 (The Practice of Interrogating Persons accused of Crime), and again in his *History of the Criminal Law* (1883), I, 342; his summary of the history was that the rule "arose from a peculiar and accidental state of things which has long since passed away, and that our modern law is in fact derived from somewhat questionable sources, though it may no doubt be defended."

vations, the attempt to get the official judges to carry prosecutions of the description in question into effect presented itself as hopeless. In a state of things like this, what could be more natural than that, by a people infants as yet in reason, giants in passion, every distinguishable feature of a system of procedure directed to such ends should be condemned in the lump, should be involved in one undistinguishing mass of odium and abhorrence; more especially any particular instrument or feature, from which the system was seen to operate with a particular degree of efficiency towards such abominable ends? . . . In those days, the supreme power of the State was *de facto* in the hands of the king alone; . . . being employed and directed against property, liberty, conscience, every blessing on which human nature sets a value, — every chance of safety depended upon the enfeeblement of it; every instrument on which the strength of that government in those days depended, every instrument which in happier times would to the people be a bond of safety, was an instrument of mischief, an object of terror and odium. . . . No practice could come in worse company than the practice of putting adverse questions to a party, to a defendant (and in a criminal, a capital case), did in that instance."

§ 2251. *Policy of the Privilege.* Neither the history of the privilege, nor its firm constitutional anchorage, need deter us from discussing at this day its policy. As a bequest of the 1600s, it is but a relic of controversies and convulsions which have long ceased. Its origin was local; in the other legal systems of the world it has had no place. It must therefore justify itself in the juridical forum of nations. Nor does its constitutional sanction, embodied in a clause of half a dozen words, relieve us from the necessity of considering its policy; for the attitude here taken may lead either by favoring implications to a wide extension of its scope, or by disfavoring interpretation to its close restriction. A sound and intelligent opinion must be formed upon the merits of the policy.

To reach this opinion, let us listen first to what has been urged against that policy. Few names, among jurists, have ever appeared as challengers on this side of the lists, but they are names of extraordinary panoply in the law, — those of Jeremy Bentham, the philosopher and reformer, and of William Appleton, Chief Justice of the Supreme Court of Maine, his disciple.¹ Remembering that in less than three generations nearly every reform which Bentham advocated for the law of evidence has come to pass, we might almost regard his condemnation of any rule as presumptively an index of its ultimate downfall. Considering, too, that his disciple, as Chief Justice, while preaching against the anomalies of the law, presided over its administration for nearly twenty years upon the bench and commanded his colleagues' constant support in the vindication of his principles, we must concede to his views that value which experience gives as test of the validity of theory. The argument against the privilege, as advanced by these jurists, is represented in the following passages:²

1827, Mr. *Jeremy Bentham*, *Rationale of Judicial Evidence*, b. IX, pt. IV, c. III (Bowring's ed., vol. VII, pp. 452 ff.): "(a) Pretences for exclusion [of the accused's testimony]

¹ A criticism of the privilege will also be found in Mr. (later L. C. J.) Denman's comments in 40 *Edinb. Rev.* 190 (1824), reviewing Bentham's treatise.

² Chief Justice Appleton's statement of the case, not differing greatly from Bentham's, is found in his treatise on Evidence (1860), c. VII, pp. 129-134, c. XV, p. 246.

on compulsion]. . . . 2. *The old woman's reason.* The essence of this reason is contained in the word 'hard': 'tis 'hard' upon a man to be obliged to criminate himself. Hard it is upon a man, it must be confessed, to be obliged to do anything that he does not like. That he should not much like to do what is meant by his criminating himself, is natural enough; for what it leads to is his being punished. What is no less hard upon him is that he should be punished: but did it ever yet occur to a man to propose a general abolition of all punishment, with this hardship for a reason for it? Whatever hardship there is in a man's being punished, that, and no more, is there in his thus being made to criminate himself. . . . Nor yet is all this plea of tenderness, — this double-distilled and treble-refined sentimentality, anything better than a pretence. From his own mouth you will not receive the evidence of the culprit against him; but in his own hand, or from the mouth of another, you receive it without scruple: so that at bottom, all this sentimentality resolves itself into neither more nor less than a predilection — a confirmed and most extensive predilection, for bad evidence. . . . 'You are sure of being convicted: by what sort of evidence would you choose rather to be convicted? By the evidence of other people without any of your own, or by evidence of other people's and your own together?' Were a question of this sort put to a malefactor, would it not be matter of perplexity to him to choose? Would not a pot of beer or a glass of gin, on whichever side placed, be sufficient to turn the scale? But allowing, for the sake of argument, that there is a difference between the pain in the one case and the pain in the other — for my own part, I can see none — but if there be, can it be assumed as a competent and sufficiently broad and solid ground for the establishment of a rule of law? Is there anything here capable of being set again to the mischiefs of impunity? the mischiefs of the offence (be it what it may) which the law in question — the law which the rule of exclusion in question seeks to debilitate — is employed to combat? . . . 3. *The fox-hunter's reason.* This consists in introducing upon the carpet of legal procedure the idea of 'fairness,' in the sense in which the word is used by sportsmen.⁴ The fox is to have a fair chance for his life: he must have (so close is the analogy) what is called 'law,' — leave to run a certain length of way for the express purpose of giving him a chance for escape. While under pursuit, he must not be shot: it would be as 'unfair' as convicting him of burglary on a hen-roost in five minutes' time, in a court of conscience. In the sporting code, these laws are rational, being obviously conducive to the professed end. Amusement is that end; a certain quantity of delay is essential to it; dispatch, a degree of dispatch reducing the quantity of delay below the allowed minimum, would be fatal to it. . . . [In this view] to different persons, both a fox and a criminal have their use; the use of a fox is to be hunted; the use of a criminal is to be tried. . . . 4. *Confounding interrogation with torture;* with the application of physical suffering, till some act is done, — in the present instance, till testimony is given to a particular effect required. On this occasion it is necessary to observe, that the act of putting a question to a person whose station is that of defendant in a cause, is no more an act of torture than the putting the same question to him would be, if, instead of being a defendant, he were an extraneous witness.⁵ Whatever he chooses to say, he is at full liberty to say; only under this condition, properly but not essentially subjoined, viz. (as in the case of an extraneous witness) that, if anything he says should be mendacious, he is liable to be punished for it, as an extraneous witness would be punished. . . . 5. *Reference to unpopular institutions.* 'Whatever Titius did was wrong: but this is among the things that Titius did; therefore this is wrong'; such is the logic from which this sophism is deduced. In the apartment in which the Court called the Court of

⁴ This is an allusion to some of the absurd rulings on confessions (*ante*, § 839).

⁵ For comments on the sportsmanship theory in English law, see *ante*, § 1845.

⁶ This attitude of mandlin sentimentality, repeating the misnomer of "torture," has not dis-

appeared even since Bentham's day; as witness the following language of Temple, J., in *People v. Arrighini*, 122 Cal. 121, 54 Pac. 591: "The inquisition of torture is restored, only without the rack and thumbcrew."

Star Chamber sat, the roof had stars in it for ornaments; or else certain deeds to which Jews were parties, and by them called ahetars or ahtars, used to be kept there; or, possibly, there being no natural incompatibility, both these facts were true. 'Whether it was owing to the gilt stars, or to the Jew parchments, the judges of this Court conducted themselves very badly; therefore judges should not sit in a room that has had stars in the roof, or in a room in which Jew parchments have been kept'; had the conclusion been in this strain, the logic would not have been very convincing, but neither would the mischief have been very great. 'In the High Commission Court, the judges sat and tried causes in virtue of a commission, and they too conducted themselves very badly; therefore judges ought not to be appointed by a commission.' The logic, though not less rational than in the preceding case, begins to be rather mischievous. . . . The Inquisition (meaning the true inquisition, of the Spanish sort) that used to work with such success in the extirpation or conversion of heretics, was a court in which it was the way of the judge to inquire into the business that came before him; to put questions to such persons as, in his conception, were likely to be more or less acquainted with the matter; and this, whether extraneous witnesses or parties. 'Now this it is that was and is a most wicked and popish practice. Judges ought not to put questions; be the business what it may that comes before them, it ought to be the care of judges never so much as to attempt to see to the bottom of it.' Here, then, we see the true source of all the odium; viz. not merely of that which has attached itself to this abominable court, but of that which attached itself to those other abominable courts. It was not by sitting in a room with stars or parchments in it, it was not by acting under a commission too high in itself, or that lay on too high a shelf; it was not by either of these causes that the two English courts, held in such just abhorrence by all true Englishmen, were rendered so bad as they were, — but by their abominable practice of asking questions, by the abominable attempt to penetrate to the bottom of a cause. [Such are the absurd reasons upon which it is claimed that the accused in a criminal cause ought to be privileged from answering all questions as to his complicity.] . . . [(b) The witness' privilege]. It may happen that the cause by means of which the deponent exposes himself to the mischief attached to the self-prejudicing evidence is not the cause in hand, but another cause, viz. a cause already in prospect, or a cause liable to be produced by the disclosure made by the evidence. . . . Prosecution for robbery: John Stiles examined in relation to it, in the character of an extraneous witness. A question is put, the effect of which, were he to answer it, might be to subject him to conviction in respect of another robbery, attended with murder, in which he bore a share. On the ground of public utility and common sense, is there any reason why the collateral advantage thus proffered by fortune to justice should be foregone? Refusing to compass the execution of justice by this means, by what fairer or better means can you ever hope to compass it? The punishment he will incur, if any, will be a distinct punishment, for a distinct offence; an offence which, at the institution of the suit, was perhaps never thought of. Be it so; and should this happen, where will be the mischief? Wherein consists the grievance? That a crime, which, but for the accident, might perhaps have remained unpunished, comes, by means of this accident, to be punished. . . . But what shall we say, if, by a summons to appear as a witness in a cause (penal or non-penal) between other persons, an individual is purposely entrapped; and, being (in obedience to that summons) actually in court, is interrogated concerning a distinct offence supposed to have been committed by himself, and, in consequence of his answers, stopped and consigned to duress. What? Why, that so a delinquent be but brought into the hands of justice, just as well may it be by this means as by any other. Truth is not violated; fiction is not employed: no false tale is told; no falsehood here defiles the lips of justice. Nor, though possible, is the case likely to be frequent. The question must be relevant, pertinent to the cause actually in hand, or an answer will not be (for it ought not to be) allowed to be given. . . . An effect (for example) which certainly might, by design and contrivance, be brought into existence by incidental self-convicting evidence, is that of instituting a sort of feigned suit, penal or

non-penal, for the purpose of bringing to light, not the facts belonging properly and directly to the avowed cause of action, but others, of a complexion differing to any degree of remoteness. Suppose, for example, a project formed for bringing down disgrace and punishment on the head of an individual, by means of questions to be put to him, in the character either of a defendant or a witness, in a cause to be instituted on purpose; drawing thus out of his mouth the confession of some crime, or disgraceful act, for which he has not been prosecuted. May not this be done? Yes: but not with any advantage to the party whose invention is supposed to be thus employed, nor with any disadvantage to the party against whom it is supposed to be employed. Why? Because in this there is nothing more than what might be done in a direct and ordinary way, by a suit instituted on purpose. In every point of view, then, in which it can be considered, the practice in question appears to stand clear of objection. In the first place, because the result supposed to be produced, cannot, with any propriety or consistency, be reckoned in the number of undesirable results; in the next place, because, though it were, no ulterior facility is afforded, beyond what would exist without it."

In weighing the foregoing objections, it is indispensable to distinguish between (1) questioning an ordinary witness, (2) questioning by preliminary inquisition one who is as yet not charged, (3) questioning an accused who has been duly placed on trial by indictment:

(1) For the *ordinary witness*, Bentham's argument seems to fail. It is true, as he points out, that the mere self-betrayal by the witness is of itself no evil, and that the instances of pretended suits to provide the opportunity for such self-betrayal would probably not be numerous. But there are other considerations. The witness-stand is to-day sufficiently a place of annoyance and dread. The reluctance to enter it must not be increased. Every influence which tends to suppress the sources of truth must be removed. To remove all limits of inquiry into the secrets of the persons who have no stake in the cause but can furnish help in its investigation, would be to add to the motives which now sufficiently dispose them to evade their duty. Moreover, no serious loss to justice can be incurred by recognizing the privilege. If the witness' testimony is indispensable, and the incriminating fact is vital to the cause, a pardon, executive or statutory, can for the particular instance remove the privilege.⁶

(2) For the *preliminary inquisition of one not yet charged* with an offence, the claims of the privilege seem equally valid. This aspect of it seems to have been ignored by Bentham. Yet it was historically this situation which gave rise to the privilege. The system of "inquisition," properly so called, signifies an examination on mere suspicion, without prior presentment, indictment, or other formal accusation (*ante*, § 2250); and the contest for one hundred years centred solely on the abuse of such a system.⁷ In the hands of petty bureaucrats, whether under James the First, or under Philip the Second, or in the twentieth century under an American republic, such a sys-

⁶ *Post*, §§ 2280, 2281.

⁷ This is illustrated by the trial of Lilburn (already quoted *ante*, § 2250), in 1637, 3 How. St. Tr. 1315, 1318; Lilburn, to those questioning him, replied: "I am not willing to answer you to any more of these questions, because I see you go about by this examination to en-

snare me; for, seeing the things for which I am imprisoned cannot be proved against me, you will get other matter out of my examination; and therefore, if you will not ask me about the thing laid to my charge, I shall answer no more."

tem is always certain to be abused.⁸ The whole principle of the grand jury presupposes a formal and deliberate accusation, based on probable cause, before any person is called to answer for a crime. No doubt a guilty person may justly be called upon at any time, for guilt deserves no immunity. But it is the innocent that need protection. Under any system which permits John Doe to be forced to answer on the mere suspicion of an officer of the law, or on public rumor, or on secret betrayal; two abuses have always prevailed and inevitably will prevail; first, the petty judicial officer becomes a local tyrant and misuses his discretion for political or mercenary or malicious ends; secondly, a blackmail is practised by those unscrupulous members of the community who through threats of inspiring a prosecution are able to prey upon the fears of the weak or the timid. The modern system of formal indictment needs no defence. In this aspect the privilege against self-crimination is, in history and in policy, its just complement, in so far as it exempts all persons from being compelled to disclose their supposed offences before formal process of charge is had.

(3) When we come to the case of an accused *duly charged* by indictment and *now placed on trial*, we reach a somewhat different set of considerations. Here the question is merely whether he shall be required to disclose all that he knows of the crime charged against him. None of the considerations applicable to the foregoing situations have here any bearing. What is there to exempt the accused from simple and straightforward answers of denial, confession, or explanation? There are, to be sure, what the great jurist so plainly and truly stigmatized as the "old woman's reason" and the "fox-hunter's reason"; and there are also the false shibboleths of torture and the like, but these can only succeed in affecting us through the old rhetorical device of calling a thing by epithets which do not belong to it. So far as Bentham's argument goes, *i.e.* for the individual case, it is irrefutable. Assuming *this* man to be guilty, there is no good reason to exempt him.

There is no escape from this fundamental truth, so long as we confine ourselves to the assumption on which it rests. That assumption is that the person charged is guilty. But assume him innocent, and a different problem is presented,—a problem to which Bentham's arguments did not do justice. The truth is that the privilege exists for the sake of the innocent,⁹—or at least for reasons irrespective of the guilt of the accused. It is not so much that the mere process of questioning and cross-questioning the accused is likely to perturb his mental operations, and educe from him the words and conduct of a guilty man. Current experience, as shown by the demeanor of defendants who voluntarily take the stand and are acquitted, discredits this.

⁸ That these abuses are the creature of no one country or time may be seen from the extent to which the moral instincts of certain American officers were sapped by the insidious example, set before them in the Philippine Islands, of the so-called "water-cure" for extracting information. Of deplorable degeneracies, the most remarkable instance is that some of the American Commonwealth should

have attempted publicly to defend this cowardly practice, which made martyrs of its victims and degraded its practitioners to the brutal level of Alva and his cohorts.

⁹ 1862, Byles, J., in *Bartlett v. Lewis*, 12 C. B. N. S. 249, 265: "The rule was intended for the protection of the innocent, and not for that of the guilty."

Moreover, the conduct of the accused, even while under the mental strain induced by arrest and incarceration, is not rejected as a source of evidence.¹⁰ The real objection is that *any system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must itself suffer morally thereby*. The inclination develops to rely mainly upon such evidence, and to be satisfied with an incomplete investigation of the other sources. The exercise of the power to extract answers begets a forgetfulness of the just limitations of that power. The simple and peaceful process of questioning breeds a readiness to resort to bullying and to physical force and torture. If there is a right to an answer, there soon seems to be a right to the expected answer, — that is, to a confession of guilt. Thus the legitimate use grows into the unjust abuse; ultimately, the innocent are jeopardized by the encroachments of a bad system. Such seems to have been the course of experience in those legal systems where the privilege was not recognized. The argument is indeed empiric; and, being empiric, it is open to the fallacy of mistaking a mere accidental association for a cause. In the Continental procedure, for example, the judge exercises also in part the functions of our prosecuting officer; and it is probable that the abuses of which such a system is capable, when the privilege is not recognized, would be much less under a system like our own, in which the judicial and the prosecuting functions are sharply separated. Nevertheless, it is difficult to know how much allowance is to be made on this account; and it is wiser to accept the warnings of experience, even at the risk of overstraining their import. It may be conceded that the Continental practice is efficacious in detecting guilt.¹¹ But it must also be conceded that it leads to or is found united with a spirit of petty judicial license and browbeating, dangerous to innocence, and capable of great abuses in our own community, if it once obtained a sanction.¹² For the sake, then, not of the guilty, but of the innocent accused,

¹⁰ *Ante*, §§ 273, 371.

¹¹ See the remarks of Mr. J. Denman, already referred to, in 40 Edinb. Rev. 190; Mr. John (later Chief Justice) Campbell, during his sojourn in France, formed somewhat similar opinions about the French practice (*Life*, I, 362).

¹² Some of these abuses are to be seen in the French trials quoted in Stephen's *History of the Criminal Law*, vol. III, Appendix; Feuerbach, *Narratives of Remarkable (German) Criminal Trials* (tr. by Duff-Gordon, 1846); Mejan, *Causés Célèbres (1808-1811)*; Loeffler, *Die Opfer mangelhafter Justiz* (Jena, 1873); Fuller, *Noted French Trials* (Boston, 1892); *Trials of Troppman and Prince Bonaparte*, 5 *American Law Review* 14 (1870); another example of a French trial, treated from the English point of view, will be found in Thackeray's *Paris Sketch-Book*, in the chapter on "The Case of Peytal"; and from the French point of view the method is favorably depicted in de Balzac's novels of Lucien de Rubempré, cc. 16-23, and *An Historical Mystery*, cc. 17, 18, and in Gaboriau's novel of *Monsieur Lecoq*, cc. 16-31.

Compare the discriminating comments in Dr.

Francis Lieber's *Civil Liberty and Self-Government*, ch. 7, and App. III (The Inquisitorial Trial); Sir S. Romilly's *Memoirs*, 2d ed., 1840, I, 315; N. W. Senior's *Biographical Sketches* (1863, pp. 209, 227, 313; *Essays on Lord Holt, on Feuerbach, and on Ramcke*).

The insidious effects of the practice in this respect may be seen in the history of the Holy Inquisition. Although the rules of the ordinary penal law of the church, even in *ex officio* inquisitions, declared a confession insufficient *per se* for condemnation, and hedged it about with rules (Esmein, *Hist. de la proc. crim.*, 268 *et passim*), yet as soon as these rules were relaxed in the special procedure of the Holy Inquisition, the whole effort degenerated into the procurement of a confession. "A confession dispensed with all other investigation and all further proceedings, either by the party-accuser (when the cause was begun by complaint) or by the judge (when it was *ex officio*). One can thus understand with what zeal it was sought for in inquisitional proceedings" (Tanon, *Hist. des tribunaux de l'inquisition en France*, 358).

and of conservative and healthy principles of judicial conduct, the privilege should be preserved.

Of the few attempts to analyze frankly the grounds of the privilege, the following passages are entitled to unusual weight, each for its own reasons :

1848, *Commissioners on Criminal Law in the Channel Islands*, Second Report, 8 St. Tr. x. s. 1127, 1200, 1210-1212; these Commissioners were appointed to inquire into the state of the criminal law in the Channel Islands — Guernsey, Jersey, Alderney, and Sark —, which, though long ago coming under English domination, had retained in their law many institutions essentially French; the Commissioners, reporting upon Guernsey, recommended the abolition of the process of examining the accused, with the following explanations : " Upon the information obtained from the preliminary examination, an 'acte d'accusation' is framed by the Court, charging the accused with the facts deposed to by the witnesses. He is then called before the Court. The 'acte d'accusation' is read to him; and, if he denies the crime, he is questioned by the Court upon the evidence previously obtained. This is called the 'interrogatoire.' It is also taken at a secret sitting of the Court; the prisoner being alone, and not allowed the assistance of a legal adviser. The present practice, however, requires that he be told that he cannot be compelled to answer the questions of the Court, and that what he says will be used against him at the trial. This is a departure from the old law in Terrien and the 'approbation,' by which the accused, in the event of refusing to answer or not answering pertinently, would be subjected to the torture. . . . The preliminary examinations 'au secret,' and the consequent 'interrogatoire' of the accused, appear to us equally objectionable. But our opinion with regard to them is not that of the Bailiff [i. e. Chief Justice] and the majority of the lawyers of the Court. This part of the criminal process differs so essentially from all that we have been accustomed to, as English lawyers, that we were anxious to have the subject discussed before us, in order to ascertain the opinions of the members of the Court, and the advocates, on the subject. With one exception, that of Mr. Falla, a gentleman very extensively engaged in the defence of criminals, the members of the Court, including the Bailiff [i. e. Chief Justice] and the Bar, were, more or less strongly, in favour of continuing the practice. The value of the Bailiff's testimony in favour of the system is the greater from his having been an English lawyer, filling criminal and civil judicial functions in England, and from his avowing that his opinions had been changed by experience. We are bound also to add that it was an unanimous opinion that the practice of the Court had much improved under his presidency, so that his opinion in favour of retaining the ancient system could not possibly arise from prejudice or illiberal dread of change. We feel diffident in dissenting from such authority; but the reasons alleged in support of the present system have failed to convince us. . . . It is certainly not, at first sight, contrary to justice, that a party accused of crime, who has heard the evidence against him and has had an opportunity of questioning the witnesses, should be interrogated to elicit his explanation of the facts, before he is committed for trial. If means could be devised to ensure its never being abused, the 'interrogatoire,' so conducted, would be perhaps a proper mode of arriving at truth. But it cannot be said to be necessary for that purpose. Its utility was maintained by the Court and members of the Bar chiefly on the ground that the truth told by a man in answer to questions of the Court, without his having heard the evidence which suggested them, gives great weight to that part of his statement which is otherwise incapable of proof. But this is precisely the objection to the 'interrogatoire' as conducted by the Royal Court. An innocent person, who is perfectly intelligent and honest, has nothing to fear from any criminal prosecution fairly conducted. But most of the persons accused of crime are ill informed; and such persons are led into contradiction and falsehood by the desire to evade circumstances which they feel to make against them. . . . The questions put are those which arise from evidence which has been so arranged (and quite properly) as to give the fullest effect to the *prima facie* case of accusation. The answers given to such questions are given at a great dis-

advantage; and probably, this disadvantage is even exaggerated by the prisoner, who is pressed with the circumstances of suspicion marshalled in their most formidable order. Hence arises a temptation to evade and deceive, by which an ignorant person would be seduced, however innocent of the offence charged. Another very dangerous feature in this practice appears to be that its tendency is to engage the Court, which conducts the examination, in a contest with the prisoner. We were assured that this in fact did not occur; and we are quite ready to believe that the members of the Court have not consciously allowed themselves to be drawn into such a course. But the danger is that the objectionable feeling will arise where the Court is conscious of nothing but an exercise of ingenuity in the pursuit of truth; and that this danger is not imaginary must, we think, be obvious to any one who has read much of the interrogatories administered by Courts in foreign criminal tribunals. We cannot see why all the advantages which this practice is alleged to possess may not be attained by merely reading over the adverse evidence to the accused, and then bidding him tell his own story, if he thinks fit. It is impossible to deny the efficacy of the present practice as an instrument for the occasional detection of crime; but it is equally clear that the practice is liable to mislead, even when administered with the purest intentions. We have no doubt that the members of the Royal Court were perfectly sincere in assuring us that it is often of the greatest use to a prisoner, and that they never knew an innocent man condemned in consequence of it. But it appears to us dangerous to make legal guilt depend upon anything short of proof from intrinsic evidence or the voluntary confession of the accused."

1888, Sir J. F. Stephen, *History of the Criminal Law*, I, 342, 441, 535, 542, 565 :¹³ "In the old Ecclesiastical Courts and in the Star Chamber [the *ex officio* oath] was understood to be and was used as an oath to speak the truth on the matters objected against the defendant — an oath, in short, to accuse oneself. It was vehemently contended by those who found themselves pressed by this oath that it was against the law of God, and the law of nature, and that the maxim '*nemo tenetur prodere seipsum*' was agreeable to the law of God, and part of the law of nature. In this, I think, as in most other discussions of the kind, the real truth was that those who disliked the oath had usually done the things of which they were accused, and which they regarded as meritorious actions, though their judges regarded them as crimes. People always protest with passionate eagerness against being deprived of technical defences against what they regard as bad law, and such complaints often give a spurious value to technicalities when the cruelty of the laws against which they have afforded protection has come to be commonly admitted. . . . [But by the institution of our privilege against self-crimination] the result of the whole is that as matters stand the prisoner is absolutely protected against all judicial questioning before or at the trial. . . . This is one of the most characteristic features of English criminal procedure, and it presents a marked contrast to that which is common to, I believe, all continental countries. It is, I think, highly advantageous to the guilty. It contributes greatly to the dignity and apparent humanity of a criminal trial. It effectually avoids the appearance of harshness, not to say cruelty, which often shocks an English spectator in a French court of justice; and I think that the fact that the prisoner cannot be questioned stimulates the search for independent evidence. During the discussions which took place on the Indian Code of Criminal Procedure in 1872,¹⁴ some observations were made on the reasons which occasionally lead native police officers to apply torture to prisoners. An experienced civil officer observed, 'There is a great deal of laziness in it. It is far pleasanter to sit comfortably in the shade rubbing red pepper into a poor devil's eyes than to go about in the sun hunting up evidence.' This was a new view to me, but I have no doubt of its truth. The evidence in an English trial is, I think, usually much fuller and more satisfactory than the evidence in such French trials as I have been able to study. The Procureur de la République and Juge d'Instruction, their power of hold-

¹³ Mr. Justice Stephen's views were originally expounded in 1857, in his essay in the *Juridical Society's Papers*, I, 456, 470 ff.

¹⁴ Drawn by Sir J. Stephen himself.

ing inquiries, drawing up *procès-verbaux*, examining suspected persons secretly, and without informing them even of the accusation or evidence against them, taking depositions behind their backs, and keeping them in solitary confinement till (whatever soft words may be used about it) every effort has been made to extort a confession from them, are contrasted in the strongest way with everything with which we are familiar, and which I have described, in detail, in the preceding chapters. To keep a man in solitary confinement and question him till he is driven into a confession is not the less torture because the process is protracted instead of being acute. . . . The following account of the matter is given by M. Hélie. 'The magistrate who puts questions to the accused and asks explanations from him has the right to interrogate him for the purpose of extracting his excuse or his confession of guilt. He should, without harassing or confusing him, but at the same time while requiring a disclosure, encourage his freedom of utterance. He should, in short, with the most complete impartiality, seek solely to get at the truth. The interrogatory must be neither an argument nor a combat; that is by no means the issue. The main object is to ascertain the theory of the defence, and thus to determine the details of the issue and the points therein which are to be established.' He adds, that though the interrogatory is not essential, yet the President can interrogate the accused either before or after the witnesses are heard, the former being the common course. . . . Whatever may be the law on the subject, the fact unquestionably is that the interrogation of the accused by the President is not only the first, but is also the most prominent, conspicuous, and important part of the whole trial. Moreover, all the reports of French trials which I have seen, and I have read very many, suggest that the views taken by M. Hélie as to the proper object of the interrogatory, and the proper method of carrying it on, are not shared by the great majority of French Presidents of Cours d'Assises. The accused is cross-examined with the utmost severity, and with continual rebuke, sarcasms, and exhortations, which no counsel in an English court would be permitted by any judge (who knew and did his duty) to address to any witness. This appears to me to be the weakest and most objectionable part of the whole system of French criminal procedure (except parts of the law as to the functions of the jury). It cannot but make the judge a party — and what is more, a party adverse to the prisoner; and it appears to me, apart from this, to place him in a position essentially undignified and inconsistent with his other functions. . . . This comparison of French and English criminal procedure naturally suggests the question, Which of the two is the best? To a person accustomed to the English system and to English ways of thinking and feeling there can be no comparison at all between them. However well fitted it may be for France, the French system would be utterly intolerable in England. . . . The whole temper and spirit of the French and the English differs so widely, that it would be rash for an Englishman to speak of trials in France as they actually are. We can think of the system only as it would work if transplanted into England. It may well be that it not only looks, but is, a very different thing in France. . . . The best way of comparing the working of the two systems is by comparing trials which have taken place under them. For this purpose I have given at the end of this work detailed accounts of seven celebrated trials, four English and three French, which afford strong illustrations of the results of the two systems. It seems to me that a comparison between them shows the superiority of the English system even more remarkably than any general observations which may be made on the subject. In every one of the English cases the evidence is fuller, clearer, and infinitely more cogent than it is in any one of the French cases, — notwithstanding which, far less time was occupied by the English trials than by the French ones, and not a word was said or a step taken which any one can represent as cruel or undignified."¹⁵

¹⁵ Our greatest American constructive jurist, Edward Livingston, in his *Introductory Report to the Code of Criminal Procedure* (Works, ed. 1872, I, 354 ff.), written about 1823, had already expounded the arguments on both sides, reach-

ing much the same conclusions as Mr. J. Stephen. One of the arguments most influential with Mr. Livingston was this: "An unrestrained right of interrogating is very apt to produce insidious and catching questions; in-

In preserving the privilege, however, we must resolve not to give it more than its due significance. We are to respect it rationally for its merits, not worship it blindly as a fetish. We are not merely to emphasize its benefits, but also to concede its shortcomings and guard against its abuses. Indirectly and ultimately it works for good, — for the good of the innocent accused and of the community at large. But directly and concretely it works for ill, — for the protection of the guilty and the consequent derangement of civic order. The current judicial habit is to ignore its latter aspect, and to laud it indiscriminatingly with false cant. A stranger from another legal sphere might imagine, in the perusal of our precedents, that the guilty criminal was the fond object of the Court's doting tenderness, guiding him at every step in the path of unrectitude, and lifting up his feet lest he fall into the pits dug for him by justice and by his own offences. The judicial practice, now too common, of treating with warm and fostering respect every appeal to this privilege, and of amiably feigning each guilty invocator to be an unsullied victim hounded by the persecutions of a tyrant, is a mark of traditional sentimentality. It involves a confusion between the abstract privilege — which is indeed a bulwark of justice — and the individual entitled to it — who may be a monster of crime. There is no reason why judges should lend themselves to confirming the insidious impression that crime in itself is worthy of protection. The privilege cannot be enforced without protecting crime; but that is a necessary evil inseparable from it, and not a reason for its existence. We should regret the evil, not magnify it by approval. No honest and intelligent accused (in the language of the Commissioners above quoted) has anything to fear from a criminal prosecution fairly conducted. To every such person, the appeal to the privilege is a repugnant and humiliating expedient. The spirit of every manly nature, unfortunate enough to be unjustly accused, must always be that of the brave and bluff Mr. George, who, when falsely charged with murder, and urged by his friends to seek the services of a lawyer, staunchly refused:¹⁶

"Say I am innocent and I get a lawyer; what would he do, whether or not? Act as if I was guilty, — shut my mouth up, tell me not to commit myself, keep circumstances back, chop the evidence small, quibble; and get me off perhaps. But, Miss Summerson, do I care for getting off in that way? . . . I don't intend to say," looking round upon us, with his powerful arms akimbo and his dark eyebrows raised, "that I am more partial to being hanged than another man. What I say is, I must come off clear and full, — or not at all. Therefore, when I hear stated against me what is true, I say it's true; and when they tell me, 'Whatever you say will be used,' I tell them I don't mind that, — I mean it to be used. If they can't make me innocent out of the whole truth, they are not likely to do it out of anything less or anything else."

There ought to be an end of judicial cant towards crime. We have already too much of what a wit has called "justice tampered with mercy." A due

stead of a cool and impartial attempt to extract the truth, the examination becomes a contest, in which the pride and ingenuity of the magistrate are arrayed against the caution or evasions

of the accused, and every construction will be given to his answers that may fix upon him the imputation of guilt."

¹⁶ Charles Dickens, *Bleak House*, c. 51.

respect for the privilege is perfectly consistent with a strict contempt for the guilty offender, and does not require or condone his protection as an end good in itself or good under any circumstances. It is enough for justice and for the commonwealth that the privilege exists, immovably fixed in the Constitution. The good which it aims at consists in that general fact and system, and not in the individual application of it to a given claimant. *That* effects mostly harm,—a particular harm which we suffer for the larger good.

The privilege therefore should be kept within limits the strictest possible. So much of it lies in the interpretation that its scope will be greatly affected by the spirit in which that interpretation is approached. Much can be settled by a consideration of its historic scope, before the constitutions were made. But, after all this, the decision will constantly depend upon whether the privilege is approached with favor or with disfavor, with fatuous adulation or with judicious appreciation. In the past twenty years, and especially in a few American Courts, this practical difference of effect is plainly apparent; for, under the guise of reasoning and interpretation, the privilege has by them, in a spirit of implicit favor, been so extended in application beyond its previous limits as almost to be incredible, certainly to defy common sense. Even Lord Hardwicke, who a century and a half ago called it "a rule of great justice and tenderness,"¹⁷ could he now revisit the glimpses of the moon and observe the rule in those courts, would marvel what manner of justice we had contrived. But a reaction must come. A true conservatism must recommence to operate. More than one great modern judge is found to pronounce against the favor that has in the past been granted to it.¹⁸ A multiplicity of statutes¹⁹ have shown how seriously it is felt to block the investigation and punishment of crime. Courts should unite to keep the privilege strictly within the limits dictated by historic fact, cool reasoning, and sound policy.

§ 2252. *Constitutional and Statutory Phrasings; Kinds of Proceeding affected by the Constitutional Sanction* (Grand Jury, Legislative Inquiry, etc.). The Federal Constitution and the Constitutions of the various States (with two exceptions¹), have at one time or another come to add their sanctions to the principle of the privilege, and have thus established it solidly beyond the reach of ordinary legislative alteration.² But this constitutional sanction, being merely a recognition and not a new creation, has not altered the tenor and scope of the privilege; it has merely given greater perma-

¹⁷ *Harrison v. Southcote*, 2 Ves. Sr. 399, 394.
¹⁸ 1863, Jessel, M. R., in *Ex parte Reynolds*,
¹⁹ 15 Cox Cr. 106, 115 ("Perhaps our law has gone even too far in that direction"); 1875, Appleton, C. J., in *State v. Wentworth*, 65 Me. 234, 241 ("It is the privilege of crime; the interests of justice would be little promoted by its enlargement").

¹⁸ *Pa.*, § 2281.

¹ Iowa and New Jersey.

² The doctrine of *State v. Height*, 117 Ia. 650,

91 N. W. 935 (1902), that even where no such constitutional clause exists, the privilege is beyond the control of the Legislature, must be regarded as anomalous and unsound; and the attempt, in the same opinion, to read the privilege by implication into the clause of "due process of law" is futile and unhistorical; that clause is already a catch-all, overflowing with misplaced principles, and no *ex post facto* interpretation can make room in it for the present privilege.

nence to the traditional rule as handed down to us.⁶ The framers of the Constitutions did not intend to codify the various details of the rule, or to

⁶ In the following list of enactments, the first under each jurisdiction of the United States is the constitutional clause; the statutory enactments are also here inserted, though it is clear that their phrasing cannot limit the constitutional provisions:

ENGLAND: 1808, 84 Geo. III, c. 37 (quoted *ante*, § 2323); 1881, 44 & 45 Vict. c. 59, § 3 (parties are made compellable in civil cases; but "nothing herein contained shall render any person who in any criminal proceeding is charged with the commission of any indictable offence, or any offence punishable on summary conviction, competent or compellable to give evidence for or against himself or herself or shall render any person compellable to answer any question tending to criminate himself or herself"); 1893, 56 & 57 Vict. c. 68, § 3 (in any proceeding instituted in consequence of adultery, no witness "shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery"); 1898, 61 & 62 Vict. c. 34, § 1 (quoted *ante*, §§ 488, 579); for the privilege under the English Bankruptcy statute, see *post*, § 2381.

CANADA: B. C. Rev. St. 1897, c. 62, § 27 (divorce; cited *ante*, § 488); N. Br. Consul St. 1877, c. 46, § 2 (quoted *ante*, § 488); St. 1902, c. 19, § 11 (in divorce, the plaintiff, "when so compulsoarily examined or cross-examined," is not bound to answer as to adultery); Newf. Consul St. 1892, c. 57, § 3 (quoted *ante*, § 488); N. Sc. Rev. St. 1900, c. 163, § 37 (quoted *ante*, § 488); Ont. Rev. St. 1897, c. 73, § 5 (no person is "compellable to answer any question tending to subject him to criminal proceedings or to subject him to prosecution for any penalty"); P. E. I. St. 1889, c. 9, § 6 (cited *ante*, § 488). But in Ontario and Manitoba the privilege is abolished, in a few classes of cases, by other statutes (cited *ante*, § 488); compare also the statutory removals by prohibition of using the evidence (*post*, § 2381).

UNITED STATES: Ala.: Art. I, § 7 ("In all criminal prosecutions the accused has a right . . . that he shall not be compelled to give evidence against himself"); Alaska C. C. P. 1900, § 675 (like Or. Annot. C. 1892, § 947, substituting "criminal prosecution" for "punishment for a felony," and omitting "and the objection," etc.); Ark.: Art. II, § 5 ("No person shall . . . be compelled in any criminal case to be a witness against himself"); Cal.: Art. I, § 13 ("No person shall . . . be compelled, in any criminal case, to be a witness against himself"); C. C. P. 1872, § 2065 (sanctioning the privilege not to give "an answer which will have a tendency to subject him to punishment for a felony"); P. C. §§ 688, 1335 (privilege recognized); Colo.: Art. II, § 18 ("No person shall be compelled to testify against himself in a criminal case"); Conn.: Art. I, § 9 ("In all criminal prosecutions, the accused . . . shall

not be compelled to give evidence against himself"); Del.: Art. I, § 7 ("In all criminal prosecutions, the accused . . . shall not be compelled to give evidence against himself"); Dist. Col.: Comp. St. 1898, c. 71, § 2 (privilege recognized); Fla.: Decl. of R., § 18 ("No person shall be . . . compelled in any criminal case to be a witness against himself"); Ill. 1898, c. 4409 ("No accused person shall be compelled to give testimony against himself"); Ga.: Art. I, § 1, par. 6 ("No person shall be compelled to give testimony tending in any manner to criminate himself"); Code 1895, §§ 2947, 2949 (similar, for matters "tending to criminate himself or to expose him to a penalty or forfeiture"); § 2967 (similar, for matters that "tend to criminate himself" or "tend to work a forfeiture of his estate"); Cr. C. 1895, §§ 9, 1011 (privilege stated); Haw.: Civil Laws 1897, § 1416 (quoted *ante*, § 488); Ind.: Art. I, § 13 ("No person shall be . . . compelled in any criminal case to be a witness against himself"; so also Rev. St. 1897, § 7354); Rev. St. 1897, § 6091 (like Cal. C. C. P. § 2065); *Id.*: Art. II, § 10 ("No person shall be compelled in any criminal case to give evidence against himself"); *Id.*: Art. I, § 14 ("No person, in any criminal prosecution, shall be compelled to testify against himself"); Ken.: Bill of R., § 7 ("No person shall be a witness against himself"); Ky.: § 11 ("In all criminal prosecutions the accused . . . cannot be compelled to give evidence against himself"); La.: Const. 1879, Art. 6 ("No person shall be compelled to give evidence against himself in a criminal case or in any proceeding that may subject him to criminal prosecution, except where otherwise provided in the Constitution"); Const. 1898, Art. 1 (like the former Art. 6); St. 1894, No. 29, § 2 (quoted *ante*, § 488); Me.: Art. I, § 6 ("In all criminal prosecutions, the accused . . . shall not be compelled to furnish or give evidence against himself"); so also Pub. St. 1893, c. 22, § 34, c. 134, § 19; Md.: Decl. of R., Art. 22 ("No man ought to be compelled to give evidence against himself in a criminal case"); Mass.: Decl. of R., Art. 12 ("No subject shall . . . be compelled to accuse, or furnish evidence against himself"); Mich.: Art. VI, § 32 ("No person shall be compelled in any criminal case, to be a witness against himself"); Comp. L. 1897, § 10179 (the rule abolishing civil privilege shall not be taken to compel "an answer which will have a tendency to accuse himself, of any crime or misdemeanor or to expose him to any penalty or forfeiture"); § 4612 (privilege not to criminate one's self, preserved for a supervisor's examination of concealment, etc., of fact relative to birth or death); Minn.: Art. I, § 7 ("No person . . . shall be compelled in any criminal case to be a witness against himself"); Miss.: Art. III, § 36 ("In all criminal prosecutions the accused . . . shall not be compelled to give evidence against himself"); Annot. Code 1892, § 1746 (privilege applies for matters which will "expose him to a criminal prosecution or penalty"); Mo.: Art. II, § 23

alter in any respect its known bearings, but merely to describe it sufficiently for identification as a principle. The extreme brevity of the clauses naming the privilege is plain proof of this intention; and the great variety of phrasing, together with the undoubted uniformity of purpose running through all

("No person shall be compelled to testify against himself in a criminal cause"); Rev. St. 1899, § 4655 (statutes making interested persons competent are not "to compel any person to subject himself by his testimony to any prosecution for a criminal offence"); *Mont.*: Art. III, § 18 ("No person shall be compelled to testify against himself in a criminal proceeding"); C. C. P. 1895, § 3401 (like Cal. C. C. P. § 2065); P. C. § 1357 (no one is compellable "in a criminal action to be a witness against himself"; so also § 3442, "in a criminal action or proceeding"); *Neb.*: Art. I, § 12 ("No person shall be compelled, in any criminal case, to give evidence against himself"); Comp. St. § 5911 (privilege declared for matters which "tend to render him criminally liable"); *Nev.*: Art. I, § 8 ("No person shall . . . be compelled, in any criminal case, to be a witness against himself"); Gen. St. 1895, § 3912 (like Const. Art. I, § 9); § 3416 (like Cal. C. C. P. § 2065); *N. H.*: Part I, Art. 15 ("No subject shall . . . be compelled to accuse or furnish evidence against himself"); *N. J.*: Gen. St. 1896, Evidence, § 10 ("a witness shall not be excused from answering any questions relevant and material to the issue, provided the answers will not expose him to a criminal prosecution or penalty or to a forfeiture of his estate"); 1909, *State v. Zdanowicz*, — N. J. L. —, 55 Atl. 743 ("Although we have not deemed it necessary to insert in our Constitution this prohibitive provision, the common-law doctrine, unaltered by legislation or by lax practice, is by us deemed to have its full force"); *N. Mex.*: Comp. L. 1897, § 3018 (no person is compellable "to answer any question to criminate himself or to subject him to prosecution for any penalty or crime"); § 3765 ("In all criminal prosecutions, the accused . . . shall not be compelled to give evidence against himself"); *N. Y.*: Art. I, § 6 ("No person shall . . . be compelled in any criminal case to be a witness against himself"; so also C. Cr. P. 1881, § 10, and Rev. St., l. 94, § 13); C. C. P. 1877, § 837 (the clause negating a privilege against answers involving civil liability "does not require a witness to give an answer which will tend to accuse himself of a crime or misdemeanor or to expose him to a penalty or forfeiture"); *N. C.*: Art. I, § 11 ("In all criminal prosecutions, every man has the right . . . not to be compelled to give evidence against himself"; so also Code 1883, § 1354); *N. Dak.*: Art. I, § 13 ("No person shall . . . be compelled in any criminal case to be a witness against himself"); *Ok.*: Art. I, § 10 ("Nor shall any person be compelled, in any criminal case, to be a witness against himself"); *Okl.*: State. 1893, § 4876 ("No person can be compelled in a criminal action to be a witness against himself"); *Or.*: Art. I, § 12 ("No person shall . . . be compelled in any criminal prosecution to testify against himself"); Annot. C. 1892,

§ 847 (a witness "need not give an answer which will have a direct tendency to subject him to punishment for felony, or to degrade his character, unless in the latter case it be as to the very fact in issue or to a fact from which the fact in issue would be presumed. This privilege is the privilege of the witness, and the objection cannot be made by a party or his attorney; but a witness must answer as to the fact of his previous conviction for felony"); *Pa.*: Art. I, § 9 ("In all criminal prosecutions, the accused . . . cannot be compelled to give evidence against himself"); Pub. L. 1887, p. 158, § 10 ("Except defendants actually upon trial in a criminal court, any competent witness may be compelled to testify in any proceeding civil or criminal; but he may not be compelled to answer any question which in the opinion of the trial judge would tend to criminate him"); *R. I.*: Art. I, § 13 ("No man in a court of common law shall be compelled to give evidence criminating himself"); *S. C.*: Const. 1892, Art. I, § 13 ("No person shall . . . be compelled to accuse or furnish evidence against himself"); Const. 1895, Art. I, § 17 ("Nor shall any person . . . be compelled in any criminal case to be a witness against himself"); *S. Dak.*: Art. VI, § 93 ("No person shall be compelled in any criminal case to give evidence against himself"); State '899, § 87 (not compellable in a "criminal action" to "be a witness against himself"); *Tenn.*: Art. I, § 9 ("In all criminal prosecutions, the accused . . . shall not be compelled to give evidence against himself"); *Tex.*: Art. I, § 10 ("In all criminal prosecutions, the accused . . . shall not be compelled to give evidence against himself"); *U. S.*: Amendment V ("No person . . . shall be compelled in any criminal case to be a witness against himself"); *Utah*: Art. I, § 12 ("The accused shall not be compelled to give evidence against himself"; so also C. Cr. P. § 4515); Rev. St. 1898, § 3431 (no answer is compellable which would tend to "subject him to punishment for felony"); *Vt.*: Ch. I, Art. 3 ("In all prosecutions for criminal offences, . . . nor can he be compelled to give evidence against himself"); *Va.*: Const. 1869, Art. I, § 10 ("In all capital or criminal prosecutions, . . . nor can he be compelled to give evidence against himself"); Const. 1902, Art. I, § 8 ("Nor shall any man be compelled in any criminal proceeding to give evidence against himself"); *Wash.*: Art. I, § 9 ("No person shall be compelled in any criminal case to give evidence against himself"); *W. Va.*: Art. III, § 5 ("Nor shall any person, in any criminal case, be compelled to be a witness against himself"); *Wis.*: Art. I, § 8 ("No person . . . shall be compelled in any criminal case to be a witness against himself"); *Wyo.*: Art. I, § 11 ("No person shall be compelled to testify against himself in any criminal case").

these legislative efforts, is a corroboration. In most jurisdictions a statute has additionally confirmed the common-law privilege, expressly or by implication.

This variety of phrasing, then, *neither enlarges nor narrows* the scope of the privilege as already accepted, understood, and judicially developed in the common law.⁴ The detailed rules are to be determined by the logical requirements of the principle, regardless of the particular words of a particular constitution. This doctrine, which has universal judicial acceptance,⁵ leads to several important consequences. (1) A clause exempting a person from being "a witness against himself" protects as well a *witness* as a *party accused* in the cause; that is, it is immaterial whether the prosecution is then and there "against himself" or not.⁶ So also a clause exempting "the accused" protects equally a mere witness.⁷ (2) A clause exempting from self-criminating testimony "in criminal cases" protects equally in *civil cases*, when the fact asked for is a criminal one.⁸ (3) The protection, under all clauses, extends to *all manner of proceedings* in which testimony is to be taken, whether litigious or not, and whether *ex parte* or otherwise; it therefore applies in all kinds of courts,⁹ in all methods of interrogation before a court,¹⁰ in investigations by a grand jury,¹¹ and in investigations by a legislature or a body having legislative functions.¹²

2. Kinds of Facts protected from Disclosure.

§ 2254. **Civil Liability.** The facts protected from disclosure are distinctly facts involving a criminal liability or its equivalent. Hence, facts involving a civil liability are entirely without the scope of the privilege. No question would probably ever have arisen in this respect, but for a ruling (possibly misreported) of Lord Kenyon in 1795,¹ whence proceeded a ripple, and then a wave, of doubt. This doubt was, however, shortly put at rest in England by a legislative declaration, based on the answers of the judges interrogated for

⁴ 1853, *Scott, J.*, in *State v. Quarles*, 13 Ark. 307, 311 ("No one, be he witness or accused, can pretend to claim it beyond its scope at the common law"); 1892, *Counselman v. Hitchcock*, 142 U. S. 547, 584, 586, 12 Sup. 195 ("There is really, in spirit and in principle, no distinction arising out of such difference of language").

⁵ For a slight qualification of this statement, see post, § 2281.

⁶ 1871, *Com. v. Emery*, 107 Mass. 171, 181; 1861, *People v. Kelly*, 24 N. Y. 74, 81 (a constitution prohibiting compulsion "in any criminal case to be a witness against himself" prohibits also self-crimination when called as a witness against another person); 1892, *Counselman v. Hitchcock*, 142 U. S. 547, 562, 12 Sup. 195; 1873, *Cullen v. Com.*, 24 Gratt. 624, 628.

⁷ 1853, *State v. Quarles*, 13 Ark. 307, 310.

⁸ 1896, *Ex parte Senior*, 37 Fla. 1, 19 So. 652; 1860, *Wilkins v. Malone*, 14 Ind. 153.

⁹ 1832, *Swift v. Swift*, 4 Hagg. Eccl. 129, 154 (ecclesiastical courts).

The question whether a *notary*, authorized to take depositions, has the power at all to enforce answers by process of contempt, is a different one, and involves the constitutional distribution of judicial functions; some authorities have been elsewhere cited (*ante*, § 2195).

¹⁰ 1864, *Pye v. Butterfield*, 5 B. & S. 829, 637 (statutory interrogatories to a party).

¹¹ 1871, *State v. Froiseth*, 16 Minn. 296; 1861, *People v. Kelly*, 24 N. Y. 74, 78; 1899, *Wilson v. State*, 41 Tex. Cr. 115, 51 S. W. 916; 1892, *Counselman v. Hitchcock*, 142 U. S. 547, 563, 12 Sup. 195.

Whether an *indictment* should be quashed for violating the rule before the grand jury, is a different question, on which opinions have varied: 1894, *Boone v. People*, 148 Ill. 440, 36 N. E. 99; 1890, *People v. Lander*, 82 Mich. 109, 45 N. W. 956.

¹² 1871, *Com. v. Emery*, 107 Mass. 171, 182.

¹ *Bain v. Hargrave, Peake, Evidence*, 184, note (quoted *ante*, § 2223).

§ 2254 PRIVILEGE AGAINST SELF-CRIMINATION. [CHAP. LXXVIII]

the purpose.³ In the United States the doubt was before long considered and duly repudiated in all the earlier courts; but an echo of it lingered for a generation or more, and so a similar legislative enactment has been repeated in many jurisdictions.⁴

§ 2255. *Infamy or Disgrace.* The privilege against disclosing facts involving disgrace or infamy (*i. e.* irrespective of criminality) began to be recognized later than the privilege against self-crimination and independently of it. Its limitations were entirely distinct, in that it did not cover facts merely "tending" to disclose infamy, and did not apply to facts material to the issues (but only to "collateral" facts, *i. e.* practically, to facts solely affecting credibility). Its history and scope have been already examined (*ante*, §§ 984-987). In English practice the two privileges — concerning infamy and concerning criminality — were never confused; and while the former has gradually fallen into desuetude, the latter has never been allowed to abate its strength. In this country, constitutional sanction was given to the latter with practical unanimity; but there never was any suggestion, in express proposal or in apparent phrasing, thus to recognize the former;¹ and here, as in England, it has in most jurisdictions come to be ignored, and is replaced by judicial restriction of cross-examination to character.

No further notice of it would here be needed, but for an egregious misconception exhibited in the course of the controversy culminating in the case of *Brown v. Walker*, in the Federal Court (*post*, § 2281). That misconception employs the argument that a statutory amnesty for a crime cannot annul the privilege against self-crimination, because the disgrace at least remains. It thus rests upon the assumption that the present constitutional privilege has the function of protecting against the disclosure not only of criminality but also of disgrace:

1896, *Field, J.*, dissenting, in *Brown v. Walker*, 161 U. S. 501, 16 Sup. 504: "It is contended, indeed, that it was not the object of the constitutional safeguard to protect the witness against infamy and disgrace. It is urged that its sole purpose was to protect him against incriminating testimony with reference to the offense under prosecution. But we do not agree that such limited protection was all that was secured. As stated by counsel of the appellant, 'it is entirely possible, and certainly not impossible, that the framers of the Constitution reasoned that, in bestowing upon witnesses in criminal cases the privilege of silence when in danger of self-incrimination, they would at the same time save him in all such cases from the shame and infamy of confessing disgraceful crimes, and thus preserve to him some measure of self-respect. . . . It is true, as counsel observes, that both the safeguard of the Constitution and the common-law rule spring alike from that sentiment of personal self-respect, liberty, independence, and dignity which has inhabited the breasts of English-speaking peoples for centuries, and to save which they have always been ready to sacrifice many governmental facilities and conveniences. In

³ 1806, St. 46 Geo. III, c. 37 (quoted *ante*, § 2254).

⁴ The history of the doubt, the judicial rulings, and the statutes, have already been fully examined *ante*, § 2232. The line of distinction, however, which it thus becomes necessary to draw between civil liability and criminal liability, can best be observed in connection with the

subsequent sections (§§ 2256, 2257) dealing with forfeitures and penalties as the subject of the present privilege; for bankruptcy questions, see *post*, §§ 2260, 2262.

¹ Except, apparently, once, in an early opinion speaking obiter: 1802, *Shippen, C. J.*, in *Republica v. Gibbs*, 3 Yeates 429, 437, 4 Dall. 255.

scarcely anything has that sentiment been more manifest than in the abhorrence felt at the legal compulsion upon witnesses to make concessions which must cover the witness with lasting shame, and leave him degraded both in his own eyes and those of others. What can be more abhorrent . . . than to compel a man who has fought his way from obscurity to dignity and honor to reveal crimes of which he had repented, and of which the world was ignorant? The essential and inherent cruelty of compelling a man to expose his own guilt is obvious to every one, and needs no illustration. . . . The counsel for the appellant justly observes that 'the proud sense of personal independence which is the basis of the most valued qualities of a free citizen is sustained and cultivated by the consciousness that there are limits which even the State cannot pass in tearing open the secrets of his bosom.'"²

The notion exhibited in this passage ignores the independence in principle, in details, and in history, of the two privileges. Its *reductio ad absurdum* is that if the privilege concerning criminality has such a scope when criminality has been expunged, leaving only turpitude, then it has also that scope when criminality never arose, if turpitude was apparent; unless we avow that there is no turpitude except as involved in criminality, and if so, how could the other privilege against the disclosure of turpitude ever have arisen? The opinion also makes the broad assumption that every criminality also involves turpitude, — the fallacy of which is seen plainly enough in the very case giving rise to the opinion; for who could, without absurdity, predicate that the disclosure of a pardoned rate-discrimination by a leading merchant or a powerful railroad official would, in the language of the opinion, "cover the witness with lasting shame and leave him degraded both in his own eyes and those of others"? It is, to be sure, of little avail to suggest reasons against a view which ignores all precedent and all history. It is simple enough to create a constitutional doctrine *instantly*, if we may snatch it like a magician's white rabbit, full-grown, out of empty space, and place it living and panting before the astonished spectators. But such is not the accepted judicial habit.

Quite apart from the errors of logic and of history, a greater fault in the opinion above quoted is its singular appeal to false sentiment. Such abuse of words is merely bathos. To invoke the sentiments of lofty indignation and of courageous self-respect against the arbitrary methods of royal tyrants and religious bigots, holding an inquisition to enforce cruel decrees of the prerogative, and torturing their victims with rack and stake, is fitting and laudable, and moves men with a just sympathy. But to apply the same terms to the orderly everyday processes of the witness-stand, in a community governing itself in freedom by the will of the majority and having on its statute-book no law which was not put there by itself and cannot be repealed to-morrow, — a community, moreover, cursed above others by constant evasion of the law and by over-laxity of criminal procedure, — this is to maltreat language, to enervate virile ideas, to abuse true sentiment, to degrade the Constitution, and to make hopeless the correct adjustment of the best

² The same reasoning had already been advanced by Grosscup, J., in *U. S. v. James*, 60 Fed. 257, a case involving the same issue.

motives of human nature to the facts of life. Were it not so serious in its implications, it would be as ludicrous a spectacle as if one were to devote a colossal fortune to founding a hospital for the care of ablebodied vagrants, or to repeat Milton's Ode to the Nativity at the birth of a favorite feline's litter.

The doctrine of the minority opinion in *Brown v. Walker* rests on a misconception so radical that only the exalted source of its promulgation makes it necessary to be thus noticed. Judges in other Courts have repeatedly repudiated that misconception when advanced at the Bar.³ In the following passages the discrimination between the two privileges is plainly expounded:

1830, *Marcy, J.*, in *People v. Walker*, 4 Wend. 229, 252: "The distinction which I have endeavored to point out between the rule which protects the witness from being compelled to proclaim his own infamy, and that which secures him when on the stand from becoming the unwilling instrument of his own conviction, is not new or unsupported by authority. . . . The object of the two rules I have been considering is very different. The one saves the witness from being the herald of his own infamy; the other from himself furnishing the means of his punishment. The confounding of these rules would in my opinion produce a strange result."

1896, *Brown, J.*, in *Brown v. Walker*, 161 U. S. 501, 16 Sup. 644: "The fact that the testimony may tend to degrade the witness in public estimation does not exempt him from the duty of disclosure. A person who commits a criminal act is bound to contemplate the consequences of exposure to his good name and reputation, and ought not to call upon the Courts to protect that which he has himself esteemed to be of such little value. The safety and welfare of an entire community should not be put into the scale against the reputation of a self-confessed criminal, who ought not, either in justice or in good morals, to refuse to disclose that which may be of great public utility, in order that his neighbors may think well of him. The design of the constitutional privilege is not to aid the witness in vindicating his character, but to protect him against being compelled to furnish evidence to convict him of a criminal charge. If he secure legal immunity from prosecution, the possible impairment of his good name is a penalty which it is reasonable he should be compelled to pay for the common good. If it be once conceded that the fact that his testimony may tend to bring the witness into disrepute, though not to incriminate him, does not entitle him to the privilege of silence, it necessarily follows that, if it also tends to incriminate, but at the same time operates as a pardon for the offense, the fact that the disgrace remains no more entitles him to immunity in this case than in the other. . . . The danger of extending the principle announced in *Counselman v. Hitchcock* is that the privilege may be put forward for a sentimental reason, or for a purely fanciful protection of the witness against an imaginary danger, and for the real purpose of securing immunity to some third person, who is interested in concealing the facts to which he would testify. Every good citizen is bound to aid in the enforcement of the law, and has no right to permit himself, under the pretext of shielding his own good name, to be made the tool of others, who are desirous of seeking shelter behind his privilege."

§ 2256. *Criminal Liability: (a) Forfeiture.* Where a right of property is divested, or a liability to pay money to another person is created, by way of a retribution for misconduct done, or of a deterrent from misconduct appre-

³ For other opinions pointing out the distinction, see the following: 1857, *Burnett, J.*, in *Ex parte Rowe*, 7 Cal. 184; 1895, *Buffington, J.*, in *Brown v. Walker*, 70 Fed. 46; 1884, *Fauntleroy, J.*, in *Kendrick v. Com.*, 78 Va. 490, 496 ("The Courts of Virginia will not recognize the Spartan morality which deprecates not the perpetration but only the exposure of crime").

hended, the effect is in spirit penal; and the disclosure of such facts should therefore be protected by the privilege. The distinction between a penalty and a sum fixed in preappointed liquidation of damages is familiar in equitable practice, and suggests here an analogy. So, too, in property rights, the distinction between an invalid divestiture of an estate as a penalty for marriage, and a grant conditioned upon non-marriage, may be of some service. But, in the end, the canon of difference remains elusive, and can hardly be phrased with nicety. The judicial interpretation has always leaned to liberality,—partly, perhaps, because of some early cases¹ concerning the ecclesiastical Courts, and occurring before the establishment of the common-law privilege, wherein was involved merely the struggle against the jurisdiction of those Courts;² partly, also, because of the time-honored maxim of equitable practice never to aid a forfeiture, in consequence of which the boundary between relief and discovery remained confused and the rule for the former (which was independent of criminality) tended to enlarge the limits of the privilege for the latter.³ Where the loss of a right is inflicted by statute, there is a greater semblance of penal policy; the distinction was indeed once taken between “a determination by the party himself and a determination by act of Parliament.”⁴ Yet this feature of public or legislative policy is equally present in the incapacity of an alien, which nevertheless is not within the privilege;⁵ so that this distinction also lacks uniform efficacy.

At the present day, the kinds of forfeiture which furnished the precedents are comparatively rare, and it is difficult to say what the line of judicial definition would be. Most of the precedents come down from the 1700s. They concern forfeitures of *ecclesiastical livings* dealt with in violation of the *statute against simony*;⁶ of *property-titles* by virtue of *statutory incapacity as a papist*;⁷ or as an *alien*;⁸ of *public office*, by virtue of statutory incapacity

¹ 1611, *Clifford v. Huntly*, Rolle's Abr. “Prohibition,” (T) 6, *Jura Ecclesiastica*, 427, pl. 7 (obligation assumed, *pendente lite* on a marriage contract, not to marry or cohabit with another; examination in the ecclesiastical Court as to such marriage afterwards refused, “for that tends to the forfeiture of the obligation”); 1615, *Bradston's Case*, Rolle, *ubi supra*, (T), 1, *Jura Ecclesiastica*, 355, pl. 9 (a layman, who is to forfeit a penalty either by statute or otherwise, cannot be examined on oath in the ecclesiastical Court as to the offence causing the forfeiture).

² The history of this has already been examined (*ante*, § 2250).

³ This is noticeable in most of the rulings of the 1700s, cited *infra*, which arose in equity on bills of discovery. Compare also the history in § 2250.

⁴ *Boteler v. Allington*, *infra*, note 6.

⁵ *Infra*, note 8.

⁶ 1745, *Boteler v. Allington*, 3 Atk. 453, 457 (clerical living; the acceptance of a second living operating by law to vacate the first under certain conditions, the defendant was held privileged from discovery, the distinction being

between “a determination by the party himself and a determination by act of Parliament”); 1755, *Grey v. Heth*, 1 Ambl. 268 (sale of an advowson during a vacancy, held not within the penalties of the statute of simony, though void at common law; and thus not privileged from discovery); 1831, *Southall v. —*, 1 Younge 308, 316 (discovery as to a simoniacal contract; the fact that the defendant was only patron and trustee of the living to be forfeited, held not to affect his privilege).

⁷ 1736, *Smith v. Read*, 1 Atk. 526 (discovery refused as to defendant's deviser being a papist and consequently disabled to take the estate; “there is no difference between a forfeiture of a thing vested and a disability to take inflicted as a penalty; . . . in the case of aliens, bastards, etc., there is a difference, where the disability arises from the rules of law and where it is imposed as a penalty”); 1751, *Harrison v. Southcote*, 2 Ves. Sr. 359, 1 Atk. 538, 539 (discovery not compelled whether defendant's vendor was a papist, a forfeiture of the estate under statute being involved).

⁸ 1753, *Dupleiss v. Attorney General*, 1 Brown P. C. 415, 420 (an alien's incapacity to

or punishment;⁹ of various other interests under *statutory prohibitions*; ¹⁰ and of estates prescribed in a will or deed to be *divested* by forfeiture as distinguished from conditional limitation.¹¹

Where the forfeiture enures solely to the party seeking disclosure, it is obvious that he has it in his power (supposing it to be consistent with his interest) to obtain the disclosure by a *waiver of the forfeiture*; and this expedient effectually nullifies the privilege.¹²

§ 2257. *Same: (b) Penalty.* The distinction between a penalty and a forfeiture is a shadowy one; though both are in essence contrasted with a civil liability. A penalty may be defined as a liability to pay money or to yield up a public privilege by way of punishment imposed by law. When the penalty lies in the *yielding up of a privilege*, a distinction therefore seems proper between inflicting a punishment and restraining the continued improper exercise of functions. The process of impeachment seems to fall in the former class;¹ but most other processes of removal or restraint would ordinarily come within the latter description.² When the penalty lies in the

take land by purchase is not a "penalty or forfeiture," and therefore not privileged from discovery; "here is no loss, no forfeiture, no right to be divested; for the appellant took nothing originally, but for the benefit of the Crown".

1744, *Honeywood v. Selwin*, 3 Atk. 376 (bond to pay money during enjoyment of office; defendant, being a member of Parliament, held privileged from discovery, because by statute the acceptance of other office vacated a seat in Parliament); 1802, *Republica v. Gibbs*, 3 Yeates 429, 437 (questions involving incapacity as an elector or juror, in punishment for treason, held privileged).

¹⁰ 1735, *Sharp v. Carter*, 3 P. Wms. 375 (statutory forfeiture for contracting to sell controverted rights, held privileged); 1840, *Slooman v. Kelly*, 1 Y. & C. Exch. 169 (discovery in aid of defendant, pleading illegal gaming as a defence to an action on securities given; held, that the inability to recover upon such securities was not a forfeiture); 1843, *Attorney-General v. Lucas*, 2 Hare 566 (information for forfeiture of an interest in a wife's property under statute; discovery refused); 1927, *Northrop v. Hatch*, 6 Conn. 361 (statutory forfeiture, prescribed for a fraudulent conveyance, of "one year's value of the land"; privilege applied); 1831, *Skinner v. Judson*, 8 Id. 528, 535 (same); 1820, *Livingston v. Tompkins*, 4 John. Ch. 415, 432, *same* (statutory cessation of a grant of a navigation charter, on the happening of an external event, held a forfeiture); 1832, *Livingston v. Harris*, 3 Paige 528, 533 (forfeiture under a usury statute; privilege applied); 1839, *Perrine v. Striker*, 7 Id. 598, 601 (forfeiture of a debt, as penalty for usury, is covered by the privilege); 1900, *La Bourgogne*, 104 Fed. 823 (loss of a ship-owner's limitation of civil liability under statutes is not a forfeiture).

¹¹ 1742, *Chauncey v. Tahourden*, 2 Atk. 392 (legacy to A at the age of 31 or day of marriage; but if she marries without B's consent, then over to another; discovery privileged, as

involving a forfeiture); 1745, *Lucas v. Evans*, 3 Id. 260 (gift with limitation over on a second marriage; the fact of the second marriage held not privileged); 1753, *Jordan v. Holkham*, 1 Amb. 209 (gift with limitation over on a second marriage, held a forfeiture); 1850, *Hambrook v. Smith*, 17 Sim. 209, 217 (estate to A during life or until bankruptcy or alienation, and then to another person; held, a conditional limitation, and the condition not privileged from discovery); 1858, *Chester v. Wortley*, 17 C. B. 410, 426 (ejectment, for breach of covenant in lease; not decided); 1862, *Blyth v. L'Estrange*, 3 F. & F. 154 (ejectment for forfeiture of a copyhold; interrogatories refused); 1864, *Pye v. Butterfield*, 5 B. & S. 829, 837 (fact of underletting, as a ground for forfeiture of a lease, privileged from discovery; the privilege covers "forfeiture of estate, except where the estate is held on a conditional limitation, in which case it would be extinguished on non-performance of the condition; this may be a fine-drawn distinction, but, whatever we may think of the rule, it is too well established to admit of doubt"). In *Horsburg v. Baker* (1828), 1 Pet. 232, a bill for discovery, in aid of a forfeiture of property under a deed and a will, was sanctioned, without apparently considering this principle.

¹² 1719, *East India Co. v. Atkins*, 1 Stra. 168, 175 (but the waiver must show plainly that he has disinterested himself to enforce the penalty); 1793, *Woolf v. Walley*, 1 Anstr. 100 (bill for tithes; plaintiff's waiver of treble-value penalty, held to require discovery); 1747, *Uxbridge v. Stavealand*, 1 Ves. Sr. 56 (lease); 1867, *U. S. of America v. McRae*, L. R. 4 Eq. 327, 334, 340.

¹ 1895, *Thruston v. Clark*, 107 Cal. 285, 40 Pac. 436 (proceedings for removal from office under Penal Code § 772; privilege applied).

² 1900, *State v. Standard Oil Co.*, 61 Nehr. 23, 84 N. W. 413 (statutory proceeding to enjoin a foreign corporation from violating the anti-trust law and to revoke its license, held not

payment of money, it seems clear that a mere unregulated increase of compensation under the name of exemplary damages is still a civil liability in essence; and therefore the same consequence ought to follow when by statute a fixed sum, or a multiple based on actual loss, is prescribed.³ In any case, the form of the proceeding is not decisive, for in the name of the State a proceeding essentially civil is sometimes conducted;⁴ and, conversely, a specific penalty for wrongdoing is sometimes made recoverable at the suit of an informer or other person by way of encouraging detection and prosecution.⁵

In a civil case, it often happens that a main part of the issue concerns conduct which is also criminal; but the privilege protects nevertheless. The mere fact that a civil liability also inheres in the same act does not override the criminal liability; for it would not be possible to disclose the former without also disclosing the latter. This application of the principle causes hardship to civil parties who are in no wise interested in the criminal aspect of their opponents' conduct and yet are by that circumstance balked of discovery of their civil wrongs; but the doctrine is unquestioned. It finds illus-

a criminal proceeding): 1899, *Re Randel*, 158 N. Y. 216, 52 N. E. 1106 (disbarment proceedings; privilege not applied).

³ 1899, *Southern R. Co. v. Bash*, 122 Ala. 470, 28 So. 168 (in an action for death, the damages, though punitive and not compensatory, are not a penalty, and the privilege does not apply to the defendant); 1895, *Levy v. Superior Court*, 105 Cal. 600, 38 Pac. 965 (administrator's citation of one charged with concealing and embezzling the estate of the deceased; the statute provided for double damages; an order of compulsory examination was held proper, the statute being remedial, not penal; *McFarland and DeHaven, J.J., diss.*); *Contra*: 1882, *Anon.*, 1 Vern. 60 (bill for tithes; discovery declined, as a treble penalty was collectible; principle apparently sanctioned); 1890, *Logan v. R. Co.*, 132 Pa. 403, 408, 409, 19 Atl. 137 (discovery of papers, refused for the purpose of recovering a penalty of treble damages for discrimination in carriers' rates, but allowed for recovering an excess of freight-money unjustly paid).

⁴ 1896, *Miller v. State*, 110 Ala. 69, 20 So. 392 (bastardy proceedings not being a criminal case, the defendant's failure to take the stand was therefore held the proper subject of comment); 1895, *State v. Collins*, 68 N. H. 299, 44 Atl. 493 (proceeding to enjoin a liquor nuisance; defendant's failure to testify is open to inference).

⁵ In these cases so much depends often upon the details of the statute that the decision, in the earlier English cases, is not worth noting in full: *Eng.*: 1749, *East India Co. v. Campbell*, 1 Ves. Sr. 246 (penalties recoverable by East India Co. against infringers of their monopoly; privilege applied); 1739, *Suffolk v. Green*, 1 Atk. 450 (usury); 1781, *Bishop of London v. Fytche*, 1 Brown Ch. C. 93 (simony); 1792, *Mynd v. Francis*, 1 Anstr. 5 (common informer's suit against one winning money at play; discovery

refused on other grounds); 1797, *Raynes v. Towgood*, Peake, Evidence, 184, note (statutory penalty for stock-jobbing; privilege affirmed); 1800, *East India Co. v. Neave*, 5 Ves. Jr. 173, 184 (contract as captain); 1802, *Mayor, etc. of London v. Levy*, 8 id. 326, 404 (alien dues on merchandise); 1803, *Bullock v. Richardson*, 11 id. 373 (stock-jobbing statute); 1826, *Billing v. Flight*, 1 Madd. 230 (stock-jobbing statute); 1836, *Glynn v. Houston*, 1 Keen 329, 337 ("In what way he would be so subject, whether by indictment, information, impeachment, or, if necessary, by a bill of pains and penalties, is immaterial; it is sufficient that he would be subject to penal consequences"); 1834, *Attorney-General v. Radloff*, 10 Exch. 84 (information for penalties for smuggling; the Court equally divided as to whether it was a criminal proceeding, under a statute making parties competent and compellable in other than criminal proceedings; this case led to the ensuing statute); 1865, *St. 28 & 29 Vict. c. 104, § 34* (cases on the revenue side of the Exchequer are not to be deemed criminal cases); *Can.*: 1867, *Burton v. Young*, 17 Low. Can. 379 (*qui tam* for penalties; cited *post*, § 2260); *U. S.*: 1901, *Robson v. Doyle*, 191 Ill. 566, 61 N. E. 435 (privilege held applicable to a bill of discovery in aid of a civil suit to recover penalties for gambling, notwithstanding the statutory sanction of such a bill in *Rev. St. § 137, c. 38*); 1832, *U. S. v. Twenty-Eight Packages*, Gilpin 306, 312 (information for forfeiture of goods fraudulently invoiced; privilege applied); 1880, *Johnson v. Donaldson*, 18 Blatchf. 267, 3 Fed. 22 (penalties and forfeitures under the copyright law; privilege applied); 1893, *Lees v. U. S.*, 150 U. S. 476, 480, 14 Sup. 163 (action for penalty under the alien-immigration statute; privilege applied to the defendant); 1901, *Newgold v. A. E. N. & M. Co.*, 108 Fed. 341 (*qui tam* action under U. S. *Rev. St. § 4901*; discovery privileged).

tration in civil suits involving *libel*,⁹ *adultery* and the like,⁷ *fraud*,⁸ *bankruptcy*,⁹ and *sundry misconduct*.¹⁰ The traditional allegation, in chancery bills, of a *conspiracy* by the defendants is not of itself an obstacle to discovery, because it is usually a mere formal phrase of the draftsman.¹¹ Moreover, it may also be possible to separate one's inquiries, so as to require discovery as to the portion concerning non-criminal acts.¹²

§ 2258. *Crime under Foreign Sovereignty*. In Samoa it was tabooed to name a deceased chieftain by the title he bore when living; in Japan it was seditious to express a scepticism as to the official genealogy of His Imperial Majesty; in Germany it might constitute *lèse majesté* to publish (as many British and American journalists have done) that irreverent metrical jest upon the Emperor. Shall our Courts, then, include in the category of criminalizing facts these various offences against the polyglot public policies of the wide world? In the State of Kansas it was, at one time, for a few months, unlawful for certain insurance companies to transact business within that sovereignty, because they had for many years struggled to avoid the payment of a noted claim alleged to have been fraudulently concocted. Should the privilege therefore have been applied in other jurisdictions during that period to all inquiries based on the transactions of these companies in Kansas? It

⁹ 1812, *Maloney v. Bartlett*, 3 Camp. 210 (libel in an affidavit; the copy of an affidavit being liable for a misdemeanor, questions on that fact were held privileged); 1842, *March v. Davidson*, 9 Paige 590 (discovery from defendant in libel, not allowed on the facts). Distinguish the case of a party who, by inviting an issue, in effect waives the privilege: 1837, *Macanlay v. Shackell*, 1 Bligh n. s. 96, 121, 133, *semble* (libel; plea of truth; the defendant is entitled to discovery as to the truth of charges involving indictable acts; on the analogy of insurance cases, where fraud is set up as a defence to an action on the policy).

⁷ 1891, *Redfern v. Redfern*, Prob. 139, 145 (divorce for adultery; discovery as to adultery, held not compellable, in so far as adultery is a punishable offence); 1862, *Marsh v. Marsh*, 16 N. J. Eq. 391, 397 (divorce for adultery; discovery as to adultery, held privileged); 1314, *Dodd v. Norris*, 3 Camp. 519 (daughter, in an action for seduction, held privileged from answering as to being "criminal with other men").

⁸ 1798, *Selby v. Crew*, 3 Anstr. 504 (discovery of creditors' signing a bankrupt's certificate for a consideration, refused as involving subornation of perjury); 1805, *Ex parte Symes*, 11 Ves. Jr. 521 (creditor's fraudulent receipt of bankrupt's money); 1807, *Claridge v. Hoare*, 14 id. 59 (compounding a felony); 1807, *Dummer v. Chippenham*, ib. 246 (conspiracy); 1858, *Michael v. Gay*, 1 F. & F. 409 (conspiracy to defraud creditors, held privileged).

Rut, of course, not all civil fraud is also criminal: 1849, *Foss v. Haynes*, 31 Me. 81, 90 (fraudulent conveyance, here held not to involve criminality).

⁹ In bankruptcy proceedings, as illustrated in note 8, the privilege would have common application. But in England, by a strict con-

struction of the doctrine as to facts "tending to criminate," and by skillful drafting of interrogatories, it would seem that the privilege was very nearly evaded, even before its practical abolition in the modern Bankruptcy Act; and in the United States a statutory amnesty partly controls. The cases can best be examined under those heads (*post*, §§ 2260, 2282).

¹⁰ 1793, *Oliver v. Haywood*, 1 Anstr. 82 (bill for tithes; discovery as to a combination against the parson, refused, as involving maintenance); 1793, *Mayor of London v. Ainsley*, ib. 158 (bill for account of tolls; discovery as to maintenance, refused); 1797, *Whittingham v. Burgoyne*, 3 id. 900 (discovery as to the sale of a commission contrary to army regulations; not decided, but a ruling refusing such discovery was cited).

Distinguish cases in which *all relief* in equity is refused in aid of an *immoral purpose*, irrespective of the privilege as to discovery merely: 1797, *Wallis v. Portland*, 3 Ves. Jr. 494 (services as solicitors for a candidate for Parliament).

¹¹ 1782, *Chetwynd v. Lindon*, 2 Ves. Sr. 451 ("It is not every conspiracy will be a ground for a criminal prosecution; if that was the case, almost all the causes in this court would come within that description; the boundaries are often very nice"; conspiracy to set up a supposititious child, *semble*, not privileged); 1849, *Adams v. Porter*, 1 Cush. 170, 174 ("The allegation of an unlawful confederation or conspiracy, which is usually introduced in bills in equity, is rather to be considered, however, as constituting a merely formal part of the bill, and requiring no particular answer").

¹² Examples are the following cases: 1843, *Lichfield v. Bond*, 6 Beav. 88, 93; 1843, *Fisher v. Price*, 11 id. 194, 200. Compare, however, the effect on this expedient of the rule as to facts "tending to criminate" (*post*, § 2260).

was at one time a criminal offence in many Southern States to read the Bible to negro slaves ; it is now a crime in Italy to export art treasures without official consent, — in Germany to emigrate during military age without governmental permission, — in the Ottoman Empire to make proselytes from Islamism to Christianity, — and in Massachusetts, until recent times, to sell cigars on Sunday. Are the Courts of our various Commonwealths to

" Let observation, with extensive view,
Survey mankind, from China to Peru,"

and catalogue within the rubrics of criminality every act which is anywhere, under any system of manners, morals, or policy, stigmatized by law ? If so, they will indeed be undertaking a huge and curious task, — stimulative, no doubt, to the science of comparative nomology, but calculated to baffle their greatest zeal and to invite frequent failure.

It will not do to argue that our Courts may confine their search to those fifty jurisdictions united externally as the United States of America. These States are all independent legislative sovereignties in criminal matters, and there is no reason for ignoring this independence. Nor is anything gained by stopping at the boundaries of Anglo-Saxon civilization, with its common trend of legal ideas ; for there are within the British dominions some sixty legislative bodies, more or less autonomous ; so that the search for criminalities might involve several scores of codes. Besides, the differences, within our own nation, of legislative policy are as radical as any within this larger field ; New South Wales and England probably do not differ so much as Maine and Texas, or Porto Rico and Illinois. If we say that there is nevertheless a practical difference of safety between the cases of him who has offended against the laws of one of our own States and of him who has broken those of a foreign State, and that this difference should lead us to take the former into consideration, one sufficient answer is that extradition treaties have practically abolished the hope of refuge from the law. "Denmark's a prison ? Then is the world one !" To-day's journal chronicles the sailing from England, under arrest, of a man who is charged with a murder committed nine years ago in Chicago ; and, in the next paragraph, the granting of an extradition-writ for a convict in Sing-Sing, charged with embezzlement in France, and just completing a long confinement for crime in this country. But, more than this, the answer is that a radical fallacy of principle underlies the assumption that the Courts of one State may consider the effect of enforced disclosures as creating a danger of prosecution in another sovereignty. It is not in the power or duty of one State, or of its Courts, to be concerned in the criminal law of another State. For the former, there is but one law, and that is its own. The boundaries of our Constitution and our sovereignty are coextensive. A constitution is intended to protect the accused against the methods of its own jurisdiction and no other. The Court's view, as well as its functions, should be confined to its own organic sphere. Practical considerations also deter. The Court of one State knows

nothing of the policies and rules of other systems; and it risks error and adds great burdens in attempting to master them. Further, it cannot well know the real probabilities of danger of prosecution under another system; for it would need to know what means and motives for prosecution there existed, what likelihood there was of migration thither by the accused or of his capture when arrived or of his involuntary extradition, and what the probability was of the discovery and employment in that prosecution of the disclosure now desired. Even if it could ascertain these elements of probability, it could not define any workable rule for measuring them. The only conceivable rule would be that when an act was by any possibility capable of being treated as criminal by the law of any other sovereignty, the privilege should protect it. That such a rule should be seriously suggested seems incredible.

And yet this, or something logically its equivalent, has at least once been proposed, — though, fortunately, without success. In the Federal Supreme Court, in considering the question how far a Federal statute, giving amnesty for a specific offence, expunged the offence and thus nullified the privilege, a minority placed their argument in part on the ground that the same act might still be an offence in another jurisdiction and would therefore still be entitled to protection in the Federal Court:

1806, *Straus, J.*, with *Gray and White, JJ.*, dissenting, in *Brown v. Walker*, 161 U. S. 501, 16 Sup. 644: "Another danger to which the witness is subjected by the withdrawal of the constitutional safeguard is that of a prosecution in the State courts. The same act or transaction which may be a violation of the interstate commerce act may also be an offence against a State law. Thus, in the present case, the inquiry was as to supposed rebates on freight charges. Such payments would have been in disregard of the Federal statute; but a full disclosure of all the attendant facts (and, if he testify at all, he must answer fully) might disclose that the witness had been guilty of embezzling the moneys intrusted to him for that purpose, or it might have been disclosed that he had made false entries in the books of the State corporation in whose employ he was acting. These acts would be crimes against the State, for which he might be indicted and punished, and he may have furnished, by his testimony in the Federal court or before the commission, the very facts, or, at least, clues thereto, which led to his prosecution."

Against this argument no more need be attempted; but it may be suggested that its exaggerated structure of apprehension of foreign prosecution is built upon a foundation of "mights" and "mays" and other exiguous possibilities so elaborate as to seem unfit for practical consideration in the zealous administration of justice. The opposite view has been expounded in the following passages:

1850, Lord Cranworth, V. C., in *King of Sicilies v. Wilcox*, 7 State Tr. n. s. 1049, 1068: "Can the defendants then object to answer that which might subject themselves to penal consequences if they should go to Sicily? I think not. The rule relied on by the defendants is one which exists merely by virtue of our own municipal law, and must, I think, have reference exclusively to matters penal by that law, — to matters as to which, if disclosed, the judge would be able to say, as matter of law, whether it could or could not entail penal consequences. . . . No judge can know, as matter of law, what would or would not be penal in a foreign country; and he cannot therefore form any judgment as to the force or truth of the objection of a witness when he declines to answer on such a

ground. . . . It is to be observed that in such a case, in order to make the disclosure dangerous to the party who objects, it is essential that he should first quit the protection of our laws and wilfully go within the jurisdiction of the laws he has violated. . . . I am of opinion for these reasons, in the absence of all authority on the point, that the rule of protection is confined to what may tend to subject a party to penalties by our law."

1896, *Brown, J.*, in *Brown v. Walker*, *supra* (after arguing that Congress has power to enact such a statutory amnesty to apply in State courts, and that the statute in question was intended as a general one): "But, even granting that there were still a bare possibility that, by his disclosure, he might be subjected to the criminal laws of some other sovereignty, that [danger], as Chief Justice Cockburn said in *Queen v. Boyes*,¹ in reply to the argument that the witness 'was not protected by his pardon against an impeachment by the House of Commons, is not a real and probable danger, with reference to the ordinary operations of the law in the ordinary courts, but 'a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct.' Such dangers it was never the object of the provision to obviate."

In point of precedent, three different cases may be distinguished. (1) The act may be criminal in another court or system of law in the *same jurisdiction* of legislative sovereignty; here the privilege applies.² (2) The act may be admitted or proved to be actually criminal by the contemporary laws of another and independent *sovereignty*; here the privilege ought not to apply, for the reasons above stated; but the precedents are not harmonious.³ (3) The act may not be *admitted or proved* to be criminal by any other State's law or, if thus criminal, to have been done so as to make the claimant of the privilege actually amenable to that law; here the privilege ought certainly to be denied, and it would seem that any Court would concede this.⁴

§ 2250. *Crime of a Third Person; Officers of a Corporation and Public Officials.* It is obvious that the criminal act of a *third person* cannot be the

¹ 1 H. & S. 311; *post*, § 2260.

² 1749, *East India Co. v. Campbell*, 1 Ves. Sr. 246 (discovery of facts rendering a defendant punishable in the British criminal jurisdiction in Calcutta, though not in England, held not compellable); 1750, *Brownson v. Edwards*, 2 id. 243 (discovery of an incestuous marriage, refused, incest being punishable in the ecclesiastical Court; "the general rule is that no one is bound to answer so as to subject himself to punishment, whether [or not] that punishment arises by the ecclesiastical law of the land").

³ *Privilege denied*: 1850, *King of Sicilies v. Wilcox*, 7 State Tr. x. a. 1049, 1068 (discovery asked from agents of a revolutionary government in Sicily; their exposure to penalties in Sicily, held no ground of privilege); 1854, *Stato v. March*, 1 Jones 526 (answer as to perjury in Georgia, compellable; "our Courts, in administering justice among their suitors, will not notice the criminal laws of another State or country" for this purpose); 1867, *Stato v. Thomas*, 98 N. C. 399, 603, 4 S. E. 518 (preceding case approved). *Privilege affirmed*: 1867, *U. S. of America v. McRae*, L. R. 4 Eq. 327, 339, L. R. 3 Ch. App. 79, 87 (bill for account against defendant for money received as agent of the Confederate States; plea, that the defendant's property was "to be seizure, and

proceedings were pending to seize it, for such agency, by act of the U. S. Congress, held valid, by Wood, V. C.; *King of Sicilies v. Wilcox*, *supra*, distinguished, because here the existence of the foreign law and the actual liability under it appeared admitted upon the record); 1820, *U. S. v. Saline Bank*, 1 Pet. 100 (bill for discovery, filed in the U. S. District Court for Western Virginia, against stockholders of a Virginia bank; plea allowed that an answer would subject them to penalties under a Virginia statute). *Undecided*: 1881, *Power v. Ellis*, 6 Can. Sup. 1, 6.

⁴ 1896, *Brown v. Walker*, 161 U. S. 591, 16 Sup. 644, as quoted *supra*. In this case, the question arose for an act once criminal by the Federal law, but afterwards given statutory amnesty. But the argument of the minority, as quoted *supra*, would apply equally well to any act that had never had the remotest taint of criminality under the Federal law; e. g. any bill of discovery into account-books, even if no interstate-commerce law had ever existed, might reveal an embezzlement which would be an offence under some State law though not under any Federal statute; so that the minority's argument is logically independent of the special facts in *Brown v. Walker*.

subject of privilege for the claimant.³ It is also plain, on the other hand, that a corporation, when discovery is sought from it as such, is to be equally protected from disclosure, so far as it is capable of committing a criminal act.⁴ What is the effect of these two premises upon the questions that arise when discovery is sought from an officer or employee of a corporation, — in the usual case, by a demand for the production of the corporate books?

In the first place, the employee or officer cannot refuse to produce on the ground that the disclosure would affect the corporation.⁵ On the other hand, where the corporate misconduct involves also the claimant's misconduct, or where the document is in reality the personal act of the claimant, though nominally that of the corporation, its disclosures are virtually his own, and to that extent his privilege protects him from producing them.⁶ Finally, public official books, being the property of the State, are always accessible to its representatives and usually to the public; and no guilty officer, merely by his own entries in them, can any more insist on privacy than if he were to have gone to the judicial records and there inscribed a forgery.⁷

³ 1850, *King of Sicilies v. Wilcox*, 7 State Tr. n. s. 1049, 1050 (Lord Cranworth, V. C. 1. "There is no privilege against disclosing matter within the knowledge of the party, merely because it might subject other persons to punishment"; here, persons in Sicily).

⁴ 1850, *King of Sicilies v. Wilcox*, *ubi supra*, 1063 (defendant corporation not privileged as to a breach of the Foreign Enlistment Act, because a corporation was not indictable under it); 1890, *Logan v. R. Co.*, 133 Pa. 403, 408, 19 Atl. 137 (privilege held applicable to corporations).

⁵ 1818, *Gibbons v. Proprietors of Waterloo Bridge*, 5 Price 491 ("a clerk to the defendants [a corporation] cannot demur on the ground that his principals are liable to penalties; and his answer could not be read against them"); 1886, *U. S. Express Co. v. Henderson*, 69 Ia. 40, 28 N. W. 426 (similar).

Distinguish, however, a refusal on the ground that the documents are not within his control (*ante*, §§ 2193, 2211, 2219). The general applicability of the privilege to documents, as well as to testimony on the stand, is noticed elsewhere (*post*, § 2264).

⁶ 1744, *R. v. Cornelius*, 2 Stra. 1210 (information against justices for granting licenses for money; inspection of the corporate books not allowed); 1749, *R. v. Purnell*, 1 W. Bl. 37, 45, 2 T. R. 202, note (information against the vice-chancellor of Oxford University, for not punishing certain offences; inspection of the corporation-books refused, because they "relate to the defendant's behaviour as a member of a particular corporation"; though it had been argued that "when a man is a magistrate, and as such has books in his custody, his having the office shall not secrete those books which another vice-chancellor must have produced"); 1849, *R. v. Granatelli*, 7 State Tr. n. s. 979, 986 (secretary of the P. & O. S. N. Co.; refusal to produce documents, on account of their tendency to criminate others "for whom I am interested" and himself, sanctioned); 1898, *McElree v. Dar-*

Hington, 167 Pa. 503, 41 Atl. 486 (embezzlement by the president of a corporation; examination of the corporation-books, not protected by the defendant's privilege).

⁷ 1701, *R. v. Worsenham*, 1 Ld. Raym. 703 (information against custom-house officers for forging a custom-house bond; custom-house books not compelled to be produced; this case and *R. v. Cornelius*, cited *supra*, with the ensuing one, seem to have turned on the anomalous nature of some of the offices and corporations in that century, which were regarded as private rights and bodies, although to-day they would be treated as public); 1704, *R. v. Mead*, 2 Ld. Raym. 927 (information against defendant, who with eight others was incorporated as highway surveyors; surveyors' books not required to be produced, the books not being of a public nature); 1836, *Bradshaw v. Murphy*, 7 C. & P. 612 (libel; a witness having custody of the parish vestry-book was compelled to produce it, as it was required by statute to be kept); Ill. Rev. St. 1874, c. 63, § 6 (like the Mass. statute *infra*); 1888, *State v. Smith*, 74 Ia. 580, 584, 38 N. W. 492 (registered pharmacist's reports, filed as required by law, admitted); 1888, *State v. Cummins*, 76 Id. 133, 136, 40 N. W. 124 (same); 1899, *Louisville & N. R. Co. v. Com.*, 106 Ky. 633, 51 S. W. 167 (criminal prosecution for an unlawful railroad charge; a tariff-sheet publicly posted, held not a private document, and therefore subject to compulsory production); Mass. Pub. St. 1882, c. 2, § 30, Rev. L. 1902, c. 2, § 17 (no "official paper or record" produced by a witness at a legislative hearing is to be within the privilege against self-crimination); 1899, *People v. Coombs*, 158 N. Y. 333, 53 N. E. 537 (false vouchers of a coroner for inquest fees, obtained by subpoena from his clerk, held not within the privilege; this case may also be supported under the first head); 1901, *State v. Donovan*, 10 N. D. 303, 86 N. W. 709 (druggist's record of sales, kept under statute, receivable to charge him with illegal liquor selling, being a public book).

§ 2260. *Facts "tending to Criminate."* Most criminal acts are made up of two or more subordinate facts, each an essential part of the completed crime. For example, embezzlement assumes (1) a position of trust or employment, (2) the receipt of valuables by the incumbent, (3) their improper disposal. So also arson at common law involves (1) the existence of a structure, (2) its use as a dwelling, (3) the setting fire by the accused, (4) a destruction of some part of the structure. Again, forgery by utterance involves (1) possession by the accused (2) of a certain kind of document (3) false in its nature, and (4) its transfer to another person. In all these instances, no one of the component facts constitutes of itself the crime, and yet every one of them must be established in order to establish the crime. It is therefore obvious that unless the privilege is to remain an empty formula easily evaded, its protection must extend to each one of these facts taken separately, as well as to the general whole. It would be immaterial whether the evasion consisted in obtaining from the witness himself all these component facts by separate inquiries, or in obtaining one such fact by inquiry of himself and the remainder by other proof; the difference would be merely in the quantity of evasion; for it would be the witness' own disclosure which still would be essential to complete the proof, and his own disclosure would thus essentially involve a criminating fact.

Such, and no more, is the orthodox and traditional doctrine that the privilege covers facts which even "tend to criminate":

1750, L. C. *Hardwicks*, in *Wearer v. Meath*, 2 Ves. Sr. 106: "Suppose a bill for discovery of waste, charging the defendant to be tenant for life and that he committed waste, and praying that he may set forth and discover whether he is not tenant for life; he may plead [his privilege] to the discovery whether he hath committed waste or not, but not whether he is tenant for life or not. . . . He may plead to discovery of the act causing the forfeiture; but this is not a plea to that, but to discovery of the estate. There never was such a thing heard of. Consider how far it would go."¹

1807, L. C. *Eldon*, in *Claridge v. Heare*, 14 Ves. Jr. 59: "A defendant has the right to insist that he is not to be compelled to answer, not only the broad and leading fact, but any fact the answer to which may furnish a step in the prosecution, if any person should choose to indict him"; here, discovery was refused as to a transfer of stock which with other facts was alleged to be the compounding of a felony.

1809, L. C. *Eldon*, in *Paxton v. Douglas*, 16 Ves. Jr. 239, 242, 19 id. 225: "If a series of questions are put, all meant to establish the same criminality, you cannot pick out a particular question and say, if that alone had been put, it might have been answered. . . . He is at liberty to protect himself against answering, not only the direct question whether he did what was illegal, but also every question fairly appearing to be put with a view of drawing from him an answer containing nothing to affect him except as it is one link in a chain of proof that is to affect him"; here the inquiry concerned consideration of a bond.

1827, V. C. *Leach*, in *Green v. Weaver*, 1 Sim. 404, 430: "[L. C. *Eldon* in *Paxton v. Douglas*] went there to the extent of stating, not only that a man should not make a dis-

¹ This utterance is not the earliest appearance of the doctrine; it had been recognized by the same judge shortly before: 1749, *East India Co. v. Campbell*, 1 Ves. Sr. 216 ("If a defendant is not obliged to answer the facts, he need not

answer the circumstances, although they have not such an immediate tendency to criminate"). Moreover, in L. C. *Macclesfield's Trial*, in 1725 (cited post, § 2261), it already appears in full-fledged form.

covery that would subject himself directly to penalty or criminal prosecution, but that every question leading incidentally to that conclusion would be likewise equally objectionable. Now when one comes to look at that as a proposition unexplained, one cannot help seeing that the true principle of a bill in equity is that every statement of fact in every bill ought to be 'incidentally leading' to the same conclusion, ultimately, as the prayer of the bill does lead to; for the fact is either conducive to the general result or it is unimportant and irrelevant. But I take Lord Eldon to have meant (and which perhaps is not very fully explained in the report, and which satisfied my mind a good deal) not that every fact which may lead to the effect of subjecting a defendant to a penalty is objectionable; but where the sole gist and object of the suit is to convict a man in a penalty, where there would be no other purpose but to have relief in a court of equity on the footing of penalty, that, as a Court of equity does not relieve on penalty, it will not give any incidental discovery."

1807, *Aaron Burr's Trial*, Robertson's Rep. I, 208, 244; treason; a cipher letter was placed before the witness, who had been secretary to the defendant, and he was asked by Mr. *McRae*, for the prosecution: "Do you understand the contents of that paper?" Mr. *Williams*, for the defendant: "He objects to answer. He says that, though that question may be an innocent one, yet the counsel for the prosecution might go on gradually, from one question to another, until he at last obtained matter enough to criminate him. If a man know of treasonable matter, and do not disclose it, he is guilty of misprision of treason. . . . The knowledge of the treason, again, comprehends two ideas, — that he must have [1] seen and understood [2] the treasonable matter. To one of these points Mr. W. is called upon to depose; if this be established, who knows but the other elements of the crime may be gradually unfolded so as to implicate him?" *Marshall, C. J.*, sanctioning the witness' refusal: "According to their [the prosecution's] statement, a witness can never refuse to answer any question unless that answer, unconnected with other testimony, would be sufficient to convict him of a crime. This would be rendering the rule almost perfectly worthless. Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the Court to be the true sense of the rule that no witness is compellable to furnish any one of them against himself. It is certainly not only a possible but a probable case that a witness, by disclosing a single fact, may complete the testimony against himself, and to every effectual purpose accuse himself as entirely as he would by stating every circumstance which would be required for his conviction. That fact of itself might be unavailing; but all other facts without it would be insufficient. While that remains concealed within his bosom, he is safe; but draw it from thence, and he is exposed to a prosecution. The rule which declares that no man is compellable to accuse himself would most obviously be infringed by compelling a witness to disclose a fact of this description. What testimony may be possessed, or is attainable, against any individual, the Court can never know. It would seem, then, that the Court ought never to compel a witness to give an answer which discloses a fact that would form a necessary and essential part of a crime which is punishable by the laws."

These expositions of the principle have ever since been followed without controversy.³ The doctrine may therefore be defined by enumerating three classes of cases. It plainly does not apply to a fact which merely under some conceivable circumstances may form part of a crime (for any fact at all may conceivably do that, — for example, using a copy of the Holy Scriptures in preaching the Gospel, provided a law against heresy were in force). But it applies (1) to a fact which is relevant to an inquiry whose sole or essen-

³ 1836, *Glynn v. Houston*, 1 Keen 329, 330 Chadwick, 23 L. J. Ch. N. S. 329 (*Green v. Langdale, M. R.*, approved the distinction taken in *Green v. Weaver*); 1853, *Chadwick v. Weaver* approved).

tial object is to charge a crime upon the claimant; or, (2) to a fact which forms an essential part of a crime now desired to be charged against the claimant as a subordinate purpose in the inquiry; or, (3) though no crime is desired to be charged against the claimant for any purpose whatever, to a fact which would form an essential part of a crime under certain circumstances, which circumstances for practical purposes must now be deemed to be true of the claimant. The first class includes the case of an *accused* in a *criminal case*, where the privilege exempts him from all answers whatsoever;³ and that of a *bill* in equity to *enforce a penalty*, where the privilege exempts from all discovery, even on incidental points.⁴ The second class includes the ordinary case of a *witness*, not a party, against whom it is desired to prove a crime by way of impeachment. The third class includes those cases in which the proof of a crime is *no part of the cause* nor of the purpose of the interrogator, and in which therefore commonly arises a difficult question (*post*, § 2271) as to the proper person to determine whether the fact is part of any crime at all. The necessity for this last question is due to the present principle, for since any fact may theoretically be conceived as *potentially* forming part of a crime under some conditions, and since the privilege can properly be enforced only on the theory that the fact is part of a crime under the *actual* conditions of the inquiry, it becomes inevitable to make some compromise between these two extreme requirements.

Apart from the last problem, which involves another aspect of the principle, the application of the present rule obviously turns much upon the various definitions of the criminal law and upon the special facts of each case and each witness. It may be noted particularly that in *bankruptcy* proceedings the English Courts had apparently driven a coach-and-four through the privilege,⁵

³ As universal practice concedes. For the question whether at least the question may be put to him, and a formal claim of privilege exacted, see *post*, § 2268.

⁴ 1820, *Thorpe v. Macaulay*, 5 Madd. 218, 229 (libel; discovery refused on all points, where "the sole object of the bill is to prove . . . the truth of the criminal charge; every question asked must necessarily be with a view to that end and tend to that point"); 1827, *Green v. Weaver*, 1 Sim. 404 (quoted *supra*); 1867, *Burton v. Young*, 17 Low. Can. 379 (*qui tam* for penalties; held, that defendant, being sworn, was not bound to answer any questions as a witness, "the tendency of every material question necessarily being to subject him to penalties," and thus it became merely a question of how to claim the privilege most conveniently and expeditiously; *Tachereau, J.*, diss.).

⁵ The bearing of the principle noted *ante*, § 2257, may have had something to do with these rulings: 1820, *Ex parte Consens*, Buck Bkcy. Cas. 531, 540 (L. C. Eldon: "A bankrupt cannot refuse to discover his estate and effects, . . . [though] that information may tend to show that he has property which he has not got according to law," this being "a qualification" of the general rule; but a question whether a certain bond was received for an illegal consid-

eration was held properly refused, because the latter part of it was not necessary"); 1833, *Re Heath*, 3 D. & Ch. 214, 221 (questions as to the bankrupt's disposition of goods, objected to as criminating him in respect to fraudulent disposition, held not privileged; following *Ex parte Consens*); 1833, *Re Smith*, ib. 230, 235 (similar; the words of the statute being taken as an express authorization); 1856, *R. v. Sloggett*, 7 Cox Cr. 139, before five judges (privilege recognised for certain matters); 1856, *R. v. Scott*, 1 D. & B. 47, before five judges (privilege held to have been abrogated by statute for the bankrupt; Coleridge, *J.*, diss.); 1877, *Ex parte Schofield*, L. R. 6 Ch. D. 230 (similar; but the exemption still applies to witnesses in bankruptcy proceedings); 1892, *R. v. Erdheim*, 2 Q. B. 260, 267 (*R. v. Scott* followed); 1902, *Re X. Y.*, 1 K. B. 98 (the debtor may be examined at large, in bankruptcy proceedings, by the petitioning creditor, because "since 1869 . . . it is difficult to say that bankruptcy proceedings are in any sense criminal"). The statutory amnesty (*post*, § 2281) may affect some of these rulings. For a few intervening cases approving *R. v. Scott*, in regard to *confessions*, see *ante*, § 850. For the *Federal bankruptcy statute*, see *post*, §§ 2281, 2282.

long before the modern statute of 1883⁶ had expressly nullified it. For other varieties of crimes and proceedings, no especial difficulties arise and no generalizations seem profitable.⁷

§ 2261. **Facts Furnishing a Clue to the Discovery of Criminal Facts.** It is obvious, from the illustrations given in the orthodox definitions of the foregoing principle, that the notion of a fact "tending to criminate" is that of a fact forming, in the phrase of Chief Justice Marshall, "a necessary and essential part of a crime." The assumption is that the means of establishing the other parts are already available for the prosecution, and that the claimant's disclosure of the missing link will complete the chain and thus in effect criminate him. This doctrine about "tending to criminate" is thus merely a logical deduction from the fundamental principle.

But the phrase has also been wrenched and extended in a certain class of rulings, to mean much more, namely, to cover facts which, though colorless

⁶ *Post*, §§ 2261, 2262. The earlier ruling seems not to have gone so far: 1793, *Chambers v. Thompson*, 4 Brown Ch. C. 434 (bankruptcy; privilege allowed as to acts of bankruptcy and intent to defraud, but not as to the fact of trading).

⁷ The other rulings are as follows: *England*: 1750, *Weaver v. Meath*, 2 Ves. Sr. 108 (discovery of the fact of tenancy for life, required, though other facts would show a forfeiture of it); 1751, *Finch v. Finch*, ib. 491 (discovery of fact of marriage and lawful issue, compelled; "it does not tend to discovery whether he cohabited with any woman, if he should answer whether he has or has not a son lawfully begotten"); 1811, *Cates v. Hardacre*, 3 Taunt. 424 (usury; a question whether the witness had before this had the bill in his possession, held privileged, as a "link in a chain"); 1802, *Cartwright v. Green*, 8 Ves. Jr. 405 (taking money of another); 1828, *Maccallum v. Turton*, 2 Y. & J. 183, 192 (sale of shares of a dissolved company, held privileged under the circumstances); 1833, *R. v. Pegler*, 5 C. & P. 521 (question whether witness had not "said that he committed" an offence, held privileged); 1842, *Lee v. Read*, 5 Beav. 391, 395; 1850, *King v. King*, 2 Rob. Eccl. 153, 156 (divorce for adultery); 1851, *Short v. Mercier*, McN. & G. 305, 216 (stock-jobbing; useful opinion by L. C. Truro); 1864, *Bunn v. Bunn*, 4 De G. J. & S. 316 (fraudulent conveyance under the statutes of Elizabeth; held that the penalty and forfeiture clauses of the statutes did not exempt from discovery as to the mere possession of such a deed); *Canada*: 1885, *Brown v. Hooper*, 3 Man. 86 (examination as to a fraudulent conveyance, prohibited); 1901, *Hopkins v. Smith*, 1 Ont. L. R. 659 (discovery of maintenance; where the whole topic is criminal, the party may refuse to answer at all); *United States: Conn.*: 1831, *Skinner v. Judson*, 8 Conn. 528, 535 (fraudulent conveyance); *Ga.*: 1853, *Higdon v. Heard*, 14 Ga. 255, 258 (gaming); 1901, *Wheatley v. State*, 114 id. 175, 89 S. E. 877 (whether the witness had seen defendant gaming, held not privileged; four judges disapproved of *Higdon v. Heard*, but the con-

currence of five was necessary for overruling it); *Ill.*: 1860, *Taylor v. McIrvine*, 24 Ill. 489, 493 (bankruptcy); *Me.*: 1845, *State v. Blake*, 25 Me. 350, 353 (whether he had admitted that his former testimony was false, *semble*, privileged; but not whether he had said that he would testify as C. told him to); *Mass.*: 1837, *Com. v. Kimball*, 24 Pick. 368, 369 (retailing liquor unlawfully; questions to witnesses as to purchases made of defendant, held not privileged; "the cases depend much upon their own circumstances"); *Minn.*: 1868, *Simmons v. Holster*, 13 Minn. 249, 254 (libel); *Mo.*: 1881, *State v. Talbot*, 73 Mo. 347, 359 (bigamy); *N. H.*: 1855, *Coburn v. Odell*, 30 N. H. 540, 555; *N. Y.*: 1830, *People v. Mather*, 4 Wend. 229, 252; 1832, *Bellinger v. People*, 8 id. 595 (witness not compelled to state what she swore to on a prior examination, because it might tend to convict her of perjury); 1840, *Burns v. Kempshall*, 24 id. 360, 4 Hill 468 (usury); 1842, *Cloyes v. Thayer*, 3 Hill 544, 546 (usury); 1845, *People v. Bodine*, 1 Denio 281, 314 (like *Bellinger v. People*, *supra*); 1846, *Bank v. Henry*, 2 id. 155, 157 (usury); 1847, *Henry v. Salina Bank*, 1 N. Y. 63, 66 (usury); 1894, *People v. Forbes*, 143 N. Y. 219, 224, 38 N. E. 303 (murder by poisonous gas); *N. C.*: 1895, *Smith v. Smith*, 116 N. C. 386, 21 S. E. 196 (whether the witness had had connection with the defendant in a divorce proceeding, a single act of the sort not being criminal, held privileged); *S. C.*: 1819, *State v. Edwards*, 2 N. & McC. 13 (challenge to a duel); 1842, *Poole v. Perritt*, 1 Spears 128 (gaming); *Tenn.*: 1860, *Lea v. Henderson*, 1 Coldw. 148, 149 (seduction); *Tex.*: 1851, *Floyd v. State*, 7 Tex. 215 (rule in *U. S. v. Burr* followed); *U. S.*: 1807, *U. S. v. Burr*, U. S. (quoted *supra*); 1876, *Matter of Graham*, 8 Ben. 419 (gambing); *Va.*: 1875, *Cullen v. Com.*, 24 Gratt. 624, 635 (duelling; questions to a surgeon in attendance, held by possibility to involve a criminalizing tendency); *Wyo.*: 1899, *Miskimmins v. Shaver*, 8 Wyo. 392, 58 Pac. 411 (compounding a felony; rule of *U. S. v. Burr* adopted; Knight, J., diss.).

in themselves, *by possibility may furnish a clue* in searching for other facts, and thus lead ultimately to the extra-judicial detection of the criminal fact and its subsequent infra-judicial proof by other testimony. How widely this differs from Chief Justice Marshall's notion may be seen in two marked features. (1) By this interpretation the fact ceases to be a "necessary and essential part of a crime," and becomes merely a colorless fact having no criminal flavor under any circumstances, — as if the witness be asked to disclose his residence, and then in his residence be found a man who discloses the whereabouts of stolen goods. (2) By this interpretation the relation between the main crime and the fact "tending to criminate" is not a logical and inherent one, *i. e.* that of a legal whole to its parts, but a casual and external one, *i. e.* a relation consisting in the probability that the one fact will so stimulate the ingenuity and fit the resources of certain prosecuting officials that they will be enabled thereby to discover the other fact, which otherwise, with the same ingenuity and resources, would have remained undiscovered by them. The thought of making an important rule of law turn upon so casual, ephemeral, and unmeasurable a test as this was never entertained, and could not have been, by so wholesome a thinker as Chief Justice Marshall. It was reserved for latter-day Courts, who treated the privilege with morbid delicacy, and were disposed to expand it into misty attenuation, to resort to this meaning. In *Counselman v. Hitchcock*, and its accordant rulings, wherein the question arose whether a statute prohibiting the subsequent use of compulsory self-incriminating testimony was effectual to nullify the privilege, the main argument against such a statute's efficacy was held to be this same interpretation, *i. e.* that the privilege protected even against facts which might furnish indirectly a clue to crime, and that the statute had not annulled, and could not, this use of such facts. These statutes, and the rulings upon them, are examined in their place.¹ It is necessary here to note that this theory of the scope of the privilege is heterodox and unsound. It had in fact long before been disposed of, without regard to its bearing upon such statutes. The issue was squarely presented in rulings upon a claim of privilege resisting such an interrogatory as this: "Who, other than yourself, is known to you to have participated in a crime?" or "to have been present at its commission?" The following opinion faces the issue firmly:

1829, *McGirt, C. J.*, in *Ward v. State*, 2 Mo. 120, 122: "Was the witness right in refusing to answer the question on the ground that the answer would implicate himself? The record shows that the game of faro is played with cards, by one person as banker against any number of persons, each person playing for himself, without any aid from the others, against the banker; and that there is no common interest among those persons playing against the banker. Thus it appears that each player against the bank is separate and independent of all others. The inquiry made by the grand jury is 'Tell who bet at the game of faro, not naming yourself.' The answer of the witness is (supposing him to be A) that 'if I tell that B, C, and D played, it will be either full or partial evidence that I played.' This is the whole argument of the case, — an argument

¹ *Post*, § 2262.

which I think is totally untenable in law and reason. . . . The question is, 'Who did you see betting at faro except yourself? It is believed that a direct answer in the negative to this would be, 'I saw no one bet at faro.' This answer, I think, all will allow, does not accuse him. But suppose his answer must be, that he saw B bet at faro, can it not be true that though B bet, yet he, the witness, did not? Does the mere fact that one man saw another commit crime, prove in law or reason that he who saw the crime committed was a participator? . . . But in this case it is said, if the witness is bound to tell who bet at the game, without naming himself, then those persons who are named will be examined as to the fact, whether he bet; and if the witness is not compelled to name who did bet, then they will remain unknown to the grand jury, and cannot be examined whether the witness bet. I understand this doctrine to be grounded more on the fear of retaliation than on any sound principle of law. Will the law permit a man to keep offences and offenders a secret, lest the offenders should in their turn give evidence against him? I have looked into the cases cited at the bar, and I am unable to perceive any principle, in any of them, which ought to vary the foregoing opinion."³

The rule as thus expounded is in accord with the earliest precedent recognizing the doctrine of facts "tending to criminate,"⁴ and seems to have been generally accepted.⁴ Whatever may have been the extent of the subsequent misconception in the cases complicated by the statutes already referred to (*post*, § 2282), the tenor of the principle in its original bearings seems plain.

3. Form of Disclosure protected.

§ 2263. **General Principle.** In the interpretation of the principle, nothing turns upon the variations of wording in the constitutional clauses; this much is conceded (*ante*, § 2252). It is therefore immaterial that the witness is protected by one Constitution from "testifying," or by another from "furnishing evidence," or by another from "giving evidence," or by still another from "being a witness." These various phrasings have a common conception, in respect to the form of the protected disclosure. What is that conception?

³ The learned judge might have added that the whole argument opposed by him rested on the assumption that these other persons not only were then unknown but unsuspected, and that they would have remained unsuspected except for the witness' disclosure, — an assumption which is, to say the least, an exaggerated one.

⁴ 1725, Lord Chancellor Macclesfield's Trial, 16 How. St. Tr. 767, 920, 1148, 1150 (the former incumbent of a public office was asked what was the greatest price for which it was illegally sold; this was held a privileged question, as involving by implication his own complicity in such a transaction; the question "whether he knows of any money paid to the Great Seal by any master in chancery" was also held privileged, because the next question might be whether he was himself a master; but the question whether he knew of money being so paid by any other master than himself was held not privileged).

⁵ *Eng.*: 1832, *R. v. Slaney*, 5 C. & P. 213, 214 (libel; a witness was not compelled to answer whether he had written the libel, but was compelled to answer whether he knew who did, and then was allowed to refuse to name the

person, "because it may be himself"); *U. S.*: 1850, *Richman v. State*, 2 Greene Ia. 552 (answer to the question "Do you know of any person, other than yourself, being engaged in gaming, etc.?" held compellable); 1861, *Printz v. Cheeney*, 11 Ia. 469 (answer to the question "what he knew in regard to any person's tearing down and carrying away the property," held not compellable); 1863, *State v. Duffy*, 18 id. 425 (answer to the question "if he knew whether N. D. altered a bull," held compellable; the preceding case distinguished); 1839, *Ward v. State*, 2 Mo. 120, 122 (gaming; quoted *supra*); 1891, *Ex parte Baskett*, 106 id. 602, 603, 17 S. W. 753 (like the preceding case); 1880, *La Fontaine v. Southern Underwriters' Ass'n*, 83 N. C. 132, 141 (supplementary proceedings against an insolvent; *Ward v. State*, Mo., approved). *Contra*: 1891, *Minters v. People*, 139 Ill. 363, 365 (gaming; the answer to a question whether he had seen others playing, held not compellable; but on the erroneous assumption that the witness himself was by his own testimony a participant; none of the cases on this point are cited).

Looking back at the history of the privilege (*ante*, § 2250) and the spirit of the struggle by which its establishment came about, the object of the protection seems plain. It is the employment of legal process to extract from the person's own lips an admission of his guilt, which will thus take the place of other evidence. Such was the process of the ecclesiastical Court, as opposed through two centuries,—the inquisitorial method of putting the accused upon his oath, in order to supply the lack of the required two witnesses. Such was the complaint of Lilburn and his fellow-objectors, that he ought to be convicted by other evidence and not by his own forced confession upon oath. Such, too, is the inference from the policy of the privilege as a defensible institution (*ante*, § 2251); that is to say, it exists mainly in order to stimulate the prosecution to a full and fair search for evidence procurable by their own exertions, and to deter them from a lazy and pernicious reliance upon the accused's confessions. Such, finally, is the practical requirement that follows from the necessity of recognizing other unquestioned methods of procuring evidence; for if the privilege extended beyond these limits, and protected an accused otherwise than in his strictly testimonial status,—if, in other words, it created inviolability not only for his physical control of his own vocal utterances, but also for his physical control in whatever form exercised, then it would be possible for a guilty person to shut himself up in his house, with all the tools and indicia of his crime, and defy the authority of the law to employ in evidence anything that might be obtained by forcibly overthrowing his possession and compelling the surrender of the evidential articles,—a clear *reductio ad absurdum*. In other words, it is not merely compulsion that is the kernel of the privilege, in history and in the constitutional definitions, but *testimonial compulsion*.¹ The one idea is as essential as the other.

The general principle, therefore, in regard to the form of the protected disclosure, may be said to be this: The privilege protects a person from any disclosure sought by legal process against him as a witness.

§ 2264. *Production or Inspection of Documents and Chattels.* (1) It follows that the production of documents or chattels by a person (whether ordinary witness or party-witness) in response to a subpoena, or to a motion to order production, or to other form of *process treating him as a witness* (i. e. as a person appearing before the tribunal to furnish testimony on his moral responsibility for truth-telling), may be refused under the protection of the privilege; and this is universally conceded.¹ For though the disclosure thus

¹ 1894, *Earl, J.*, in *People v. Gardner*, 144 N. Y. 119, 32 N. E. 1003 ("The main purpose of the provision was to prohibit the compulsory oral examination of prisoners before trial, or upon trial, for the purpose of extorting unwilling confessions or declarations implicating them in crime").

¹ To the following cases add those concerning corporations, etc., cited *ante*, § 2259: *Eng.*: 1749, *R. v. Purnell*, 1 W. Bl. 37, 45 (*Lee, C. J.*: "We know no instance wherein this Court has

granted a rule to inspect books in a criminal prosecution nakedly considered"); 1769, *Roe v. Harvey*, 4 Burr. 2484, 2489 (the plaintiff in ejectment would not produce a deed affecting his title, the deed being "in Court, or at least in the plaintiff's power"; Lord Mansfield "observed that in civil causes the Court will force parties to produce evidence which may prove against themselves, or leave the refusal to do it (after proper notice) as a strong presumption to the jury. . . . But in a criminal or penal cause,

sought be not oral in form, and though the documents or chattels be already in existence and not desired to be first written and created by a testimonial of the person in response to the process, still no line can be drawn short of any process which treats him as a witness; because in virtue of it he would be at any time liable to make oath to the identity or authenticity or origin of the articles produced.

(2) It follows, on the other hand, that documents or chattels obtained from the person's control *without the use of process against him as a witness* are not in the scope of the privilege, and may be used evidentially; for obviously the proof of their identity, or authenticity, or other circumstances affecting them, may and must be made by the testimony of other persons, without any employment of the accused's oath or testimonial responsibility:

1717, *Francia's Trial*, 15 How. St. Tr. 897, 966; *Pratt, J.*: "I never knew in my life but what was done in this case was ordinarily done in the like case, and ought to be done; and you ought not to go on with invectives to the jury, complaining that his papers are seized and then that those papers are turned against him. When a correspondence is carried on by letters, ought they not to be seized? And if they appear to be treasonable, ought they not to be kept and made use of against him?; *Counsel for defendant*: "I have not said anything to impeach the legality of what was done. All I said, and do say, is that the evidence is from the papers found in his own custody."

1858, *Bell, J.*, in *State v. Flynn*, 36 N. H. 64: "Its ground [of the objection] is, rather, that information obtained by means of a search-warrant, in a case not authorized by the Constitution, is not competent to be given in evidence, because it has been obtained by compulsion from the defendant himself, in violation of that clause of the Constitution which provides that no person shall be compelled to furnish evidence against himself. . . . It seems to us an unfounded idea that the discoveries made by the officers and their assistants, in the execution of process, whether legal or illegal, or where they intrude upon a man's privacy without any legal warrant, are of the nature of admissions made under duress, or that it is evidence furnished by the party himself upon compulsion. The information thus acquired is not the admission of the party, nor evidence given by him, in any sense. The party has in his power certain mute witnesses, as they may be called, which he endeavors to keep out of sight, so that they may not disclose the facts which he is desirous to conceal. By force or fraud, access is gained to them, and they are examined, to see what evidence they bear. That evidence is theirs, not their owner's. . . . It does not seem to us possible to establish a sound distinction between that case, and the case of the counterfeit bills, the forger's implements, the false keys, or the like, which have been obtained by similar means. The evidence is in no sense his."

This distinction has received repeated illustration and almost universal acceptance, in a variety of applications to documents and chattels obtained by search or seizure independent of testimonial process.²

the defendant is never forced to produce any evidence, though he should hold it in his hands in court"; *U. S.*: 1896, *Lamson v. Boyden*, 160 Ill. 613, 43 N. E. 781 (privilege applied to documents called for by demand in court); 1890, *Logan v. R. Co.*, 132 Pa. 403, 406, 409, 19 Atl. 137 (discovery of papers refused); 1892, *Boyle v. Smithman*, 146 Pa. 255, 257, 274, 23 Atl. 397 (defendant not compellable by subpoena or Court order to produce his books of account); 1898, *Ex parte Wilson*, 39 Tex. Cr. 630, 47 S. W. 996 (privilege applied to the production of docu-

ments); 1885, *Boyd v. U. S.*, 116 U. S. 616, 6 Sup. 524 (cited *infra*); 1896, *U. S. v. Lead Co.*, 75 Fed. 94; 1903, *Re Kanter*, 117 Fed. 356 (privilege applied to documentary proof in bankruptcy proceedings); 1901, *State v. Squires*, Tyler Vt. 147 (compulsory process ordering the delivery of a client's notes in his attorney's hands, the notes being alleged to be forged, held improper).

² 1887, *Chastang v. State*, 63 Ala. 29, 3 So. 304 (defendant was arrested under a warrant, but resisted; on disarming and searching him, a pistol was found; admitted, distinguishing

It would apparently never have suffered any judicial doubt,³ but for a modern opinion, in which (in spite of a protest by a minority of the Court) the seeds of a dangerous heresy were sown. In *Boyd v. United States*,⁴ an order for

U. S. v. Boyd, *infra*, since "the evidence is obtained without requiring the defendant to do any affirmative act"; 1893, *Shields v. State*, 104 id. 35, 39, 16 So. 38 (similar); 1896, *Starchman v. State*, 63 Ark. 538, 36 S. W. 240 (tools found by officers searching defendant's house, admitted); 1896, *State v. Griawohl*, 67 Conn. 290, 34 Atl. 1047 (papers seized in the defendant's house during his absence, held not privileged); 1893, *Franklin v. State*, 69 Ga. 36 (shoes and socks, taken by officers from the defendant's feet without objection by him, held admissible); 1885, *Drake v. State*, 74 id. 413 (clothing taken off the defendant, held properly admitted; the privilege applies "when a person is sworn as a witness"); 1898, *Woolfolk v. State*, 81 id. 551, 552, 8 S. E. 724 (clothing removed from defendant by the coroner's order at an inquest, admitted; "the officer has a right to do so," and the discoveries are admissible); 1894, *Rusher v. State*, 94 id. 363, 367, 21 S. E. 593 (money discovered by compelling the accused, without unlawful violence, to point it out, held admissible); 1895, *Hinkle v. State*, *ib.* 595, 21 S. E. 595 (evidence obtained from an accused by compulsion out of court is not within the privilege, except where, in violation of the confession-rule, "a substantive preexisting physical fact bearing directly on the fruits of the crime has been discovered by means of exciting hope or fear"; here the discovery of stolen money); 1896, *Myers v. State*, 97 id. 76, 23 S. E. 252 (the taking of a pair of shoes from the defendant by an officer and comparing them with certain tracks, held not a violation of the privilege); 1898, *Williams v. State*, 100 id. 511, 28 S. E. 624 (lottery-tickets and money obtained by a search of the defendant's house and person, by officers not having a warrant, held admissible; *Boyd v. U. S.*, *infra*, expressly distinguished, and *Gindrat v. People*, Ill., followed); 1899, *Evans v. State*, 106 id. 519, 32 S. E. 659 (a police-officer called to quell a disturbance found the defendant, and compelled him to give up his pistol; excluded, on a prosecution for carrying a concealed weapon; the singular distinction is taken that such evidence is inadmissible if the person was not at the time in legal custody, but otherwise if he was); 1899, *Dosier v. State*, 107 id. 708, 33 S. E. 418 (carrying concealed weapon; that the sheriff searched the accused without meeting resistance, and found the pistol, admitted; *Evans v. State* distinguished, since there the defendant was compelled to hand over the pistol); 1891, *Gindrat v. People*, 138 Ill. 103, 105, 27 N. E. 1085 (larceny; articles obtained by illegal search of defendant's rooms without a warrant, admitted; quoted *infra*); 1892, *Siebert v. People*, 143 id. 571, 583, 32 N. E. 431 (similar; here, letters); 1894, *Trask v. People*, 151 id. 523, 38 N. E. 248 (similar; here, papers); 1903, *State v. Stoffels*, 89 Minn. 205, 94 N. W. 675 (introduction of liquors illegally kept, possession being obtained by a search-warrant, held not a violation of the privilege); 1895, *State v. Pomeroy*,

130 Mo. 489, 497, 32 S. W. 1002 (lottery tickets seized by officers, without a search-warrant, from defendant's desk and on his person, held not privileged); 1902, *Russell v. State*, — Nebr. —, 92 N. W. 751 (shoes of the defendant, found in the county jail and taken therefrom, admitted); 1858, *State v. Flynn*, 36 N. H. 64 (liquor found on defendant's premises by officers searching under a warrant, admitted; quoted *supra*); 1903, *People v. Adams*, 176 N. Y. 351, 68 N. E. 636 (policy gambling; papers seized in the defendant's office under a search-warrant, and used partly as standards of handwriting and partly as papers forming part of the crime, admitted; *Boyd v. U. S.*, *infra*, distinguished); 1899, *State v. Mallett*, 125 N. C. 718, 34 S. E. 651 (books already seized on attachment, admitted); 1893, *State v. Atkinson*, 40 S. C. 363, 372, 18 S. E. 1021 (papers taken from defendant's house, in defendant's absence and without communication to him, held not privileged); 1893, *State v. Nordstrum*, 7 Wash. 506, 509, 35 Pac. 382 (boots, socks, cap, memorandum-book, obtained by search of the person, held not privileged); 1889, *State v. Baker*, 33 W. Va. 319, 331, 10 S. E. 639 (pantalons taken off by accused, while in jail, at the sheriff's request and handed to him, held not privileged); 1902, *State v. Edwards*, 51 id. 220, 41 S. E. 429 (larceny by trick, in using worthless State bank-notes; the notes, seized on the defendant's person by the officer arresting, held admissible, quoted *infra*). Distinguish the following: 1889, *R. v. Luce*, 6 Haw. 684 (under a statute authorizing a search-warrant to discover "articles necessary to be produced as evidence or otherwise," held that the statute did not apply to books of account of the accused; the constitutional question not decided).

Distinguish the question whether an officer's entry upon a party's premises or seizure of a chattel, for preservation as evidence, under a warrant, is a justifiable trespass: 1895, *Newberry v. Carpenter*, 107 Mich. 567, 65 N. W. 530 (impounding an exploded boiler pending trial of the liability for the explosion).

³ Except that the fallacy was anticipated, by some years, in an utterance of Mr. Justice Cooley in his *Constitutional Limitations*, c. X.

⁴ 1885, *Boyd v. U. S.*, 116 U. S. 616, 618, 6 Sup. 437, 524 (information for evasion of customs dues by fraudulent invoicing; on the order of the trial Court, the invoice was compelled to be produced by the defendant for inspection in court, under St. June 22, 1874, § 5 (quoted *ante*, § 2219), requiring production on motion, and taking the facts to be confessed as alleged, in case of failure to produce; the order was held unconstitutional, under the Fifth and also the Fourth Amendments; the present case was held to be in effect a criminal proceeding, and the above statute apparently held void so far as its provisions are literally applicable to "all suits and proceedings other than criminal"; Waite, C. J., and Miller, J., diss., solely to the extent

production of documents involving self-criminating matter was properly held to be within the privilege, on the principle of par. (1), *supra*; but the opinion of the majority, speaking *obiter*, declared the privilege applicable also to documents obtained by officers' search or seizure, legal or illegal, irrespective of testimonial process. Incidentally, it may be noted that the Constitution (in the Fourth Amendment) does not by any means prohibit searches and seizures as such; but only "unreasonable" ones. Historically (as is well known) it was the illegal practices of "general warrants" (defeated by Wilkes' great struggle of 1763-65 and by Lord Camden's vindication⁶) and of "writs of assistance" (eloquently opposed in 1761 by Otis⁷), against which the various Bills of Rights and the Federal Fourth Amendment were intended to provide protection.⁸ The majority's opinion in *Boyd v. United States* therefore mis-treats the Fourth Amendment, in applying its prohibition to a returnable writ of seizure describing specific documents in the possession of a specific person. But, apart from this error, the radical fallacy of the opinion lies in its attempt to wrest the Fourth Amendment to the aid of the Fifth. The "intimate relation between them," which the opinion predicates, must be wholly denied. In the first place, the two doctrines had had a totally different political and legal history.⁹ Furthermore, if the privilege against self-crimination had been regarded as violated by seizures of papers, it is singular that this principle did not suffice, without anything more, to defeat the practice of general warrants in Wilkes' controversy. And again, if it had any such bearing, it would have protected equally against all warrants, whether general or specific, lawful or unlawful. Nor can we suppose that the framers of the Constitutions and Bills of Rights, with Wilkes' pamphlets and Otis' speeches fresh in their memories, could have believed that they were merely duplicating one principle in the two clauses of the same document. In short, the principles of the Fourth and the Fifth Amendments are complementary to each other; what the one covers, the other leaves untouched. In the second place, the only bearing which the Fourth Amendment can be conceived to have is that, in case of a seizure under a warrant violating that rule, the seized articles come before the court as illegally obtained. But this circumstance of itself cannot stand in the way of their use as evidence. If there was ever any rule well settled (until the opinion in *Boyd v. United States*), it was this, that an illegality in the mode of obtaining evidence cannot exclude it, but must be redressed or punished or resisted by appropriate pro-

of holding that the Court's order was not for a search nor a seizure and therefore not within the prohibition of the Fourth Amendment). It is obvious that the decision of this case, apart from the opinion, was correct, under par. (1), *supra*.

⁶ 1763, *Wilkes' Case*, 19 How. St. Tr. 989, 1361; 1765, *Leach v. Money*, *ib.* 1001, 1027, 3 Burr. 1692, 1742; 1765, *Entick v. Carrington*, 19 How. St. Tr. 1029, 1063, 2 Wils. 275; *Cooley*, *Constitutional Limitations*, 6th ed., 364; *May*, *Constitutional Law*, c. 11; *Campbell*, *Lives of the Chancellors*, VI, 367.

⁷ 1761, *Paxton's Case*, *Quincy's Rep.* 51; *Cooley*, *Constitutional Limitations*, 6th ed., 367.

⁸ This sufficiently appears from a comparison e. g. of the Bill of Rights of Virginia, art. 10, in 1776, and of the Declaration of Rights of Massachusetts, art. 14, in 1780, with the Fourth Amendment to the Federal Constitution, a decade later.

⁹ That of the Fifth has been examined in detail (*ante*, § 2250). That of the Fourth began a hundred years later, as a direct sequence of the Wilkes affair.

ceedings otherwise taken.⁹ There is, therefore, no respect whatever in which the principle of the Fourth Amendment can be properly invoked in applying the principle of the Fifth Amendment. For these reasons, judicial opinion elsewhere, since *Boyd v. United States* was decided, has generally refused to accept its pronouncement:

1901, *Baker, J., in Gindrat v. People*, 133 Ill. 103, 109, 111, 27 N. E. 1085: "That which was condemned in *Boyd v. U. S.* [cited *supra*] was the enforced production by the parties to the criminal case of evidence against themselves, through and by means of an order made by the Court and a process under the seal of the Court, issued by virtue thereof. . . . The unconstitutional and erroneous order, process, and procedure of the trial Court compelled the claimants to produce evidence against themselves, and such order, process, and procedure were also held to be tantamount to an unreasonable search and seizure; while here, and in the other cases cited, the question of illegality was raised collaterally, and the Courts exercised no compulsion whatever to procure evidence from the defendants, and neither made orders nor issued process authorizing or purporting to authorize a search of premises or a seizure of property or papers; but simply admitted evidence which was offered, without stopping to inquire whether possession of it had been obtained lawfully or unlawfully."

1902, *Paffenbarger, J., in State v. Edwards*, 51 W. Va. 220, 41 S. E. 429 (admitting worthless bank-notes used in cheating, and seized on the defendant's person): "There is such a thing as unreasonable search, which the law will not permit. But where a man stands charged with crime, and an instrument or device is found upon his person or in his possession which was a part of the means by which he accomplished the crime, those instruments, devices, or tokens are legitimate evidence for the State, and may be taken from him and used for that purpose. If it were otherwise, the pistol with which a murderer shoots down his victim, or the dagger with which he stabs him, inseparably connected with the *corpus delicti*, and, therefore, competent and legitimate evidence, could not be taken from the pocket of the murderer and used as evidence against him, for the reason that they belong to him and are found upon his person. It is well settled that a person in custody on a criminal charge may be subjected to a personal search, and examination against his will, in order to discover upon him evidences of his criminality. . . . What are these old papers except the instruments, as effectually used in closing the eyes of Dennison to the larceny of his money which the defendant was perpetrating under the deception practiced by their use, as a burglar uses his jimmy to break open a safe?"¹⁰

Nevertheless, the *obiter* expressions of opinion by the majority in *Boyd v. United States* have led a few other Courts, since the publication of that case, to adopt its erroneous view and to exclude documents obtained by seizure.¹¹

⁹ This principle has been already examined (*ante*, § 2183).

¹⁰ The cases in accord have been placed *supra*, note 2.

¹¹ 1902, *State v. Height*, 117 Ia. 630, 91 N. W. 935 (*Boyd v. U. S.* approved, *obiter*; cited *post*, § 2265); 1903, *State v. Sheridan*, — *Id.* —, 96 N. W. 730 (goods unlawfully taken, on a search-warrant, from the defendant's premises, for the sole purpose of obtaining evidence against the defendant, excluded; following *State v. Height*); 1902, *Blum v. State*, 94 Md. 375, 51 Atl. 26 (false pretences; account-books obtained from a constable who had taken possession of defendant's premises under an attachment issued for a receiver, held inadmissible; following

Boyd v. U. S.); 1894, *People v. Spiegel*, 143 N. Y. 107, 38 N. E. 284, *semble* (*Boyd v. U. S.* approved); 1897, *Hoover v. M'Chesney*, 51 Fed. 472 (a seizure by the post officials of mail of a person supposed to be infringing the law, and its return to the sender or the dead-letter office, held a violation of the privilege); 1901, *State v. Slamon*, 73 Vt. 212, 50 Atl. 1097 (following *Boyd v. U. S.* on both grounds; a letter improperly taken from defendant under a search-warrant for stolen goods, held inadmissible to impeach the writer, a witness for the defendant; unsound, because the privilege certainly does not apply to documents written by other persons).

Two apparent exceptions to the first branch of the rule (*supra*, par. (1)) may now be noted.

(a) Where a document, even though possessed or made or inscribed by the claimant of the privilege, is an *official document*, it is not protected by the privilege, because it is made or kept by him as an official holding a public trust and is therefore liable to inspection at any time, either by the proper authorities or (as in most cases) also by the public at large or by citizens interested. His assumption of the office involves an implied undertaking to yield the documents of the office to all inspection duly authorized. The judicial demand for its disclosure is therefore made against him as an official, and not as an accused person; and his status as the latter cannot annul or override his status as the former. This distinction seems generally accepted.¹²

(b) Where a document *within the privilege is withheld*, under claim of privilege, *no inference of its contents* can be made (*post*, § 2272). But just as an inference may be drawn, in spite of that principle, from the accused's failure to summon witnesses who might naturally have been able to clear him if he were innocent, so a similar inference may be drawn from his failure to produce documents which might have exonerated him if innocent.¹³

§ 2265. **Bodily Exhibition.** If an accused person were to refuse to be removed from the jail to the court-room for trial, claiming that he was privileged not to expose his features to the witnesses for identification, it is not difficult to conceive the judicial reception which would be given to such a claim. And yet no less a claim is the logical consequence of the argument that has been frequently offered and occasionally sanctioned in applying the privilege to proof of the bodily features of the accused. The limit of the privilege is a plain one. From the general principle (*ante*, § 2263) it results that an inspection of the bodily features by the tribunal or by witnesses cannot violate the privilege, because it does not call upon the accused as a witness, *i. e.* upon his testimonial responsibility. That he may in such cases be required sometimes to exercise muscular action — as when he is required to take off his shoes or roll up his sleeve — is immaterial, — unless all bodily action were synonymous with testimonial utterance; for, as already observed (*ante*, § 2263), not compulsion alone is the component idea of the privilege, but testimonial compulsion. What is obtained from the accused by such action is not testimony, about his body, but his body itself.¹ Unless some attempt is made to secure a communication, written or oral, upon which reliance is to be placed as involving his consciousness of the facts and the operations of his mind in expressing it, the demand made upon him is not a testimonial one. Both principle and practical good sense forbid any larger interpretation of the privilege in this application; and healthy judicial opinion has frequently pointed this out with force:

¹² The cases have been placed, for convenience, *ante*, § 2259.

¹³ This distinction is considered in dealing with the general principle applicable to inferences (*post*, § 2273).

¹ The theory of such evidence ("real" evidence) has elsewhere been examined (*ante*, § 1150).

1870, *Redman, J.*, in *State v. Graham*, 74 N. C. 648 (admitting evidence of a compulsory placing of the accused's foot in a track): "If an officer who arrests one charged with an offence had no right to make the prisoner show the contents of his pocket, how could the broken knife or the fragment of paper corresponding to the wadding [alluding to cases cited] have been found? If when a prisoner is arrested for passing counterfeit money, the contents of his pocket are sacred from search, how can it ever appear whether or not he has on his person a large number of similar bills, which if proved is certainly evidence of the scienter? If an officer sees a pistol projecting from the pocket of a prisoner arrested for a fresh murder, may he not take out the pistol against the prisoner's consent to see whether it appears to have been recently discharged? Suppose it be a question as to the identity of the prisoner, whether a person whom a witness says he saw commit a murder, and the prisoner appears in Court with a veil or mask over his face; may not the Court order its removal in order that the witness may say whether or not he was the person whom he saw commit the crime? Would the robber whose face was marked with the wards of a key have been allowed to conceal his identity by wearing a mask during the trial? We conceive that these questions admit of but one answer, and that is one consistent with the general practice."

1892, *Cox, J.*, in *U. S. v. Cross*, 20 D. C. 365, 382 (admitting a measurement of the defendant made in the Marshal's office): "It could not be contended that the knowledge of the size or height of a man acquired in any other way, for instance by a tailor, could not be used when at the time it was not taken for the purpose of being used as testimony, and it seems to us that a record taken as this was, for a lawful purpose and under the rules of the office, might be made use of afterwards. It does not seem to us that it is compelling the defendant to give evidence against himself, although some cases that have been cited to us go very far in that direction. There was one case holding that it was error for the prosecuting officer to compel the prisoner in court to put his foot into a vessel filled with mud in order to measure it and identify it. That is well enough. It was held in another case that where the officer compelled the defendant to put his foot in certain tracks that were discovered, in order to identify him, that was wrong, as it was compelling him to give evidence against himself, and evidence of that kind, so secured, could not be used. We think that is going very far; it is rather too fine. What would be the consequence if such evidence should be entirely excluded? You could not compel a person after his arrest to empty his pockets and disclose a weapon, when the most vital evidence on the part of the Government, in a homicide case, is the possession of the deadly weapon. Could you not compel him to open his pocket-book and exhibit papers that might be conclusive in the case of a forgery, or anything of that sort? We think that officers having a prisoner in custody have a right to acquire information about him, even by force, and that, for example, when his photograph is taken or his measurement taken, it is simply the act of the officers and is not compelling him to give evidence against himself."

Of the cases which thus fall within the privilege, those of requiring an utterance of voice for identification, or an inscription of handwriting to be used, or of a pointing out of places or articles (the act of pointing out being offered as an admission), are perhaps safely within the line of protection. The use of the accused's utterances for forming a witness' opinion as to sanity is a dubitable case only when compulsion has been resorted to.² The

² 1890, *People v. Kemmler*, 119 N. Y. 580, 24 N. E. 9 (testimony of physicians, sent for the purpose, and based on an observation of the accused's mental condition while in jail, held admissible); 1901, *People v. Molineux*, 168 id. 264, 61 N. E. 286 (specimens written by a defendant, when under suspicion of a crime, but

voluntarily, at the request of the prosecuting attorney, held admissible against him); 1886, *Johnson v. Com.*, 115 Pa. 369, 373, 395, 9 Atl. 78 (defendant called upon by prosecution to repeat certain words to enable his voice to be identified; privilege doubted, but held waived by assent); 1886, *Sprouse v. Com.*, 81 Va. 374,

remaining instances are for the most part clearly without the privilege; although Courts vary much in the strictness of their interpretation.⁵ It is not

276 (defendant's act of writing his name at the judge's request, without threat or compulsion, held not to violate the privilege); 1902, *State v. Eastwood*, 73 Vt. 205, 50 Atl. 1077 (testimony of the superintendent of an insane asylum to the defendant's mental condition, based on the defendant's conduct while there committed after arrest, held admissible).

⁵ Where in the following cases the examination was voluntarily submitted to, the ruling is not decisive, for the privilege may there be deemed to have been waived; compare the cases about garments and weapons, cited *ante*, § 2364: *England*; 1694, *Vaughan's Trial*, 18 How. St. Tr. 517 (Witness, identifying a defendant: "If it be the same gentleman, his hair is reddish." L. C. J. Holt: "Pull off his peruke," which was done; *Powis, B.*: "Let somebody look on it more particularly"; then an officer took a candle and looked on his head, but it was shaved so close the color could not be discerned); 1775, *Maharajah Nandocomar's Trial*, 20 Id. 923 (physicians were ordered to examine the defendant to see whether he was in truth unable by illness, as alleged, to attend the trial; 933, 965, the same measure, to see whether a witness was in truth too ill to come and give testimony); 1877, *Agnew v. Jobson*, 13 Cox Cr. 625 (a magistrate has no right to order the medical examination of defendant, here of a woman charged with concealment of birth); *Canada*: St. 1890, c. 54 (any person in lawful custody under charge or conviction of an indictable offence may be subjected to the identifying measurements known as the Bertillon Signaletic System); *United States: Ala.*: 1891, *Spicer v. State*, 69 Ala. 159, 163 (child-murder; facts disclosed by a corporal examination of defendant, submitted to by her on inducements, admitted); 1895, *Cooper v. State*, 86 Id. 610, 6 So. 110 (held improper to force the accused to make foot-tracks for comparison); 1892, *Williams v. State*, 93 Id. 82, 13 So. 333 (requiring the defendant to "stand facing the jury, that they might determine her age from her appearance," held improper); 1902, *Davis v. State*, 131 Id. 10, 31 So. 569 (defendant's refusal to let his shoes be taken for comparison with tracks, excluded); *Cal.*: 1889, *People v. Goldenson*, 76 Cal. 328, 247, 19 Pac. 161 (a trial Court's order to the defendant to stand up for identification, held proper); 1899, *People v. Oliveria*, 127 Id. 37, 49 Pac. 772 (compelling defendant to stand up for comparison of size, allowable); *D. C.*: 1892, *U. S. v. Crows*, 20 D. C. 365 (quoted *supra*); *Ga.*: 1890, *Day v. State*, 63 Ga. 669 (testimony that a witness forcibly placed defendant's foot in certain tracks, held inadmissible); 1891, *Blackwell v. State*, 67 Id. 76, 78 (order of the Court to a defendant, to stand up so that a witness could identify him as lacking the right foot, held improper); 1892, *Gordon v. State*, 68 Id. 814 (after the defendant had voluntarily exhibited a scar, an order to allow a medical witness to examine it was held proper); *Ind.*: 1890, *O'Brien v. State*, 123 Ind. 35, 42, 25 N. E. 137 (testimony based on an

examination of the defendant, in jail, against his will, by officers, to discover scars of identification, held proper); *Id.*: 1897, *State v. Reasley*, 100 Id. 231, 60 N. W. 431 (compelling the defendant to stand up in court for identification, allowed); 1902, *State v. Height*, 117 Id. 620, 91 N. W. 985 (rape; testimony of physicians to defendant's diseased condition, based on an examination of his parts while in jail, after he had refused and been directed to submit, held inadmissible); *Id.*: 1872, *State v. Prudhomme*, 25 La. An. 522, 523 (compelling an accused "to place his feet where they could be seen by the witness and the jury" for identification, allowable); *Mich.*: 1893, *People v. Mead*, 30 Mich. 229, 231, 15 N. W. 95 (defendant privileged not to try on or measure a shoe in court for identification); 1899, *People v. Glover*, 71 Id. 303, 307, 38 N. W. 674 (testimony gained by a medical examination in jail, voluntarily submitted to, received); *Mo.*: 1900, *State v. Jones*, 153 Mo. 457, 35 S. W. 80 (examination held not compulsory on the facts); 1900, *State v. Testatton*, 159 Id. 354, 60 M. W. 743 (testimony of physicians as to the condition of a wound on defendant's head, shaved by compulsion, admissible); *N. Y.*: 1873, *People v. Mc'oy*, 45 How. Pr. 216 (murder of defendant's bastard infant; testimony of physicians, as to her recent delivery, based on an examination of her in jail, under the coroner's order and against her objection, held inadmissible); 1894, *People v. Gardner*, 144 N. Y. 119, 38 N. E. 1008 (defendant held compellable to stand up in court for identification; good opinion by Earl, J.); 1902, *People v. Truck*, 170 Id. 303, 63 N. E. 261 (examination by experts, in jail, to ascertain sanity and testify thereto, held not a breach of the privilege); 1903, *People v. Van Wormer*, 175 Id. 186, 67 N. E. 299 (taking the defendants' shoes from them and placing the shoes in foot-marks, held not a violation of the privilege); *N. C.*: 1858, *State v. Jacobs*, 5 Jones 239 (accused held not compellable to exhibit himself to the jury as being of colored race within a prohibited degree); 1872, *State v. Johnson*, 67 N. C. 55, 58 (*State v. Jacobs* approved; here it was held proper to allow witnesses "to point at him as being the identical person of whom they were speaking"); 1874, *State v. Garrett*, 71 Id. 85, 87 (the defendant had been ordered by the coroner to unwrap her hand, and show it to a medical witness, who testified that there was no burn on it; held allowable, on the theory (*ante*, § 2183) that testimony based on an act in itself inadmissible was still admissible; *State v. Jacobs* distinguished); 1876, *State v. Graham*, 74 Id. 647 (evidence obtained by compelling an accused, out of court, to put his foot in a track for identification; held admissible; quoted *supra*); *S. C.*: 1893, *State v. Atkinson*, 40 S. C. 363, 367, 373, 18 S. E. 1021 (compelling the accused to put his foot in tracks; undecided); *Tenn.*: 1875, *Stokes v. State*, 5 Baxt. 619 (ordering the accused to put his foot in a pan of mud, for identification, before the jury, held improper);

always noted that the compulsion, to come within the present principle, must be by process of law, or its equivalent, for the purpose of obtaining testimony,—a distinction to be further examined (*post*, § 2266). The tendency to-day, almost everywhere, is against the loose extension of the privilege,—by way of just reaction against an inclination at one time exhibited to the contrary. That the doubt is entirely one of the present generation shows how alien it is to the orthodox spirit of the privilege. It will one day be incredible that judges could have descended as far as they sometimes have here gone on the road to logical absurdity.

§ 2266. *Confessions and the Self-Crimination Privilege, distinguished.* The rule excluding untrustworthy confessions and the rule giving a privilege against compulsory testimonial self-crimination are sometimes not kept plainly apart,—and naturally enough, for not only have they the common feature of an acknowledgment of guilty facts, but also, by the test frequently employed (*ante*, § 826) the test of voluntariness for confessions becomes almost identical with the idea of compulsion as forbidden by the privilege. Judicial expressions which blend the two into one principle might therefore sometimes be expected.¹

But this confusion is radically erroneous, both in history, principle, and practice. That the history of the two principles is wide apart, differing by one hundred years in origin, and derived through separate lines of precedents, appears sufficiently from a survey of the two histories as already set forth (*ante*, §§ 818, 2250). If the privilege, fully established by 1680, had sufficed for both classes of cases, there would have been no need in 1780 for creating the distinct rule about confessions. So far as concerns principle, the two doctrines have not the same boundaries; i. e. the privilege covers only statements made in court under process as a witness; the confession-rule covers statements made out of court, but may also, overlapping, cover statements made in court. Finally, in regard to practical effects, the conceded differences become material: (a) The confession-rule is broader, because it may exclude statements which are obtained without compulsion; (b) Where the privilege is waived or not claimed, the confession-rule may still operate to exclude; (c) Where the privilege is nullified by statute (as it may be in

1885, *Lipe v. State*, 15 Lea 125, 128 (examination of the defendant's feet under order of the Court to see if they fitted tracks, *semble*, held compellable; to rebut testimony as to peculiarities of the defendant's feet, the State was allowed to have a physician examine them under orders of the Court); *Tex.*: 1879, *Walker v. State*, 7 Tex. App. 245, 264 (testimony admitted as to tracks made by the defendant, apparently without compulsion, in the magistrate's office before trial); 1902, *Benson v. State*, — Tex. Cr. —, 69 S. W. 165 (compelling the defendant to stand up in court for identification, and, *semble*, to put on his hat, held proper); *Wash.*: 1893, *State v. Nordstrom*, 7 Wash. 506, 510, 35 Pac. 382 (measurement of defendant's feet, allowed, to contradict his testimony that he could not wear certain boots; *semble*, that

exhibition of parts of the body usually covered is not compellable); *Wis.*: 1903, *Thornton v. State*, 117 Wis. 388, 93 N. W. 1107 (requiring the defendant to give up his shoe and then comparing it with tracks, held not a violation of privilege).

¹ For example, the following, used of a confession: "I have always felt that we ought to watch jealously any encroachment on the principle that no man is bound to criminate himself, and that we ought to see that no one is induced either by a threat or a promise to say anything of a criminatory character against himself" (1867, *Kelly, C. B.*, in *R. v. Jarvia*, 10 Cox Cr. 576); "[The constitutional privilege against self-crimination] was but a crystallization of the doctrine as to confessions" (1897, *White, J.*, in *Bram v. U. S.*, 168 U. S. 532, 18 Sup. 182).

England, and has been by the English Bankruptcy Act), the confession-rule may still operate; (d) Where the testimony, though given under oath, does not violate the confession-rule, it may still involve a violation of the privilege; (e) The privilege applies to witnesses as such, in civil and in criminal cases, but the confession-rule is concerned only with party-defendants in criminal cases; (f) A party-defendant is protected by the confession-rule against the use of his own statements only; but the privilege is applicable also to witnesses during his trial, and it is by some maintained that he may object to the use against him of testimony extracted by a violation of the witness' privilege.² No doubt other situations may be conceived in which the two principles operate with entire independence. Nothing but subversion of principle and confusion of practical rules can result from an attempt to predicate an analogy and relationship. The sole relationship is found in the general spirit of protection and caution which our legal system shows towards an accused. But this spirit is equally responsible for the rule about reasonable doubt, the rule about *corpus delicti*, the rule about lists of witnesses, and several others peculiar to criminal cases; and there is no more reason for linking the privilege with the one than with the others,—there is, indeed, less reason, since the privilege is intended as well for witnesses as for parties defendant.³

4. Mode and Effect of Claiming the Privilege.

§ 2268. *Criminating Questions not forbidden; Improper Cross-Examination to Character, distinguished.* (1) The privilege is merely an option of refusal, not a prohibition of inquiry. Hence, when an *ordinary witness* is on the stand, and a criminating fact, relevant to the issue, is desired to be proved through him, the question may be asked, and it is for him then to say whether he will exercise the option given him by the law. It cannot be known beforehand whether he will refuse. Besides, to prevent the question would be to convert the option into a prohibition. This principle would seem incapable of dispute.¹ But it sometimes is involved in confusion, because the fact inquired about in the question may of course be irrelevant or otherwise forbidden by some rule of law, and thus a ruling upon the admissibility of the fact may sometimes tend to be confused with a ruling upon the compulsion of the answer. For example, in the impeachment of a witness by cross-examination to character, he may be asked whether he stole from his last employer, and this fact might for that purpose be held inadmissible (*ante*, §§ 982-987), though, even if it were admissible to be asked, it might still be

² These contrasts between the two may be seen illustrated in the precedents concerning the application of the confession-rule to testimony on oath (*ante*, §§ 848-850).

³ For opinions making clear the distinction between the privilege-rule and the confession-rule, see those of Campbell, C. J., in *R. v. Scott*, 1 Deara. & B. 47 (1836), Selden, J., in *Hendrickson v. People*, 10 N. Y. 33 (1854), and in *People v. McMahon*, 15 id. 386 (1867).

¹ Yet a great judge has here used language likely to mislead: 1872, Cooley, J., in *Gale v. People*, 26 Mich. 157, 160 (commenting on the trial Court's allowance of a question, while telling the witness that he had the option to decline to answer: "When the judge sustained the questions, he decided in effect that they were proper to be put and answered"; no authorities cited).

privileged from answer. The confounding of these two things has occurred most often in dealing with the waiver of the privilege (*post*, § 2277). Here it is enough to note that the privilege always presupposes that the fact inquired about is a proper one and that its propriety has been assumed or otherwise determined:

1878, *James, L. J.*, in *Allhusen v. Labouchere*, L. R. 3 Q. B. D. 654, 660: "Nobody was ever allowed to object to a relevant question because that question tended to criminate himself. He might object to answer it, but it was never a ground of demurrer to an interrogatory or a ground for striking it out, that the answer might involve him in a crime."

1863, *Porter, J.*, in *Great Western Turnpikes Co. v. Loomis*, 32 N. Y. 127, 138: "Strictly speaking, there is no case in which a witness is at liberty to object to a question. That is the office of the party or of the Court. The right of the witness is to decline an answer, if the Court sustains his claim of privilege. When the question is relevant, it cannot be excluded on the objection of the party, and the witness is free to assert or to waive his privilege. But when the question is irrelevant, the objection properly proceeds from the party, and the witness has no concern in the matter unless it be overruled by the judge."

Accordingly, it is universally conceded that the question may be put to the witness *on the stand*; ² and the same rule applies to *interrogatories* in a bill of discovery, both in ordinary chancery practice and under modern statutory interrogatories to the adverse party. ³ Whether the refusal, in case of written interrogatories of discovery, should be by plea or by demurrer or by answer has been a much mooted question, depending on the orthodox technicalities of pleading in chancery. ⁴

² 1881, *Power v. Ellis*, 20 N. Br. 40, 6 Can. Sup. 1, 7, 8 (Taschereau, J., *diss.*); 1845, *Short v. State*, 4 Harringt. 568; 1835, *Macarty v. Bond*, 9 La. 351, 356; 1830, *Fries v. Brugler*, 12 N. J. L. 79; 1828, *Southard v. Hexford*, 6 Cow. 254, 259; 1838, *People v. Abbot*, 19 Wend. 192, 195; 1898, *State v. Butler*, 47 S. C. 23, 26, 24 S. E. 291.

³ *Eng.*: 1809, *Paxton v. Douglas*, 16 Ves. Jr. 239 (L. C. Eldon: "The objection is, not to the question, but to answering it"); 1821, *Ex parte Burlington*, 1 Gl. & Jam. 30, Leach, V. C.; 1855, *Quilara v. London Dock Co.*, 10 Exch. 699; 1856, *Chester v. Wortley*, 17 C. B. 410; 1862, *Bartlett v. Lewis*, 12 C. B. n. s. 249, 259 (Erie, C. J., and Willes, J., took the ground that the situation was analogous to that of putting a question on the stand, but, further, that they did not object to the possibility that the party's refusal might lead to the jury's drawing inferences, *post*, § 2272; Keating, J., took the more correct ground that "we are not to assume that he cannot answer them without admitting his guilt or that he will claim protection from answering them"; the prior contrary cases *infra* were repudiated); 1868, *McFadden v. Liverpool*, L. R. 3 Exch. 279; 1878, *Fisher v. Owen*, L. R. 3 Ch. D. 645, 656 ("Where an interrogatory, although tending to criminate, is put for the purpose of establishing a definite fact upon which the party interrogating relies, then that party is entitled to have the oath of the person interrogated, either in answering the interroga-

tory or in asserting his privilege not to answer"); 1878, *Allhusen v. Labouchere*, L. R. 3 Q. B. D. 654, 660, 666; 1879, *Webb v. East*, L. R. 5 Exch. D. 23; 1897, *Spokes v. Hotel Co.*, 2 Q. B. 124, 131 (the objection must be taken "in answer, and not as an objection to the putting of the question"; here, a summons to make an affidavit as to what relevant documents he had). The following earlier rulings are therefore outlawed: 1822, *Schultes v. Hodgson*, 1 Add. 105, 110 (following literally the Stat. 13 Car. II, *ante*, § 2250, the oath is not even to be "tendered," in the ecclesiastical court); 1861, *Tupling v. Ward*, 6 H. & N. 749 ("Without laying down any general rule, we think that in cases of this kind [libel], it would be unfair to submit questions which a party is clearly not bound to answer"; compare *par.* (3), *infra*).

In the following cases interrogatories were on this ground disallowed: 1856, *Thornton v. Adkins*, 19 Ga. 464 (by express statute); 1882, *Simpron v. Smith*, 27 Kan. 565, 578 (by two judges to one; answers in a deposition, claiming privilege, may be suppressed).

⁴ The following cases deal with this question: *Eng.*: 1742, *Baker v. Pritchard*, 2 Atk. 387, 389; 1789, *Williams v. Farrington*, 3 Brown Ch. C. 38; 1818, *Curson v. De la Zouch*, 1 Swanst. 185, 192; 1818, *Attorney-General v. Brown*, *ib.* 265, 294, 305; 1823, *Fleming v. St. John*, 2 Sim. 181; *U. S.*: 1839, *Atterberry v. Knox*, 8 Dana Ky. 282; 1823, *Salmon v. Claggett*, 3 Bland Ch. Md. 125, 144; 1823, *Wolf v. Wolf*, 2 H. & G. 365,

(2) For the *party-defendant in a criminal case*, the privilege permits him to refuse answering any question whatever in the cause, on the general principle that it "tends to criminate" (*ante*, § 2260). This being so, the prosecution could nevertheless on principle have a right at least to call him to be sworn, because, as with an ordinary witness, it could not be known beforehand whether he would exercise his privilege. But no Court seems ever to have sanctioned this application of the principle. This result may be rested on several considerations: (a) Historically, the privilege existed long before the abolition of the accused's disqualification; hence, until those statutory changes (in 1860-1900), the accused could not testify even if he were willing; thus, to call him would be useless, and the negative practice became fixed. (b) Under the modern statutory competency of the accused, if he should choose to testify when the time comes for putting in his case, the prosecution may on his cross-examination put the questions which it could have put on calling him earlier, and thus the prosecution's opportunity to find whether he will exercise his privilege is practically obtained. (c) Even though the prosecution might technically be entitled to that opportunity at the earlier stage, still the exercise of this technical right need hardly be conceded, since that procedure could only have, as its chief effect, the emphasizing of his refusal, should he refuse, and thus the indirect suggestion of that inference against him from which he is protected by another aspect of the principle (*post*, § 2272). (d) By the express tenor, in most jurisdictions, of the statute qualifying the accused, he is declared to be a competent witness "at his own request, but not otherwise" (*ante*, §§ 488, 579). Whether this form of words was chosen with a view to its present bearing can only be surmised; but its evident effect is to forbid the calling of the accused by the prosecution.⁵

(3) For a *party-defendant in a civil cause having a criminal fact as its main issue*, the question arises whether his situation is to be assimilated to the former or the latter case above mentioned. None of the reasons applicable to the latter case (except perhaps the third) have force here; and it would therefore seem that the technical right of the plaintiff, to call the opponent as a witness and question him until it appears that the privilege will be exercised, should be conceded to operate.⁶ The same rule should apply to an *ordinary witness* called in a case plainly involving his crimination.⁷

§ 2269. *Judge's Warning to the Witness.* It is plausible to argue that the witness should be warned and notified, when a criminating fact is inquired

389; 1859, *Bay State Iron Co. v. Goodall*, 39 N. H. 223, 235; 1869, *Carrier v. R. Co.*, 48 Id. 321, 327, 330; 1819, *M'Intyre v. Mancius*, 16 John. 592; 1832, *Livingston v. Harris*, 3 Paige N. Y. 528, 530; 1843, *Brownell v. Curtis*, 10 Id. 210. Compare the practice for privileged communications between *attorney and client*, *post*, § 2321.

⁵ But the following ruling goes too far: 1901, *Town Council v. Owens*, 61 S. C. 22, 39 S. E. 184 (testimony of a defendant, not asking to be sworn, but not objecting, held improperly taken).

⁶ 1855, *Boyle v. Wiseman*, 10 Exch. 647, 653 (libel, the defendant objected to being sworn, on the present ground; held, that he must be sworn, and could object upon being asked questions); 1867, *Burton v. Young*, 17 Low. Can. 379, *semble* (cited *ante*, § 2260).

⁷ 1886, *Ex parte Stice*, 70 Cal. 51, 53, 11 Pac. 459 (like the next case); 1892, *Eckstein's Petition*, 148 Pa. 509, 516, 24 Atl. 63 (a witness is not exempted from being sworn because incriminating questions are likely to be asked).

about, that he has by law an option to refuse an answer; and this view was often insisted upon, a century ago, by the leaders at the Bar:

1783, Mr. *Beaucroft*, arguing in *Bembridge's Trial*, 23 How. St. Tr. 143 (for the defence): "It is true he was examined in a mode of inquiry in which it was not improper perhaps, to examine him; but it cannot be doubted that the persons who did examine him saw that the questions that they put upon that occasion tended to criminate the person under that examination. What does your lordship do in that situation? What does every judge do, even down to the lowest justice of the peace, even to committee-men upon elections, whenever a question of that sort is asked of a witness? 'Stop; understand that you are at your own discretion whether you will answer that question or not; you need not accuse yourself.' The law of England is that no man is bound to accuse himself; and the man who administers that law best always takes care to give that caution."

1794, Mr. *Erskine*, in *Watt's Trial*, 23 How. St. Tr. 1265 (for the defence): "I conceive it to be of all things the idlest and most superfluous to recognize as a principle of law that a witness is not to answer a question that might criminate himself, without at the same time warning him what might or not be a question where the answer might criminate himself."

But there are opposing considerations. In the first place, such a warning would be an anomaly; it is not given for any other privilege; witnesses are in other respects supposed to know their rights; and why not here? In the next place, it is not called for by principle, since, until the witness refuses, it can hardly be said that he is compelled to answer; nor is it material that he believes himself compelled, for the Court's action, and not the witness' state of mind, must be the test of compulsion. Again, the question can at any rate only be one of judicial propriety of conduct, for no one supposes that an answer given under such an erroneous belief should be struck out for lack of the warning. Finally, in practical convenience, there is no demand for such a rule; witnesses are usually well enough advised beforehand by counsel as to their rights when such issues impend, and judges are too much concerned with other responsibilities to be burdened with the prevision of individual witnesses' knowledge; the risk of their being in ignorance should fall rather upon the party summoning than the party opposing.

Nevertheless, it is plain that the old practice was to give such a warning, when it appeared to be needed.¹ But, as general knowledge spread among the masses, and the preparation for testimony became more thorough, this practice seems to have disappeared in England, so far at least as any general rule was concerned.² In this country both the rule and the trial custom vary in the different jurisdictions.³ No doubt a capable and painstaking

¹ 1725, *L. C. Macclesfield's Trial*, 16 How. St. Tr. 850 (Mr. Solicitor-General: "It is our duty that he should not be surprised into a question that may subject him to a punishment . . . We ought to let him know that an answer to the question may subject him to a prosecution"); 1783, Mr. *Beaucroft*, quoted *supra*; 1800, *L. C. Eldon*, in *Lloyd v. Passingham*, 16 Ves. Jr. 59, 64 ("The practice formerly was that the judge told the witness he was not bound to answer the question").

² 1800, *L. C. Eldon*, in *Paxton v. Douglas*, 16 Ves. Jr. 239, 242 ("Now, it appears to be understood that he may waive the objection and proceed if he thinks proper; and in general it is left to his own discretion"); 1854, *Parke, B.*, in *Att'y-Gen'l v. Radloff*, 10 Exch. 84, 88 ("I think that a witness ought to make the objection himself").

³ 1896, *Dunn v. State*, 99 Ga. 211, 25 S. E. 448, *semble* (caution is not required); 1896, *Republic v. Parsons*, 10 Haw. 601, 605 (the

judge will give the warning, where need appears; but there is no reason for letting a wholesome custom degenerate into a technical rule.

§ 2270. **Who may Claim the Privilege; Party, Witness, Counsel; Effect of Erroneous Compulsion.** The privilege is that of the person under examination as witness, and, like all other privileges, is intended for his protection only (*ante*, § 2196); consequently, it does not concern a right of the party calling him:

1870, *Cockburn*, C. J., in *R. v. Kinglake*, 22 L. T. R. n. s. 335: "By refusing to be examined, the witness may have exposed himself to imprisonment for contempt or to a fine. But that merely concerns the witness himself. If he chooses to give his evidence voluntarily, it would be perfectly good evidence, and would not be illegal evidence in any sense whatever, and there could be no cause of complaint. If so, what difference does it make that he has given his evidence in consequence of some coercion which has been put upon him?" *Blackburn*, J.: "Granting that a wrong was done to the witness, it is a ground of complaint for him and no one else."

1842, *Nelson*, C. J., in *Cloyes v. Thayer*, 3 Hill 564, 566: "The privilege belongs exclusively to the witness, who may take advantage of it or not, at his pleasure. . . . If ordered to testify in a case where he is privileged, it is a matter exclusively between the Court and the witness. The latter may stand out and be committed for contempt, or he may submit; but the party has no right to interfere or complain of the error. It would be otherwise if the Court allowed the privilege in a case where the witness had not brought himself within the rule, as the [cross-examining] party would then be improperly deprived of his testimony."

(1) It follows, where the party and the witness are separate persons, that the witness must be left to make the claim for himself, and the calling party may not make it for him;¹ furthermore, that the party's counsel may not, as such, give public warning of the privilege to the witness or require the judge to do so;² and, finally, that the calling party has no ground for com-

plaint (Court is not bound to instruct); 1900, *Bolen v. People*, 184 Ill. 338, 86 N. E. 408 ("when such inquiry [as to the extent of his right to refuse] is made by the witness, it is the duty of the Court to inform him"); 1876, *Mayo v. Mayo*, 119 Mass. 290, 292 ("It is within the discretion of the Court, and the usual practice, to advise a witness that he is not bound to criminate himself, where it appears necessary to protect the rights of the witness"); 1854, *Jauvin v. Scammon*, 29 N. H. 380, 390 ("The Court will frequently interfere and inform the witness of his privilege"); 1833, *Taylor v. Wood*, 2 Edw. Ch. 84 (the Court should advise the witness); 1849, *Ralph v. Brown*, 3 W. & S. 395, 400 ("the judge ought to advise the witness of his privilege"); 1840, *Smith v. Crane*, 12 Vt. 491, 493 ("Ordinarily" he should be told of his privilege, when it is likely to apply); 1899, *Emery v. State*, 101 Wis. 627, 78 N. W. 145. That the party cannot object for lack of an instruction is noticed *post*, § 2270, note 2.

¹ *Eng.*: 1870, *R. v. Kinglake*, 22 L. T. R. n. s. 335 (quoted *supra*); *U. S.*: *Alaska C. C. P.* 1900, § 675 (quoted *ante*, § 2252); 1891, *Lothrop v. Roberts*, 16 Colo. 250, 254, 27 Pac. 698; 1903, *Barr v. People*, 30 id. 523, 71 Pac. 992; 1900, *Bolen v. People*, 184 Ill. 338, 86 N. E.

408; 1902, *New York Life Ins. Co. v. People*, 195 id. 430, 63 N. E. 264; 1894, *South Bend v. Hardy*, 98 Ind. 577, 583; 1892, *Clifton v. Granger*, 86 Ia. 573, 575, 53 N. W. 316; 1869, *Foster v. People*, 18 Mich. 266, 271; 1876, *White v. State*, 52 Minn. 216, 225; 1830, *Fries v. Brugler*, 12 N. J. L. 79; 1826, *Southard v. Rexford*, 6 Cow. 254, 259 ("It is a personal privilege only"); 1842, *Cloyes v. Thayer*, 3 Hill 564, 566; 1843, *Ward v. People*, 6 id. 144, 146; 1845, *People v. Bodine*, 1 Denio 281, 314; *Or.* Annot. Code 1892, § 847 (quoted *ante*, § 2252); 1895, *Ingersoll v. McWillie*, 87 Tex. 647, 30 S. W. 369; 1869, *State v. Olin*, 23 Wis. 309, 319.

A corporation may of course claim by its officers: 1897, *D'Ivry v. World Newspaper Co.*, 17 Ont. Br. 387. Compare the rule for decedents of a corporation (*ante*, § 2259).

² *Eng.*: 1828, *Thomas v. Newton*, M. & M. 48, note (L. C. J. Tenterden would not allow counsel to object or argue as to the privilege); 1831, *R. v. Adey*, 1 Mo. & Rob. 24 (L. C. J. Tenterden: "The privilege is that of the witness, not of the party, and I think therefore that counsel have no right to interfere for the purpose of excluding an examination to which, as against their client, there is no objection"); *U. S.*: 1903, *Barr v. People*, — Colo. —, 71

plaint if the privilege is erroneously held inapplicable and the answer compelled.³ It would seem, however, that the opposing party would have ground for complaint, if the opposite error were committed and the answer erroneously suppressed; because in the former case the error would have the effect merely of admitting facts concededly relevant, while in the latter case it would have the effect of excluding relevant evidence.⁴

(2) Where the *party* and the *witness* are identical, it would seem that the same results must follow; i. e. neither can the counsel make claim on the party-witness' behalf,⁵ nor can an error in denying the privilege be complained of by the party for the purpose of overthrowing the proceedings in the cause; for, in his capacity as a witness, he must employ the course appropriate to a witness. But most Courts would probably decline to accept this conclusion in the latter respect.⁶

§ 2271. *Who may Determine the Claim; Judge and Witness.* Plainly, and by all principle, the judge at a trial is to pass upon the application of rules of evidence and to determine incidental questions of fact upon which their

Pac. 392 (the party cannot require that the judge instruct the witness); 1837, Com. v. Shaw, 4 Cush. 594 (sustaining the trial judge's refusal, on demand by the party as matter of right, to inform the witness of his privilege); 1859, Com. v. Howe, 13 Gray 26, 31 (similar); 1833, Taylor v. Wood, 2 Edw. Ch. 94 ("The counsel of the parties have no right to interrupt the examination by advising a witness that he is not bound to answer the question"; yet if the witness desires to decline, he may apply to the party's counsel for advice); 1896, State v. Ekanger, 8 Id. 559, 80 N. W. 433; 1893, State v. Butler, 47 S. C. 23, 24 S. E. 291. *Contra*: 1892, Clifton v. Granger, 86 Ia. 573, 575, 53 N. W. 316 (the claim may be made through counsel for the party).

But note that where the counsel is objecting to improper cross-examination to character and is not claiming privilege — the distinction already adverted to (ante, § 2268), — he is of course entitled to speak; this distinction is brought out in the opinion in South Bend v. Hardy, 98 Ind. 577, 584 (1884).

* 1870, R. v. Kinglake, 11 Cox Cr. 500, 22 L. T. R. n. s. 335 (a witness having been compelled to answer against his protest, held, that the party against whom his evidence was given had no ground of exception); 1896, Samuel v. People, 164 Ill. 379, 45 N. E. 728 (following R. v. Kinglake); 1842, Cloyes v. Thayer, 3 Hill 564, 566 (quoted *supra*); 1903, State v. Morgan, 133 N. C. 743, 45 S. E. 1033; 1853, Phelin v. Kenderdine, 20 Pa. 354, 363, *semble*; 1896, State v. Butler, 47 S. C. 23, 24 S. E. 291 (refusal to instruct as to privilege, not available as error for the party); 1894, Morgan v. Halberstadt, 9 C. C. A. 147, 60 Fed. 592, 596, 20 U. S. App. 417, 424 ("if the witness waives his privilege, or the Court disregards it and requires him to answer, the party has no right to interfere or complain of the error"). *Contra*: 1837, Com. v. Kimball, 24 Pick. 366, 368 (on the ground that "it could

not be held that the verdict was supported by legal evidence"); 1849, Com. v. Shaw, 4 Cush. 594 (apparently approving Com. v. Kimball, as involving "the only mode practicable for reversing such decision"); 1899, State v. Olin, 23 Wis. 309, 318 ("It seems" that "a party" may appeal).

* R. v. Kinglake, Cloyes v. Thayer, quoted *supra*; and the like general principle for all privileges (ante, § 2196).

* 1875, State v. Wentworth, 65 Me. 234, 241; 1896, State v. Kent, 5 N. D. 516, 67 N. W. 1052 (because otherwise it cannot be supported by the witness' oath; but counsel may raise the point, and ask that the witness be apprised of his rights and given an opportunity to make the claim).

* 1856, R. v. Scott, 11 D. & B. 47 (quoted ante, § 850, note 8); 18... People v. Brown, 72 N. Y. 571, 573 ("An error committed by the Court against him may inure to his benefit as a party"). This reason would be suitable for a game of whist.

What constitutes *compulsion*, in such a case, ought not to be a difficult question; compare with the following the cases under confessions before a magistrate (ante, §§ 849, 850, 852); 1902, U. S. v. Kimball, — C. C. —, 117 Fed. 156 (certain witnesses, afterwards indicted, held not to have been compelled at a grand jury investigation; compulsion held to signify first a claim of privilege, an "expression of unwillingness in some form," and next an over-riding of the claim; the opinion unnecessarily dignifies by lengthy consideration the quibbles of the defendant).

For the propriety of quashing an indictment founded on testimony so obtained, see State v. Gardner, 88 Minn. 130, 92 N. W. 529 (1902).

Whether an answer erroneously compelled, but falsely given, is *perjury*, is a different question: 1903, State v. Faulkner, — Mo. —, 75 S. W. 116 (citing the precedents fully); 1903, State v. Lehman, ib. —, 75 S. W. 139.

application depends.¹ On the other hand, and plainly also, if the data which show that the answer to a certain question does in fact criminate or tend to criminate are to be disclosed to the judge by the witness claiming the privilege, then the very disclosure has been made which the privilege aims to protect. It is true that the disclosure could be made without the hearing of the jury (as questions involving the admissibility of evidence are usually presented by counsel); but none the less has the disclosure been compelled, and by judicial compulsion; so that this expedient, which is adequate to solve other questions of privilege,² seems here inappropriate, and has never found favor. This dilemma was in England the source of long judicial hesitation and difference of opinion:

1847, *R. v. Garbett*, 2 C. & K. 474, 492, 2 Cox Cr. 448, 1 Den. Cr. C. 276; Mr. Martin: "It is for the discretion of the judge, where he is satisfied of *bona fides* in the witness, and sees real danger to him, to allow him to decline to answer; otherwise a witness might say so in every case and as to everything"; Maule, J.: "The judge may think that a man knows his own affairs better than anybody else knows them"; . . . Rolfe, B.: "If the witness says on his oath that he believes the answer will criminate him, can you compel him to give the answer after that?"; Willes, C. J.: "I have known judges over and over again tell the witness he must answer"; Parke, B.: "It must appear to the judge that the answer really had some tendency to criminate the witness." Afterwards, "a majority of their Lordships held the conviction wrong; being of opinion that if a witness claims the protection of the Court on the ground that his answer would tend to criminate himself, and there appears reasonable ground to believe that it would do so, he is not compellable to answer."

1861, Willes, J., in *Ex parte Fernandez*, 10 C. B. n. s. 3, 39: "Some judges, out of tenderness for the witness, have held it a sufficient excuse if he swears that in his opinion — where such opinion may be well founded — his answering will expose him to such proceeding; some have thought that too lax and yielding a practice; but there has never been any doubt that it is for the Court to decide whether the circumstances judicially before it are such as to excuse the witnesses from answering."³

¹ Post, § 2680.

² Post, § 2332, *ante*, §§ 2193, 2212.

³ The English rulings, before and after the above cases, are as follows: 1847, *R. v. Garbett*, 2 C. & K. 474, 494, 1 Den. Cr. C. 276 (whether the mere declaration of the witness sufficed; not decided; quoted *supra*); 1851, *Short v. Marcier*, McN. & G. 205, 218 (L. C. Truro: "It will satisfy the rule if the witness state circumstances, consistent on the face of them with the existence of the peril alleged and which also render it extremely probable; . . . if the fact forms one of a series, and a party declines to answer who alone knows all the circumstances and how the fact is connected with others which may form a chain of evidence by which guilt may be established, I apprehend that in such a case the Court would be disposed to assist the party"); 1852, *Fisher v. Ronalds*, 12 C. B. 762 (bill of exchange; plea, illegal gaming as a consideration; question as to a roulette-table being in the room, held privileged, the witness claiming that it would tend to incriminate him; whether "the statement of the witness is conclusive," not decided, but Maule, J., thought that it was); 1855, *Parke, B.*, in *Osborn v. London Dock Co.*, 10 Exch. 696 ("The weight

of authority seems to be in favor of the rule which requires the witness to satisfy the Court"); 1855, *Pollock, C. B.*, in *Adams v. Lloyd*, 3 H. & N. 351, 357, 361 (the view of Maule, J., in *Fisher v. Ronalds*, approved; conceding an exception where "the judge is perfectly certain that the witness is trifling with the authority of the Court . . . having in reality no ground whatever for claiming his privilege"); 1857, *Sidebottom v. Atkins*, 3 Jur. 631 (V. C. Stuart disagreed with Mr. J. Maule's extreme opinion, and thought that the Court was to judge on the circumstances of the case); 1859, *Re Mexican & S. A. Co.*, 37 Beav. 474 (Romilly, M. R.: "In a great number of instances the witness himself must be the only person to determine that point, but certainly, where all the facts relating to it are brought before the attention of the Court, then I am of opinion that it is for the Court to determine it"); 1861, *Ex parte Fernandez*, 10 C. B. n. s. 3, 39 (quoted *supra*); 1861, *R. v. Boyce*, 1 B. & S. 311, 330 ("If the fact of the witness being in danger be once made to appear, great latitude should be allowed to him in judging for himself of the effect of any particular question. . . . Subject to this reservation a judge is in our

The danger and impracticability of yielding to the extreme in the protection of the witness have been repeatedly pointed out, in passages which demonstrate the necessity of considering that aspect of the problem:

1882, *Jessel*, M. R., in *Ex parte Reynolds*, 15 Cox Cr. 108, 114: "[It] is obvious that if you allowed the witness merely on his own statement . . . to refuse to answer the question, it would enable a friendly witness, who wished to assist one of the parties, to escape examination altogether, and to refuse to give his evidence, — an evil so great that, when weighed even against the chance of occasionally assisting to convict a guilty man, it would certainly far overbear, as a question of public policy, the danger (if it is to be treated as a danger) of assisting to convict a guilty man occasionally out of his own mouth."

1891, *Sterrett*, J., in *Com. v. Bell*, 145 Pa. 374, 387, 22 Atl. 641, 644: "Was his determination, in opposition to the judgment of the Court, to be accepted as a finality, and was the Court powerless to enforce its order in the premises? We think not. If it was, courts of justice would be at the mercy of contumacious witnesses. . . . It is the plain duty of the trial judge to decide that question. Men who are as conscious of extreme susceptibility of crimination as the relator appears to have been would be badly qualified to decide such questions, especially in their own cases."

But a solution of the dilemma has now been generally accepted; the judicial differences to-day, if any, are in the phrasing rather than the substance, and concern in effect (as pointed out by Mr. Justice Mitchell) merely the burden of proof in the judge's mind. It is interesting to note that, during the two generations of repeated judicial attempts in England, there was already recorded, even before that controversy began, an opinion of Chief Justice Marshall which solved the problem in the manner now recognized as sound:

1861, *Cockburn*, C. J., in *R. v. Boyes*, 1 B. & S. 311, 321: "To entitle a party called as a witness to the privilege of silence, the Court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer; . . . [although] if the fact of the witness being in danger be once made to appear, great latitude should be allowed to him in judging for himself of the effect of any particular question. . . . Further than this, we are of opinion that the danger to be apprehended must be real and appreciable, with reference to the ordinary operation of law in the ordinary course of things; not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct. We think that a merely remote and naked possibility, out of the ordinary course of the law, and such as no reasonable

opinion bound to insist on a witness answering unless he is satisfied that the answer will tend to place the witness in peril"; quoted *infra*; 1868, *The Mary or Alexandra*, L. R. 3 Ad. & Ec. 319, 324 (defendant's oath held sufficient on the facts); 1877, *Ex parte Schofield*, L. R. 6 Ch. D. 230, per James and Baggallay, LLJJ. ("the judge will satisfy himself that the objection is a genuine one"); 1882, *Ex parte Reynolds*, 15 Cox Cr. 108, L. R. 20 Ch. D. 294 (bankruptcy; an auctioneer, as witness, was asked whether he had executed a certain deed, but refused to answer; the judge compelled him, not seeing "any chance of an answer to that

question forming a link in a chain" of crimination, and believing that the witness was "setting up excuses which have no kind of foundation"; the witness was held bound to answer, unless the judge believes that "he is declining to answer *bona fide* for his own protection and there is any appreciable danger to him"; approving *R. v. Boyes* and *Ex parte Schofield*; Bacon, C. J.: "Am I not bound to exercise such portion of common sense as I possess, and to say whether an answer to that question can possibly criminate anybody?"); 1888, *Ex parte Maguire*, 14 Que. 359, 362 (following *R. v. Boyes*; careful opinion).

man would be affected by, should not be suffered to obstruct the administration of justice. The object of the law is to afford to a party, called upon to give evidence in a proceeding *inter alios*, protection against being brought by means of his own evidence within the penalties of the law. But it would be to convert a salutary protection into a means of abuse if it were to be held that a mere imaginary possibility of danger, however remote and improbable, was sufficient to justify the withholding of evidence essential to the ends of justice."

1807, *Marshall, C. J.*, in *Burr's Trial*, Robertson's Rep. I, 248: "It is alleged that he [the witness] is and from the nature of things must be the sole judge of the effect of his answer; that he is consequently at liberty to refuse to answer any question, if he will say upon his oath that his answer to that question might criminate himself. . . . [But] there is a distinction which takes from the Court the right to consider and decide whether any direct answer to the particular question propounded could be reasonably supposed to affect the witness. There may be questions no direct answer to which could in any degree affect him; and there is no case which goes so far as to say that he is not bound to answer such questions. . . . When two principles come in conflict with each other, the Court must give them both a reasonable construction so as to preserve them both to a reasonable extent. The principle which entitles the United States to the testimony of every citizen, and the principle by which every witness is privileged not to accuse himself, can neither of them be entirely disregarded. They are believed both to be preserved to a reasonable extent, and according to the true intention of the rule and of the exception to that rule, by observing that course which, it is conceived, Courts have generally observed: it is this: When a question is propounded, it belongs to the Court to consider and decide whether any direct answer to it can implicate the witness; if this be decided in the negative, then he may answer it without violating the privilege which is secured to him by law. If a direct answer to it may criminate himself, then he must be the sole judge what his answer would be; the Court cannot participate with him in this judgment, because they cannot decide on the effect of his answer without knowing what it would be, and a disclosure of that fact to the judges would strip him of the privilege which the law allows and which he claims."

1890, *Mitchell, J.*, *State v. Thaden*, 43 Minn. 253, 255, 45 N. W. 447: "The problem is how to administer the rule so as to afford full protection to the witness, and at the same time prevent simulated excuses. All the authorities agree to the general proposition that the statement of the witness that the answer will tend to criminate himself is not necessarily conclusive, but that this is a question which the Court will determine from all the circumstances of the particular case, and the nature of the evidence which the witness is called upon to give. But the question on which the cases seem to differ is as to what we may call the burden of proof; some holding that the statement of the witness must be accepted as true, unless it affirmatively appears from the circumstances of the particular case that he is mistaken, or acts in bad faith, while other cases hold that, to entitle a witness to the privilege of silence, the Court must be able to see from the circumstances of the case and the nature of the evidence called for, that there is reasonable ground to apprehend danger to the witness, if he is compelled to answer. . . . The difference is theoretical, rather than practical; for it would be difficult to conceive of an instance where the circumstances of the case, and the nature of the evidence called for, would be entirely neutral in their probative force upon the question whether or not there was reasonable ground to apprehend that the answer might tend to criminate the witness. After consideration of the question and an examination of the authorities, our conclusion is that the best practical rule is that laid down in some of the English cases, and adopted and followed by Chief Justice Cockburn, in *Reg. v. Boyce*. . . . To this we would add that, when such reasonable apprehension of danger appears, then, inasmuch as the witness alone knows the nature of the answer he would give, he alone must decide whether it would criminate him. This, we think, is substantially what Chief Justice Marshall meant by his statement of the rule in the *Burr* trial."

This summing-up of Mr. Justice Mitchell leaves nothing to be added, and ought to remain the last word in the development of the rule. In the courts of the United States, a few of the earlier rulings inclined towards Mr. Justice Maule's extreme view in *Fisher v. Ronalds*; but the later decisions have generally adopted the common principle of *R. v. Boyes* and *U. S. v. Burr*, and the phraseology of either the one or the other.⁴ It need only be noted that in chancery practice a special question may arise, dependent upon the technicalities of that system of pleading, as to the proper mode of furnishing the judge with the data for decision.⁵

§ 2272. *Effect of Making Claim, as to Inferences permissible against the Claimant; (a) General Principle.* The question whether an inference may be drawn from a person's exercise of his privilege is one which may well

⁴ *Ala.*: 1876, *Calhoun v. Thompson*, 56 Ala. 168, 170 ("If it is not apparent [to the Court] that such would be the tendency of the answer, the witness is not privileged"); 1896, *Alston v. State*, 109 Id. 51, 20 So. 81 (the witness need not expressly explain, if the answer would clearly criminate); *Cal.*: 1900, *Overend v. Superior Court*, 131 Cal. 260, 63 Pac. 373 (the Court must decide); 1901, *Bradley v. Clark*, 133 Id. 196, 65 Pac. 395 (similar); 1900, *Re Rogers*, 129 Id. 468, 63 Pac. 47 ("It is for the Court to pass upon the sufficiency of the objection"); *Fla.*: 1896, *Ex parte Senior*, 37 Fla. 1, 19 So. 652 (the Court is to decide on all the circumstances, but the witness cannot be required to explain); 1899, *Wallace v. State*, 41 Id. 547, 26 So. 718 (the witness need not explain how it would criminate); *Haw.*: Civil Laws 1897, § 1419 (the privilege shall not be allowed to any witness for any question "relevant and material to the matter in issue," unless the Court "shall be of the opinion that the answer will tend to subject such witness to punishment for treason, felony, or misdemeanor"); *Ia.*: 1850, *Richman v. State*, 2 Greene 532, 533 (the ruling in *U. S. v. Burr* followed); 1861, *Prints v. Cheesey*, 11 Ia. 469, 471 (same); 1863, *State v. Duffy*, 15 Id. 425, 427 (same); 1898, *Mahanke v. Cleland*, 76 Id. 401, 404, 41 N. W. 53 (the Court should compel, "unless reasonable grounds for believing" a tendency to criminate); *Md.*: 1885, *Cheapeake Club v. State*, 63 Md. 446, 455 (*R. v. Boyes* approved); *Minn.*: 1890, *State v. Thaden*, 43 Minn. 253, 45 N. W. 447 (rule of *Cockburn, C. J.*, in *R. v. Boyes*, approved; quoted *supra*); *Mo.*: 1829, *Ward v. State*, 2 Mo. 120, 123 (following *U. S. v. Burr*); *N. H.*: 1854, *Janvrin v. Scammon*, 29 N. H. 280, 290 ("He will be protected unless the Court can see from the circumstances of the case that he is in error, or that it is a mere pretext on the part of the witness to avoid answering, and that his answer cannot, from the nature of things, criminate him"); 1862, *Carter v. Beals*, 44 Id. 408, 412 (preceding case approved); 1865, *Eaton v. Farmer*, 46 Id. 300, 302 (same); *N. Y.*: 1830, *People v. Mather*, 4 Wend. 229, 233 (good opinion by Marcy, J., adopting substantially the rule in *U. S. v. Burr*); 1894, *People v. Forbes*, 143 N. Y. 219, 231, 33 N. E. 368 ("The weight

of authority seems to be in favor of the rule that the witness may be compelled to answer when he contumaciously refuses, or when it is perfectly clear and plain that he is mistaken"); 1900, *People v. Priori*, 164 Id. 456, 53 N. E. 666 (it rests largely in the trial Court's discretion; to justify compulsion, it must at least clearly be shown that an answer would not incriminate); *N. C.*: 1880, *La Fontaine v. Southern Underwriters' Ass'n*, 83 N. C. 132, 141 (approving *Osborn v. Dock Co.*); *Pa.*: 1891, *Com. v. Bell*, 145 Pa. 374, 387, 22 Atl. 641, 644 (quoted *supra*); *R. I.*: 1901, *Rosendale v. McNulty*, 23 R. I. 465, 50 Atl. 650 (privilege, held not applicable, where "the questions do not show that such a result [as crimination] is possible"); *S. C.*: 1819, *State v. Edwards*, 2 Nott & McC. 13 ("Something must necessarily be left to the witness"); 1842, *Pool v. Perritt*, 1 Spears 128 (witness allowed to refuse, "upon his own assurance"; "the law does act wisely in leaving it to the witness himself"; *Earle and Wardlaw, JJs., diss.*); 1896, *State v. Butler*, 47 S. C. 23, 26, 24 S. E. 591 (preceding case approved); *U. S.*: 1807, *U. S. v. Burr* (quoted *supra*); 1883, *U. S. v. McCarthy*, 18 Fed. 37 (*R. v. Boyes* approved); 1896, *Ex parte Irvine*, 74 Fed. 954 (the Court's discretion controls, depending upon whether there is reasonable ground to infer crimination); *Vt.*: 1840, *Smith v. Crane*, 12 Vt. 491, 494 (witness' oath is to be taken, unless the Court is "fully satisfied such is not the fact, i. e. that the witness is either mistaken or acts in bad faith"); *Va.*: 1881, *Temple v. Com.*, 75 Va. 892, 896 (rule in *U. S. v. Burr*, approved by one judge; the other two reserving their opinion); 1884, *Kendrick v. Com.*, 78 Id. 490, 495 (rule in *U. S. v. Burr* approved); *Wash.*: 1897, *Perkins v. Bank*, 17 Wash. 100, 49 Pac. 241 (the witness need not expressly say that the answer would criminate, if it is plain from the question; this is going too far, for he must of course state what privilege he claims); *Wis.*: 1859, *Kirschner v. State*, 9 Wis. 140, 143 ("The Court is to determine, under all the circumstances of the case, whether such is the tendency of the question"); *Wyo.*: 1899, *Miskimins v. Shaver*, 8 Wyo. 392, 59 Pac. 411 (rule in *U. S. v. Burr* approved).

⁵ See *Sharp v. Sharp*, 3 John. Ch. 407 (1818), and the cases cited *ante*, § 2268, note 4.

puzzle by its anomalies. Both principle and expediency are involved. The layman's natural first suggestion would probably be that the claim was a clear confession of the criminating fact. The lawyer's natural first answer would certainly be that then the privilege would thereby be annulled. Both of these have a truth, but only a partial truth. The nature of the issue should not be lost sight of. It is not a question of mere reasoning,—of the recognition that an inference is open. "Logic is logic," ever since the days of the one-hoss shay; and it is on that score impossible to deny that the very claim of the privilege involves a confession of the fact. "Were you assisting the defendant at the time of the affray?" this may be answered "yes" or "no"; if "no," the fact is not criminating and the privilege is not applicable; if "yes," the fact is criminating and the privilege applies. The inference, as a mere matter of logic, is not only possible but inherent, and cannot be denied.

Yet, though not denied, can it not be ignored? This is the true question, —whether, in view of our trial methods, it is possible and proper to insist on the practical ignoring of this inference. If our trial tribunals were not divided in function, and if issues of fact and law came equally to the judge's mind for decision, the question would be a mere quibble, because the judge could hardly perform the impossible feat of ignoring the operations of his own mind. But since the jury, and the counsel's efforts with the jury, are more or less within the control of the judge irrespective of his own mental operations, it remains after all a practical question whether principle and expediency require us to prevent, so far as feasible, any further use of the inference than such as is inevitable from the mere disclosure of the claim. Perhaps the jury can effectively be instructed on the subject; at any rate, the comment by counsel can be prohibited. Thus the question ceases to be merely one of mental gymnastics, and is after all worth attempting to solve.

For a century this question has remained in controversy in England. Until very modern times, it could not arise for an accused's testimony, because the accused could not testify even if he would. But the case of an ordinary witness presented very much the same issue; and each generation exhibited from time to time the same difference of opinion.¹ In the United States,

¹ The rulings are as follows: *Eng.*: 1809, *Millman v. Tucker*, Peake Add. Cas. 122 (L. C. J. Ellenborough told the jury "that if the witness chose to avail himself of that protection which the law gave him, he was not thereby at all discredited"); 1809, L. C. Eldon, in *Lloyd v. Passingham*, 16 Ves. Jr. 59, 64 (quoted *infra*); 1817, *R. v. Watson*, 3 Stark. 153 (Bayley, J.: "He may demur to the question, for he is not bound to criminate himself; and if he refuse, this is not without its effect on the jury. . . . It would perhaps be going too far to say that you may discredit him if he refuse to answer; it is for the jury to draw what inferences they may"; Holroyd, J.: "If you propose a question to a witness and he declines to answer it, his not answering can have no effect with the jury"); 1836, *Rose v. Blakemore*, Ry. & Mo.

383, *Abbott, C. J.* ("There was an end of the protection of a witness if a demurrer to the question were to be taken as an admission of the fact inquired into"); 1855, *Boyle v. Wiseman*, 10 Exch. 647, 651 (Parke, B.: "The protection given by the statute would be of no avail, if the refusal to answer was construed into evidence of guilt; it is impossible, however, to prevent the jury drawing their own conclusions"; Alderson, B.: "It seems to me that a party not denying a fact which it is in his power to deny gives a color to the other evidence against him"); 1862, *Bartlett v. Lewis*, 12 C. B. n. s. 349, 363 (*infra*); 1899, *R. v. Rhodes*, 1 Q. B. 77, 83 (the Court's right to comment to the jury on the evidence is not taken away by the statute qualifying the accused, *ante*, § 488; and comment on a failure

almost universal legislation has decreed, in varying phraseology, that the inference shall not be availed of.³ But the inquiry remains necessary whether this solution was right or wrong, — for, if wrong, it may be set right again by the same method. To those who have solved the problem in accord with the legislators, the matter has apparently been so simple that no elaborate reasoning was necessary in support. The following passages represent the grounds vouchsafed:

1906, L. C. Eldon, in *Lloyd v. Passingham*, 16 Ves. Jr. 50, 61: "I protest strongly against the doctrine that Robert Passingham, having demurred to so much of the bill as seeks a discovery of facts which have a tendency to affect him criminally, is on that account to be considered as admitting the allegations of the bill; having observed a notion prevailing, lately, that a witness who refuses to answer a question upon that ground is therefore not to be believed. Nothing can be more fallacious, as a standard of credit, than such a conclusion, or more dangerous to justice by depriving the subject of that protection to which he is entitled by law."

to testify is allowable); *Gen. & Dom. St. 1893*, c. 31, § 4 (quoted ante, § 488); *Mass. St. 1902*, c. 57, § 4 (quoted ante, § 488); *Que. 1867*, *Barton v. Young*, 17 Low. Can. 379, 394 (no inference can be drawn).

³ In the following list are found all jurisdictions except Georgia, New Jersey, and South Carolina; but the Court of the first-named State (in which an accused is as yet qualified only to make a "statement") has taken the same view (1874, *Bird v. State*, 50 Ga. 585, 589), and the Court of the second-named State has taken the opposite view (in the citations *infra*, note 3); in Maine, the statute supplanted the decisions collected *infra*, note 3; the statutes are quoted ante, § 486; their application usually takes the form of prohibiting comment by counsel: *Ala. Code 1897*, § 5297; 1898, *Cooper v. State*, 96 Ala. 616, § So. 110 (refusal to exhibit one's body); *Alaska C. Cr. P. 1900*, § 149; *Ariz. Rev. St. 1887*, § 2040; *Ark. Gen. St. 1894*, § 2910; *Cal. P. C. 1872*, § 1323; 1889, *People v. Tyler*, 36 Cal. 522, 527; 1871, *People v. McGungill*, 41 id. 429; 1873, *People v. Russell*, 46 id. 121, 123; 1878, *People v. Brown*, 53 id. 66; 1896, *People v. Sanders*, 114 id. 216, 46 Pac. 153; 1896, *People v. Cuff*, 123 id. 589, 53 Pac. 407 (holding C. C. P. § 2061, subd. 6, 7, not applicable); *Colo. Annot. Stats. 1891*, § 1171; 1893, *Petite v. People*, 3 Colo. 518; *Conn. Gen. St. 1887*, § 1623; *Del. Laws 1893*, c. 777, § 1; *D. C. Comp. St. 1894*, c. 71, § 8; *Fla. St. 1896*, c. 4400; *Ida. Rev. St. 1887*, § 8143; *Haw. Civil Laws 1897*, § 1416; *Ill. Rev. St. 1874*, c. 28, § 35, 426; 1880, *Angelo v. People*, 96 Ill. 209, 213; 1889, *Quinn v. People*, 123 id. 333, 15 N. E. 46; *Ind. Rev. St. 1897*, § 1899; 1877, *Long v. State*, 56 Ind. 182, 186; *Ia. Annot. Code 1897*, § 5424; 1893, *State v. Baldoser*, 38 Ia. 55, 56, 55 N. W. 97; *Kan. Gen. St. 1897*, c. 102, § 218; *Ky. Stats. 1899*, § 1645; *La. St. 1886*, No. 29, § 2; 1898, *State v. Marceauz*, 50 La. An. 1187, 24 So. 611; *Me. Pub. St. 1893*, c. 134, § 19; 1896, *State v. Banks*, 78 Me. 490, 7 Atl. 269; 1892, *State v. Landry*, 65 id. 98, 26 Atl. 998; *Md. Pub. Gen. L. 1869*, Art. 35, § 3; *Mass. Pub. St. 1892*, c.

169, § 18, Rev. L. 1906, c. 173, § 20; 1877, *Com. v. Scott*, 123 Mass. 239 (comment not allowed, even where defendant's counsel had improperly alleged special reasons for the defendant's failure to take the stand; unsound, for the defendant's counsel's act was virtually a waiver of the right to prohibit comment, and the prosecution's comment was merely an answer to the defendant's counsel's); 1896, *Com. v. Hanley*, 140 id. 437, 5 N. E. 466; *Mich. Comp. L. 1897*, c. 282, § 100; 1906, *People v. Hammond*, — Mich. —, 95 N. W. 1084; *Minn. Gen. St. 1894*, § 5658; 1894, *State v. Pearce*, 56 Minn. 224, 57 N. W. 652, 1085; 1896, *State v. Holmes*, 65 id. 220, 68 N. W. 11; 1903, *State v. Stoddard*, 99 id. 305, 94 N. W. 675; *Miss. Annot. C. 1892*, § 1741; 1893, *Yarbrough v. State*, 70 Miss. 593, 12 So. 551; 1895, *Reddick v. State*, 73 id. 1008, 16 So. 490; *Mo. Rev. St. 1892*, § 2638; *Mont. P. C. 1896*, § 2442; *Nebr. Comp. St. 1897*, § 7199; *Nebr. Gen. St. 1889*, § 4563; *N. H. Pub. St. 1891*, c. 224, § 25; *N. Mex. Comp. L. 1897*, § 3431; *N. Y. C. Cr. P. 1881*, § 393; 1896, *People v. Hoch*, 150 N. Y. 291, 44 N. E. 977; 1898, *People v. Fitzgerald*, 156 id. 253, 50 N. E. 846; *N. C. Code 1893*, § 1353; *N. Dak. Rev. C. 1896*, § 8190; *Ok. Annot. Rev. St. 1898*, § 7285; *Old. Stats. 1898*, c. 68, § 11; *Or. Codes & G. L. 1892*, § 1365; *Pa. P. & L. Dig. Witnesses*, § 22 (Pub. L. 1867, p. 158, § 10); *R. I. Gen. L. 1898*, c. 244, § 41; 1893, *State v. Hall*, 18 R. I. 207, 211, 26 Atl. 191; *S. D. Stats. 1899*, § 9680; 1898, *State v. Garrington*, 11 S. D. 178, 76 N. W. 326; *Tenn. Code 1896*, § 5401; *Tex. P. C. 1895*, § 770; 1891, *Jordan v. State*, 29 Tex. App. 595, 16 S. W. 543; *U. S. St. 1878*, c. 37, March 16; 1892, *Wilson v. U. S.*, 149 U. S. 60, 13 Sup. 765; *Utah C. Cr. P. 1898*, § 5015; *Vt. Stats. 1894*, § 1915; 1868, *State v. Cameron*, 40 Vt. 555, 565; *Va. Code 1887*, § 3897; *Wash. Annot. C. & St. 1897*, § 6941; *W. Va. Code 1891*, c. 152, § 19; 1890, *State v. Ice*, 34 W. Va. 244, 249, 13 S. E. 695 (comment held not improper on the facts); *Wis. Stats. 1898*, § 4071; *Wyo. Rev. St. 1887*, § 3288.

1898, *Sanger, O. J.*, in *People v. Tyler*, 38 Cal. 323, 330: "If the inference in question could be legally drawn, the very act of exercising his option as to going upon the stand as a witness, which he is necessarily compelled by the adoption of the statute to exercise one way or the other, would be, at least to the extent of the weight given by the jury to the inference arising from his declining to testify, a crimination of himself."

The various aspects of the argument against suppressing the inference are to be found in the following passages, — the notable efforts being those of the Supreme Court of Maine:

1837, *Editors' Note*, in *Ryan & Moody*, 384: "Where the objection is that the answering the question may subject him to forfeiture, penalty, or punishment, it seems open to contend that there is no reason why comments should not be made on the fact of the witness' refusal to answer, with a view to satisfy the jury of the truth of the fact suggested in the question. It would seem that the witness is sufficiently secured from penalties, punishment, or forfeiture if he is not compelled to say anything which would be evidence against him in proceedings instituted with those objects; and as neither the inferences of counsel nor the opinion of the jury could have that effect, it appears as unreasonable to prevent counsel from drawing the one as it is impossible to prevent the jury from forming the other. The conclusion indeed is so obvious that the only way of preventing the jury from forming it is by declaring . . . not merely that the question need not be answered, but that it ought not to be asked. . . . With respect to questions tending merely to degrade, there may be more reason to adopt the principle laid down by Abbott, L. C. J., . . . as the ill opinion of the jury and of the persons present in Court forms part of that disgrace and infamy from which the Court is to protect the witness."

1892, *Willis, J.*, in *Bartlett v. Lewis*, 12 C. B. n. s. 949, 263: "It appears to me that, even admitting that the interrogatories are put for the purpose of extracting answers which may criminate the party, or of prejudicing him in the estimation of the jury if he declines to answer them, they ought to be allowed to be put. I must own I have no sympathy with a witness who is compelled, in order to protect himself from answering a question, to admit that his answer would tend to criminate him"; *Erie, C. J.*: "I know of no principle of law which should protect a man who has been guilty of an indictable offence from being placed in this predicament. . . . A man is not to be punished upon his own forced admission of guilt. . . . [But] I must confess I do not see why a guilty man should not be prejudiced in the eyes of a jury."

1867, *Tapley, J.*, in *State v. Bartlett*, 55 Me. 200, 217: "If a person remains silent when he may speak, he does so from choice, and the choice he makes upon such occasions has always been regarded competent evidence. It is the act of the party. From time immemorial the reply or the silence of the accused person, when charged [outside of the court], has been regarded as legitimate evidence on his trial for the consideration of the jury. Any act of his, when charged, tending to sustain the charge, may be proved. Fleeing from arrest, giving contradictory, untrue, or improbable accounts of the matters in issue, and refusals to account for the possession of stolen property, are evidences of guilt admitted upon the trial of the persons accused. These are proofs derived from the prisoner's acts, sayings, and silence. He never has been, and is not now, compelled to furnish the Court the evidence of the existence of these facts. If it be said, these are the voluntary acts of the prisoner, the manifest answer is, they are not more so than the refusal or neglect to testify. When found in the possession of stolen property and inquired of concerning it, he must speak or be silent. When found with the implements used in a recent burglary and interrogated in reference to them, he must answer or be silent. When found with the bloody instruments of a foul murder, and he is called upon to explain his possession, he must answer or be silent. There is no escape from this. He is in the strait betwixt the two. He must choose the one or the other. He must speak or be silent. Yet, in all these cases, it has been the uniform practice of the Court

to admit in evidence the conduct of prisoners upon such occasions, and it never¹ held an infringement of the rule referred to. . . . The Act in question [qualifying accused] imposes no obligation upon the prisoner to testify; it only affords him an opportunity as to do, if he chooses. It changes his condition only in adding one more opportunity to speak or be silent, and the same rule applies to the result which has been applied to such cases for a long time. . . . The danger apprehended has two antidotes; one lies in the intelligence of the jury, where the security of a proper consideration of every other fact lies, and the other remedy lies with the prisoner himself. If in silence there lies insecurity, the law in its beneficence allows him to break silence and avoid the danger arising from it. If he has so conducted himself that he thus encounters greater difficulties, the fault is his own and not that of the law."

1871, *Appleton, C. J.*, in *State v. Cleaves*, 59 Me. 298, 300: "The statute authorizing the defendant in criminal proceedings, at his own request, to testify, was passed for the benefit of the innocent and for the protection of innocence. The defendant, in criminal cases, is either innocent or guilty. If innocent, he has every inducement to state the facts, which would exonerate him. The truth would be his protection. There can be no reason why he should withhold it, and every reason for its utterance. Being guilty, if a witness, a statement of the truth would lead to his conviction, and justice would ensue. Being guilty, and denying his guilt as a witness, an additional crime would be committed, and the peril of a conviction for a new offence incurred. But the defendant, having the opportunity to contradict or explain the inculpatory facts proved against him, may decline to avail himself of the opportunity thus afforded him by the law. His declining to avail himself of the privilege of testifying is an existent and obvious fact. It is a fact patent in the case. The jury cannot avoid perceiving it. Why should they not regard it as a fact of more or less weight in determining the guilt or innocence of the accused? . . . The silence of the accused, the omission to explain or contradict, when the evidence tends to establish guilt, is a fact—the probative effect of which may vary according to the varying conditions of the different trials in which it may occur—which the jury must perceive, and which perceiving they can no more disregard than one can the light of the sun, when shining with full blaze on the open eye. It has been urged that this view of law places the prisoner in an embarrassed condition. Not so. The embarrassment of the prisoner, if embarrassed, is the result of his own previous misconduct, not of the law. If innocent, he will regard the privilege of testifying as a boon justly conceded. If guilty, it is optional with the accused to testify or not, and he cannot complain of the election he may make. If he does not avail himself of the privilege of contradiction or explanation, it is his fault, if by his own misconduct or crime he has placed himself in such a situation that he prefers any inferences which may be drawn from his refusal to testify, to those which must be drawn from his testimony, if truly delivered."²

This reasoning is not to be summarily disposed of. Perhaps it is impregnable. Certainly the possibilities of *pro* and *con* are prolific and interesting. But the substance of it all, and the answers to it, seem to be as follows:

Argument *first*: An inference from the refusal is inevitable; therefore why try futilely to avoid it? Answer: The bare inference is indeed inevitable; but it is at least a practical question whether counsel's comment shall be permitted. Argument *second*: There is no actual compulsion, as pro-

² This view has been sanctioned by three Courts in this country, though the statutes cited *supra*, note 2, have since controlled the subject in Maine and North Carolina: *Me.*: 1867, *State v. Bartlett*, 55 Me. 200, 216 (quoted *supra*); 1870, *State v. Lawrence*, 57 id. 574, 581; 1871, *State v. Cleaves*, 59 id. 298 (quoted *supra*); *N. J.*: 1898, *Parker v. State*, 61 N. J. L. 308, 39

Atl. 631 (careful opinion by Magie, C. J.); 1900, *State v. Wines*, 65 id. 31, 46 *Atl.* 702; *N. C.*: 1853, *State v. Garrett*, Bush. 357 (dealing only with the privilege against disgracing facts, but assuming that the witness is not bound to answer). Compare also the opinion of Bach, J., in *State v. Pearce* (1894), 54 Minn. 226, 238, 57 N. W. 652, 1045.

hibited by the rule; for the accused has an option, and the exercise of this option, by choosing silence, is therefore a voluntary act of his own. Answer: By hypothesis, his answer will be criminating (and it is the ignoring of this hypothesis which seems to form the fallacy of the learned Chief Justice Appleton); thus, the supposed option lies between answering in confession of the criminating fact or keeping silence and letting the same fact be inferred; which is no option at all. Argument *third*: The inference is drawn by virtue of the non-production of the testimony of a competent witness (*ante*, § 285), and not by virtue of the claim of privilege, and hence the two may be kept distinct, — precisely as the characters of the party as witness and as accused are allowed to be kept distinct (*ante*, § 61). Answer: It is true that the inference is drawable by virtue of that principle, but it is also a necessary implication in the claim of privilege; so that the analogy is not exact. Where a constitutional rule is involved, and not merely an ordinary rule of evidence, it would seem better to allow the former and not the latter aspect to control the situation. Nevertheless, if a logical mode of escape from the privilege is desired — that is, if we are determined to limit its harmful operation by any interpretation which an honest logic will permit —, this argument seems a tenable one. Argument *fourth*: There is no actual extraction of any reply, and hence the privilege not to reply is literally maintained. Answer: It is true that no reply is required, and that this is the strongest argument for maintaining that the privilege is not violated. But if we consider the ultimate ground of policy upon which the privilege rests (*ante*, § 2251), we observe that a general practice of permitting the use of such inferences would (as against accused persons, at least) tend to bring about the very evils which the privilege is intended to prevent, namely, the reliance by the prosecution, for the means of proof, upon the confessions in court of the accused himself or upon the inferences of guilt which could be drawn from his silence, and the consequent slack and imperfect investigation of other sources of proof. If there is such a policy involved in the privilege, it applies equally to the prohibition of inferences, differing only in the degree of danger involved.

Such, then, being the conclusions of principle and expediency which forbid the drawing of inferences from a claim of privilege, it remains to notice the forms in which the rule is applicable:

(1) It clearly forbids *comment by counsel* upon the *accused's failure to testify*.⁴ But there is no call for the stringent rule that a *new trial* shall be granted *ipso facto* where comment has been improperly made;⁵ the trial

⁴ Most of the statutes cited *ante* enact this expressly; and the decisions invariably accept it; most of those cited *supra*, note 2, make this application.

⁵ This unnecessary measure is expressly provided by the statutes of Iowa and Oklahoma, cited *supra*; for the judicial views upon the question whether an instruction may cure the fault, see the following cases and compare the general doctrine of new trials (*ante*, § 31): 1896, *R. v.*

Corby, 30 N. Sc. 390 (marital privilege); 1885, *Petite v. People*, 8 Colo. 518, 520, 9 Pac. 622; 1880, *Angelo v. People*, 96 Ill. 209, 213; 1887, *Coleman v. State*, 111 Ind. 543, 547, 13 N. E. 100; 1900, *Blume v. State*, 154 Id. 343, 54 N. E. 771; 1888, *State v. Ryan*, 70 Ia. 154, 156, 30 N. W. 397; 1903, *Knight v. U. S.*, 54 C. C. A. 353, 115 Fed. 972, 982; 1903, *Dunn v. State*, 118 Wis. 82, 94 N. W. 646.

judge must be trusted, not only to control counsel, but also to remedy the effect of his impropriety. Nor is it proper to go so far as to instruct the jury (even when no comment has been made) to disregard the inference;⁶ it is well enough to contrive artificial fictions for use by lawyers, but to attempt to enlist the layman in the process of nullifying his own reasoning powers is merely futile, and tends towards confusion and a disrespect for the law's reasonableness. (2) The rule applies equally to the *ordinary witness*; i. e. the inference that the criminating fact exists is not to be made because of his claim of privilege.⁷ (3) The rule also forbids drawing an inference, during the trial, from the accused's prior failure to testify at a *preliminary* or other prior *examination*;⁸ unless where he has now waived the privilege by voluntarily taking the stand.⁹ (4) The rule equally forbids inferences from the *non-production of privileged documents*;¹⁰ but it does not forbid the *proof of copies* by other means, when the production of the original is refused.¹¹

§ 2273. *Same: (b) Inference from not producing Evidence, distinguished.* The principle has been already examined (*ante*, §§ 285-291) that a party's failure to produce evidence which, if favorable, would naturally have been produced, is open to the inference that the facts were unfavorable to his cause. One application of this principle (*ante*, § 289) is that the party's failure to testify in his own behalf is equally open to that inference. This specific application of it is obviously (as already noted) in conflict with the privilege against self-crimination. But the other applications of it remain in full force. It is therefore necessary to draw the line between the two, and to determine the boundary of the prohibited inference. No Court has doubted that such a boundary must be recognized, but there is not always unanimity in locating it:

1850, *Shaw, C. J.*, in *Com. v. Webster*, 5 Cush. 295, 316: "When pretty stringent proof of circumstances is produced, tending to support the charge, and it is apparent that the accused is so situated that he could offer evidence of all the facts and circumstances

⁶ By express statute in Indiana, Nevada, and Washington, such an instruction is required; by express statute in Oklahoma and West Virginia, and perhaps by implication in other statutes, no "mention" of the accused's silence is to be made, and this may be construed to forbid even the judge's reference to it by instructions; thus, the words of the local statute may affect the result. The following cases deal with the subject: 1890, *Farrell v. People*, 133 Ill. 344, 24 N. E. 423; 1885, *State v. Stevens*, 67 Ia. 557, 559, 25 N. W. 777; 1898, *State v. Carnagy*, 106 Id. 493, 76 N. W. 905; 1898, *State v. Johnson*, 80 La. An. 138, 23 So. 199; 1892, *State v. Landry*, 65 Me. 95, 26 Atl. 998; 1894, *State v. Pearce*, 56 Minn. 226, 234, 57 N. W. 652, 1063; 1893, *State v. Robinson*, 117 Mo. 649, 663, 23 S. W. 1066; 1895, *Metc v. State*, 46 Nebr. 547, 65 N. W. 190; 1903, *Lamb v. State*, — Id. —, 95 N. W. 1050; 1871, *Ruloff v. People*, 45 N. Y. 213; 1890, *Fulcher v. State*, 28 Tex. App. 465, 475, 13 S. W. 750. In one State the final ab-

surdity has been committed of forbidding the jury even to discuss the subject among themselves: 1898, *Wilson v. State*, 39 Tex. Cr. 365, 46 S. W. 251.

⁷ 1886, *Harrison v. Powers*, 76 Ga. 218, 238, 245; 1853, *Phelin v. Kenderdine*, 20 Pa. 354, 363; 1892, *Boyle v. Smithman*, 146 Id. 255, 258, 274, 23 Atl. 397; 1890, *Beach v. U. S.*, 46 Fed. 754 (as also the inference that the witness is by collusion shielding the accused). Compare the opposite view expressed by some of the English judges, quoted *supra*.

⁸ 1890, *State v. Bailey*, 54 Ia. 414, 415, 6 N. W. 569 (former claim of privilege as a witness); 1900, *Bunckley v. State*, 77 Miss. 540, 27 So. 638.

⁹ These cases are collected *post*, § 2273, note 5.

¹⁰ This is unquestioned; cases involving certain discriminations are collected *post*, § 2273, note 11.

¹¹ *Ante*, § 1210.

as they existed, and show, if such was the truth, that the suspicious circumstances can be accounted for consistently with innocence, and he fails to offer such proof, the natural conclusion is that the proof, if produced, instead of rebutting would tend to sustain the charge. But this is to be cautiously applied, and only in cases where it is manifest that proofs are in the power of the accused not accessible to the prosecution."

Certain situations must here be discriminated.

(1) The *failure to produce evidence*, in general, other than his own testimony, is open to inference against a party accused, with the same limitations (*ante*, §§ 285-291) applicable to civil parties.¹ Here the effect of the burden of proof has sometimes tended to confuse. It is true that the burden is on the prosecution (*post*, § 2485), and that the accused is not required by any rule of law to produce evidence; but nevertheless he runs the risk of an inference from non-production. This seeming paradox, which has been already sufficiently noticed in treating of the general principle (*ante*, § 290), has misled a few Courts to deny that any inference may be drawn.²

(2) The inference is equally applicable to the *non-production of documents*. But since the privilege applies to all documents which as a witness the party is called upon to produce (*ante*, § 2264), does the prohibition of an inference extend to all documents which he *might* as a witness otherwise have been compelled to produce, *i. e.* to all documents within his possession or control? Presumably not. It is clear that a document here plays a double part; it is, with regard to the inference, like a witness, *i. e.* it is something distinct from his own testimony and personality, and is merely an object which he has the power to produce; yet, with regard to the privilege, it is on a level with his own testimony. In this dilemma, where it becomes a question in what capacity the document should be regarded and which aspect should override the other, it seems desirable to choose that solution which is not open to abuse. Now it is obvious that if the inference were to be prohibited for all documents in the party's control, he could, by purposely securing the control of all sorts of documents, effectually prevent not only their perusal but even any inference as to their contents. This would be an abuse of the privilege, and is certainly not to be endured by the law. It seems proper therefore

¹ 1890, *People v. Cline*, 83 Cal. 374, 378, 23 Pac. 391 (larceny of horse; defendant's failure to call the alleged vendor, held to be open to inference); 1900, *State v. Griswold*, 73 Conn. 93, 46 Atl. 829; 1899, *Price v. U. S.*, 14 D. C. App. 391, 400 (failure to attempt to prove an alibi); 1893, *Frazier v. State*, 135 Ind. 38, 39, 34 N. E. 817 (failure to produce any evidence); 1858, *State v. Hinkle*, 6 Ia. 385 (failure to explain where arsenic was bought); 1903, *State v. Haast*, — *id.* —, 96 N. W. 1115 (the absence of contradiction for certain facts may be noticed, even though the accused is the only one who could contradict them); 1850, *Com. v. Webster*, 5 Cush. 395, 316 (quoted *supra*); 1872, *Com. v. Horner*, 110 Mass. 411; 1887, *Com. v. Brownell*, 145 *id.* 319, 14 N. E. 108; 1893, *People v. Mills*, 94 Mich. 630, 638, 54 N. W. 488; 1900, *State v. Costner*, 127 N. C.

566, 37 S. E. 326 (failure to call witnesses to explain accused's whereabouts); 1892, *Jackson v. State*, 31 Tex. Cr. 342, 344, 30 S. W. 921 (failure to account for possession of stolen goods).

² 1898, *People v. Strenber*, 121 Cal. 431, 53 Pac. 918 ("No presumption against him is raised by the law if he does not make the attempt to explain [evidence against him]"); 1873, *State v. Carr*, 25 La. An. 407, 408 (inference not allowable from a failure to offer any evidence for the defence); 1893, *State v. Hall*, 18 R. I. 207, 211, 36 Atl. 191 (keeping a house of ill-fame; comment forbidden, on the theory that, by virtue of the burden of proof, "the State was bound to prove her guilty without any assistance, either active or passive, on her part"). Undecided: 1866, *Doan v. State*, 26 Ind. 495, 496 (instruction held not properly worded).

to restrict the prohibition of the inference to such documents only as are of his own personal authorship (for thus they become in truth his own testimony and admissions), and to permit the inference for all others which happen to be within his control and are not produced. Such would seem to have been the practice hitherto.³

(3) Where the witness not produced is *privileged* and therefore might refuse to testify if called, there arises an interesting and complicated problem, already elsewhere considered (*ante*, § 286). It here involves the question whether the accused's failure to call a *co-defendant*, who would be privileged but competent, and whose non-production would otherwise be open to inference, can thus be noticed. It would seem that it ought to be, — at least, unless it appears that the co-defendant claims his privilege.⁴

(4) Where the accused *takes the stand voluntarily*, he waives his privilege, to a certain extent at least (*post*, § 2276). Hence the prohibition against inferences from his failure to testify comes to an end, with the ending of the privilege. His *failure in his testimony to deny or explain* the evidence against him which he might naturally have explained is therefore open to inference;⁵ and this must be so, however narrowly (*post*, § 2276) the

³ See the following cases, also cited *ante*, § 291, and compare the criminal cases cited *ante*, §§ 1202, 1205, 1207, 1210; 1764, *R. v. Smith*, 3 Burr. 1475; 1902, *Central Stock & G. Exchange v. Board of Trade*, 196 Ill. 598, 63 N. E. 740 (plaintiff, in a bill to secure quotation-service, refused to produce its sales-sheets, claiming the privilege; held, that the inference could be drawn as against a party to a civil cause, even though production was not compellable because of the privilege); 1896, *State v. Chamberlain*, 59 Mo. 129, 134, 1 S. W. 145; 1846, *Clifton v. U. S.*, 4 How. 242, 247; 1884, *U. S. v. Flemming*, 16 Fed. 907, 916. The following case is unique: 1903, *McKnight v. U. S.*, 54 C. C. A. 358, 115 Fed. 972 (after evidence that an incriminating document is in the accused's possession, no notice of production can be given by the prosecution, because the claiming of the privilege would permit inferences to be drawn against him; the ruling is made on the assumption that a copy could be used under such circumstances without notice to produce, — an incorrect assumption, as shown *ante*, §§ 1202, 1205, 1207; it also involves the fallacy that the mere necessity of making a claim of privilege for documents is improper because of the possible resulting inference, — a fallacy which reasons in a circle, because the privilege cannot be enforced until it is claimed and the Court cannot both enforce it and forbid the necessary condition precedent to enforcing it; the ruling also involves the fallacy that the accused's failure, on notice, to produce the document was equivalent to a claim of privilege, but it was not, because it might have been done in precisely the same way for a non-incriminating document and would merely have served as a basis for the use of a copy by the prosecution; these three fallacies so subtly combine in this ruling that the result is a plausible one; but the ruling remains purely fallacious and wholly un-

sound; the opinion in *R. v. Smith*, *supra*, cited *ante*, § 291, shows the natural and orthodox treatment of the situation).

⁴ The precise question has apparently not been decided: 1899, *Brook v. State*, 123 Ala. 24, 26 So. 329 (adultery with C.; defendant's failure to call C., who would be privileged, and was equally available for the prosecution, not a matter for inference; *Tyson J.*, *disa.*; useful opinions); *Coppin v. State*, *ib.* 56, 26 So. 333 (same); 1888, *State v. Mathews*, 98 Mo. 125, 130, 10 S. W. 144, 11 S. W. 1135 (inference allowed, the co-defendant not being on trial at the same time, and being therefore qualified and not privileged; *Sherwood, J.*, *disa.*, on the ground that a co-defendant not on trial is privileged); 1901, *State v. Weaver*, 165 *id.* 1, 65 S. W. 308 (no inference allowed for a failure to call a competent co-indictée not on trial; *State v. Mathews*, *supra*, repudiated, with the undignified and unprecedented remark that "the ruling in that case simply dodged the issue, and that is what every lawyer will say who reads the opinion in the case").

⁵ 1888, *Clarke v. State*, 57 Ala. 71, 74, 6 So. 368; 1888, *Cotton v. State*, *ib.* 103, 6 So. 396; 1873, *Solander v. People*, 3 Colo. 48, 69; 1893, *State v. Glave*, 51 Kan. 330, 335, 33 Pac. 8; 1874, *Stover v. People*, 54 N. Y. 315, 320 (larceny; defendant's failure, when on the stand, to account for the money, admissible for comment; *Church, C. J.*, and *Andrews, J.*, *disa.* on unspecified points in the case); 1902, *U. S. v. Lee Huen*, 113 F. 442, 455. *Contra*: 1888, *State v. Graves*, 95 Mo. 510, 514, 8 S. W. 739 (Rev. St. § 1918, quoted *post*, § 2276, interpreted to mean that "when he elects to go on the stand, he may testify only to such matters as he may choose," and that therefore no inference may be drawn from his failure to mention certain matters; *Brace* and *Sherwood, JJ.*, *disa.*); 1888,

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extent of the waiver be interpreted. Furthermore, where the party refuses answer and claims privilege as to the matter which is in truth included in the waiver, but the answer is not insisted upon, the inference is of course available,⁶ and this is conceded even under the anomalous doctrine of Mr. Justice Cooley (*post*, § 2276) as to waiver.⁷ Finally, this waiver has been held to go so far as to permit inferences to be drawn from *prior omissions or failures or refusals to testify* at a time when the privilege existed and the inference would have been prohibited.⁸

5. Cessation of the Privilege.

§ 2275. *Waiver: (a) by Contract.* It has never been doubted that the privilege is in itself waivable:

1719, *L. C. Parker, in East India Co. v. Atkins*, 1 Stra. 168, 176 (holding valid a covenant to give discovery): "It is a negative privilege that is allowed by the law, that a man may, if he please, refuse to discover a matter that will subject him to penalties. It is only a privilege, not a natural right, for then he would shake that natural right whenever he saw fit to make such discovery. If a man will waive such a privilege, surely he may; it is not a thing prohibited by the law. The reason why he is not obliged to discover is a want of right in the other party to oblige him to it; but if he will make a discovery, he may, nor is any rule of justice or natural right broke by it. Is it unjust that the whole case should be laid before the Court? If the party has not done anything contrary to his duty, an answer can do him no harm. And why should not this Court carry it so far, when there can be no prejudice unless the party is a knave? And if he be one, shall a Court of equity protect him?"¹

But may such a waiver be made irrevocably by contract before trial? Unless the contract is one which by its circumstances has come within the doctrine of duress or oppression, and is thus avoidable on general principles of contract, there is no reason in its present aspect why it should not be binding. This had been the doctrine since the origin of the privilege.² It

State v. Jackson, ib. 632, 655, 8 S. W. 749 (Sherwood, J., points out the fallacy of the preceding ruling, but a majority of the Court express dissent on this point); 1893, *State v. Elmer*, 115 Ill. 401, 122 S. W. 369 (*State v. Graves* approved); 1893, *State v. Fairbank*, 121 Id. 137, 150, 25 S. W. 895 (failure to testify to a "particular fact," held not open to inference); 1899, *State v. Hedspeth*, 150 Id. 12, 51 S. W. 463 (instruction that statements of the accused testified to by the prosecution and not denied by the accused are to be taken as facts, held erroneous).

⁶ 1870, *Andrews v. Frye*, 104 Mass. 234, 236; 1873, *State v. Ober*, 52 N. H. 459, 465.

⁷ Cooley, C. J., in *Constitutional Limitations*, p. 317, quoted *post*, § 2276. Compare the following cases of earlier date: 1852, *Carr v. Litchfield*, 2 Mich. 340, 344; 1867, *Knowles v. People*, 15 Id. 403, 413.

⁸ 1896, *Taylor v. Com.*, — Ky. —, 34 S. W. 227 (failure to testify at a preliminary examination); 1898, *Com. v. Smith*, 163 Mass. 411, 40 N. E. 189 (refusal to testify before the grand jury). *Contra*: 1901, *Woolley v. State*, — Tex. Cr. —, 64 S. W. 1084; 1904, *Rogers v. State*,

44 Id. 350, 71 S. W. 18; and compare the cases as to impeaching a witness by his former silence (*ante*, § 1042).

Otherwise, of course, where the defendant has not now taken the stand: cases cited *ante*, § 2272, note 3.

² The only hesitation indicated by any Court on this point has been in Georgia: 1884, *Gravett v. State*, 74 Ga. 191, 200 (questioning the *obiter* remark that there can be no waiver, in *Higdon v. Heard*, 14 Id. 258, where alone that view seems to have been uttered). But compare the doctrine of Mr. J. Cooley, *post*, § 2276.

³ 1719, *East India Co. v. Atkins*, 1 Stra. 168, 176 (bill against plaintiff's employees to discover misconduct involving a forfeiture of the plaintiff's right to a franchise of trade; defendant's covenant to answer any bill of discovery, held valid; quoted *supra*); 1728, *South Sea Co. v. Bumpstead*, *Moseley* 74 (covenant by a supercargo to make discovery to a bill by employer, here enforced, although involving disclosure of matter of forfeiture); 1837, *Green v. Weaver*, 1 Sim. 404, 430 (bill against a broker, who had given a bond to the corporation subject to penalties,

would follow that a contract found *by implication* from the relations of the parties is equally effective:

1827, V. C. Leach, in *Green v. Weaver*, 1 Sim. 404, 425, 433: "I think that two propositions may be assumed; first, that the policy of the law not only requires that a broker or agent should act with fidelity to his employer, and should be ready, at all times, to render a full and clear account of his transactions; but, secondly, from the nature of this case, the defendant must possess, and perhaps exclusively possess, the means of stating that account, which the policy of the law entitles the plaintiff to demand. I think these propositions may be assumed in this case as clear. . . . Then the next question is, inasmuch as the objection to make the discovery arose, in the cases I have referred to, from the stipulations of instruments under seal, can the solemnity of the seal make that obligation to discover more obligatory in a court of equity, than the moral obligation resulting from principal and agent, when one reposes and another accepts the confidence so reposed? . . . I should say that a Court of equity knows no difference between a mere moral obligation, and one resulting from stipulation by deed. If we contrast the circumstances of this case with those of the decisions I have referred to, I think we shall find that this case creates a higher moral obligation to give the discovery than any of those cases. In each of those cases the parties dealt at arm's length. The employer contemplated a breach of the contract by the agent, and stipulated for his own damages in case a breach of contract should take place. In the present case the employer surrendered himself, unconditionally, to the agent whom he employed, in the confidence that the agent sustained the character that he publicly assumed. The employer had no reason to suspect, nor had any means of detecting the misrepresentation of the fact, whether they were, or not, duly constituted legal brokers. Much less could he apprehend that they were daily and hourly living in the violation of the law of the country in so acting; and that they kept this violation lurking in the background, to be brought forward, by way of defence, against the just demands of those whose confidence they invited. If a Court of equity gives effect to a defence so constituted, I do not know that there can be any reason why an executor or administrator, who has made oath duly to administer the assets, and executed a bond for that purpose, may not allege those matters in answer to a bill of discovery charging him with fraudulently tendering an account of the assets."²

§ 2276. Waiver: (b) by Volunteering Testimony on the Stand. (1) The case of the *ordinary witness* can hardly present any doubt. He may waive his privilege; this is conceded. He waives it by exercising his option of answering; this is conceded. Thus the only inquiry can be whether, by answering as to fact X, he has waived it for fact Y. If the two are related facts, parts of a whole fact forming a single relevant topic, then his waiver as to a part is a waiver as to the remaining parts; because the privilege exists for the sake of the criminating fact as a whole. The reasoning is aptly expounded in the following passage:

1869, Campbell, J., in *Foster v. People*, 18 Mich. 266, 274: "Where he has not actually admitted criminating facts, the witness may unquestionably stop short at any point and

V. C. Leach: "A man may contract so as to incur an obligation to discover the facts, although that discovery may incidentally subject him to pecuniary penalties".

* 1827, *Green v. Weaver*, 1 Sim. 404, 431 (bill against a broker to discover the transactions which he had had on the plaintiff's account; held, that the relation was confidential and implied an agreement to give discovery without reserve; quoted *supra*). The principle ought to be

equally applicable to a stipulation made before the trial though not as a part of a covenant of employment: *Contra*: 1842, *Lee v. Read*, 5 Beav. 381, 385, *semble* (defendant's agreement, before trial, to give full discovery is not binding). It ought equally to apply to an *accused's* agreement made before trial: *Contra*: 1889, *U. S. v. Smith*, 4 Day 121, 124 (accomplice agreeing to turn State's evidence, but afterwards refusing).

determine that he will go no further in that direction. . . . But the rule which allows a witness to refuse answering questions not directly pointing to guilt, rests solely on the doctrine that, as in most cases the crimination would be made out by a series of circumstances, any one of them may have such a tendency to aid in reaching the result, that an answer concerning it may supply means of conviction, by aiding the other proofs which it indicates, or supplements, on behalf of the prosecution. The right to decline answering as to these minor facts is merely accessory to the right to decline answering to the entire criminating charge, and can be of no manner of use when that is once admitted, and must be regarded as waived when the objection to answering to the complete offense is waived. The law does not endeavor to preserve any vain privileges, and such a privilege as would allow a witness to answer a principal criminating question, and refuse to answer as to its incidents, would be worse than vain; for, while it could not help the witness, it must inevitably injure the party, who is thus deprived of the power of cross-examination to test the credibility of a person who may, by avoiding it, indulge his vindictiveness or corrupt passions with impunity. . . . And the further consideration is also recognised, that a witness has no right, under pretence of a claim of privilege, to prejudice a party by a one-sided or garbled narrative."

This view, however, did not receive final sanction in England; after much contrariety of opinion, the doctrine seems there to obtain that the privilege may be claimed at any moment,—a practical nullification of the present application of the principle of waiver.¹ But in the United States the rule set forth in the above passage is generally accepted, with varying phraseology; one or two Courts alone following the English doctrine of *R. v. Garbett*. The application of the rule thus comes to depend chiefly on the relations of the particular facts inquired about and the extent to which the particular witness has gone in his prior answers.²

¹ *Eng.*: 1820, *Ex parte Comens*, Buck Bkcy. Cas. 531, 540 (bankrupt's examination); L. C. Eldon: "If a man has gone on answering questions that had a tendency to criminate himself, he may stay, in answering those questions, wherever he pleases; you cannot carry him further than he chooses voluntarily to go himself"; 1824, *Dixon v. Vale*, 1 C. & P. 278 (Best, C. J., said that if a witness, after caution, chooses to answer, "he is bound to answer all questions relative to that transaction"); 1827, *Dandridge v. Corden*, 3 id. 11 (bill of exchange; after answering that there was an acceptance for value, the witness refused to state the consideration); L. C. J. Tenterden refused to compel him); 1827, *East v. Chapman*, M. & M. 46 (after answering "one or two questions on the subject" of a libel, the witness claimed his privilege; Abbott, C. J.: "Having partially answered you are now bound to give the whole truth"); 1834, *Ewing v. Osbaldiston*, 6 Sim. 606 (account of partnership, the answer defending, on the ground of the partnership's illegality; discovery compelled, because in the answer the liability to penalties was apparent, "and consequently he could not be damnedified by a production of the documents"); 1847, *R. v. Garbett*, 2 C. & K. 474, 485, 1 Den. Cr. C. 276 (answering in part is no waiver, for a witness; he may "claim the privilege at any stage of the inquiry"); 1851, *King of the Two Sicilies v. Wilcox*, 1 Sim. n. s. 301, 320 (*R. v. Garbett*

followed; *Ewing v. Osbaldiston* said to be inconsistent with it); 1860, *Fisher v. Fisher*, 30 L. J. P. M. A. 24 (divorce on the ground of cruelty; the petitioner by testifying does not waive the privilege of refusing to answer questions as to her adultery); *Ont. Rev. St.* 1897, c. 73, § 7 (adultery; quoted *ante*, § 489).

² *Ala.*: 1879, *Lockett v. State*, 63 Ala. 5, 11 (compellable to answer only "questions concerning the matter he has testified about," and not "those concerning other matters, though they come within the scope of the cause"; here, an accomplice turning State's evidence); 1886, *Smith v. State*, 79 id. 21, 23 (approving the preceding case); 1888, *Clarke v. State*, 87 id. 71, 74, 6 So. 368 (similar); 1888, *Cotton v. State*, ib. 103, 6 So. 372 (similar); 1889, *Rains v. State*, 88 id. 91, 92, 7 So. 315 (similar); 1892, *Williams v. State*, 96 id. 52, 54, 13 So. 333 (similar); *Cal.*: 1890, *People v. Freshour*, 55 Cal. 375 (a disclosure of part of a transaction waives the privilege as to the whole); *Fla.*: 1896, *Ex parte Senior*, 37 Fla. 1, 19 So. 622 ("if with full knowledge of his rights he consents to testify about the very matter that may criminate him, he must submit to a full, legitimate cross-examination" upon it; here the witness, after caution, testified for a contestant of an election that he had voted for him, and refused on cross-examination to answer as to his residence, registration, etc.; held, a waiver, since to speak as to voting was to testify about the main element of

(2) The case of an accused in a criminal trial, who voluntarily takes the stand, is different. Here his privilege has protected him from being asked even a single question, for the reason that no relevant fact that could be inquired about would not tend to criminate him (*ante*, § 2260). On this very hypothesis, then, his voluntary offer of testimony upon any fact is a waiver as to all other relevant facts, because of the necessary connection between all. His situation is distinct from that of the ordinary witness, with reference to the point of time when a waiver can be predicated, because the ordinary witness is compelled to take the stand in the first instance, and his opportunity for choice does not come till later, when some part of the criminalizing fact is asked for; while the accused has the choice at the outset. From the point of view of the actual prescience of witness and accused, the

the crime of illegal voting); *Ill.*: 1898, *Eggers v. Fox*, 177 Ill. 185, 52 N. E. 369 (no test laid down); *Id.*: 1876, *State v. Fay*, 43 Ia. 651 (after testifying to an admission by the defendant, the witness was compelled to answer as to the other persons present at the conversation); 1886, *Blodum v. Knosby*, 70 Id. 75, 30 N. W. 18 (action on notes; plea, payment; a clerk's testimony to non-payment, held not to waive privilege as to collateral questions about embezzling from his employer; *Beck, J., diss.*); *Ky.*: 1824, *Ginn v. Com.*, 5 Litt. 300 (complainant in bastardy, held bound to answer as to intimacy with other men); *Me.*: 1831, *Tillson v. Bowley*, 5 Greenl. 163 (like the next case); 1841, *Low v. Mitchell*, 16 Me. 372 (privilege waived as to "that matter so far as material to the issue," but not as to "other unlawful acts, wholly unconnected with the act of which he has spoken, even though they may be material to the issue"; here a complainant in bastardy, held privileged as to intercourse with other men about the time of begetting; a ruling clearly erroneous on the facts); 1875, *State v. Wentworth*, 65 Id. 274, 246 (preceding rulings disapproved; the privilege is waived for the "subject-matters of the inquiry of the direct examination"); *Md.*: 1895, *Chesapeake Club v. State*, 63 Md. 446, 455, 462 (illegal liquor-selling; questions as to seeing liquor on the premises, after other questions of the same sort answered, held privileged, on the authority of *R. v. Garbett*, that the witness "may claim his protection at any stage of the inquiry"; no American cases cited); *Mass.*: 1853, *Foster v. Pierce*, 11 Cush. 437 (bastardy; after answering a question to the complainant's intercourse, the witness refused to answer the cross-examiner's question as to the person with whom it was had; held compellable, on "the broad principle that the witness must claim his privilege in the outset, when the testimony he is about to give will, if he answers fully all that pertains to it, expose him to a criminal charge"); 1858, *Com. v. Pierce*, 10 Gray 472, 477 (forgery; an accomplice compelled on cross-examination to testify to part of the transaction, since "he must answer all questions legally put to him concerning that matter"); 1876, *Mayo v. Mayo*, 119 Mass. 290 (answers given by a witness not fully understanding his rights, but intending to claim the

privilege, were struck out, and a claim of privilege as to further answers was allowed); 1879, *Com. v. Pratt*, 126 Id. 462 (illegal liquor-selling; witness compelled to answer as to other illegal sales); 1887, *Com. v. Trider*, 143 Id. 180, 9 N. E. 510 (adultery; witness held not to have waived on the facts); 1899, *Evans v. O'Connor*, 174 Id. 287, 54 N. E. 557 (loss of wife's affections by adultery in 1893, 1894, and 1895; plaintiff's wife allowed to testify to 1893 without waiving privilege as to 1894 and 1895, as involving "distinct transactions"); *Mich.*: 1869, *Forster v. People*, 18 Mich. 266, 273 ("where he has not actually admitted criminalizing facts, the witness may unquestionably stop short at any point"; but otherwise, he must "disclose fully what he has attempted to relate"; accomplices, however, cannot "stop short of a full disclosure"; quoted *supra*); *Minn.*: 1882, *State v. Nichols*, 29 Minn. 357, 358, 13 N. W. 153 (bastardy; a witness testifying to knowledge of the complainant's intercourse with other parties than defendant, compelled to name the person); *Mo.*: 1865, *State v. Marshall*, 36 Mo. 400, 401 (murder; a witness for the prosecution held privileged as to matters irrelevant on the facts); *Nebr.*: 1868, *Lombard v. Mayberry*, 24 Nebr. 674, 690, 40 N. W. 271 (action on bond as security for notes; witness to genuineness of notes held not to have waived his privilege as to their alteration); *N. H.*: 1829, *State v. K.*, 4 N. H. 562 (witness compellable, if he testifies to the general fact of defendant's innocence, to "state all the circumstances relating to that fact"); 1837, *Amherst v. Hollis*, 9 Id. 107, 110 (support of a pauper; witness testifying to his poverty may claim the privilege as how he had disposed of certain property); 1851, *State v. Foster*, 23 Id. 348, 354, (illegal liquor selling; witness held compellable on the facts); 1855, *Coburn v. Odell*, 30 Id. 340, 355 (note for illegal consideration; party plaintiff called by defendant, held not to have waived on the facts); *N. Y.*: 1894, *People v. Forbes*, 143 N. Y. 219, 230, 38 N. E. 303 (murder by poisonous gas; grand jury's inquiry; voluntary answering of general questions as to the witness' guilt, held not to preclude a claim of privilege as to questions about the purchase of the instruments used for the offence).

result is the same. Each knows well enough that the inquiries will be upon topics relevant to the charge in issue; but that is immaterial. The question is, What does he know as to the connection between the first question and a possible subsequent incriminating question? Now the accused knows that there must always be such a connection; but in the witness' case there may or may not be such a connection, and if there is not, then his answer cannot be a waiver. The result is, then, that the accused, as to all facts whatever (except those which merely impeach his credit and therefore are not related to the charge in issue), has signified his waiver by the initial act of taking the stand.

The judicial and legislative solutions of this problem have been numerous. Leaving aside for the moment (*post*, § 2277) certain rules that are to be distinguished, there are half a dozen forms of solution:

(a) The first is that the voluntary taking of the stand is a waiver as to *all facts whatever, including even those which merely affect credibility*:

1872, *Churek, C. J.*, in *Connors v. People*, 50 N. Y. 240 (permitting answers as to former arrests, as affecting credibility): "The prohibition in the Constitution is against compelling an accused person to become a witness against himself. If he consents to become a witness in the case, voluntarily and without any compulsion, it would seem to follow that he occupies for the time being the position of a witness with all its rights and privileges and subject to all its duties and obligations. If he gives evidence which bears against himself, it results from his voluntary act of becoming a witness, and not from compulsion. His own act is the primary cause, and if that was voluntary, he has no reason to complain."

This goes beyond the limit above suggested. It may be supported on the ground that as the privilege protects the accused against any form of compulsory disclosure as a witness (*ante*, § 2263), so its waiver abandons any right to refuse as a witness.

(b) The second view is the one above suggested as correct, and appears in varying phraseology. Commonly, it is said that the waiver extends to all matters *relevant to the issue*, meaning thereby to exclude "collateral" matters, i. e. facts merely affecting credibility:

1875, *Appleton, C. J.*, in *State v. Wentworth*, 65 Me. 224, 243: "He was not obliged to testify. He does testify. . . . He exonerates himself. He denies the commission of the offense charged. He is subject to cross-examination, as the necessary result of his assuming the position of a witness. . . . If he discloses part, he must disclose the whole in relation to the subject-matter about which he had answered in part. Answering truly in part with answers exonerative, he cannot stop midway, but must proceed, though his further answers may be self-criminative. Answering falsely as to the subject-matter, he is not to be exempt from cross-examination because his answers to such cross-examination would tend to show the falsity of those given on direct examination. If it were so, a preference would be accorded to falsehood rather than to truth."

(c) A third rule, usually originated by statute, makes the accused liable to cross-examination "*like any other witness*." This would upon its face go no further than the second rule just examined, i. e. it would not predicate a waiver for facts merely affecting credibility. But it is not always construed

so narrowly; and the statute may be supposed merely to be dealing with the topics available for cross-examination (*post*, § 2277), without expressing anything as to the doctrine of waiver.

(d) A fourth rule, usually under statute, is that the accused may be cross-examined only as to the subjects *already dealt with in his direct examination*. This form was doubtless intended merely to apply to the accused the usual rule of a majority of the States as to the order of topics on cross-examination (*ante*, §§ 1885-1890, *post*, § 2778); but its literal effect is to limit the doctrine of waiver to the subject of the direct examination. This, though an unnecessary result on principle, ought not to make any practical difference; for the subject of the direct examination, properly construed, is the whole fact of guilt or innocence, and hence the topic of cross-examination might always range over any relevant facts except those merely affecting credibility; and thus the rule becomes in effect identical with that of (b) *supra*. The judicial interpretation of this statutory rule is not always harmonious.

(e) Still another view, substantially more restricted, and expressly embodied in a few statutes, is that the waiver extends to no other criminal acts than the one precisely charged. The policy of this rule is set forth in the following passage:³

1898, *McCoy, J.*, in *State v. Bartmess*, 33 Or. 110, 54 Pac. 167: "The reason for this distinction is found in the fact that if the defendant could be treated as a general witness, and cross-examined as such, evidence of inculpatory acts tending to the commission of the crime with which he was charged, and also of the commission of other crimes, might be brought before the jury, thereby causing them to lose sight of the real issue to be tried, and tending to the return of a verdict of guilty based upon evidence of particular acts wholly disconnected with the case on trial."

This limitation is sufficiently answered by the reasoning of Mr. Justice Campbell (above quoted). An accused who voluntarily takes the stand may fairly be asked to tell all he knows that is relevant. Since the prosecution can in any event, by other witnesses, prove the "inculpatory acts" above referred to (*ante*, § 305), it is difficult to see why the same acts cannot be proved by his own testimony, without unfair prejudice.

(f) Finally, there is an extreme view that the privilege *may be claimed at any moment*, i. e. virtually no waiver is conceded:

1871, *Cooley, J.*, *Constitutional Limitations*, 2d edition, p. 317: "If the accused does not choose to avail himself of it [his option to testify], unfavorable inferences are not to be drawn to his prejudice from that circumstance; and if he does testify, he is at liberty to stop at any point he chooses, and it must be left to the jury to give a statement, which he declines to make a full one, such weight as under the circumstances they think it entitled to; otherwise the statute [giving him the option] must have set aside and overruled the constitutional maxim which protects an accused party against being compelled to testify against himself, and the statutory privilege [to testify] becomes a snare and a delusion."

This passage was explained by the learned author in his third edition as follows:

³ Which, however, occurs in interpreting a statute of the fourth form just mentioned.

1873, *Cooley, J., Constitutional Limitations*, 3d edition, 317: "This paragraph appears to have led to some misapprehension of our views, and consequently we must regard it as unfortunately worded. Nevertheless, after full consideration, it has been concluded to leave it as it stands. What we intend to affirm by it is, that the privilege to testify in his own behalf is one the accused may waive without justly subjecting himself to unfavorable comments; and that if he avails himself of it, and stops short of a full disclosure, no compulsory process can be made use of to compel him to testify further. It was not designed to be understood that, in the latter case, his failure to answer any proper question would not be the subject of comment and criticism by counsel; but, on the contrary, it was supposed that this was implied in the remark, that 'it must be left to the jury to give a statement which he declines to make a full one such weight as, under the circumstances, they think it entitled to.' All circumstances which it is proper for the jury to consider, it is proper for counsel to comment upon. . . . We not only approve of this ruling, but we should be at a loss for reasons which could furnish plausible support for any other."

On the inconsistency in permitting an inference for a particular refusal but prohibiting it for a general refusal, it is needless to comment. It is further inconsistent (*ante*, § 2272) to hold that no compulsion may be used and yet that an inference may be drawn. On the precise point in controversy, whether the privilege against compulsion may be claimed at any point, no detailed reasoning is vouchsafed by the learned author. His view has apparently not been accepted outside of a single jurisdiction.

The state of the law in the various jurisdictions is not easy to determine, partly because of the ambiguity of the various statutes and partly because of the differing interpretations of the same statutory words by different Courts.⁶

⁶ *Sic?* "Claim."

⁷ In the following list, the statutes referred to are quoted in full *ante*, § 488; their tenor is here briefly indicated by letters referring to the six forms of rule above noted in the text; many rulings do not indicate whether they intend to apply the present principle or that of the ensuing section (§ 2277); the rulings cited *ante*, § 1890 (cross-examination to one's own case) should also be compared: *Eng.*: St. 1898, 61 & 62 Vict. c. 36, § 1 (rule c); 1900, *Charcock v. Merchant*, 1 Q. B. 474 (statute applied); *Ont.*: 1901, *R. v. D'Aoust*, 3 Ont. L. R. 635 (an accused taking the stand may be asked as to prior convictions; "he is in the same situation as any other witness"); *Ala.*: 1885, *Harris v. State*, 76 Ala. 462 (defendant becomes subject to cross-examination by co-defendants on their own behalf); 1903, *Smith v. State*, 137 Ala. 23, 34 So. 396 (he becomes "subject to cross-examination and impeachment as are other witnesses"); *Alaska C. Cr. Pr.* 1900, § 140 (rule d); *Ariz. Rev. St.* 1887, § 2040 (rule d); 1900, *Lewis v. Terr.*, — *Ariz.* —, 60 Pac. 694 (privilege not waived as to questions about former offences and convictions, under Rev. St. § 2040); *Cal. P. C.* 1872, § 1323 (rule d); 1870, *People v. Dennis*, 39 Cal. 625, 634 (answer to a cross-examination as to the details of a matter testified to in chief, held compellable); 1885, *People v. O'Brien*, 66 id. 602, 6 Pac. 695 (defendant's cross-examination held to be limited to the subject of the direct examination, under the statute;

McKee, J., diss., points out that the rule as to privilege and the rule as to order of evidence are distinct); 1888, *People v. Meyer*, 75 id. 383, 385, 17 Pac. 431 (privilege waived as to cross-examination to character; *Peterson and McFarland, JJ., diss.*); 1888, *People v. Rosello*, 78 id. 84, 92, 30 Pac. 36 (P. C. § 1323, applied; defendant may be cross-examined by the same rule as other witnesses, except that the Court has no discretion); 1892, *People v. O'Brien*, 96 id. 171, 180, 31 Pac. 45 (same); 1893, *People v. Gallagher*, 100 id. 446, 475, 476, 35 Pac. 80 (same; privilege is waived upon all such matters); 1897, *People v. Arnold*, 116 id. 682, 687, 48 Pac. 808 (privilege is waived as to cross-examination to character); 1898, *People v. Dole*, — *Id.* —, 51 Pac. 345 (*Gallagher Case* approved; here, a question as to a former admission, allowed); 1899, *People v. Arrighini*, 122 id. 121, 54 Pac. 591 (cross-examination allowed only on the matter of the direct examination); 1903, *People v. Walker*, 140 id. 153, 73 Pac. 631 (cross-examination to prior self-contradiction, allowed); compare here the cases cited *ante*, § 1890, and *post*, § 2277; *Colo.*: 1896, *Bradford v. People*, 23 Colo. 157, 43 Pac. 1013 (forgery; defendant taking the stand was required to write a specimen); *Conn.*: 1859, *Norfolk v. Gaylord*, 38 Conn. 300 (bastardy; defendant not privileged as to other acts of intercourse); 1866, *State v. Gaylord*, 35 id. 203, 207, *semble* (murder; cross-examination to credit, allowed); *Fla. St.* 1885, c. 4400 (rule c);

On the whole, the second form of rule above described seems to find the greatest support.

- 1890, *Wallace v. State*, 41 Fla. 547, 26 So. 713 ("becomes liable to cross-examination as other witnesses"); *Ga. Cr. Code* 1896, § 1010 (rule *f*); 1897, *Hackney v. State*, 101 Ga. 512, 29 S. E. 1007 (the cross-examination of a defendant making a statement can be only after it is finished and his consent is expressed; a cross-examining question by the Court, improper); 1902, *Walker v. State*, 116 id. 537, 42 S. E. 787; *Id.*, 1907, *State v. Larkins*, — *Id.* —, 47 Pac. 945 ("any facts material to the issues in the action," except so far as limited by the rule for order of evidence); *Ill. Civil Laws* 1897, § 1415 (rule *c*); *Id.*: 1893, *Chambers v. People*, 108 Ill. 409, 415 (defendant "is to be examined precisely as other witnesses"); 1897, *Spies v. People*, 122 id. 1, 335, 12 N. E. 885, 17 N. E. 896 (defendant "cannot excuse himself" on this ground); *Id.*: 1895, *Thomas v. State*, 108 Ind. 419, 438, 2 N. E. 506 (not decided; but *Com. v. Nichols, Mass.*, is quoted with approval); 1895, *Boyle v. State*, 105 id. 469, 475, 5 N. E. 208 (same); *Id.*: *Code* 1897, § 5485 (rules *c* and *d*); 1900, *State v. Peppers*, 50 Ia. 580, 583, 46 N. W. 683 (defendant not privileged from answering as to prior testimony); *Ky.* (the citations are placed *post*, § 2277); *La. St.* 1894, No. 29, § 2 (rules *c* and *d*); *Mo.*: 1875, *State v. Wentworth*, 65 Mo. 234, 240, 243 (defendant waives the privilege "as to all matters pertinent to the issue"; here, as to other illegal sales of liquor than the one charged; quoted *supra*); *Id.*: 1875, *Roddy v. Finnegan*, 43 Md. 490, 503 (privilege waived "as to any matter about which he has given testimony in chief"); 1899, *Gay v. State*, 90 id. 29, 44 Atl. 997 (may be cross-examined "concerning any matter pertinent to the issue on trial, regardless of the extent of the direct examination"; here, as to possession of a Federal liquor license, in a prosecution for unlawful sale); *Mass.*: 1864, *Com. v. Lannan*, 13 All. 563, 569 (liquor selling; defendant compelled to answer a question relating to the charge; he waives objection to "any question pertinent to the issue"); 1867, *Com. v. Mullen*, 97 *Mass.* 545 (he must testify to "any facts relevant and material to the issue"); 1867, *Com. v. Bonner*, *ib.* 567 (defendant not privileged from cross-examination to character; he assumes "the liabilities incident to that position"); 1871, *Com. v. Morgan*, 107 id. 190, 200, 206 (similar to *Com. v. Mullen*); 1873, *Com. v. Nichols*, 114 id. 295 (defendant "cannot refuse to testify to any facts which would be competent evidence in the case, if proved by other witnesses"); 1876, *Com. v. Tolliver*, 119 id. 312, 315 (defendant allowed to be cross-examined to inconsistent statements); 1889, *Com. v. Sullivan*, 180 id. 315, 32 N. E. 47 (defendant allowed to be cross-examined as to prior conviction); 1895, *Com. v. Smith*, 163 id. 411, 430, 40 N. E. 169 (preceding cases approved); *Mich.*: 1872, *Gale v. People*, 26 Mich. 157, 159 (defendant held not to waive the privilege as to matters affecting his character and credibility); 1893, *People v. Howard*, 73 id. 10, 12, 40 N. W. 739 (defendant may be cross-examined to character like any other witness); 1898, *Ritchie v. Stenium*, *ib.* 543, 549, 41 N. W. 667 (same for a civil case); 1899, *People v. Pinkerton*, 79 id. 110, 114, 117, 44 N. W. 180 (defendant not compellable to "answer questions irrelevant to the issue, having a tendency to bring in other charges"; no authority cited, *Sherwood, C. J., diss.*); 1900, *People v. Hicks*, *ib.* 457, 463, 44 N. W. 291 (defendant cross-examined as to details of the issue; no authority cited); 1900, *People v. Busey*, 82 id. 49, 57, 63, 46 N. W. 97 (defendant held subject to "any cross-examination which went directly to the merits of the case"); 1892, *People v. Foote*, 93 id. 32, 40, 53 N. W. 1036 (like *People v. Howard*); 1897, *Georgia v. Bond*, 114 id. 196, 73 N. W. 232 (like *Ritchie v. Stenium*); 1900, *People v. Ecarine*, 134 id. 616, 53 N. W. 628 (murder; defendant required to place a weapon in his pocket to illustrate the alleged circumstances); 1903, *People v. Duponce*, — *Id.* —, 94 N. W. 388 (the waiver extends to "any question, material to the case, which would in the case of any other witness be legitimate cross-examination," even though it involves some other crime; here applied to questions concerning the rape-intercourse which led to the charge of bastardy; the view of *Cooley, J.*, quoted *supra*, expressly repudiated); *Minn.*: 1891, *State v. Klitske*, 46 Minn. 343, 49 N. W. 97 (bastardy; defendant denying the intercourse charged, compelled to testify as to other intercourse); *N. J.*: *Rev. St.* 1899, §§ 2437, 2440 (rule *d*); 1899, *State v. Graves*, 95 Mo. 510, 514, 8 S. W. 739 (*Rev. St.* § 1916 interpreted in mean that "when he elects to go on the stand he may testify only to such matters as he may choose"; *Brace and Sherwood, JJ., diss.*); 1898, *State v. Jackson*, *ib.* 623, 655, 8 S. W. 749 (contrary statement, *Sherwood, J.*, writing the opinion, but a majority of the Court dissenting); 1893, *State v. Elmer*, 115 id. 401, 23 S. W. 369 (rule of *State v. Graves*, approved); 1901, *State v. Fisher*, 163 id. 169, 63 S. W. 690 (statute applied); compare here the cases cited *ante*, § 1890, and *post*, § 2277; *N. H.*: 1873, *State v. Ober*, 82 N. H. 459 (illegal liquor-selling; a defendant denying certain sales, held to have waived the privilege as to other sales; he is examinable "as to any and every matter pertinent to the issue"; "he places himself in the attitude of any ordinary witness, irrespective of any interest in the case"; *Mr. J. Cooley's* utterance in his 2d *id.* adversely criticized); *N. J.*: 1909, *State v. Zdanowicz*, — *N. J. L.* —, 55 Atl. 743 (rule of prior cases that the cross-examination must not go beyond the topics of the direct examination, applied; whether such a limitation is sound, not decided; compare the cases cited *ante*, § 1875); *N. Y.*: 1870, *Braddon v. People*, 43 N. Y. (Hand) 270 (question not determined, because the privilege was not claimed); 1872, *Connors v. People*, 50 id. 240 (assault; questions as to former arrests, to affect credibility, allowed; quoted *supra*); 1878, *People v. Casey*, 72 id. 596, 598 (assault; questions as to former

(3) The waiver involved in the accused's taking the stand permits the usual stages of inquiry to be pursued (*ante*, § 1866). He may therefore be recalled for further cross-examination under the same conditions as the ordinary witness.⁶

(4) The waiver involved in the accused's taking the stand is limited to the particular proceeding in which he thus volunteers testimony. His voluntary testimony before a coroner's inquest, or a grand jury, or other preliminary and separate proceeding, is therefore not a waiver for the main trial;⁷ nor is

an attempt, to affect credibility, allowed); 1878, *People v. Brown*, 73 id. 571, 573 (ignoring *People v. Casey*, and apparently approving *Conners v. People* so far as concerned the self-crimination privilege; but here making the curious distinction that the privilege against self-dignity, *ante*, § 2316, was not waived; confused opinion); 1892, *People v. Tice*, 131 id. 651, 655, 30 N. E. 494 (approving *Conners v. People*; defendant not privileged as to questions affecting his credibility); 1893, *People v. Webster*, 139 id. 73, 84, 24 N. E. 780 (preceding case followed); N. C. Code 1893, § 1833 (rule c); 1893, *State v. Lawhorn*, 90 N. C. 634, 637 (defendant allowed to be cross-examined to prior convictions); 1897, *State v. Thomas*, 96 id. 599, 604, 4 S. E. 518 (compellable to answer as to prior charges); 1900, *State v. Allen* 107 id. 805, 11 S. E. 1016 (preceding case approved); N. D.: 1894, *State v. Kent*, 5 N. D. 516, 67 N. W. 1032 (the privilege is "that of every witness who goes into the witness-box, and nothing more"; waiving as to collateral crimes relevant to the crime in question, but not as to collateral crimes merely affecting credibility); Ok.: 1891, *Hanoff v. State*, 57 Ok. St. 178, 181, 186 (defendant held apparently to waive his privilege to some extent; *Okay, J., diss.*); 1897, *State v. Withshire*, 44 id. 636 (broker's fraud; motion tried on affidavits; defendant held to have waived his privilege by filing an affidavit); Or.: *Codes & G. L.* 1892, § 1365 (rule d); 1897, *State v. Moore*, 33 Or. 65, 43 Pac. 488; and cases cited in § 2377, *post*, apply the statute; R. I.: 1903, *State v. Babcock*, — R. I. —, 35 Atl. 485 (cross-examination to prior conviction allowed); S. C.: 1903, *State v. Williamson*, 65 S. C. 242, 43 S. E. 671 (question not decided); Tenn.: 1895, *Clapp v. State*, 94 Tenn. 195, 30 S. W. 214 (privilege not waived as to other crimes); Tex.: 1891, *Quintana v. State*, 29 Tex. App. 401, 406, 16 S. W. 258 ("he is subject to all the tests and rules applicable to other witnesses, even to the answering of questions that would tend to criminate him"); 1896, *Rodriguez v. State*, — Tex. Cr. —, 36 S. W. 435 (in impeachment, no confessions, otherwise inadmissible, may be proved, by cross-examination or otherwise); compare here the cases cited *post*, § 2377; U. S.: 1897, U. S. v. Mullaney, 32 Fed. 370 (defendant charged with forging the registration of electors, compelled to write the names on cross-examination); 1897, *Spies v. Illinois*, 123 U. S. 131, 150, 6 Sup. 21, 22 ("He became bound to submit to a proper cross-examination"); 1900, *Fitzpatrick v. U. S.*, 178 id. 304, 20 Sup. 944 (Oregon rule applied; the prosecution may cross-examine "with the same latitude

as would be exercised in the case of an ordinary witness, as to the circumstances connecting him with the alleged crime"); Utah: C. Cr. P. 1896, § 5013 (rule c); Va. Code 1897, § 2397 (rule c); 1901, *Watson v. Com.*, 87 Va. 606, 613, 13 S. E. 33 (cross-examination to the issue, held proper on the facts); Wash.: *Annot. C. & G.* 1897, § 6941 (rule c); 1900, *State v. Duncan*, 7 Wash. 324, 329, 33 Pac. 117 (defendant is treated "the same as any other witness"; *Stiles, J., diss.*); 1897, *State v. O'Hara*, 17 id. 328, 30 Pac. 477, 328 (cross-examination as to the execution of a paper already introduced in chief by the prosecution, excluded); 1900, *State v. McIvern*, 53 id. 7, 73 Pac. 499 (cross-examination to prior conduct, held not within the privilege, on the facts).

⁶ 1890, *Peters v. Irish*, 4 All. M. Br. 295 (answer on cross-examination, held a waiver for the purpose of re-examination); 1890, *Thomas v. State*, 100 Ala. 53, 14 So. 631 (recall allowed); 1894, *Thompson v. State*, 14 So. 70, 14 So. 678 (defendant may be recalled to identify him with a convicted person, the record being offered to discredit him); 1899, *Dudley v. State*, 121 id. 4, 35 So. 743 (defendant may be recalled to ask as to prior inconsistent statements); 1873, *State v. Horns*, 9 Kan. 123 (where the defendant had taken the stand, and was cross-examined and re-examined, a recall for the purpose of calling attention to a prior self-contradiction was held allowable); 1896, *State v. Lewis*, 34 id. 374, 43 Pac. 268 (defendant cannot be recalled in rebuttal; this is unsound); 1901, *Abbots v. Com.*, Ky. —, 69 S. W. 715 (recall for a prior self-contradiction, allowed); 1892, *State v. Walsh*, 44 La. An. 1122, 1133, 11 So. 611 (recall for a prior self-contradiction, allowed); 1899, *State v. Favre*, 51 id. 424, 25 So. 93 (similar); 1904, *State v. Brown*, 111 La. —, 35 So. 819 (similar); 1894, *State v. Kennada*, 151 Ma. 406, 415, 25 S. W. 347 (recall for cross-examination, allowed); 1899, *Clay v. State*, 40 Tex. Cr. 593, 51 S. W. 370 (recall allowable as for ordinary witnesses); 1880, *State v. Glass*, 50 Wis. 218, 233, 6 N. W. 500 (recall allowable in the trial Court's discretion).

⁷ 1900, *Overend v. Superior Court*, 131 Cal. 290, 63 Pac. 372 (testimony at a preliminary examination, held not a waiver for the trial); 1896, *Samuel v. People*, 164 Ill. 379, 45 N. E. 729 (the making of an affidavit, informed on the information, declaring the truth of the charge, and thus setting the prosecution in motion, is not a waiver); 1873, *Cullen v. Com.*, 34 Gratt. 624, 637 (voluntary disclosure as witness at an inquest without warning as to his privilege, held not to be a waiver sufficient on the trial for the

his testimony at a first trial a waiver for a *later trial*.⁹ But it is sometimes held that a present waiver is *retroactive*, so that his voluntary testimony at the present trial permits inferences to be drawn from his refusal and claim of privilege at a former proceeding.¹⁰

(5) When the privilege is justly claimed, by either witness or accused, at such a stage or on such topics as to prevent substantially all cross-examination, the *direct testimony* may be *struck out*; for no testimony under any conditions can be received without liability to a substantially full cross-examination.¹¹

§ 2277. *Waiver: Cross-examination to Accused's Character in Impeachment distinguished.* When an accused takes the stand, several other questions arise, as to the applicability of principles affecting witnesses in general, and they tend sometimes to be confused with the one just examined.

(1) *May the accused be impeached at all?* An accused with bad moral character is, by universal concession, not to be impeached by the prosecution unless he first has attempted to show his good character (*ante*, § 35). But as a witness, his character may be impeached.¹² What status is he to be regarded? Is his status as an accused to make his status as a witness? This question, already elsewhere examined on principle (*ante*, § 890), is universally answered in the negative. The accused, as a witness, is open to impeachment like any other witness. In applying this principle, it will be seen that Courts might employ a form of words similar to those employed in predicating a waiver of his privilege (*ante*, § 2276).¹ The difference in bear-

homicide); 1899, *Mickimius v. Shaver*, 9 Wyo. 592, 58 Pac. 411 (compounding a felony; the witness' affidavit as informant in the requisition proceedings for the felon, held not a waiver of the privilege for the preliminary examination). 1891, *Temple v. Com.*, 75 Va. 392, 396 (same ruling for one who had testified before the grand jury; but a majority of the Court declined to express an opinion).

⁹ 1896, *Georgia R. & B. Co. v. Lybrend*, 99 Ga. 421, 27 S. E. 794; 1899, *Emery v. State*, 101 Wis. 637, 78 N. W. 145.

¹⁰ *Ante*, § 2273, note 3.

Of course, a waiver, by volunteering testimony, leaves him responsible for *perjury* in such testimony: 1899, *State v. Tarley*, 153 Ind. 345, 55 N. E. 39 (examination before grand jury). Compare the cases cited *post*, § 2281, *ad finem*, and *ante*, § 2270.

¹¹ *Ante*, § 1391.

Where the witness waives by answering, his answers may be afterwards used against him: 1903, *State v. Burrell*, 37 Mont. 282, 70 Pac. 982; and cases cited *ante*, §§ 850, 852 (confessions).

¹² The authorities are placed here, for convenience of comparison with those in § 2276. Where not otherwise noted, the impeachment was allowed. It is sometimes impossible to ascertain which principle the Court has in mind. Indeed, it is not inconceivable that the Court is sometimes not aware of the distinction. It is to be noted that, so far as impeachment through cross-examination is concerned, the present principle

is in some States covered by the statutes noted *ante*, § 2277, making the accused examinable "like any other witness": *Alabama*: 1896, *Buchanan v. State*, 109 Ala. 7, 19 So. 410; 1899, *Fields v. State*, 131 id. 18, 25 So. 727 (general bad character); *California*: 1862, *Clark v. Reese*, 35 Cal. 69, 96 (personal liberties with a woman); 1870, *People v. Reinhart*, 39 id. 449 (former conviction of sundry offenses); 1877, *People v. Chin Mook How*, 51 id. 597, 601; 1891, *People v. Johnson*, 57 id. 371; 1891, *People v. Beck*, 58 id. 212 (character for veracity); 1898, *People v. Meyer*, 75 id. 383, 385, 17 Pac. 431 (prior conviction); 1896, *People v. Hickman*, 112 id. 24, 45 Pac. 175; 1896, *People v. Mayes*, ib. 618, 45 Pac. 861; 1897, *People v. Arnold*, 116 id. 482, 48 Pac. 803 (questions as to former conviction are allowable, and P. C. § 1093, — dealt with *ante*, § 196, — regulating the use of such evidence as affecting sentence, does not prevent its independent use in this connection); 1897, *People v. Sears*, 119 id. 267, 51 Pac. 325 (prior conviction); 1898, *People v. Read*, — id. —, 52 Pac. 835 (character for truth); *Colorado*: 1892, *McKeone v. People*, 6 Colo. 346, 347 (prior self-contradiction); 1900, *Herron v. People*, 28 id. 33, 62 Pac. 833 (general character for credibility); *Connecticut*: 1896, *State v. Grawold*, 67 Conn. 290, 34 Atl. 1047 (questions showing a prior self-contradiction); *Florida*: (here the accused was not a competent witness until 1895; the following rulings hold him now open to impeachment); 1896, *Lester v. State*, 57 Fla. 382,

ing is nevertheless obvious. The question whether the accused may be impeached as a witness involves all forms of proof and all kinds of facts, i. e.

20 So. 222 (holding the amended act of 1895 constitutional as regards its title); 1899, *Copeland v. State*, 41 id. 320, 26 So. 319 (since So. 1895, c. 4400, there can be no sworn statement without cross-examination); 1899, *Wallace v. State*, 41 id. 547, 26 So. 713; 1900, *Squires v. State*, 42 id. 231, 27 So. 664; *Georgia*: (here the accused is still not competent and may merely make a "statement"; for the ways of impeaching this "statement," see the citations in *Hackney v. State*, cited *ante*, § 2276, and the cases cited *ante*, § 79); *Illinois*: 1883, *Chambers v. People*, 105 Ill. 406, 413 (in general); 1899, *Halloway v. People*, 181 id. 544, 54 N. E. 1030 (cross-examination to conduct); *Indiana*: 1874, *Fletcher v. State*, 49 Ind. 124, 130 (general character); 1875, *Merriam v. State*, 51 id. 14, 21; 1879, *State v. Bloom*, 68 id. 84, *semble*; *State v. Beal*, ib. 346; 1884, *South Bend v. Hardy*, 98 id. 579; 1885, *Boyle v. State*, 105 id. 469, 475, 5 N. E. 203 (cross-examination); 1889, *Keyes v. State*, 122 id. 527, 531, 23 N. E. 1097 (same); 1897, *Vanceleave v. State*, 150 id. 273, 275, 49 N. E. 1060 (same); *Iowa*: 1880, *State v. Red*, 53 Ia. 69, 70, 4 N. W. 831 (in general); 1884, *State v. Kirkpatrick*, 63 id. 554, 559, 19 N. W. 640; 1886, *State v. Teeter*, 69 id. 717, 719, 27 N. W. 485; 1890, *State v. O'Brien*, 81 id. 93, 46 N. W. 861; *Kansas*: 1886, *State v. Pfefferle*, 36 Kan. 90, 92, 12 Pac. 406 (he may be "contradicted, discredited, and impeached"); 1891, *State v. Probasco*, 46 id. 310, 311, 28 Pac. 749 (cross-examination to character); *Kentucky*: (in this State the precedents as to cross-examination to misconduct are much entangled, as noted *ante*, § 987, but the present principle is unquestioned); 1887, *McDonald v. Com.*, 86 Ky. 13, 4 S. W. 687; 1888, *Lockard v. Com.*, 87 id. 201, 204, 8 S. W. 266; 1889, *Pace v. Com.*, 89 id. 204, 209, 12 S. W. 271; 1892, *Burdette v. Com.*, 93 id. 77, 18 S. W. 1011; 1895, *Saylor v. Com.*, 97 id. 184, 30 S. W. 390; 1895, *Montgomery v. Com.*, — id. —, 30 S. W. 602; 1895, *Barton v. Com.*, — id. —, 32 S. W. 172; 1897, *Trusty v. Com.*, — id. —, 41 S. W. 766; 1898, *Justice v. Com.*, — id. —, 46 S. W. 499; 1899, *Baker v. Com.*, — id. —, 50 S. W. 54; *Louisiana*: 1893, *State v. Taylor*, 45 La. An. 606, 607, 12 So. 927; *State v. Murphy*, ib. 959, 13 So. 229; 1896, *State v. Southern*, 46 id. 628, 19 So. 648 (cross-examination to character); *Maine*: 1876, *State v. Watson*, 65 Me. 79 (prior conviction); 1875, *State v. Carson*, 66 id. 116, 117 (cross-examination to character); 1881, *State v. Witham*, 72 id. 531, 534 (except as protected by privilege); 1892, *State v. Farmer*, 84 id. 436, 24 Atl. 985 (record of conviction); *Massachusetts*: 1859, *Holbrook v. Dow*, 12 Gray 357, 359 (the accused testifies "subject to all the responsibilities which the law attaches"; here, cross-examination); 1867, *Com. v. Brennan*, 97 Mass. 587; 1868, *Com. v. Gorham*, 99 id. 421; 1870, *Root v. Hamilton*, 105 id. 23; *Michigan*: 1895, *People v. Sutherland*, 104 Mich. 468, 63 N. W. 566 (cross-examination to misconduct); 1897, *People v. Parmelee*, 112 id. 291, 70 N. W. 577; 1897, *Georgia v.*

Bond, 114 id. 194, 73 N. W. 282 (cross-examination to character); *Minnesota*: 1838, *State v. Curtis*, 39 Minn. 387, 389, 40 N. W. 263 (cross-examination to misconduct); 1890, *State v. Sener*, 42 id. 259, 44 N. W. 115; *Missouri*: (in this State it may be noted that, by another principle — *ante*, § 1270 — proof of conviction of crime by cross-examination is forbidden); 1878, *State v. Clinton*, 67 Mo. 380, 390 (constraining So. 1877, p. 356, making defendants in criminal cases competent; "he may be impeached as any other witness"; here, by general character); *State v. Cox*, ib. 392 (general character); 1878, *State v. Testerman*, 69 id. 408, 414 (prior self-contradiction); *State v. Ragan*, ib. 215 (misconduct and false statements); 1890, *State v. Cooper*, 71 id. 436, 442; 1893, *State v. Owen*, 78 id. 567, 377; 1896, *State v. Palmer*, 86 id. 569, 571; 1886, *State v. Bulla*, 59 id. 595, 598, 1 S. W. 764; 1886, *State v. Rider*, 60 id. 54, 63, 1 S. W. 825; 93 id. 474, 486, 8 S. W. 733; 1897, *State v. Beardsleigh*, 92 id. 490, 493, 4 S. W. 666; 1897, *State v. Brooks*, ib. 542, 581, 5 S. W. 257, 330; 1888, *State v. West*, 95 id. 139, 143, 8 S. W. 354; 1889, *State v. Taylor*, 98 id. 240, 244, 11 S. W. 570 ("in the same manner as any other witness"); 1894, *State v. Smith*, 125 id. 2, 6, 28 S. W. 181; 1897, *State v. Dyer*, 139 id. 199, 40 S. W. 788; *Montana*: 1900, *State v. Schuepel*, 23 Mont. 523, 59 Pac. 927; *Nevada*: 1874, *State v. Cohn*, 9 Nev. 179, 189 (he is to be "treated as an ordinary witness"); 1876, *State v. Huff*, 11 id. 17, 27 (he is subject to "the same cross-examination that would be proper in the case of any other witness"); *New Mexico*: 1894, *Terr. v. De Gutman*, 8 N. M. 92, 42 Pac. 68; *New York*: (the principle is in this State unquestioned; most of the cases declaring it have been collected *ante*, §§ 2277 and 987); 1897, *People v. Conroy*, 153 N. Y. 174, 47 N. E. 358 ("specific immoral acts" may be inquired of on cross-examination); *North Carolina*: 1881, *State v. Elier*, 85 N. C. 585, 587; 1883, *State v. Lawhorn*, 88 id. 634, 637; 1897, *State v. Traylor*, 121 id. 674, 28 S. E. 493; *North Dakota*: 1890, *Terr. v. O'Hare*, 1 N. D. 30, 44, 44 N. W. 1003 (cross-examination to character); 1899, *State v. Rosum*, 8 id. 348, 80 N. W. 480 (cross-examination to collateral offences); *Ohio*: 1881, *Hanoff v. State*, 37 Oh. St. 178 (cross-examination to conduct); *Oklahoma*: 1898, *Ashe v. Terr.*, 7 Okl. 188, 54 Pac. 445 (similar); 1899, *Hyde v. Terr.*, 8 id. 69, 56 Pac. 851 (cross-examination to character); *Oregon*: 1883, *State v. Abrams*, 11 Or. 169, 173, 8 Pac. 327 (prior self-contradiction); 1886, *State v. Saunders*, 14 id. 300, 309, 313, 12 Pac. 441 (excluding cross-examination to past misconduct not involved in the issue, probably on the principle of § 2276, *ante*); 1898, *State v. Bartmess*, 33 id. 110, 34 Pac. 167 (cross-examination as to prior inconsistent statements, and outside testimony thereto, allowable, following *State v. Abrams*); *Rhode Island*: 1885, *State v. McGuire*, 15 R. I. 23, 23 Atl. 1118 (the accused is "liable to impeachment like any other witness"); *South Carolina*: 1886, *State v. Robert-*

proof by other witnesses, proof of general character, conviction of crime, and the like; while the question of privilege involves merely an inquiry of the accused himself as to a criminal act. Upon such an inquiry there are involved both questions at once, and a settlement of the question of privilege will usually involve incidentally the settlement of the other question. But upon all other inquiries the question of privilege is not involved, and the question of impeachment in general is alone involved and settled.²

(2) By what *kind of character* may the accused be impeached? As a witness, only by his *character for veracity*, in most jurisdictions, but in others by his general bad character; as an accused, not at all, until he has himself attempted to prove good character for the trait relevant in the charge, and then the prosecution may deny this in rebuttal. As a witness, then, he is subject to proof which would not be receivable against him as an accused except on certain conditions.³

(3) As an accused, the party may offer his *good character in support*, but this character must be for the trait relevant to the charge (*ante*, §§ 56, 59). As a witness, however, the party may not offer his good character *until impeachment* (*ante*, § 1104), and then (in most jurisdictions) only his character for veracity. Thus, a further practical distinction may arise, in consequence of his double status (*ante*, § 61).

(4) As a witness, the accused is subject to cross-examination to *specific acts of misconduct impeaching his character for veracity*. The distinction between the propriety of such inquiries and the privilege not to answer them has been already considered (*ante*, §§ 2268, 2276).⁴ It may also here be noted that in some jurisdictions⁵ a question has occasionally been raised whether, for an accused, there should be stricter limits to this cross-examination than for an ordinary witness.⁶

son, 36 S. C. 117, 120, 1 S. E. 443 (character for truth); 1890, *State v. Wyse*, 33 id. 582, 591, 12 S. E. 656 (contradiction); 1890, *State v. Merri-man*, 34 id. 16, 59, 12 S. E. 619 (cross-examination to character); 1892, *State v. Turner*, 36 id. 534, 543, 15 S. E. 602 (similar); 1900, *State v. Mitchell*, 56 id. 524, 33 S. E. 210 (liquor offence; questions as to former indictments and fines for liquor offences, allowed); *Tennessee*: 1887, *Peck v. State*, 86 Tenn. 259, 263, 6 S. W. 389; 1892, *Hill v. State*, 91 id. 521, 524, 19 S. W. 674 (the accused is "subject to impeachment as any other witness would have been"); *Texas*: 1892, *Bell v. State*, 31 Tex. Cr. 276, 20 S. W. 549 (in general); 1896, *Morales v. State*, 36 id. 234, 245, 36 S. W. 435, 446 (but the statutory restrictions as to using his confessions, *ante*, § 851, still apply to questions about them on cross-examination; and thus a cross-examination to the accused's admission or self-contradictions is practically prevented); 1898, *Holley v. State*, 39 id. 301, 46 S. W. 39; 1900, *Walton v. State*, 41 id. 454, 55 S. W. 546 (like *Morales v. State*); 1900, *Dickey v. State*, — id. —, 56 S. W. 627 (cross-examination to character); 1901, *Woolley v. State*, — id. —, 64 S. W. 1054 (allowing cross-examination to self-contradictions); *Utah*: 1894, *People v. Lar-*

son, 10 Utah 143, 37 Pac. 258 (cross-examination to character); *Wisconsin*: 1881, *Yanke v. State*, 51 Wis. 464, 467, 8 N. W. 276 (the accused subjects himself "to the same rules of cross-examination applicable to other witnesses.")

² In *People v. Tice*, N. Y., cited *ante*, § 2276, the distinction is brought out.

³ The rule for witnesses' character has been considered *ante*, § 923; its application to the accused as a witness is dealt with *ante*, § 61. Many of the rulings cited in the §§ 2276 and 2277 are concerned also with these questions.

⁴ See also the opinions in *South Bend v. Hardy*, Ind., cited *ante*, § 2270, and in the *Brown and Brandon* cases, N. Y., cited *ante*, § 2276.

⁵ Notably in Kentucky and New York.

⁶ This question has already been considered in connection with the general principle as to cross-examination to misconduct (*ante*, §§ 981-987); but some of the rulings already cited in this section (§ 2277) and in § 2276 do not always keep in mind the distinction between those three principles, namely, impeaching an accused witness in general (*supra*, par. 1), impeaching him by cross-examination to misconduct (*ante*, § 987), and privileging him not to answer (*ante*, § 2276).

(5) As a witness, the accused may be impeached by proof of conviction of another crime (*ante*, § 985). But whether this proof may be made on his own cross-examination, without producing a copy of the record of conviction, involves another principle (*ante*, § 1270).

§ 2278. *Same: Other Principles affecting the Accused's Cross-examination and Impeachment, distinguished (Cross-examining to One's Own Case, etc.).*

(1) By a rule intended originally to prescribe merely the order of presenting evidence, it is in a majority of jurisdictions not permitted to put in one's own case on the cross-examination of the opponent's witnesses (*ante*, §§ 1885-1891), or, in the usual phrase, the *cross-examination must be confined*, in its material, to the *subject of the direct examination*. This rule, in its effect upon the examination of the accused, is palpably unfair to the prosecution; for, since the prosecution would presumably have neither the right nor the desire to recall the accused as its own witness, that which was intended merely as a prohibition against obtaining certain facts on his cross-examination becomes in effect a prohibition against obtaining them from him at all. The poor policy and faulty reasoning of such a result has already been sufficiently examined (*ante*, § 1887). It is here, however, worth while to note that this rule, as enshrined in many States by statute, is by some Courts interpreted as if it were a rule affecting the waiver of the privilege against self-crimination.¹ The two have of course no connection; although, if the former rule forbids questions which go beyond the subject of the direct examination, the waiver is also incidentally thus limited, for the simple reason that there are no questions for the accused to answer, and the result is the same. But the practical error of treating the two questions as one (an error not uncommon under such statutes) is seen in the case of questions directed merely to facts impeaching character. Here it is plain that the effect of the first rule is not to exclude such inquiries (*ante*, § 1891); for there would otherwise never be any opportunity to ask them. But this leaves the question of privilege and its waiver still undetermined, and resort must be had for that purpose to the appropriate principle (*ante*, § 2276). In a few jurisdictions, however, this distinction seems irrevocably buried in the decisions interpreting the statute.²

(2) The accused as a witness may be discredited by the biased position which he occupies as an *interested party*, i. e. the jury may consider that circumstance in weighing his credit (*ante*, § 968). This is in no way connected with the doctrine of waiver; yet the possibilities of misunderstanding these various principles seem unlimited, and this sort of confusion has sometimes occurred in rulings dealing with the accused as an impeachable witness (*ante*, § 2277, par. 1).

§ 2279. *Expurgation of Criminality: (a) by Acquittal; (b) by Lapse of Time.* The law is concerned with its own penalties only. Legal criminality

¹ This has been noticed in dealing with the waiver, in § 2276. The distinction is pointed out by McKee, J., *dis.*, in *People v. O'Brien*, Cal., cited *ante*, § 2276.

² The rulings in §§ 1890 and 2276 should be compared.

consists in liability to the law's punishment. When that liability is removed, criminality ceases; and with the criminality the privilege. Of the various modes in which that liability may cease, the following enumeration seems to be complete: Conviction and the suffering of the punishment; Acquittal, or other former jeopardy; Abolition of the general crime; subsequent to its commission (provided the rule of criminal law thereby exonerates prior offenders); Lapse of time barring prosecution of the particular offence; Executive pardon for the particular offender; Statutory amnesty, before or after the act, for the particular criminal act or for the offender. Of these various modes, however, not all seem to have called for judicial interpretation as to their effect.

(a) An acquittal conclusively negatives criminality; no privilege can therefore be based upon the charge of crime.¹

(b) A crime erased by lapse of time exists no longer. There is therefore no criminal fact to be privileged from disclosure. A legal limitation of the time of prosecution is in effect an expurgation of the crime; and after the lapse of the time fixed by law the privilege ceases.² Moreover, since the prohibition of inferences from a claim of privilege rests merely on the ground that the privilege would otherwise be evaded (*ante*, § 2272), it follows that a person's claim of privilege on a prior occasion may be used³ to impeach him as an admission or self-contradiction, in a trial occurring after the statutory period has elapsed.⁴ The only question can be whether the claimant or the opponent of the privilege has the burden of proof with respect to the usual condition upon which the running of the statutory period depends, namely, that no prosecution has been begun within the time; and this burden is held to be upon the opponent.⁵

§ 2280. *Expurgation of Criminality; (c) by Executive Pardon.* It seems

¹ 1888, *Holt v. State*, Tex., cited *post*, § 2280.

It would seem that the *nolle pro.* of a co-defendant, entered in order to secure his testimony for the State, is equivalent to an acquittal: 1886, *Ex parte Stice*, 70 Cal. 51, 25, 11 Pac. 459 (applying P. C. §§ 1099-1101).

² Eng.: 1789, *Williams v. Farrington*, 3 Brown Ch. C. 38, 40 (privilege ceases, so far as the time for recovering penalties has elapsed); 1828, *Roberts v. Allatt*, M. & M. 192 (privilege denied, where the statutory period had expired without proceedings begun); 1828, *Trinity House v. Burge*, 3 Sim. 411 (and this is equally so, where the period ends after plea filed but before the hearing); 1832, *Davis v. Reid*, 5 id. 443, 446; U. S.: 1876, *Calhoun v. Thompson*, 54 Ala. 166, 170 (aiding a criminal to escape); 1899, U. S. v. Smith, 4 Day 121, 123 (under a statute limiting prosecutions to a period of two years, except the person flee from justice, the witness "is *prima facie* protected from prosecution by the statute"; the witness' plea that he fled does not preserve his privilege, but the prosecution will thereafter be barred); 1871, *Skinner v. Judson*, 3 Conn. 528, 535 (penalty for fraudulent conveyance, barred by statute; explaining *Northrop v. Hatch*, 6 id. 341); 1859,

Norfolk v. Gaylord, 26 id. 309, 314 (bastardy; same ruling); 1849, *Marshall v. Riley*, 7 Ga. 367, 372 (penalty for unlicensed practice of medicine; principle recognised); 1851, *Weldon v. Burch*, 12 Ill. 374 (riot and burglary; principle applied); 1888, *Mahankie v. Cleland*, 76 Ia. 401, 404, 41 N. W. 53 (general principle affirmed); 1845, *Cloze v. Olney*, 1 Denio 319, 323 (usury; principle applied).

³ On the general principles of §§ 200, 1045, 1060, *ante*.

⁴ 1894, *Childs v. Merrill*, 66 Vt. 322, 326, 29 Atl. 532 (refusal to answer in a prior criminal proceeding, admitted in a civil suit after the limitation-period for the crime had elapsed). The same principle applies to a prior acquittal: 1898, *Holt v. State*, 39 Tex. Cr. 282, 45 S. W. 1016, 45 S. W. 829 (a witness previously acquitted of the present charge, compelled to answer that he had claimed his privilege on that trial).

⁵ 1888, *Southern R. N. Co. v. Russell*, 91 Ga. 203, 16 N. E. 40; 1895, *Lamson v. Boyden*, 160 Ill. 612, 43 N. E. 781; 1846, *Bark v. Henry*, 2 Denio 158, 160; 1847, *Bank v. Henry*, 1 N. Y. 63, 67, *conide*.

always to have been conceded that an executive pardon for a past offence, by prohibiting and preventing all punishment for the offence, nullifies the privilege. Criminality, in the sense of the law, is liability to legal punishment; and if the punishment is abrogated, the criminality ceases. In the reason of the thing, from every point of view, there can be no doubt of the correctness of this conclusion. Nevertheless, in applying the principle, certain discriminations become necessary.

(1) The pardon of the Executive, under the Constitution of the nation, may be no protection against duplicate *penal proceedings by some other branch of the government*; does the privilege then continue?¹ This ought to depend upon whether the liability has been practically, even though not technically, taken away:

1801, *Cockburn, C. J.*, in *R. v. Byles*, 1 B. & S. 311, 285 (the witness was pardoned for bribery in election; by statute the witness was still liable to impeachment by the House of Commons): "It was contended that a bare possibility of legal peril was sufficient to entitle a witness to protect . . . [But] we are of opinion that the danger to be apprehended must be real and appreciable, with reference to the ordinary operation of the law in the ordinary course of things, — not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct. We think that a merely remote and naked possibility, out of the ordinary course of the law and such as no reasonable man would be affected by, should not be suffered to obstruct the administration of justice. The object of the law is to afford, to a party, called upon to give evidence in a proceeding *inter alios*, protection against being brought by means of his own evidence within the penalties of the law. But it would be to convert a salutary protection into a means of abuse if it were to be held that a mere imaginary possibility of danger, however remote and improbable, was sufficient to justify the withholding of evidence essential to the courts of justice. Now in the present case no one seriously supposes that the witness runs the slightest risk of an impeachment by the House of Commons. . . . It was therefore the duty of the presiding judge to compel him to answer."

(2) The pardon may not protect against prosecution by another sovereignty for the same offence. Here, however, the act is in truth a different offence under a different system of laws, — a foreign crime; and this question has been elsewhere examined (*ante*, § 2258.) (3) Is a prosecuting officer's promise of immunity equivalent to a pardon? Technically, and perhaps practically, it is not.² If not, the criminality, and therefore the privilege, does not thereby cease.³ (4) A pardon abrogates all legal consequences of the crime, but it cannot abrogate the social consequences, the *disgrace*. There may therefore remain, unfringed, the independent privilege against disclosure of facts of

¹ The same question may arise with reference to the effect of a pardon upon private suits for penalties: 1870, *R. v. Kinglake*, 22 L. T. R. N. S. 335 (bribery being by statute subject to prosecution and also to an action for penalties, *Cockburn, C. J.*, and *Blackburn, J.*, doubted whether any privilege remained after the granting of a pardon and entering of a *nolle pros.* by the Government); 1846, *Hank v. Salina*, 2 Denio 155, 159 (usury penalties; cited *post*, § 2282).

² For the learning on this subject, see the *Whiskey Cases*, 99 U. S. 594 (1878).

³ 1896, *Ex parte Irvine*, 74 Fed. 945, 946 (because the promise merely gives an "equitable right" to future immunity, and is both conditional and uncertain); 1881, *Temple v. Com.*, 75 Va. 392, 397 (a promise by the State's attorney not to prosecute is not sufficient). For a *nolle pros.*, as equivalent to an acquittal, see *ante*, § 2279.

disgrace or infamy.⁴ But this privilege is not protected by the Constitution, never applied to any but "collateral" inquiries, and is to-day in many jurisdictions fallen into disuse (*ante*, §§ 984, 987, 2255).

§ 2281. *Expurgation of Criminality: (d) by Statutory Amnesty or Indemnity*; (1) *Statutes forbidding Prosecution for the Offence*. If a statute passed July 1 were to abolish the crime of liquor-selling or bribery or gambling, and declare that on and after the ensuing January 1 no person doing any of these things should be liable to punishment by the law, it is plain that a person doing any of them on January 1 could plead no privilege, although the door of them on December 31 would retain his privilege. And yet the act itself, and the morality of it, would be identical on December 31 and January 1. Criminality is the creation of the law, not an inherent element in the act itself. It may therefore be taken away by the law; and the prior existence of the attribute is in no sense a continuing necessity. The treasons and the criminal libels which filled English prisons two centuries ago are now non-existent, though the same acts are done as of yore. Furthermore, legislation may remove criminality for a class of persons or an individual, as well as for a generic act. Finally, the removal of criminality may be conditioned on the happening of an event; and this event may equally be the doing of an act by the individual himself who is to obtain a benefit thereby. A legislative provision, therefore, providing *amnesty for an individual offender who shall disclose the facts of the offence* upon inquiry is effective to remove the criminality of the offence, and the privilege thereby ceases as to him:

1855, *Scott, J.*, in *State v. Quarles*, 13 Ark. 307, 310: "When this rule of the common law should have been so changed by legislative enactment, as to make unnecessary any appeal whatever on the part of the witness to his constitutional guarantee — as by regulations securing to him otherwise and effectually all that was guaranteed by the Bill of Rights — he could have no greater reason to complain than he would have had, had the law remained unchanged and under its operation he had never had any occasion to take shelter under the guarantee. And in such case, there would be no more ground upon which to suppose a want of competent power in the Legislature to make such regulations than there would be in case that body were to repeal the statute of gaming, and by this means deprive the gambler of his constitutional privilege to be accused and tried for a criminal offence, which has no longer existence. In either case, all that could be said would be, as to the gambler, that the Courts could not indulge him in the luxury of a constitutional accusation and trial, wherein he could display his skill in breaking through the meshes of the law, for the reason that he had committed no offence then known to the law. And as to the witness, that he could not be indulged with the arm of the law to prevent his being ravished of matters tending to a crimination of himself, for the reason that nothing that could be wormed out of him could possibly have that effect. In a word, in neither case, there being no invasion of right or privilege, could there be any place for vindication; and there being no encroachment upon any right retained by the citizen, and no pretence of any transgression of any of the higher powers delegated to the

⁴ 1861, *R. v. Boyes*, 1 B. & S. 311, 321.

Distinguish, moreover, the question whether a pardoned crime, being no longer a crime, is even relevant to discredit a witness: 1879, *Reading's Trial*, 7 How. St. Tr. 259, 296 (*Oates*, for the prosecution, was not allowed to be asked

about a crime for which he had been pardoned, because the object was merely to discredit him as a witness, and a pardoned crime was not relevant for that purpose); and cases cited *ante*, § 985.

Legislature, such acts would be clearly without the pale of prohibition and within the scope of authority."

1878, *Smith, J.*, in *State v. Newell*, 58 N. H. 314: "The legal protection of the witness against prosecution for crime disclosed by him is in law equivalent to his legal innocence of the crime disclosed. . . . The witness, regarded in law as innocent, if prosecuted for a crime which he has been compelled by statute to disclose, will stand as well as other innocent persons; and it was not the design of the common-law maxim, affirmed by the Bill of Rights, that he should stand any better. . . . He could plead and show that he had disclosed the same offence upon a lawful accusation against his principal, and thus make a perfect answer in bar or abatement of the prosecution against himself."

1894, *Harrison, J.*, in *Ex parte Cohen*, 104 Cal. 534, 539, 38 Pac. 364: "Any evidence that he may give under such a statutory direction will not be 'against himself,' for the reason that by the very act of giving evidence he becomes exempted from any prosecution or punishment for the offence respecting which his evidence is given. In such a case he is not compelled to give evidence which may be used against himself in any criminal case, for the reason that the Legislature has declared that there can be no criminal case against him which the evidence which he gives may tend to establish."

Such statutes, therefore, have for two centuries been the expedients resorted to for the investigation of offences whose proof and punishment were otherwise practically impossible because of the criminal implication in the offence itself of all who could bear useful testimony. Though doubtless the expedient was earlier employed,¹ the first notable instance (in 1725) was that of Lord Chancellor Macclesfield, whose traffic in the sale of offices and appointments was beyond the endurance even of a generation in which the spoils system and political venality were accepted as matters of course.² The next instance of political note was the parliamentary investigation, in 1742, into the practices of Lord Orford (Robert Walpole), whose long prime-ministry was maintained by his cynical and notorious methods of political corruption.³ The expediency and practical utility of this mode of obtaining evidence, may, as a measure of legislation, be open to argument.⁴ But the tradition of it as a lawful method of annulling the privilege against self-crimination is unquestioned in English history.

¹ 1733, Bishop Atterbury's Trial, 16 How. St. Tr. 604 (here the witness was not summoned, because he was jointly concerned in the very treasons charged against the defendant and thus would have criminated himself, while the Bill acquitting him of any future prosecution for those treasons had passed the House but not received the royal assent; many lords dissented).

² 1725, Lord Chancellor Macclesfield's Trial, 16 How. St. Tr. 921, 1147 (illegal traffic in public offices, an act was passed to indemnify present Masters in Chancery for such malfeasance, and persons in that class were compelled to testify to such transactions, but former Masters and other officers were allowed to refuse to answer).

³ The proceedings and debates will be found in Cobbett's Parliamentary History, vol. XII, pp. 625-734. The form of the bill here provided that the witnesses, if they truly discovered, "are hereby freed, indemnified, and discharged of . . . all forfeitures, penalties, punishments,

. . . which he, she, or they may incur or become subject to for or by reason or means of any matter or thing which he, she, or they, shall upon his or her or their being examined, as aforesaid, truly and faithfully discover . . . concerning the said enquiry").

⁴ The arguments *pro* and *con* will be found in Cobbett, *ubi supra*, and in Hansard Parl. Deb. 1st ser., VI, 401 (Lord Melville's case), and in the debates in Congress on the act of Jan. 24, 1857, now Rev. St. 1875, § 102 (Congr. Globe, Jan. 23, p. 434. Smith's Digest of Precedents of Privileges of Congress, 1894, pp. 151-190). In 1806, in the debate on a similar bill to indemnify the witnesses against Lord Melville (Mr. Dundas), Lord Eldon, speaking against it (Hans. Parl. Deb., 1st ser., VI, 170) referred to Lord Hardwicke's opposition, sixty years before, to the other bill, and remarked that "that great man concluded his speech by observing 'that he would much rather be the object of such a bill than the author of it.'"

In more modern times the expedient has apparently not been resorted to for individual cases of misdoing, but rather for classes of crimes. It is thus placed upon a sounder basis of policy, and has been vastly extended in its use.⁵ Indeed, in the United States, or parts of them, it is difficult to conceive

⁵ The following list of statutes covers both those which grant express and entire amnesty and those which merely prohibit the use of the compelled testimony; the constitutionality of the latter class is dealt with in the ensuing § 2282. After each statute are placed the decisions constraining it on points not involving the general principle.

ENGLAND: 1842, St. 5 & 6 Vict. c. 39, § 6 (factors' liability; the agent committing the offence specified is not to be "convicted by any evidence whatsoever in respect of any act done by him, if he shall, at any time previously to his being indicted for such offence, have disclosed such act, on oath, in consequence of any compulsory process of any court of law or equity in any action, suit, or proceeding which shall have been *bona fide* instituted by any party aggrieved," or on examination before a bankrupt commissioner); 1852, St. 15 & 16 Vict. c. 57, § 8 (in election inquiries as to corrupt practices, "no statement made by any person in answer to any question put by such commissioner shall, except in cases of indictment for perjury committed in such answers, be admissible in evidence in any proceeding civil or criminal"); 1861, St. 24 & 25 Vict. c. 96, § 85 (like St. 5 & 6 Vict.; but substituting "charged" for "indicted," as to the time of disclosure, and adding "compulsory" under the last clause); 1863, St. 26 & 27 Vict. c. 29, § 7 (in election inquiries, no person shall be excused from answering on the ground of self-crimination; "provided always that where any witness shall answer every question relating to the matters aforesaid," when required, "and the answer to which may criminate or tend to criminate him," he shall be entitled to a certificate to that effect; and, then, if any information etc. be pending for any offence punishable under the election-acts, "committed by him previously to the time of his giving his evidence and as or in relation to the election concerning or in relation to which the witness may have been so examined, the Court shall, on production and proof of such certificate, stay the proceedings," and providing further as in St. 15 & 16 Vict.); 1883, St. 46 & 47 Vict. c. 52, § 17 (it shall be the bankrupt's duty "to answer all such questions as the Court may put or allow to be put to him"); 1890, St. 53 & 54 Vict. c. 71, § 27 (statement made by any person on compulsory examination in bankruptcy proceedings "shall not be admissible as evidence against that person" on charges of specified misdemeanors); 1894, *Orme v. Crookford*, 13 Price 376, 388 (statute on gaming); 1860, *R. v. Charlesworth*, 2 F. & F. 326, 332 (St. 15 & 16 Vict. c. 57); 1789, *Bancroft v. Wentworth*, 3 Brown Ch. C. 11 (stock-jobbing statute); 1870, *R. v. Hulme*, L. R. 5 Q. B. 377 (St. 26 & 27 Vict. c. 29); 1902, *R. v. Pike*, 1 K. B. 383 (statute applied; the bankrupt's "statement of affairs," not being

made on an examination, held not within the immunity); and compare the bankruptcy rulings cited *ante*, § 2260.

CANADA: here compare also the statutes abolishing the privilege entirely (*ante*, § 2252); *Dominion*: Rev. St. 1886, c. 106, § 92 (in proceedings concerning elections relating to intoxicating liquors, the privilege is abolished; but no answer shall be used against the witness in any proceeding, except perjury, if the judge gives a certificate that the witness claimed this privilege and "made full and true answers to the satisfaction" of the judge); c. 10, § 9 (election offences; provision similar to Eng. St. 26 & 27 Vict.); c. 9, § 39 (similar to c. 106, § 92, *supra*); c. 8, § 106 (similar); c. 158, §§ 9, 10 (in gaming offences, the privilege is abolished for all except the person on trial; but one who "makes true disclosure to the best of his knowledge of all things as to which he is examined" shall receive a certificate, and be "freed from all criminal prosecutions and penal actions and from all penalties, forfeitures, and punishments to which he has become liable for anything done before that time in respect of the matters regarding which he has been examined"; the certificate to operate in stay of subsequent proceedings when produced and proved); *Evidence Act* 1893, c. 31, § 5 ("No person shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any other person; provided, however, that no evidence so given shall be used in evidence against such person in any criminal proceeding thereafter instituted other than a prosecution for perjury in giving such evidence"); 1890, St. 61 Vict. c. 53 (amends the foregoing by substituting "witness" for "person" in the first line and omitting "other" in the first clause; and by substituting, for the entire proviso, the following: "provided, however, that if with respect to any question the witness objects to answer" on one of the above-named grounds, "and if but for this section the witness would therefore have been excused from answering such question, then, although the witness shall be compelled to answer, yet the answer shall not be used or receivable in evidence against him in any criminal trial or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in giving such evidence"); St. 1901, c. 26 (the above proviso made applicable to an answer compelled "pursuant to an enactment of the Legislature of a province"); *British Columbia*: Rev. St. 1897, c. 67, § 226 (electoral positions; substantially like Ont. Rev. St. 1897, c. 9, § 189, as amended); §§ 290, 291 (corrupt practices at elections; like Eng. St. 1852, c. 57, §§ 9, 10); St. 1900, c. 9, § 2 (repeals R. S. 1897, c. 71, § 6, and substitutes a section like Can. St. 1898, § 5,

how the law could ever be enforced to punish certain insidious offences without thus smoothing the way for justice. In England and Canada no written

as amended); *Manitoba*: Rev. St. 1902, c. 24, § 52 (controversied elections; privilege abolished, but no answer shall be used if the judges give a certificate that the witness claimed the privilege and "made full and true answers to the satisfaction of the judges"); c. 27, § 5 (like Can. St. 1898, c. 31, § 5, as unamended); c. 101, § 203 (privilege abolished for others than the defendant, in offences under the liquor act; but the evidence shall not be used against him in any prosecution); c. 246 (no answer of a witness in a municipal election inquiry shall be "admissible in evidence in any other proceeding"); *New Brunswick*: St. 1896, c. 22, § 1 (privilege abolished in trials for violation of a statute of this province or for a penalty imposed by its law, but not for trials under the criminal laws of Canada for breach of the provincial statutes; but "no evidence so given shall be used or receivable in evidence" in any proceeding, except perjury); *Newfoundland*: Consol. St. 1892, c. 3, § 106 (election inquiries; like Ont. Rev. St. c. 9); § 122 (parties, etc., to be compellable, in civil actions for election penalties or damages, but such evidence is not to be thereafter used against them in any criminal proceeding under this chapter); § 147 (privilege abolished, in election inquiries, for matters tending to criminate under this chapter); *Nova Scotia*: Rev. St. 1900, c. 5, § 115 (in election offences, privilege abolished; but no answer given after such claim "shall be used in any proceeding" against him); c. 6, § 36 (similar, for controversial elections); c. 100, § 163 (similar, for offences concerning the sale of intoxicating liquors; except for the person charged); St. 1902, c. 31, adding § 19 (a) to Rev. St. c. 72 (similar, for municipal elections); *Ontario*: Rev. St. 1897, c. 9, § 189 (in proceedings concerning an election, the privilege is abolished; but no answer after such a claim "shall be used in any proceeding against such person" under any act of this Legislature, if the judge gives the witness a certificate that he claimed the privilege and "made full and true answers to the satisfaction of the judge"); c. 11, § 53 (similar, for controversial elections); c. 228, § 256 (same for municipal elections, except that the answer is not to be used "in any proceeding under this Act," when claimed on the ground of subjection "to any penalty under this Act"); all the foregoing three statutes also declare that no one shall be excused "on the ground of privilege" or "any privilege"; this would, if literally taken, abolish all privileges in election cases; St. 1900, § 27 (Rev. St. c. 9, § 189 and c. 11, § 53 repealed by substituting a similar provision, differing chiefly in that the answer shall not be receivable against him "in any proceeding" except for perjury, and that the certificate may be used in any of proceedings); St. 1900, c. 49, § 30 (in offences against the game law, the privilege is abolished, but "no evidence so given shall be used" against him in any proceeding, except for perjury); St. 1902, c. 23, § 106 (in proceedings under the liquor act, the

privilege is abolished for answers "tending to subject him to any penalty imposed by this Act," except for the defendant or his wife; but "such evidence shall not be used against him in any prosecution"); St. 1903, c. 12, § 256 (like Rev. St. c. 228, § 256); *Prince Edward Island*: St. 1900, c. 2, § 26 (election trials; like Ont. Rev. St. c. 9).

UNITED STATES: *Alabama*: Code 1897, § 4908 (privilege ceases for a witness before the grand jury for offences within twelve months; "but no witness must be prosecuted for any offence as to which he testified before the grand jury"); *Arizona*: P. C. 1887, §§ 14, 361 (duelling offences; privilege ceases, but "no evidence given upon any examination of a person so testifying shall be received against him in any criminal prosecution or proceeding," except perjury); §§ 14, 345 (gaming offences; privilege ceases, "but no prosecution can afterwards be had against him for any offence concerning which he testified"); St. 1895, March 11, No. 20, § 3 (in election offences, an offender is compellable; but "the testimony so given shall not be used in any prosecution or proceedings, civil or criminal," against him, except perjury; and "a person so testifying shall not thereafter be liable to indictment, prosecution, or punishment for the offence with reference to which his testimony was given," and may plead in bar the giving of such testimony); *Arkansas*: Const. 1874, Art. III, § 9 ("In trials of contested elections and in proceedings for the investigation of elections, no person shall be permitted to withhold his testimony on the ground that it may criminate himself or subject him to public infamy; but such testimony shall not be used against him in any judicial proceeding, except for perjury in giving such testimony"); *California*: P. C. 1872, § 89 (obtaining money to influence a legislative vote; the privilege ceases for a witness "testifying as such," "but such testimony shall not afterwards be used against him in any judicial proceeding," except for perjury); § 323 (unlawful duel or challenge; the privilege ceases; "but no evidence given on any examination of a person so testifying shall be received against him in any criminal prosecution or proceeding"); § 284 (gaming; the privilege ceases for a witness "testifying as such"; "but no prosecution can afterwards be had against him for any offence concerning which he testified"); Pol. C. § 304 ("No person sworn and examined before either house of the Legislature or any committee thereof can be held to answer criminally or be subject to any penalty or forfeiture for any fact or act touching which he is required to testify; nor is any statement made or paper produced by any such witness competent evidence in any criminal proceeding against such witness"; except on a charge of perjury); St. 1891, p. 185, adding § 64 to the Pol. C. (privilege abolished for election offences; "but no prosecution can afterwards be had against any such witness for any such offence concerning which he testified for the prosecution"); St. 1903,

constitution grants protection; only a just conservatism requires that the nullification of the privilege be attained by the method of amnesty. But our

p. 26, § 32 (election offences; privilege abolished for the offenders; but "the testimony so given shall not be used in any prosecution or proceeding civil or criminal against the person so testifying. A person so testifying shall not thereafter be liable to indictment or prosecution by information nor to prosecution or punishment for the offence with reference to which his testimony was given, and may plead or prove the giving of testimony orally in bar of such indictment, information, or prosecution"); 1901, *Bradley v. Clark*, 125 Cal. 196, 65 Pac. 395 (St. 1893, § 32, construed); *Colorado*: Const. 1876, Art. VII, § 9 (like Ark. Const. Art. III, § 9, for contested elections and electoral offences); *Annot. State*, 1891, § 1678 (testimony in election contests as to a witness not being a qualified voter; "no part of his testimony shall be used against him in any criminal prosecution," except for perjury); § 1812 (publishing as a coward or challenging to a duel; the publisher or printer is compellable, but "the testimony given by any such witness shall in no case be used in any prosecution against such witness"); C. C. P. 1896, § 61 ("no pleading can be used in a criminal prosecution as evidence of a fact admitted or alleged in such pleading"); St. 1891, p. 166, § 42 (in election offences, the privilege ceases, but "the testimony so given shall not be used in any prosecution or proceeding, civil or criminal, against the person so testifying," except for perjury; and "a person so testifying shall not thereafter be liable to indictment, prosecution, or punishment, for the offense with reference to which his testimony was given, and may plead or prove the giving of testimony accordingly, in bar of such indictment or prosecution"); St. 1891, p. 171, § 8 (corrupt practices act; same provision); *Columbia (District)*: Comp. St. 1894, c. 71, § 6 (in prosecutions for obtaining money, etc., by false pretences, or keeping a gaming-table, or duelling offences, the privilege ceases, "but the testimony so given shall not be used in any prosecution or proceeding, civil or criminal, against the person so testifying"); c. 20, § 29 (like U. S. Rev. St. § 860); c. 16, § 20 (offences concerning abortions; the privilege ceases for offenders, "but the testimony so given shall not be used in any prosecution or proceeding, civil or criminal, against the person so testifying"); *Connecticut*: Gen. St. 1897, § 842 (no person is to be compelled to give evidence against himself, except upon prosecution of another for gaming, and "such evidence as to such crime" shall not be used against him); § 1500 (on a prosecution for improper conduct with a jury, full disclosure is compellable, "which shall not be used against him"); § 1624 (no one to be excused, in cases of election-bribery, on the ground of disgrace or self-crimination, but he shall not "be prosecuted for anything connected with the transaction about which he shall so testify," nor shall "the evidence he may so give be used against him in any proceeding whatever"); § 2553 (defendant's evidence in an action for gaming-loans is not to

be "offered against him in any criminal prosecution"); § 2561 (a person arraigned for the prosecution on a charge of illegal gaming is not to be excused on the ground of disgrace and self-crimination, but he shall not be prosecuted "for anything connected with the transaction about which he shall so testify"); § 2997 (witness for a prosecution for an unlawful exhibition is not to be prosecuted "for anything about which he shall have so testified"); § 3105 (person intoxicated; when he shall in the prosecuting officer's opinion "testify fully and freely" upon the liquor seller's trial, "such disclosure and the evidence given by him on such trial shall not be used against him on any prosecution for such intoxication"); *Georgia*: Cr. C. 1895, § 181 (blacklisting by employers; the privilege ceases, but "nothing then said by such witness shall at any time be received or given in evidence against him in any prosecution against the said witness," except for perjury in so testifying); § 404 (gaming offences; same as the preceding provision); Acts 1896, p. 57, Van Epps' Suppl. § 6431 (in complaints of illegal rates by common carriers, certain persons are compellable by the railroad commission to testify; the commission shall first make an order that he is required, and "that he is exempt thereafter from indictment or prosecution for any transaction about which he is so compelled to testify; when such order is made, the witness shall be compelled to give evidence touching such complaints, and he shall be forever free from indictment or prosecution in any court of this State touching the matters about which he is compelled to testify"); ib. § 6432 (a witness thus exonerated by the Commission shall be compellable to testify in any suit or prosecution in the State Courts for those transactions); 1898, *Henderson v. State*, 95 Ga. 526, 23 S. E. 537 (the exemption of Code 1883, § 4545, Code 1898, § 404, does not apply to the new sections 4549 b and c against lotteries); *Idaho*: Rev. St. 1887, § 149 ("no statement made" in testimony before the Legislature or a committee thereof "is competent evidence in any criminal proceeding against such witness," but this is not to exempt from prosecution for perjury); § 6716 (the privilege ceases on prosecution for duelling offences; "but no evidence given . . . shall be received against him in any criminal prosecution or proceeding"); § 6306 (wherever evidence under these sections is forbidden to be used, the prohibition does not extend to a charge of perjury in such testimony); § 6882 (gaming offences; the privilege ceases, but "no prosecution can afterwards be had against him for any offense concerning which he testified"); St. 1899, Feb. 6, § 7 (in gambling offences, the privilege ceases; "but no prosecution can afterwards be had against him for any offense concerning which he testified"); *Illinois*: Rev. St. 1874, c. 38, § 35 (when in a grand jury investigation or on the trial of bribery offences it appears to the Court that a person not charged is "a material and necessary wit-

constitutional enshrinement of this particular privilege leaves no other method available; and the frequent and increasing resort to it seems to show how

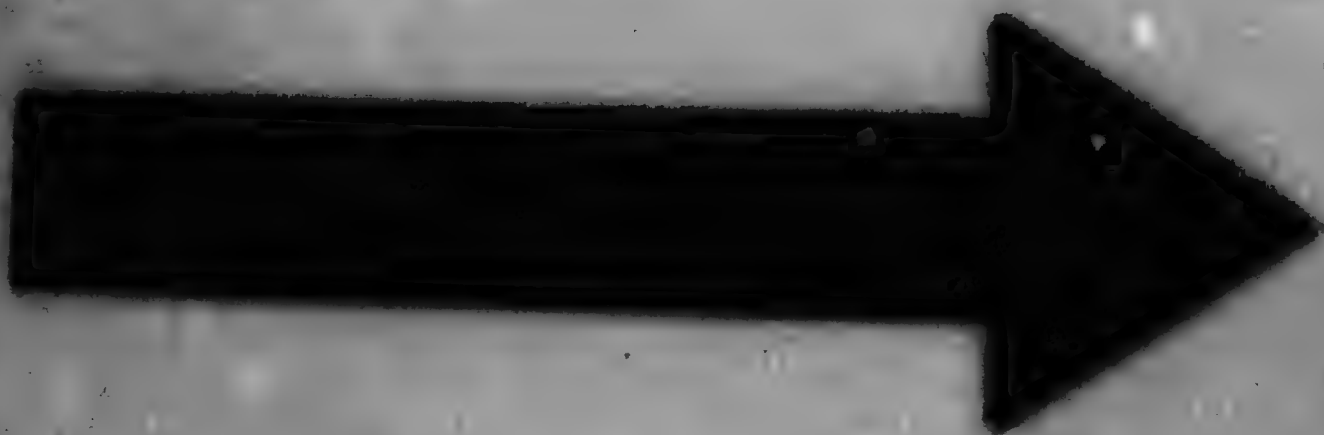
ness," and that "his testimony would tend to criminate himself," the Court may order "that such witness be released from all liability to be prosecuted or punished on account of any matter to which he shall be required to testify," and privilege shall then cease, and if he testifies such order shall be a bar to any prosecution, etc., "for such matter"; § 187 (in proceedings for illegal gaming, "all persons shall be obliged and compelled to answer upon oath" a bill of discovery for the same won; "upon the discovery and repayment of the money or other thing so to be discovered and repaid, the person who shall discover and repay the same, as aforesaid, shall be acquitted, indemnified, and discharged from any other or further punishment, forfeiture, or penalty," etc.); c. 43, § 6 ("the testimony of a witness examined and testifying" before either house of the General Assembly, or a committee or joint committee thereof, "shall not be used as evidence in any criminal proceedings against such witness in any court of justice," but no official paper produced shall be regarded as within the privilege "so [as] to protect such witness from any criminal proceeding as aforesaid," and no exemption is secured from punishment for perjury); St. 1891, June 11, p. 306, as amended by St. 1897, July 1, p. 298, §§ 7 a, 7 b (the Secretary of State shall by letter of inquiry to the officer of each corporation doing business in this State "require an answer under oath" as to membership in any combination, etc., made criminal by §§ 3 and 4; on refusal or failure to make such oath, a penalty of \$50 for each day is incurred; provided "that no corporation, firm, association, or individual, shall be subject to any criminal prosecution by reason of anything truthfully disclosed by the affidavit required by this act or truthfully disclosed in any testimony elicited in the execution thereof"); *Indiana*: Rev. St. 1897, § 1890 (the privilege ceases for a witness in gaming prosecutions; but "such evidence shall not be used against him in any prosecution for such or any other offense, and he shall not be liable to trial by indictment or information, or [to] punishment, for such offense"); § 1891 (same, for a witness "required to testify touching the commission of any misdemeanor"; but the testimony may be used for perjury therein); § 1904 (in a prosecution for having corrupt interest in public contract, the contractor is compellable to testify against the officer, and officer against contractor; but "such evidence shall not be used against the party testifying, in any prosecution against himself, and the person thus testifying shall be exempt from prosecution or punishment for such offense"); § 1907 ("The discovery of any fraud as against creditors, under oath in any civil suit, by any person, shall not be evidence against any such person on any criminal prosecution for committing such fraud"); § 1059 (admissions in answers in divorce are not to be "used as evidence" in any other case); *Iowa*: Code 1897, § 4612 (the privilege ceases for prosecutions

for gaming and liquor offenses; "but any matter so elicited shall not be used against him, and said witness shall not be prosecuted for any crime connected with or growing out of the act on which the prosecution is based in the case in which his evidence is used for the State under the provisions of this section"); § 3887 (a verification of a pleading that might result in a criminalizing answer is not required); § 2131 (in a statutory action against a common carrier, the privilege ceases for the agent, etc., of a corporation defendant, "but no person shall be prosecuted or subjected to any penalty or forfeiture for and on account of any transaction, matter, or thing concerning which he may testify or produce evidence," except for perjury therein); § 2599 (illegal liquor sales; the privilege ceases for seller and buyer as to documents and testimony, "but such oral evidence shall not be used against such person or witness on the trial of any criminal proceeding against him"); § 4075 (in proceedings auxiliary to execution, the debtor must answer on oath, without privilege for answers that "will tend to convict him of a fraud, but his answers shall not be used as evidence against him in a prosecution for such fraud"); 1892, *Parks v. Johnson*, 86 Ia. 475, 53 N. W. 285 (exemption from the use of answers on a charge of debtor's "fraud," held not applicable to contempt proceedings); *Kansas*: Gen. St. 1897, c. 102, § 234 (bribery or corruption at elections; no person testifying "shall be deemed to criminate himself, nor shall he be held to answer, . . . for any complicity on his part in the bribery or corruption concerning which he may testify"; except for a candidate for election or appointment); c. 100, § 269 (the privilege ceases for a witness in a gaming charge; but "the testimony which may be given by such person shall in no case be used against him"); c. 101, § 48 (the privilege ceases on charges of liquor-law offenses; but "the testimony given by such person shall in no case be used against him"); § 225 (a witness against another in a gaming offense is compellable; "but he shall not be liable to punishment in any such case"); *Kentucky*: Stats. 1899, § 213 (champertous contracts concerning land; the privilege of parties ceases, but "such evidence or discovery" shall not "be used in any such prosecution"); § 1973 (in gaming prosecutions, the privilege ceases; but "no such testimony shall be used against him in any prosecution except for false swearing or perjury, and he shall be discharged from all liability for any gaming so necessarily disclosed in his testimony"); § 2579 (same, for the buyer of a lottery ticket, in a prosecution against the seller); §§ 1893, 1894 (the privilege ceases for a witness summoned by the grand jury as to his knowledge of election-offenses in the county within eighteen months; but his testimony is not to "be used against him in any prosecution except for perjury," and "if used on behalf of the Commonwealth, he shall stand discharged from all penalty for any violation of this chapter,

necessary it is found to be. Bribery and other forms of political corruption call chiefly for its aid; and, next, gambling, liquor-selling, bankrupts' frauds,

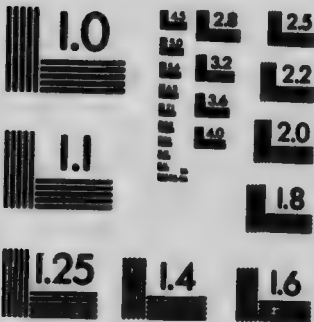
so necessarily disclosed in his testimony, as tending to convict the accused"); St. 1897, May 26, c. 30, § 10, Stats. 1899, § 1241 A (lynching offences, etc.; privilege abolished, "but no such testimony given by the witness shall be used against him in any prosecution except for perjury, and he shall be discharged from all liability for any violation of this act so necessarily disclosed in his testimony"); St. 1902, c. 25, § 7 (re-enacts the above); Louisiana: Const. 1898, § 184 ("Any person may be compelled to testify in any lawful proceeding against any one who may be charged with having committed the offence of bribery, and shall not be permitted to withhold his testimony upon the ground that it may criminate him or subject him to public infamy; but such testimony shall not afterwards be used against him in any judicial proceeding, except for perjury in giving such testimony"); § 216 ("In the trial of contested elections and in proceedings for the investigation of election, and in all criminal trials under the election laws, no person shall be permitted to withhold," etc., substantially as in § 184); Maryland: Pub. Gen. L. 1848, Art. 27, § 131 (in gaming or betting charges, the privilege ceases; but after giving testimony for the State, the witness "shall not be prosecuted for any offence to which his testimony relates"); Massachusetts: Pub. St. 1882, c. 127, § 14, c. 203, § 22, Rev. L. 1902, c. 135, § 15, c. 208, § 29 (a person suspected of concealing, etc., a will is compellable to respond under oath, but his examination is not to be used against him in a prosecution for stealing or destroying the will); P. S. c. 2, § 80, R. L. c. 3, § 17 (testimony before the Legislature or a legislative committee is not to be used against the witness in any criminal proceeding, except for perjury in the testimony); P. S. c. 85, § 16, R. L. c. 82, § 16 (in bastardy proceedings, the mother of the child may be compelled to testify, but the testimony "shall not be used against her in any criminal prosecution," except perjury in the testimony); St. 1893, c. 417, § 187, R. L. c. 11, § 252 (in election petitions, no person is to be excused from testifying or producing documents on the present ground; but no person so testifying is to be "liable to any suit or prosecution civil or criminal," except perjury, for any matter, etc., to which he is examined or his testimony relates); St. 1895, c. 358, § 8, R. L. c. 11, § 313 (in election inquests no person is to be excused on the present ground; but no person so testifying shall "be prosecuted or be subjected to a penalty or forfeiture for or on account of any action, matter, or thing concerning which he may so testify except for perjury committed in such testimony"); Michigan: Comp. L. 1897, § 1142 (offences by attorneys; "no evidence derived from the examination of any such attorney . . . shall be admitted in proof on any criminal prosecution against him for violating any of the provisions of this chapter"); § 9660 (an insolvent debtor examined and answering to the officer's satisfaction "shall not be sub-

ject to any liability imposed by this chapter," but his answers may be used as if given in an answer to a bill in chancery); Minnesota: Gen. St. 1894, § 6889 (where these statutes provide that evidence shall not be used against one testifying, a charge of perjury in such examination is excepted); § 389 c (offences by a common carrier; the privilege ceases, "but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding"); § 6495 (in duelling offences, the privilege ceases, "but evidence given by a person so testifying cannot be received against him in any criminal action or proceeding"); § 6356 (in bribery offences, the privilege ceases, "but the testimony so given shall not be used in any prosecution or proceeding, civil or criminal, against the person so testifying. A person so testifying to the giving of a bribe, which has been accepted, shall not thereafter be liable to indictment, prosecution, or punishment for that bribery," and may plead his testimony in bar); § 3108 (in game-law offences, "any participant in any violation thereof may testify . . . without criminating himself by so doing, nor shall the evidence so given by him be used against him in any criminal proceeding against him for such violation"); § 6957 (on indictment for a violation of the anti-trust law, the privilege ceases for officers and agents of a corporation or partnership charged, "but nothing which such witness shall testify to and no books or papers produced by him shall in any manner be used against him in any suit, civil or criminal, to which he is a party"); § 6662 (on a prosecution or investigation for crimes against the public peace, including prize-fighting, duelling, etc., the privilege ceases, "but such evidence shall not be received against him upon any criminal proceeding"); § 6916 ("No testimony or evidence given by any person in any civil action . . . nor any evidence or testimony derived from the books or papers of such party or witness produced by him as a witness or otherwise . . . can or shall be used in any criminal prosecution against such party or witness" for counterfeiting trademarks, etc.; and the privilege ceases, in civil actions, as to offences specified); §§ 389 c, 391 c (in actions for damages or proceedings by the railroad and warehouse commission involving common carriers' rates, etc., the privilege ceases for a corporation's officer, agent, etc., "but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding"); Mississippi: Annot. Code 1892, § 1450 (for duelling offences, the privilege ceases; but "the testimony so given shall not be used in any prosecution or proceeding, civil or criminal, against the person so testifying," except for perjury; "and the fact that he testified thereof shall be a bar to any prosecution against him for such transaction"); § 1432 (a witness giving evidence of a gaming offence "shall be thereafter exempt from criminal prosecution for such offence in relation to which he shall have testified in good faith"); § 1433



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and monopolistic extortions; moreover, investigations upon all subjects by legislative committees are commonly thus facilitated. These statutes,

(crimes against the legislative power; the privilege ceases, but "such testimony shall not afterwards be used against him in any criminal prosecution" except for perjury); § 2657 (a person sworn without his contrivance before a legislative House "shall not be held to answer criminally, or be subject to any penalty or forfeiture for any fact or act touching which he is required to testify; nor shall any statement made, or book, document, or paper produced by any such witness be competent evidence in any criminal proceeding against such witness" except for perjury; "nor shall such witness refuse to testify," etc., because of this privilege); *Missouri*: Rev. St. 1899, § 4657 (when a person testifies in any suit, "the testimony of such person shall not be used as evidence to prove any fact in any suit or prosecution" against him for a penalty in regard to a fraudulent conveyance); § 2206 (the privilege ceases for one betting or playing at an unlawful game, on the trial of another for a gaming offence; "but the testimony which may be given by such person shall in no case be used against him"); § 3429 (in civil actions to recover money lost at gaming, the defendant's answer on oath "shall not be admitted as evidence against such person in any proceeding by indictment"); § 2345 (on a trial for illegal dealing in options, every officer, agent, and employee of the defendant is compellable to "answer all questions propounded to him relevant to the issue in such trial"); § 8972 (a compulsory affidavit under the anti-trust law is not "competent as evidence against such person in any criminal prosecutions brought under this section"); § 8989 (in the attorney-general's investigation under the anti-trust law, testimony given by a witness "shall not be given against him in any criminal action or proceeding, nor shall any criminal action or proceeding be brought against such witness on account of any testimony so given by him"); § 10172 (trademark actions and offences; "no testimony or evidence given" in any civil action "can or shall be asked in any criminal prosecution against such party or witness under any of the provisions of this chapter," and no person shall refuse to testify in a civil case because of those provisions); *Montana*: Pen. C. 1893, § 14 (the prohibition in the following sections does not apply to a perjury charge); § 416 (the privilege ceases on trials for duelling offences; "but no evidence given upon any examination of a person so testifying shall be received against him in any criminal proceeding or prosecution"); § 172 (the privilege ceases for the offence of promising legislative bribery, "but such testimony shall not afterward be used against him in any judicial proceeding"); § 200 (on a charge of bribery or corruption, the offender's privilege ceases, "but the testimony so given shall not be used in any prosecution or proceeding, civil or criminal, against the person so testifying. A person so testifying to the giving of a bribe which has been accepted shall not thereafter be liable to indictment, prosecution, or punishment

for that bribery," and may plead it in bar); Pol. C. § 264 ("No person sworn and examined before either house of the Legislative Assembly, or any committee thereof, can be held to answer criminally or be subject to any penalty or forfeiture for any fact or act touching which he is required to testify; nor is any statement made or paper produced by any such witness competent evidence in any criminal proceeding against such witness"; and the privilege ceases for such witness); St. 1901, p. 166, March 13, § 5 (in gaming prosecutions, the privilege ceases, "but no prosecution may afterwards be had against him for any offense to which he testifies"); *Nebraska*: Comp. St. 1897, § 4056 (the privilege ceases for testimony before the board of railroad commissioners, "but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding"); § 3502 (the privilege ceases for the officer or agent of one charged with usury; "but the testimony of such witness, or the answer of a party as required by § 6 [§ 3500], shall not be used against any such witness or party in any criminal prosecution [except?] for perjury"); § 6128 (an insolvent debtor on examination is not privileged as to an answer showing fraud; "but his answer shall not be used as evidence against him in a prosecution for such fraud"); § 4054 (action against a common carrier; the privilege ceases for an agent of the corporation-defendant, "but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding"); § 5343 d (prosecution under the statute against illegal trusts; the privilege ceases, "but no person shall be prosecuted or subject to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, except for perjury"); *Nevada*: Gen. St. 1885, § 900 (in proceedings based on railroad discrimination, the privilege ceases, but "such evidence or testimony shall not be used as against such person on the trial of any indictment against him"); § 4708 (on a trial for obtaining money on a promise to influence legislation, etc., the privilege ceases, "but such testimony shall not afterwards be used against him in any judicial proceeding," except for perjury); § 1265 (no person is to be excused on this ground from testifying to gaming offences); § 4600 (in trials for duelling offences, any spectator, etc., may be compelled to testify, "but the testimony" so given shall not be used in any prosecution "proceeding, civil or criminal, against the person so testifying"); § 4929 (the privilege ceases on trials for trademark offences, but "no indictment or prosecution shall afterward be brought against him for said offences, concerning which he has testified as a witness"); § 4930 (the privilege ceases for any witness giving "such testimony," "and such witness shall not be liable to suffer any punishment or forfeiture for any offence against the provisions of this [trademark] Act, so disclosed"); § 4576 (the privilege ceases for accomplices; quoted *ante*, § 488); *New Hamp-*

then, represent a demand for more effective investigation by any lawful expedient.

shire: Pub. St. 1891, c. 112, § 26 (no employee or agent is to be excused on the present ground in prosecutions for illegal dealing with liquor; but no such testimony is to be used against him and no prosecution is to be instituted for any offence so disclosed by him); c. 190, § 1 (one suspected of elotgning a deceased person's property may be examined under oath, but "no evidence elicited on such examination" may be used against him except on a charge of perjury in testifying); c. 201, § 27 (same, for one suspected of elotgning or possessing an insolvent debtor's property); c. 245, § 43 (no deposition taken in trustee process is to be evidence in a criminal prosecution, except for perjury therein); c. 260, § 10 (the participant in a riot who testifies fully for the prosecution shall not be liable for such participation); *New Jersey*: Gen. St. 1896, Evidence, § 75 (legislative investigations; the privilege ceases, but no answer "shall be used or admitted in evidence in any proceeding against him," except in perjury in the answer); *Crim. Procedure*, § 115 (procuring miscarriage; the privilege ceases, but the testimony "shall not be used in any prosecution civil or criminal" against him); *Crimes*, §§ 158, 159 (certain corporate frauds; no person disclosing his act under compulsion "shall be liable to be convicted of any" of the offences specified "by any evidence whatever in respect of" the act disclosed); *Usury*, § 3 (every offender under this act "may be compelled to answer as a witness in any suit that he may bring," as to an agreement in violation of the law); *N. Mex.* St. 1901, c. 85 (in trials for offences of prostitution, the privilege ceases for such offences, "but the testimony which may be given by such person shall in no case be used against him"); *N. Y.*: Const. 1895, Art. XIII, § 3 (bribery; the privilege ceases for the offeror of bribe, but "he shall not be liable to civil or criminal prosecution therefor"); § 5 (free pass by a corporation to a public officer; similar provision); *Rev. St. I*, 664, § 20 (answer to a bill of discovery against the winner in gambling "shall not be used as testimony in any case" against him); *Laws 1830*, c. 179, § 8 (the answer to a bill of discovery against a merchandise-factor shall not be "read in evidence" against him on indictment for fraud charged in bill); *Laws 1877*, c. 466, § 2 (in a creditor's action relating to a debtor's assignment, the privilege ceases, but the "answer shall not be used against him in any criminal action or proceeding"); *Laws 1880*, c. 184, § 4 (bribery of an Indian voter; similar to the next); *Laws 1892*, c. 488, § 248 (fisheries-law violation; the privilege ceases, but "such evidence shall not be received" against him in any proceeding); *Laws 1894*, c. 338, § 15 (public-works fraud; the privilege ceases, but the "testimony shall not be used against him" criminally); *C. C. P.* 1877, § 523 (a civil pleading is not to be used in a criminal prosecution as an admission); § 3139 (corrupt practice by a justice, etc.; the privilege ceases; but the testimony "is not evidence" against him criminally); § 2460 (examination of a judgment

debtor; the privilege ceases, but the answer "cannot be used as evidence" against him criminally); *Pen. C.* 1881, § 41 r (election offences; the privilege ceases, but the testimony shall not be used in any proceeding and he "shall not thereafter be liable" criminally); § 79 (bribery charge; the privilege ceases, but the testimony shall not be used against him in any proceeding, and he "shall not thereafter be liable" criminally "for that bribery"); § 142 (champerty; the privilege ceases, but "no evidence derived from the examination of such person shall be received against him" criminally); § 241 (duelling; the privilege ceases, but "evidence given . . . can not be received against him" criminally); § 3 (gambling offences; like *Laws 1877*, c. 460); § 489 (no person is to be excused from giving evidence upon offences specified in §§ 448-469; "but such evidence shall not be received against him upon any criminal proceeding"); *North Carolina*: Code 1883, § 1215 (in gaming prosecutions, the privilege ceases as to unlawful gaming; but "no discovery made by the witness upon such examination shall be used against him" in any penal prosecution, "and he shall be altogether pardoned of the offence so done or participated in by him"); § 1349 (on a charge of "fraud upon the State," a refusal to answer is a contempt; but "it shall not be competent to introduce any admissions thus made on the trial of any persons making the same"); *St. 1897*, p. 85 (violation of the fishing law; in a civil action for a penalty, the privilege ceases, but the answer "shall not be used as evidence against" him in any criminal action); *St. 1895*, c. 159, § 58 (challenging a voter as convicted of crime; the privilege ceases, but an answer is not to be "used against him in any criminal prosecution"); *Code 1883*, § 42, as amended by *St. 1897*, c. 185 (bribery of an elector; the privilege ceases for the offender, but the "testimony given shall not be used in any prosecution or proceeding civil or criminal" against him); *1903, State v. Morgan*, 133 N. C. 743, 45 S. E. 1033 (*Cr. Code*, § 1215, applied); *North Dakota*: *Rev. C.* 1895, § 7484 (trusts, etc., prohibited; the privilege ceases, except for the defendant, on a prosecution for such offences, "but such testimony or evidence shall not be used against the person so testifying or producing records . . . upon a prosecution for violating any of the provisions of this chapter"); § 3038 (the privilege ceases for an officer, etc., of a common carrier defendant in an action for damages; "but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding"); § 6891 (bribing to influence an elector, under *Code*, § 6856; the privilege ceases "but any person so testifying against the other party shall be exempt from punishment for such offense mentioned in said section"); § 7014 (like *Okl. Stats.* § 2038); § 7236 (like *Okl. Stats.* § 2529, omitting the last clause as to perjury); § 7359 (like *Okl. Stats.* § 2303, with the same omission); § 7140 (like *Okl. Stats.* § 2139, with the same omission); § 7711 (like *Okl. Stats.* § 2581); *Ohio*: *Rev. St.* 1898, § 7285 (the privi-

Singular as it may seem, there have been found those who dispute the legal effectiveness of such statutes under the Constitution. The general

lege ceases in a certain prosecution for illegal liquor-selling, etc.; but the witness shall "thereafter be discharged from any liability to prosecution or punishment for such matter of offense"; § 5110 (a verified pleading is not admissible in a criminal prosecution or in an action for a penalty or forfeiture); § 2966, par. 51 (the privilege ceases on trials for election offences; but the testimony "shall not be used in any prosecution or proceeding civil or criminal against the person so testifying. A person so testifying shall not be liable thereafter to indictment, prosecution, or punishment, for the offence with reference to which his testimony may be given, and may plead or prove the giving of testimony accordingly in bar of such an indictment or prosecution"); par. 53 (testimony before a legislative committee "shall not be used as evidence in a criminal proceeding against him"; but this is not to prevent such use of an official document produced by him); § 1688 (testimony as an investigation before a municipal council "shall not be used as evidence in any criminal proceeding against him" except for perjury); § 5476 (the privilege ceases for a debtor examined as to fraud; but "his answer shall not be used as evidence against him" in a prosecution for such fraud); *Oklahoma*: Stats. 1893, § 2139 (the privilege ceases on a trial for duelling offences; "but no evidence given upon any examination of a person so testifying shall be received against him in any criminal prosecution or proceeding," except for perjury); § 4378 (on the examination of an insolvent debtor, the privilege ceases as to answers tending "to convict him of a fraud; but his answer shall not be used as evidence against him in a prosecution for such fraud"); § 3131 (in a legislative investigation for a member's expulsion, the privilege ceases; no witness is to be exempt from answering a question "which does not tend to criminate him, or from producing any record or paper whatsoever, but the evidence so taken shall not be used against him in any civil or criminal proceeding"); § 2038 (in a civil action, no privilege is to be allowed on this ground for "facts showing that an evidence of debt or thing in action has been bought, sold, or received contrary to law"; "but no evidence derived from the examination of such person shall be received against him upon any criminal prosecution"; § 2303 (on an investigation or prosecution for specified crimes against the public peace, the privilege ceases; "but such answer or evidence shall not be received against him upon any criminal proceeding or prosecution," except for perjury); § 1850 (in bribery offences, "the party to such crime who shall first furnish information in relation thereto, as against the other parties, and in any prosecution therefor shall testify to the same truthfully and fully, shall not thereafter be criminally liable therefor"); § 1926 (in trials for election offences, the privilege ceases, "but any person testifying against the other party shall thereafter be exempt from punishment for such

offense mentioned in said section"); § 2281 (the prohibition in these sections against using evidence given does not apply to a charge of perjury in the examination); St. 1895, c. 41, § 5 (before the grand jury, "all witnesses, including grand jurors, shall be bound to answer fully, and shall not be answerable for the testimony so given in any way," except for perjury); *Pa.*: Const. 1874, Art. III, § 32 ("Any person may be compelled to testify, in any lawful investigation or judicial proceeding, against any person who may be charged with having committed the offence of bribery or corrupt solicitation, or practices of solicitation, and shall not be permitted to withhold his testimony upon the ground that it may criminate himself or subject him to public infamy; but such testimony shall not afterwards be used against him in any judicial proceeding, except for perjury in giving such testimony"); Art. VIII, § 10 ("In trials of contested elections and in proceedings for the investigation of elections, no person shall be permitted," etc., as in Art. III, § 32); St. 1860, Pub. L. 382, § 49, P. & L. Dig., Crimes, § 62 (the privilege ceases for a witness to bribery in a criminal proceeding or a legislative investigation, but "the evidence so given or the facts divulged by him shall not be used against him in any prosecution under this Act"); St. 1874, Pub. L. 308, § 19, P. & L. Dig., Contested Elections (the privilege ceases in investigations of elections; but "such testimony shall not afterwards be used against him in any judicial proceeding," except perjury in the testimony); St. 1883, Pub. L. 32, § 3, P. & L. Dig., Witnesses, § 40 (witnesses before the Philadelphia city councils; the privilege ceases, but "such testimony shall not be used against him in any criminal prosecution"); St. 1901, June 4, Pub. L. 404, § 15 (the privilege ceases for examinations in insolvency proceedings by a receiver; "but the information thus obtained shall not be used against him in any other proceeding"); 1891, Com. v. Bell, 145 Pa. 374, 389, 22 Atl. 641, 644 (Art. III, § 32, of the Constitution, construed as to the crimes covered); *Rhode Island*: Gen. L. 1896, c. 208, § 15 (a person having in control property of a deceased person or ward is not to be excused on the present ground from answering on oath, but the answer is not to be "used as evidence against him" in a criminal prosecution, except a prosecution for perjury); c. 283, § 12 (a person playing at a game may be compelled to answer for the prosecution in a gambling prosecution); *South Carolina*: C. C. P. 1893, Code 1902, § 312, par. 5 (examination of an execution-debtor; the privilege ceases, but "his answer shall not be used against him in any criminal proceeding or prosecution"); § 178 (no pleading may be used "in a criminal prosecution" as an admission); Cr. Code 1902, § 64 (the accused may testify; nor shall testimony given voluntarily on his own behalf be "used against him in any other criminal case" except perjury); St. 1902, No. 575, § 3 (privilege ceases in investigations for violation of anti-trust laws;

reasoning in support of the statutes has been set forth above; and it will suffice here to notice briefly the various opposing arguments:

but "no person shall be prosecuted in any criminal action or proceeding, or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing, concerning which he may testify or produce evidence, documentary or otherwise, before said justice, etc."; *South Dakota*: Const. 1889, Art. III, § 32 (the privilege ceases in proceedings against a person charged with bribery or corrupt solicitation; "but said testimony shall not afterwards be used against him in any judicial proceeding except for bribery [sic?] perjury] in giving such testimony"); *State*: 1899, § 7539 (like N. D. Rev. C. § 6891); § 7763 (like N. D. Rev. C. § 7140); § 7856 (like N. D. Rev. C. § 7336); § 7960 (like N. D. Rev. C. § 7359); § 8241 (like N. D. Rev. C. § 7711); § 7660 (like N. D. Rev. C. § 7014); *Tennessee*: Code 1896, §§ 7046-7048 (a witness testifying to a grand jury upon any of thirty specified classes of offences shall not "be indicted for any offense in relation to which he has testified"); 1859, *State v. Hatfield*, 3 Head 331 (the statute giving immunity to witnesses before grand jury, construed not to include a grand juror); *Texas*: P. C. 1895, § 391 (gaming offences; "any person so summoned and examined [for the State] shall not be liable to prosecution for any violation of said articles about which he may testify"); *United States*: Rev. St. 1878, § 859 ("No testimony given by a witness before either House, or before any committee of either House of Congress, shall be used as evidence in any criminal proceeding against him in any court," except for perjury; "but an official paper or record produced by him is not within that privilege"); § 860 ("No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture," except for perjury therein); St. 1887, Feb. 1, c. 104, § 9, 24 Stat. 379 (in any action against a common carrier for damage under this statute, the privilege is not to excuse from testimony; "but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding"); § 12 (similar, for investigations by the Interstate Commerce Commission); St. 1891, Feb. 10, c. 128, amending St. 1887, Feb. 4, c. 104, § 12 (upon investigations by the Interstate Commerce Commission, where the aid of the circuit court is required to obtain testimony, "the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying; but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding"); St. 1893, Feb. 11, c. 53, 27 Stat. 443 (passed in consequence of the decision in *Counselman v. Hitchcock*, post, § 2282; "No person shall be excused from attending and testifying or from producing books, papers,

tariffs, contracts, agreements and documents before the Interstate Commerce Commission, or in obedience to the subpoena of the commission, whether such subpoena be signed or issued by one or more commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of the act of Congress, entitled 'an act to regulate commerce,' approved Feb. 4, 1887, or of any amendment thereof, on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, before said commission, or in obedience to its subpoena, or the subpoena of either of them, or in any such case or proceeding: Provided, that no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying"); St. 1898, July 1, c. 541, § 7, 30 Stat. 548 (a bankrupt shall "submit to an examination" concerning all matters affecting the settlement; "but no testimony given by him shall be offered against him in any criminal proceeding"); St. 1901, March 1, c. 866, § 3, 31 Stat. 1446 (common carriers are to make reports of collisions, etc.; but "neither said report nor any part thereof shall be admitted as evidence or used for any purpose against such railroad" in any suit for damages arising from the matter reported); St. 1903, c. 708, Feb. 19, 32 Stat. 847 (interstate commerce offences and procedure; similar to St. 1893, supra); St. 1903, c. 552, Feb. 14, 32 Stat. 828 (the immunities of St. 1893 are made to apply to inquiries by the Commissioner of Corporations in the Department of Commerce and Labor); *Utah*: Rev. St. 1898, § 4060 (in general; like Cal. P. C. § 14); § 4187 (duelling offences; like Cal. P. C. § 232); § 4265 (gaming offences; like Cal. P. C. § 334, substituting "is compelled to testify" for "testified"); § 4103 (bribery, etc.; like Cal. P. C. § 89); § 912 (election offences; the privilege ceases for offenders, "but the testimony so given shall not be used in any prosecution or proceeding, civil or criminal, against the person so testifying," except for perjury; "a person so testifying shall not thereafter be liable to indictment, prosecution, or punishment for the offense with reference to which his testimony was given, and may plead or prove the giving of testimony accordingly in bar of such indictment or prosecution"); *Vermont*: St. 1894, § 928 (a defendant's answer in Chancery is not to be used against him in a prosecution for crime or penalty); § 1249 (testimony at law or in equity is not to be used against the witness in a proceeding involving a penalty or a fraudulent conveyance); § 1367 (a trustee's disclosure on oath is not to be evidence against him in a prosecution for a crime or penalty); §§ 2715, 2716 (in bastardy complaints,

(1) It has been urged that the *disgrace* or *infamy* of the offence remains indelibly, even after its criminality has been abolished, and that the privilege was meant to protect against this also.⁶ Enough has already been said in disposal of this argument (*ante*, § 2255).

(2) It has been urged that the act may also be a *crime under another sovereignty*, and that the amnesty of one Legislature cannot protect the offender against the use of his disclosures in a prosecution in the other sovereignty.⁷ This argument has also been dealt with in another place (*ante*, § 2258).

(3) It has been suggested that the amnesty does not supervene except from

the woman is compellable to testify, after thirty days from time of delivery, but her testimony is not to be used against her in a criminal prosecution except for perjury in the testimony); § 4541 (in prosecutions for violations of the liquor-law, no witness except the defendant shall be examined on the present ground, but his testimony shall not be used against him in any proceeding except a prosecution for perjury in testifying); § 5092 (no person testifying, in prosecutions for unlawful oaths, as the taker or the administrator of the oath, against the other, is to be prosecuted for a prior offence of the same kind); *Virginia*: Code 1887, § 3692 (the privilege ceases as to a person concerned in duel; but after testifying "he shall never thereafter be liable to any punishment" for any offence "in or about said duel"); § 2259 (unlawful gaming; the privilege ceases, but the witness shall not "be ever proceeded against" for any such offence committed as citizen in this prosecution); *Washington*: C. & Stats. 1897, § 4926 ("No [verified] pleading shall be used in a criminal prosecution against the party as evidence of a fact alleged in such pleading"); *West Virginia*: Code 1891, c. 3, § 90 (in cases of violation of the election law, the privilege ceases, but "if such witness testify fully, he shall be exonerated from such offence in which he is implicated, and shall not be prosecuted therefor"); c. 148, § 11 (in prosecutions for lynching or mobbing, the privilege ceases for a witness for the State, but a witness answering "fully and truly" all questions "touching his connection with or knowledge of such combination" or of the offence charged, shall not be "prosecuted or punished for the same offence in the indictment"); St. 1890, c. 16 (in cases of violation of the caucus law, the privilege ceases, but "his testimony shall not be given in evidence against him in any prosecution for such offence"); St. 1901, c. 93, § 8 (in offences against the game laws, the privilege ceases, but "his testimony shall not be given in evidence against him in any prosecution against him for such offence"); *Wisconsin*: Stats. 1898, § 4078 (in actions by the State or a municipality involving the official conduct of an officer, etc., the privilege ceases; "but no testimony so given shall be in any manner used against the person so testifying in any other action or proceeding, civil or criminal," except for perjury); § 4581 (certain offences against chastity; the privilege ceases, "but no testimony so given by any per-

son shall be used against him in any civil or criminal action to which he is a party," except for perjury); § 4594 (gaming offences; the privilege ceases, but "any such answer or evidence thus required of any person shall not be used against him for any purpose in any case, either civil or criminal, in which he is a party"); § 126 (no person required to testify before the Legislature or a committee "shall be held to answer criminally in any court or be subject to any penalty or forfeiture for any fact or act touching which he shall be so required to testify and as to which he shall have been examined and have testified," and no such testimony shall be used against him); § 3033 (examination of a judgment debtor; no privilege obtains as to answers involving fraud, "but his answer shall not be used against him in any criminal action or proceeding"); St. 1899, c. 357, § 4 (on a charge of soliciting or giving free passes for political services, the privilege ceases, but "no person having so testified shall be liable to any prosecution or punishment for any offence concerning which he was required to give his testimony or produce any documentary evidence"); St. 1901, c. 65 (amends Stats. 1898, § 4078, by substituting, for the prohibition to use the testimony, a prohibition against prosecution or subjection to penalty or forfeiture for "any transaction, matter, or thing, concerning which he may testify or produce evidence, documentary or otherwise, in such action, proceeding, or examination," except for perjury therein); *Wyoming*: Rev. St. 1887, § 978 (libelling one for not accepting a challenge; the publisher or printer of a newspaper is compellable to testify, but "the testimony given by such witness shall in no case be used in any prosecution against such witness"); § 2324 (examination of a debtor; the privilege ceases as to answers involving fraud; "but his answer shall not be used as evidence against him in a prosecution for such fraud").

⁶ 1896, Field, J., dissenting, in *Brown v. Walker*, U. S., cited *infra*.

⁷ *Shirra*, J., *ibid*.

It has also been argued, but unsoundly, that the Legislature cannot in this manner infringe upon the Executive prerogative of pardon (Report of Senate Judiciary Committee 1876, by Senator Edmunds, answered by Senator Thurman in the minority report, 44th Cong. 1 sess. Sen. Rep. No. 253, reprinted in Smith's Digest of Precedents of Privileges of Congress, 1894, pp. 558-567).

reasoning in support of the statutes has been set forth above; and it will suffice here to notice briefly the various opposing arguments:

but "no person shall be prosecuted in any criminal action or proceedings, or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing, concerning which he may testify or produce evidence, documentary or otherwise, before said justice, etc."); *South Dakota*: Const. 1889, Art. III, § 32 (the privilege ceases in proceedings against a person charged with bribery or corrupt solicitation; "but said testimony shall not afterwards be used against him in any judicial proceeding except for bribery (*sic*? perjury) in giving such testimony"); *State*: 1899, § 7539 (like N. D. Rev. C. § 6891); § 7763 (like N. D. Rev. C. § 7140); § 7856 (like N. D. Rev. C. § 7236); § 7940 (like N. D. Rev. C. § 7359); § 8241 (like N. D. Rev. C. § 7711); § 7660 (like N. D. Rev. C. § 7014); *Tennessee*: Code 1896, §§ 7046-7048 (a witness testifying to a grand jury upon any of thirty specified classes of offences shall not "be indicted for any offense in relation to which he has testified"); 1899, *State v. Hatfield*, 3 Head 231 (the statute giving immunity to witnesses before grand jury, construed not to include a grand juror); *Texas*: P. C. 1895, § 391 (gaming offences; "any person so summoned and examined [for the State] shall not be liable to prosecution for any violation of said articles about which he may testify"); *United States*: Rev. St. 1878, § 859 ("No testimony given by a witness before either House, or before any committee of either House of Congress, shall be used as evidence in any criminal proceeding against him in any court," except for perjury; "but an official paper or record produced by him is not within that privilege"); § 860 ("No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture," except for perjury therein); St. 1887, Feb. 1, c. 104, § 9, 24 Stat. 379 (in any action against a common carrier for damage under this statute, the privilege is not to excuse from testimony; "but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding"); § 12 (similar, for investigations by the Interstate Commerce Commission); St. 1891, Feb. 10, c. 128, amending St. 1887, Feb. 4, c. 104, § 12 (upon investigations by the Interstate Commerce Commission, where the aid of the circuit court is required to obtain testimony, "the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying; but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding"); St. 1893, Feb. 11, c. 83, 27 Stat. 443 (passed in consequence of the decision in *Counselman v. Hitchcock*, post, § 2283; "No person shall be excused from attending and testifying or from producing books, papers,

tariffs, contracts, agreements and documents before the Interstate Commerce Commission, or in obedience to the subpoena of the commission, whether such subpoena be signed or issued by one or more commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of the act of Congress, entitled 'an act to regulate commerce,' approved Feb. 4, 1887, or of any amendment thereof, on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, before said commission, or in obedience to its subpoena, or the subpoena of either of them, or in any such case or proceeding: Provided, that no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying"); St. 1898, July 1, c. 841, § 7, 30 Stat. 548 (a bankrupt shall "submit to an examination" concerning all matters affecting the settlement; "but no testimony given by him shall be offered against him in any criminal proceeding"); St. 1901, March 3, c. 866, § 3, 31 Stat. 1446 (common carriers are to make reports of collisions, etc.; but "neither said report nor any part thereof shall be admitted as evidence or used for any purpose against such railroad" in any suit for damages arising from the matter reported); St. 1903, c. 708, Feb. 19, 32 Stat. 847 (interstate commerce offences and procedure; similar to St. 1893, *supra*); St. 1903, c. 553, Feb. 14, 32 Stat. 828 (the immunities of St. 1893 are made to apply to inquiries by the Commissioner of Corporations in the Department of Commerce and Labor); *Utah*: Rev. St. 1898, § 4060 (in general; like Cal. P. C. § 14); § 41 (duelling offences; like Cal. P. C. § 233); § 4265 (gaming offences; like Cal. P. C. § 324, substituting "is compelled to testify" for "testified"); § 4103 (bribery, etc.; like Cal. P. C. § 89); § 912 (election offences; the privilege ceases for offenders, "but the testimony so given shall not be used in any prosecution or proceeding, civil or criminal, against the person so testifying," except for perjury; "a person so testifying shall not thereafter be liable to indictment, prosecution, or punishment for the offense with reference to which his testimony was given, and may plead or prove the giving of testimony accordingly in bar of such indictment or prosecution"); *Vermont*: St. 1894, § 928 (a defendant's answer in Chancery is not to be used against him in a prosecution for crime or penalty); § 1249 (testimony at law or in equity is not to be used against the witness in a proceeding involving a penalty or a fraudulent conveyance); § 1367 (a trustee's disclosure on oath is not to be evidence against him in a prosecution for a crime or penalty); §§ 2715, 2716 (in bastardy complaints,

(1) It has been urged that the *disgrace* or *infamy* of the offence remains indelibly, even after its criminality has been abolished, and that the privilege was meant to protect against this also.⁶ Enough has already been said in disposal of this argument (*ante*, § 2255).

(2) It has been urged that the act may also be a *crime under another sovereignty*, and that the amnesty of one Legislature cannot protect the offender against the use of his disclosures in a prosecution in the other sovereignty.⁷ This argument has also been dealt with in another place (*ante*, § 2258).

(3) It has been suggested that the amnesty does not supervene except from

the woman is compellable to testify, after thirty days from time of delivery, but her testimony is not to be used against her in a criminal prosecution except for perjury in the testimony); § 4341 (in prosecutions for violations of the liquor-law, no witness except the defendant shall be excused on the present ground, but his testimony shall not be used against him in any proceeding except a prosecution for perjury in testifying); § 5092 (no person testifying, in prosecutions for unlawful oaths, as the taker or the administrator of the oath, against the other, is to be prosecuted for a prior offence of the same kind); *Virginia*: Code 1857, § 3692 (the privilege ceases as to a person concerned in duel; but after testifying "he shall never thereafter be liable to any punishment" for any offence "in or about said duel"); § 3899 (unlawful gaming; the privilege ceases, but the witness shall not "be ever proceeded against" for any such offence committed as charged in this prosecution); *Washington*: C. & Stats. 1897, § 4926 ("No [verified] pleading shall be used in a criminal prosecution against the party as evidence of a fact alleged in such pleading"); *West Virginia*: Code 1891, c. 2, § 90 (in cases of violation of the election law, the privilege ceases, but "if such witness testify fully, he shall be exonerated from such offence in which he is implicated, and shall not be prosecuted therefor"); c. 149, § 11 (in prosecutions for lynching or mobbing, the privilege ceases for a witness for the State, but a witness answering "fully and truly" all questions "touching his connection with or knowledge of such combination" or of the offence charged, shall not be "prosecuted or punished for the same offence in the indictment"); St. 1890, c. 16 (in cases of violation of the census law, the privilege ceases, but "his testimony shall not be given in evidence against him in any prosecution for such offence"); St. 1901, c. 93, § 8 (in offences against the game laws, the privilege ceases, but "his testimony shall not be given in evidence against him in any prosecution against him for such offence"); *Wisconsin*: Stats. 1898, § 4078 (in actions by the State or a municipality involving the official conduct of an officer, etc., the privilege ceases; "but no testimony so given shall be in any manner used against the person so testifying in any other action or proceeding, civil or criminal," except for perjury); § 4581 A (certain offences against chastity; the privilege ceases, "but no testimony so given by any per-

son shall be used against him in any civil or criminal action to which he is a party," except for perjury); § 4584 (gaming offences; the privilege ceases, but "any such answer or evidence thus required of any person shall not be used against him for any purpose in any case, either civil or criminal, in which he is a party"); § 126 (no person required to testify before the Legislature or a committee "shall be held to answer criminally in any court or be subject to any penalty or forfeiture for any fact or act touching which he shall be so required to testify and as to which he shall have been examined and have testified," and no such testimony shall be used against him); § 3033 (examination of a judgment debtor; no privilege obtains as to answers involving fraud, "but his answer shall not be used against him in any criminal action or proceeding"); St. 1899, c. 357, § 4 (on a charge of soliciting or giving free passes for political services, the privilege ceases, but "no person having so testified shall be liable to any prosecution or punishment for any offence concerning which he was required to give his testimony or produce any documentary evidence"); St. 1901, c. 85 (amends Stats. 1898, § 4078, by substituting for the prohibition to use the testimony, a prohibition against prosecution or subsection to penalty or forfeiture for "any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in such action, proceeding, or examination," except for perjury therein); *Wyoming*: Rev. St. 1897, § 978 (libelling one for not accepting a challenge; the publisher or printer of a newspaper is compellable to testify, but "the testimony given by such witness shall in no case be used in any prosecution against such witness"); § 2834 (examination of a debtor; the privilege ceases as to answers involving fraud; "but his answer shall not be used as evidence against him in a prosecution for such fraud").

⁶ 1896, Field, J., dissenting, in *Brown v. Walker*, U. S., cited *infra*.

⁷ Shiras, J., *ibid*.

It has also been argued, but unsoundly, that the Legislature cannot in this manner infringe upon the Executive prerogative of pardon (Report of Senate Judiciary Committee 1876, by Senator Edmunds, answered by Senator Thurman in the minority report, 44th Cong. 1 sess. Sen. Rep. No. 253, reprinted in Smith's Digest of Precedents of Privileges of Congress, 1894, pp. 558-567).

and after the disclosure, and that therefore the fact disclosed is at that moment (though for the single instant only) still a crime, and therefore the privilege is at that moment still valid.⁸ This bit of metaphysical quibbling will not command the support of healthy minds, especially where a great question of practical justice is at stake.

(4) Still another argument, and the only one bearing the semblance of a substance, urges that there is for the offender a practical burden in proving the amnesty which detracts from its absolute efficacy.⁹ A sufficient answer to this is that the argument would apply equally to a pardon (which for practical efficacy depends upon the preservation of records), to a judgment of acquittal (whose theoretical conclusiveness may be practically defeated by the loss of its record), and to all judicial and legislative acts, which, while in theory creating objective facts, may in practice never produce results because of the mutability of human affairs and of that substratum of contingencies which constantly defeats the most cherished dogmas of the law. A jury's verdict in theory establishes facts, and the law could never admit any other supposition; but the truth often remains untouched by a verdict. A judgment establishes a right; but the insolvency of the debtor or the exhaustion of the creditor's resources for litigation may leave the right as barren as the claim of Charles Stuart's descendant to the crown of England. The law has long ago decided to ignore this frequent contrast between its decrees and the realities. When justice has been done, on legal principles, it is out of the question for the law to stultify its general rules because the accidents of an individual's situation leave him a barren remedy. One could as well argue, because a judge might by error or malice compel a criminating disclosure, and because the witness thus wronged might not have the money to pursue his appeal or might lose by death or conflagration the proofs of the wrong, that therefore no witness should ever be compelled to answer against a claim of privilege whether that claim be right or wrong. Such a refined possibility of a contingency cannot deter a sane and practical justice from exercising its functions:

1896, *Brown, J.*, in *Brown v. Walker*, 161 U. S. 501, 16 Sup. 644: "If the object of the provision be to secure the witness against a criminal prosecution, which might be aided directly or indirectly by his disclosure, then, if no such prosecution be possible, — in other words, if his testimony operate as a complete pardon for the offense to which it relates, — a statute absolutely securing to him such immunity from prosecution would satisfy the

⁸ 1874, *Turney, J.*, dissenting, in *Hirsch v. State, Tenn.*, cited *infra*; the same judge makes much the same argument in *State v. Warner, Tenn.*, cited *infra*.

⁹ 1896, *Shiras, J.*, with *Gray and White, JJ.*, dissenting, in *Brown v. Walker, infra*: "All that can be said is that the witness is not protected by the provision in question from being prosecuted, but that he has been furnished with a good plea to the indictment, which will secure his acquittal. But is that true? Not unless the plea is sustained by competent evidence. His condition, then, is that he has been prosecuted, been compelled presumably, to furnish bail, and

put to the trouble and expense of employing counsel and furnishing the evidence to make good his plea. . . . Nor is it a matter of perfect assurance that a person who has compulsorily testified, before the commission, grand jury, or court, will be able, if subsequently indicted for some matter or thing concerning which he testified, to procure the evidence that will be necessary to maintain his plea. No provision is made in the law itself for the preservation of the evidence. Witnesses may die or become insane, and papers and records may be destroyed by accident or design."

demands of the clause in question. . . . It can only be said, in general, that the clause should be construed, as it was doubtless designed, to effect a practical and beneficent purpose, — not necessarily to protect witnesses against every possible detriment which might happen to them from their testimony, nor to unduly impede, hinder, or obstruct the administration of criminal justice. . . . The same answer may be made to the suggestion that the witness is imperfectly protected by reason of the fact that he may still be prosecuted and put to the annoyance and expense of pleading his immunity by way of confession and avoidance. This is a detriment which the law does not recognize. There is a possibility that any citizen, however innocent, may be subjected to a civil or criminal prosecution, and put to the expense of defending himself; but, unless such prosecution be malicious, he is remediless, except so far as a recovery of costs may partially indemnify him. He may even be convicted of a crime, and suffer imprisonment or other punishment before his innocence is discovered; but that gives him no claim to indemnity against the State, or even against the prosecutor, if the action of the latter was taken in good faith, and in a reasonable belief that he was justified in so doing."¹⁰

This view, then, that such statutes, by expurgating the crime, remove the privilege, has prevailed wherever the question has been decided,¹¹ except in a single jurisdiction.¹²

It may be noticed that the immunity thus conceded is not to be obtained by a merely collusive or pretended process of disclosure; there must be a compulsion, *bona fide* submitted to.¹³ Moreover, the immunity obtained under

¹⁰ Compare the similar remarks in *R. v. Boyce*, quoted *ante*, § 2280.

¹¹ 1894, *Ex parte Cohen*, 104 Cal. 524, 528, 28 Pac. 364 (holding the election statute of 1893 effective); 1903, *People v. Butler* St. F. & I. Co., 301 Ill. 236, 66 N. E. 349 (St. 1893, June 20, §§ 7 a, 7 b, amending the anti-trust law, held not unconstitutional; the argument as to extra-territorial use of the disclosures, expressly repudiated; *Brown v. Walker* followed); 1877, *France v. State*, 58 Ind. 8, 13 (gaming statute, held sufficient to annul the privilege); 1879, *State v. Enoch*, 69 Id. 314, 316 (*France v. State* approved; here a statute relating to trespass on land was held defective); 1903, *Weber v. Com.*, — Ky. —, 72 S. W. 30, *semble* (under St. 1897, May 30, § 10, Ky. Stats. § 1241 A, applying to lynching offences, the privilege is effectively annulled and an accomplice may be required to testify); 1879, *State v. Nowell*, 58 N. H. 314; 1851, *Floyd v. State*, 7 Tex. 215, 218 (gaming statute); 1895, *Brown v. Walker*, 70 Fed. 46, *Buffington, J.* (St. 1893, Feb. 11, held effective); on appeal, confirmed in 161 U. S. 591, 16 Sup. 644; 1884, *Kendrick v. Com.*, 78 Va. 490, 495, 497 (gaming statute, barring prosecution, held to annul the privilege; *Lacy, J.*, diss.). To these should be added, by necessary implication, all the cases in the next section holding the other class of statutes effective.

¹² 1874, *Hirsch v. State*, 8 Baxt. 89, 91 (statute giving immunity to witnesses before the grand jury, held constitutional; the effect being, "as to him, an abrogation of the offense"; *Nicholson, C. J.*, and *Turney, J.*, diss., on the ground that the abrogation followed the giving of testimony, and hence the privilege not to give it remained until it was given); 1884, *State v. Warner*, 13 Lea 53, 56 (opinion by *Turney, J.*;

preceding case repudiated, on the grounds given in the dissenting opinion there). The following similar ruling is now disposed of by *Brown v. Walker*: 1894, U. S. v. *James*, 60 Fed. 257 (No. 1893, Feb. 11, held not effective, on the chief ground that the disgrace-privilege remained undisposed of; the attempted appeal to history, citing no authorities, is totally unfounded; see *ante*, § 2255).

In the following cases the decision was avoided: 1896, *Lamson v. Boyden*, 160 Ill. 613, 43 N. E. 791 (a statute making the pardon conditional not merely on the discovery, but on repayment by the defendant; div. 1, § 187, of Crim. Code, held not effective without such repayment); 1901, *Robson v. Doyle*, 191 Id. 566, 61 N. E. 435 (effect of Rev. St. c. 38, § 137, as abolishing the privilege, left undetermined).

¹³ *Re Strahan*, 7 Cox Cr. 85 (voluntary application of bankrupt to be examined; per *Alderson, B.*, the statutory permission to plead such examination in bar of an indictment did not cover "a mere process, got up for the purpose, voluntarily absolving themselves from the consequences of their acts"); 1859, *R. v. Sken*, 8 Id. 143 (under the same bankruptcy statute, an examination given in bankruptcy, after commitment for trial on indictment, and covering only the facts at that time already otherwise testified to and known, held not a "disclosure" sufficient to exonerate under the statute, by nine judges to five). Compare the following ruling: 1896, *People v. Sternberg*, 111 Cal. 3, 43 Pac. 198 (whether the person had in fact so testified to the offence now charged); and the cases cited *ante*, § 2270, as to what constitutes compulsion.

The proper mode (apart from express provision by statute) for taking advantage of the immunity gained by thus testifying under com-

these statutes cannot extend to a prosecution for *perjury* committed in the very disclosure itself; nor does the usual express statutory proviso in that tenor make them any the less effective. If argument were needed, it would be sufficient merely to appeal to the terms of the privilege, which forbids that one be compelled to give evidence against himself; for (a) the perjured utterance is not "evidence" or "testimony" to a crime but *is* the very act of crime itself, (b) the compulsion is not to testify falsely, but to testify truly; and (c) the privilege, by hypothesis, would have been violated only if the witness had truly confessed his crime, but if he denies it and falsely exonerates himself, he has confessed no fact "against himself"; hence his privilege has not been infringed by the actual answer, even though it might have been by some other answer; *e. g.*, if a witness is asked, "Did you kill Doe?" and answers "No," it is not, as it turns out, "against himself," and what it might have been is immaterial.¹⁴

§ 2282. *Same*: (2) *Statutes forbidding the Use of Testimony*. Where the statute does not pronounce an entire amnesty, by forbidding punishment or prosecution for the offence disclosed, but merely prohibits in any criminal prosecution the use of the testimonial admissions made by the witness, a slightly different question is presented, not so plain of solution. The only argument, however, that has ever been advanced against holding such statutes equally effective is an argument based on the theory of facts "tending to criminate." By the conceded principle (*ante*, § 2260), the privilege protects against the disclosure of facts "tending" to criminate; and it is argued that a compulsory admission, though itself prohibited to be used, may nevertheless furnish a clue to other evidence, the use of which is not reached by the statute's prohibition; and that thus the disclosure may "tend" to criminate in spite of the statute:¹

1802, *Blatchford, J.*, in *Counselman v. Hitchcock*, 142 U. S. 547, 564, 566, 12 Sup. 195: "This [statute] of course protected him against the use of his testimony against him or his property in any prosecution against him or his property, in any criminal proceeding, in a court of the United States. But it had only that effect. It could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding in such court. It could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted. . . . [Section 860 U. S. Revised Statutes] affords no protection against that use of compelled testimony which consists in gaining therefrom a knowledge of the

pulsion is a motion to quash the indictment found upon the charge testified to: 1903, *Sandwich v. State*, 137 Ala. 83, 34 So. 630; compare the citations *ante*, § 2270, note.

¹⁴ *Contra*: 1907, U. S. v. Bell, C. C., 81 Fed. 830, *semble*, in a labored opinion of perverse ingenuity; the soundness of which may be judged by its holding that a negro "lawyer and notary public" was not sufficiently informed of his privilege, and by its predication of a "long-established right to stand silent and refuse to answer when his answers might . . . submit him to the

pains and penalties of yielding to the temptation to sustain his wrongdoing by false swearing"! This "right" not to be tempted to commit perjury would be popular enough among witnesses, if it should be any more widely promulgated. Compare *State v. Turley, Ind.*, cited *ante*, § 2276, par. 4, and the cases upon perjury, cited *ante*, § 2276, note.

¹ This argument was first advanced in 1853, in the Second Report of the Commissioners of Common Law Practice, p. 21.

details of a crime, and of sources of information which may supply other means of convicting the witness or party. . . . We are clearly of opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminati- question put to him can have the effect of supplanting the privilege conferred by the Constitution of the United States."

The answer to this argument has been already supplied in dealing with the "tendency" aspect of the privilege (*ante*, § 2261). That doctrine signifies merely that when facts A, B, C, and D are the constituents of a crime, but no one of them is of itself criminal, the disclosure of fact A alone cannot be compelled, because, if the facts B, C, and D were otherwise proved, then fact A could be proved, and the "chain" completed, by the witness' compulsory admission, and thus the admission would after all have criminated him. But the doctrine does not mean that the disclosure of fact X can be refused because from fact X a clue might by possibility be obtained, which otherwise could not have been obtained, to some criminal fact A B C D. If, then, we repudiate the notion that the "tendency" doctrine involves facts which might furnish clues, and suppose that the disclosure of fact A has been compelled, we have, under the statutes in question, a prohibition to use this compulsory admission of fact A in any prosecution charging the crime A B C D; the prohibition being obeyed, it is obvious that the proof of the entire criminal fact A B C D must be still as impossible as ever without the aid of the admission, and that, so long as the admission remains out of the evidence in that prosecution, no criminating consequences (so far as the privilege protected against them) will have come to the witness.² This is the sufficient answer; and it is plain that it turns upon the precise meaning of the privilege with reference to clues disclosed (*ante*, § 2261). But it may be added that if reliance is to be placed upon the liberality of the Constitutions³ in forbidding the "use" of evidence "furnished" against himself by the witness, and if this be thought to prohibit even the "use" of it to obtain clues to other evidence, then that prohibition may none the less be made effective, under the statutes in question, by the exclusion, in the subsequent prosecution, of any evidence which has in fact been obtained by this forbidden "use" of the clues in the original disclosure. Such a prohibition can also be carried out. If this forced interpretation of the word "use" is to be put upon the constitutional enactment, it must surely also be applied to the statutory enactments, which equally forbid any "use" of the admissions obtained. It is illogical to expand the prohibition of the Constitution without equally expanding the remedy of the statute. The efficacy of such statutes for their purpose has been well expounded in the following early opinions, written at a period

² Such is the construction of these statutes in England: 1861, *R. v. Leatham*, 3 E. & E. 658 (defendant, testifying on the former occasion under statutory immunity, had mentioned a letter written by him to W.; afterwards W. produced the letter; held, that "a document already existing before, and referred to by the witness in the course of, the examination" is not to be excluded,

if proved by other evidence; the fact that his testimony had given the clue does not exclude the evidence).

³ That the principle, not the words, control, see *ante*, § 2254. The opinion in *Counselman v. Hitchcock* itself declares this. But *Com. v. Emery*, Mass. (cited *infra*), on which it partly relied, had turned upon the local wording.

nearer to the era of constitution-making, when the cobwebs of artificial fantasy had not begun to obscure its plain meanings:

1858, *See v. J.*, in *State v. Quarles*, 18 Ark. 307, 311: "The privilege in question, in its greatest scope, as allowed by the common law — and no one, be he witness or accused, can pretend to claim it beyond its scope at the common law —, never did contemplate that the witness might not be proved guilty of the very crime about which he may be called to testify; but only that the witness should not be compelled to produce the evidence to prove himself guilty of that crime. His privilege, therefore, was not an exemption from the consequences of a crime that he might have committed; but only an exemption from the necessity of himself producing the evidence to establish his own crime. . . . So long as it might be lawful to produce in evidence against an accused party whatever he might before have voluntarily said as a witness on a prosecution against another, there were no means by which the privilege could be made available short of a claim by the witness to be silent; and as that was the rule of the common law, this was the common-law mode of making the privilege available. And that silence was but a mode of making the privilege available, and was not of the essence of the privilege itself, is conclusively proven by all that current of enlightened authority, to which we yield our fullest assent, which holds that the privilege has ceased when the crime has been pardoned, when the witness has been tried and acquitted, or is adjudged guilty, or when the prosecution, to which he was exposed, has been barred by lapse of time. . . . But the Legislature has so changed the common-law rule, by the enactment in question, in the substitution of a rule that the testimony, required to be given by the act, shall never be used against the witness for the purpose of procuring his conviction for the crime or misdemeanor to which it relates, that it is no longer necessary for him to claim his privilege as to such testimony, in order to prevent its being afterwards used against him. And the only question that can possibly arise under the present state of the law, as applicable to the case now before us, is as to whether our statutory regulations afford sufficient protection to the witness, responsive to this new rule and to his constitutional guarantee against compulsory self-accusation. . . . In any case where more than ordinary precautions may be thought expedient or necessary, the powers of the Circuit Court are ample for the complete preservation of every item of evidence that might be produced. There can then be no ground for apprehension for the safety of the witness from this source. Nor can there be any greater cause for apprehension from any supposed possibility or probability that the true privilege of the witness may be invaded under the operation of the new rule, by the practical effect of his evidence, either direct or indirect, in opening up to the State, avenues of light leading to evidences of other crimes or misdemeanors, upon which prosecutions might be afterwards founded against the witnesses, that might otherwise remain closed and unsuggested. Because, when the course of examination would lead to any inquiry — to any matter materially connected with any crime or misdemeanor other than that which was the subject of direct inquiry before the court, — as, when such matter might be indispensable for the elucidation of some material matter already produced in evidence by the witness and directly involved in the issue — the witness could claim his privilege as to such matter as fully as if he had been inquired of in chief touching such other crime or misdemeanor. . . . And when the effect of the witness' testimony would not substantially amount to the furnishing of an item in a consecutive series of proofs tending to his conviction for another crime or misdemeanor, it would be so remote, contingent, and intangible, as scarcely to be of capacity to be considered of as legitimately resulting from his testimony in legal contemplation, in any sense to invade his true privilege. At any rate, we can safely say, it would not *prima facie* be so. And the argument to maintain the contrary can only be supported by assuming that the privilege is absolute and unqualified, which is not only legally untrue as to it, but untrue as to every other right and privilege of the citizen, because they are all but component elements, not of natural liberty, but of civil liberty. And the error of the hypothesis will abundantly appear in the absurdities

evolved in carrying out, to its inevitable result, any given right or privilege of the citizen when so based. If, for instance, it were broadly admitted that the privilege in question was so based, and hence would be invaded whenever the incidental effect of the testimony of the witness might in any degree be suggestive of sources of light that, when pursued, might lead to evidences upon which prosecutions might afterwards be founded against the witness for other crimes or misdemeanors; and also (as contended for on the other side) that the witness is to be the sole judge of the occasion for the exercise of his privilege, it would be difficult to drive the machinery of government forward in its ordinary course. A Court, for instance, might then lawfully refuse to try a cause, lest its investigation, by the instrumentality of the jury and witnesses, might be suggestive of inquiries that might ultimately lead to evidence upon which a criminal prosecution might be afterwards founded against the presiding judge. And for a like reason, the Executive might feel lawfully authorized to withhold his ordinary communications from the Legislature; and even that body might lawfully decline to perform its ordinary duties upon the same grounds — especially if the true privilege not only authorizes the citizen to withhold criminating matter, but also any matter that might have a tendency to degrade — because, the very remedies for the future would often be suggestive of the errors of the past, and these might not all be of an excusable cast. But to all objections of this class, it is a conclusive answer to say that, if, beyond reasonable foresight, any such cases should arise under the operation of our statute rule, as would seem to be clearly within its equity, although not embraced within its strict letter, all such special and unlooked-for cases would be as fully within its provisions, as if embraced by its terms, and witnesses in such extreme cases would doubtless obtain full protection from the Courts."

1861, *Denio, J.*, in *People v. Kelly*, 24 N. Y. 74, 83: "But it is proposed by the appellant's counsel to push the construction of the Constitution a step further. A person is not only not compellable to be a witness against himself in his own cause, or to testify to the truth in a prosecution against another person where the evidence given, if used as his admission, might tend to convict himself if he should be afterwards prosecuted, but he is still privileged from answering, though he is secured against his answers being repeated to his prejudice on another trial against himself. It is no doubt true that a precise account of the circumstances of a given crime would afford a prosecutor some facilities for fastening the guilt upon the actual offender, though he were not permitted to prove such account upon the trial. The possession of the circumstances might point out to him sources of evidence which he would otherwise be ignorant of, and in this way the witness might be prejudiced. But neither the law nor the Constitution is so sedulous to screen the guilty as the argument supposes. If a man cannot give evidence upon the trial of another person without disclosing circumstances which will make his own guilt apparent or at least capable of proof, though his account of the transactions should never be used as evidence, it is the misfortune of his condition and not any want of humanity in the law. If a witness objects to a question on the ground that an answer would criminate himself, he must allege, in substance, that his answer, if repeated as his admission on his own trial, would tend to prove him guilty of a criminal offence. If the case is so situated that a repetition of it on a prosecution against him is impossible, as where it is forbidden by a positive statute, I have seen no authority which holds or intimates that the witness is privileged. It is not within any reasonable construction of the language of the constitutional provision. The term 'criminal case,' used in the clause, must be allowed some meaning, and none can be conceived other than a prosecution for a criminal offence. But it must be a prosecution against him; for what is forbidden is that he should be compelled to be a witness against himself. Now if he be prosecuted criminally touching the matter about which he has testified upon the trial of another person, the statute makes it impossible that his testimony given on that occasion should be used by the prosecution on the trial. It cannot, therefore, be said that in such criminal case he has been made a witness against himself, by force of any compulsion used towards him to procure, in the other case, testimony which cannot possibly be used in the criminal case against himself."

This was the view once generally accepted throughout this country, including the lower Federal courts.⁴ But in 1892 came the ruling in *Counselman v. Hitchcock*, in the Federal Supreme Court.⁵ Up to that time, three

⁴ *Art.*: 1853, *State v. Quarles*, 13 Ark. 307, 310 (quoted *supra*: statute as to accomplice's testimony, held constitutional); 1855, *Pleasant v. State*, 15 id. 634, 650 (preceding case approved); 1899, *State v. Bach Liquor Co.*, 67 id. 163, 55 S. W. 534 (*State v. Quarles* approved; but on a trial for selling liquor, a witness asked as to a purchase is still privileged under the statute, because he is not "concerned" in the offence charged); *Cal.*: 1857, *Ex parte Rowe*, 7 Cal. 184 ("The statute gives the witness that protection which was contemplated by the Constitution"); *Ga.*: 1853, *Higdon v. Heard*, 14 Ga. 255, 259 (gaming statute; "they get that protection [of the Constitution] thus: answers filed, in cases originating under the act of 1784, cannot be read in evidence against them in any criminal case whatever"); 1879, *Knoeland v. State*, 62 id. 395, 398 ("It is difficult to see how that which can never be used against him can tend in the slightest degree to criminate the witness"; sanctioning Code § 4545); *Ind.*: 1860, *Wilkins v. Malone*, 14 Ind. 153, 155 (usury statute, held sufficient to annul the privilege; following *State v. Quarles*, Ark., and *Higdon v. Heard*, Ga.); 1879, *State v. Enoch*, 69 id. 314, 316 (*Wilkins v. Malone* approved); 1888, *Bedgood v. State*, 115 id. 275, 17 N. E. 621 (rape); *Ill. S.* 1891, § 1800, held to annul the privilege); *Mo.*: 1891, *Ex parte Baskett*, 106 Mo. 602, 608, 17 S. W. 753 (gaming statute; "there can be no doubt that the language of the statute granting the protection . . . is as broad as the constitutional privilege"; following *People v. Kelly*, N. Y., and *People v. Quarles*, Ark.); *N. Y.*: 1839, *Perrine v. Striker*, 7 Paige 598, 600 (*Walworth*, C., apparently ruled as in the next case); 1841, *Bank of Salina v. Henry*, 1 Hill N. Y. 555, *Henry v. Bank of Salina*, 5 id. 523, 547 (statute making a usurer compellable as a witness when plaintiff; *Walworth*, C., held that the act "removes the constitutional difficulty in compelling them to answer, by declaring that the testimony given . . . shall not be used," etc.; this was supported by a vote of 13 to 8, the dissenters proceeding apparently on other grounds); 1846, *Bank v. Salina*, 2 Denio 155, 159 (statute protecting against the use of testimony of a usurer on indictment, held not sufficient, since a forfeiture also, recoverable by action, was not covered by the statute; on the principle of § 2280, *ante*); 1861, *People v. Kelly*, 24 N. Y. 74, 82 (quoted *supra*; applied to the bribery Act of 1853); 1869, *Lothrop v. Clapp*, 40 id. (Hand) 328, 332 (statutory supplementary proceedings against an insolvent debtor; statute assumed to be constitutional); 1867, *People v. Sharp*, 107 id. 427, 441, 14 N. E. 319 (preceding case followed; here the statute, P. C. § 78, contained also an exemption from liability to prosecution, but this was apparently not considered material); *N. C.*: 1880, *La Fontaine v. Southern Underwriters Ass'n*, 83 N. C. 132, 141 (examination of an insolvent debtor; "the answers of the witness cannot be used against him in any

criminal proceeding whatever, and his constitutional right . . . is maintained intact and full"; following *Lothrop v. Clapp*, N. Y.); *Pa.*: 1901, *Re Kelly*, 200 Pa. 430, 50 Atl. 248 (Const. Art. 3, § 10, held to be not repugnant to § 9, and therefore to be sufficient to destroy the privilege in election cases; "his answer could not be used against him in any legal proceeding; therefore he would be subject to no penalty or fine"); *U. S.*: 1871, *U. S. v. Brown*, 1 Sawyer 531, 536, Fed. Cas. No. 14,671 (statute held to annul the privilege; *Deady*, J.: "If this is not the object and effect of the act, I confess I do not know what it is"); 1883, *U. S. v. McCarthy*, 18 Fed. 87, 89 (*Brown*, J.: "The statute, in preventing all possible use of testimony thus given, does away with the reason for the rule, and . . . will be a complete protection"); 1890, *Re Counselman*, 44 id. 268 (similar ruling, in a good opinion by *Gresham*, J.); *Vt.*: 1840, *Smith v. Crane*, 12 Vt. 491, 493 (*Redfield*, J., *obiter*: "A rule that the testimony should be given in all cases but should never after be used for the purpose of procuring a conviction of crime, would . . . afford full protection to the witness").

⁵ 1892, *Counselman v. Hitchcock*, 142 U. S. 547, 12 Sup. 195 (quoted *supra*; dealing with Rev. St. § 860, and St. 1887, Feb. 1); applied in the lower Federal Courts in the following cases: 1896, *Ex parte Irvine*, 74 Fed. 954, 963 (*Counselman v. Hitchcock* recognized); 1897, *U. S. v. Bell*, 81 id. 630 (same); 1902, *Foot v. Buchanan*, 113 id. 156 (*U. S.* § 860, held still ineffective, since *Counselman v. Hitchcock*, except so far as remedied by express statute).

The *Bankruptcy Act* of 1898 (quoted *ante*, § 2281) has received varying treatment in the different Federal Courts; but enacted as it was after the ruling in *Counselman v. Hitchcock*, it is difficult to imagine that its § 7 was framed by any friend of the Act: 1899, *Re Scott*, 95 Fed. 815 (§ 7, *Bankruptcy Act* 1898, does not deprive the bankrupt of his privilege not to incriminate himself in bankruptcy proceedings); *Re Rosser*, 96 id. 305 (same); 1900, *Mackel v. Rochester*, 43 C. C. A. 427, 102 id. 314 (bankrupt compellable to answer, under the immunity granted by § 7 of the *Bankruptcy Act* and *U. S. Rev. St. § 860*); 1900, *Re Franklin Syndicate*, 114 id. 205 (§ 7, subd. 9, of the *Bankruptcy Act*, is a complete protection, taking away the privilege; but the disclosure of documents which might be used against him will not be compelled); 1901, *Re Smith*, 112 id. 509 (*Bankruptcy Act* affords immunity to the bankrupt only); 1902, *Re Shera*, 114 id. 207 ("an immunity similar to that which the *Bankruptcy Act* purports to afford is not sufficient"; citing *Counselman v. Hitchcock*); 1902, *Re Nachbman*, ib. 995 (bankrupt held privileged from disclosing the criminal conduct of his business); 1902, *State v. Burrell*, 27 Mont. 282, 70 Pac. 922 (privilege held not annulled); 1903, *Re Leslie*, 119 Fed. 406 (the refusal of a bankrupt's dis-

rulings only, so far as appears, had held such statutes ineffective; of these three, one had afterwards been doubted in its own Court, a second was expressly based on the words of the local Constitution, and the third, in an *obiter* approval of the second, ignored an expressly contrary prior decision in its own jurisdiction.⁶ The remaining decisions discrediting these statutes have all been subsequent to *Counselman v. Hitchcock*.⁷ It is unfortunate that the Court in which the latter pronouncement was made should have allied itself with such feeble forces.

charge is not a penalty, but a civil proceeding; and the bankrupt's prior testimony can be used therein, under Bankruptcy Act, § 7).

⁶ Va.: 1873, *Cullen v. Com.*, 34 Gratt. 634, 633 ("Nothing short of complete amnesty to the witness, an absolute wiping out of the offence as to him, so that he can no longer be prosecuted for it, will furnish that indemnity"; here applied to the duelling statute of 1870); 1881, *Temple v. Com.*, 75 Va. 892, 896, 902, 903 (preceding case doubted to some extent by a majority of the Court); Mass.: 1871, *Com. v. Emery*, 107 Mass. 171, 182 (under a constitution forbidding that one "be compelled to accuse, or furnish evidence against himself," the privilege is extended by the second phrase so as to protect from disclosure of "the circumstances of his offence, the sources from which or the means by which evidence of its commission or of his connection with it may be obtained, or made effectual for his conviction, without using his answers as direct admissions against him," and hence, since "the terms of the provision in the Constitution of Massachusetts require a much broader interpretation" than that of New York, the privilege remains, "so long as he remains liable to prosecution criminally for any matters or causes in respect of which he shall be examined or to which his testimony shall relate"); N. H.: 1869, *Carrier v. B. Co.*, 48 N. H. 327, 332 (compulsory statute, held insufficient for not providing "that such disclosures should not be used against them on trial for such offences, and thus obviating the objection that they were required to furnish evidence against themselves"; the ruling in *People v. Kelly*, N. Y. approved; the N. H. Constitution being phrased as in Massachusetts, more explicitly than that of New York, and this phrasing being noted in the opinion); 1878, *State v. Nowell*, 58 id. 314 (under a statute providing immunity from prosecution and also forbidding the tes-

timony to be used, it was said that "if our statute went no further [than the latter provision] in this respect, that case [of *Emery*, in Mass.] would be directly in point," and that the statute would then be "ineffectual," citing only *Emery's Case*, and ignoring *Carrier v. B. Co.*). There was also, to be sure, the Tennessee case, cited *ante*, § 2261, which implied the same result, but was itself in repudiation of its own prior doctrine.

⁷ Cal.: 1894, *Ex parte Clarke*, 100 Cal. 387, 37 Pac. 230 (statutory examination of an insolvent debtor, held improper; no protective clause of any sort was in the statute; but the Court approved *Counselman v. Hitchcock*, *obiter*; the question apparently was not argued); 1894, *Ex parte Cohen*, 104 id. 534, 530, 38 Pac. 364 (approving the preceding case, *obiter*; ignoring *Ex parte Rowe*, cited *supra*, note 4); Ma.: 1902, *Ex parte Carter*, 166 Mo. 604, 66 S. W. 540 (Mo. Rev. St. 1892, § 2206, held not to annul the privilege effectually; following *Com. v. Emery*, Mass., and *Counselman v. Hitchcock*, U. S.); N. Y.: 1894, *People v. Forbes*, 143 N. Y. 210, 239, 38 N. E. 308 ("It seems that in such cases nothing short of absolute immunity from prosecution" can suffice; citing *Counselman v. Hitchcock* alone, although on the next preceding page *People v. Kelly*, *supra*, is cited for another point; the statement was wholly uncalled for in the case, and reprehensibly tended to unsettle the law in this jurisdiction); 1908, *People v. O'Brien*, 176 id. 233, 68 N. E. 233 (P. C. § 342, relating to gambling offences, and prohibiting the subsequent receipt of testimony compulsorily obtained, does not suffice to abolish the privilege, because it does not give complete immunity; *People v. Kelly*, *supra*, repudiated; *Counselman v. Hitchcock*, U. S., followed); 1898, *Miskimins v. Shaver*, 8 Wyo. 382, 56 Pac. 411 (*Counselman v. Hitchcock*, U. S., approved *obiter*).

